COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2019/CLE/gen/001594

BETWEEN

HNR COMPANY LIMITED

Plaintiff

AND

PALM CAY DEVELOPMENT CO LTD

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Wayne Munroe QC with Kirsten Butler for the Plaintiff**

Dion Smith for the Defendant

17 January 2020

RULING

WINDER J

This is the plaintiff's application for summary judgment and for strike out pursuant to Order 18 rule 19 of the Rules of the Supreme Court.

1. The plaintiff is a company engaged in construction works. The plaintiff and the defendant entered into two construction contracts identified as Anchorage Phase 4 (Anchorage) and One Marina (OM). The contracts were executed in September and October 2018 respectively. This action seeks relief for what the plaintiff says is the breach of these contracts.

2. In respect of the Anchorage contract the plaintiff alleges breach as particularized in the Statement of Claim as follows:

   9. The Defendant has breached the contract with regard the Anchorage.

   PARTICULARS OF BREACH OF CONTRACT

   i. The Defendant in breach of Clause 4.1 of the contract deducted retention from the amount of signed certificates in the total amount of $49,307.
   ii. The Defendant purported to terminate the contract by letter from the architect of record dated the 15th November, 2019. The Defendant further in furtherance of the aforesaid letter excluded the Plaintiff from the work site and wrongfully took possession of the Plaintiff's material and tools.

3. In respect of the OM contract the plaintiff alleges breach as particularized in the Statement of Claim as follows:

   13. The Defendant has breached the contract with regard OM.

   PARTICULARS OF BREACH OF CONTRACT

   i. In breach of the Contract, the Defendant failed to obtain the fully approved drawings even up to the 22nd of November, 2019.
   ii. The Defendant in breach of Clause 4.1 of the contract deducted retention from the amount of signed certificates in the total amount of $40,805.00.
   iii. The Defendant in breach of Clause 4.1 of the contract failed to pay the Certificate for payment of $178,219.00 signed by the Architect dated the 30th October, 2019.

iv. The Defendant purported to terminate the contract by letter from the architect of record dated the 15th November, 2019. The Defendant further in furtherance of the aforesaid letter excluded the Plaintiff from the work site and wrongfully took possession of the Plaintiff's material and tools.

4. The defence is contained in paragraphs 8 (i)-(iv), 12(i)-(ix) and 12 (xiii)-(xiv) of the Defence and Counterclaim, which provides:

8. It is denied that PCD breached the contract of A4 as alleged in paragraph 9 of the Statement of Claim or at all.

DEFENCE TO PARTICULARS OF BREACH A4

i. It is denied that PCD breached Article/Clause 4.1 of the contract as alleged in paragraph 9i. of the Statement of Claim or at all.
ii. On the original contract for A4 the inclusion of a retention clause was an oversight. This issue was corrected when addressed between Sean Wright, the President of HNR and Robert Batchelor CEO of PCD in January 2019.
iii. At this time, it was mutually agreed that 2.5% would be deducted from monies already paid by PCD and on all future Valuations for the remainder of the contract. Sean Wright of HNR began voluntarily deducting retention from payment application number 4, dated 13th of February 2019. This reduction was applied by HNR on all subsequent valuations retrospectively to ensure the it (sic) was applied across the entire job despite it only beginning from payment number 4.
iv. HNR is required to prove, which is denied, that PCD owes $49,307.00 for retention on A4. PCD will rely at trial on applications for payments submitted by HNR to substantiate the above position on retention.

...

12. It is denied that PCD breached the contract as alleged in paragraph 13 of the Statement of Claim or at all.

DEFENCE TO PARTICULARS OF BREACH OM

i. PCD has fully approved plans and HNR is required to prove, which is denied, that PCD breached the contract as alleged in paragraph 13.i. of the Statement of Claim.
ii. It is denied that PCD breached Article/Clause 4.1 of the contract as alleged in paragraph 13ii. of the Statement of Claim or at all. On the original contract for OM the inclusion of a retention clause was an oversight. This issue was corrected when addressed between Sean Wright of HNR and Robert Batchelor CEO of PCD in January 2019.
iii. At this time, it was mutually agreed that 2.5% would be deducted from monies already paid by PCD and on all future Valuations for the remainder of the contract. Sean Wright of HNR voluntarily begun deducting retention from payment application number 2, dated 13th

of February 2019. This reduction was applied by HNR on all subsequent valuations retrospectively to ensure the it (sic) was applied across the entire job despite it only beginning from payment number 2.

iv. HNR is required to prove, which is denied, that PCD owes it $40,805.00 for retention on OM. PCD will rely at trial on applications for payments submitted by HNR and reports to substantiate the defects mentioned at paragraph 11 of the Defense and Counterclaim.

v. It is denied that PCD breached of Article/Clause 4.1 of the contract as alleged in paragraph 13iii. of the Statement of Claim or at all. HNR is required to prove, which is denied, that PCD is in breech (sic) by failing to pay the certificate for payment of $178,219.00. The figure of $178,219.00 is disputed as this sum does not solely represent contract works carried out by the PCD.

vi. This figure includes the sum of $72,960.00 which was the second payment for the elevator from Basden Elevator Company Limited. This was subsequently paid directly to the company by PCD.

vii. Around the time of this payment request, discussions had already commenced between the parties regarding PCD taking direct responsibility for some elements of the Contract. The elevator contract and future payments in respect thereof were one of the items discussed and it was proposed by HNR that PCD would take over this element of the Contract.

viii. PCD then undertook a review of previous payment request to insure that HNR complied with Article 16.2.1.2. This Article gives authority to terminate the contract if the contractor fails to make payments to subcontractors and/or suppliers for materials or labor in accordance with payments already made by the owner to the contractor. PCD noted that payment request number 4, dated 6th April 2019, included a mobilization sum of $52,500.00 for the elevator company which was paid by PCD to HNR. PCD contacted the company and it was confirmed by their latest invoice that they were only paid $36,480.00. No explanation or rational was ever provided for this difference when requested.

ix. Further the $52,500.00 value claimed on payment application Number 4, was subsequently changed to $42,000.00 on payment application Number 6, dated 16th of September 2019. No explanation or rationale was ever provided for lowering the amount when requested.

...

xiii. Sean Wright, of HNR requested to vary the original plans to save time and costs based on the original bill of quantities by eliminating the steel beams from the structure. This was done by HNR purely on a cost and material availability basis. PCD agreed to this so long

as it had no impact on the integrity of the building, the cost and the timeframe for completion.

xiv. Sean Wright then consulted with the CCT Engineers and changed the construction method and furthermore paid CCT for new drawings that deviated from the originals. At no time did PCD agree to pay HNR any additional fees for any revisions to the original Structural Engineers' drawings. Up until the date of service of the Statement of Claim PCD was not aware of this payment request.

5. The application of the plaintiff is supported by the affidavits of Sean Wright and relies on clause 6.1, which is contained in each of the contracts which provide:

> 6.1 The Contract
> The Contract represents the entire and integrated agreement between the parties and supersedes prior negotiations, representation or agreements, either written or oral. The Contract may be amended or modified only by a written modification in accordance with Article 10.

6. The plaintiff says in its submissions that:

> 3.4 The contracts contained an entire Clause, 6.1 which provides that the contracts may only be amended or modified in writing.
>
> 3.5 The paragraphs in the Defence sought to be struck out plead modifications in the terms of the contracts that are not pleaded to have been reduced to writing nor have they been reduced to writing. The consequence is that these modifications would not be binding on the parties to the contracts.
>
> ...
>
> 4.3 It is clear that, in the instant case, the Defendant claims has no basis in relation to the signed contract between them and cannot be a pleading in good faith as the Defendant is well aware that its contracts do not admit for oral modification and therefore oral modification cannot be prayed in aid in defence to the Plaintiff's claim in prayer 1 of the Statement of Claim.

7. The plaintiff says that paragraphs 8(i)-(iv), 12(ii), 12(iv) 12(v), 12(viii), 12(ix)-(xi), 12(xiii) and 12(xiv) of the Statement of Claim ought to be struck out pursuant to Order 18 rule 19 1(b) and (c) of the Rules of the Supreme Court. The plaintiff says that it is frivolous and vexatious to advance a Defence as such, adhering to Article 6.1, 4.1 and 12.4.1 of the AIA contract. They submit that, there is no Defence after the removal of the paragraphs praying in aid the purported oral modifications, retention and the certificate of the contract and such an unsustainable paragraphs in the Defence ought to be struck out.

8. Order 18 rule 19 (1) of the RSC provides that the Court "...may at any stage of proceedings order to be **struck out** or amended any pleading... on the ground that-

    (a) it discloses no reasonable cause of action or defence, as the case may be; or
    (b) it is scandalous, frivolous or vexatious; or;
    (c) it may prejudice, embarrass or delay the fair trial of the action; or
    (d) it is otherwise an abuse of the process.

    In the relevant note of the Supreme Court Practice, at paragraph 18/19/15 it is provided as follows:

    > "Frivolous or vexatious" By these words are meant cases which are obviously frivolous or vexatious, or obviously unsustainable..."

9. ***Bowen L.J***, in ***Willis v. Earl of Beauchamp (1886) 11 P. 59, 63*** stated that the Court has the inherent power to prevent the abuse of its legal machinery which would occur, if for no possible benefit, a party is to be dragged through litigation which must be long and expensive. The frivolous claim is reserved for cases which are obviously unsustainable. In the case of ***West Island Properties Limited v. Sabre Investment Limited and others - [2012] 3 BHS J. No. 57*** The **Bahamas** Court of Appeal has provided some guidance on the question of **striking out** actions under Order 18 rule 19 (1). ***Allen P.,*** delivering the majority decision of the Court, at paragraphs 15, 30 and 57, stated:

    > **15** In the case of Drummond-Jackson v. British Medical Association [1970] 1 W.L.R. 688, Lord Pearson determined that a cause of action was reasonable where it had some chance of success when considering the allegations contained in the pleadings alone. That is, beginning at page 695, he said the following:
    >
    > > "Over a long period of years it has been firmly established by many authorities that the power to **strike out** a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.
    > >
    > > ...
    >
    > In my opinion the traditional and hitherto accepted view - that the power should only be used in plain and obvious cases - is correct according to the intention of the rule for several reasons. First, there is in paragraph (1)(a) of the rule the expression "reasonable cause of action," to which Lindley M.R. called attention in Hubbuck & Sons Ltd. v. Wilkinson, Heywood & Clark Ltd. [1899] 1 Q.B. 86, pp. 90 - 91. No exact paraphrase can be given, but I think

"reasonable cause of action" means a cause of action with some prospect of success, when (as required by paragraph (2) of the rule) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be **struck out**.

...

Salmon L. J. said, at p. 651: 'It is well settled that a statement of claim should not be **struck out** and the plaintiff driven from the judgment seat unless the case is unarguable.' Secondly, subparagraph (a) in paragraph (1) of the rule takes some colour from its context in subparagraph (b) "scandalous, frivolous or vexatious," subparagraph (c) "prejudice, embarrass or delay the fair trial of the action" and subparagraph (d) "otherwise an abuse of the process of the court." The defect referred to in subparagraph (a) is a radical defect ranking with those referred to in the other subparagraphs. Thirdly, an application for the statement of claim to be **struck out** under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not be "driven from the judgment seat" at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. The fourth reason is that the procedure, which is (if the action is in the Queen's Bench Division) by application to the master and on appeal to the judge in chambers, with no further appeal as of right to the Court of Appeal, is not appropriate for other than plain and obvious cases.

...

30 Concerning *Order 18; rule 19(1)(d) R.S.C.,* both Bramwell B. and Blackburn J. in the cases of Castro v. Murray Law Rep. 10 Ex. 213;218 and Dawkins v. Prince Edward of Saxe-Weimar 1Q. B.D. 499;502 respectively, underscored the fact that the court possessed a discretion to stop proceedings which are groundless and an abuse of the court's process. The discretion, as Mellor, J. in *Dawkins v. Prince Edward of Saxe-Weimar* indicated, must be exercised carefully and with the objective of saving precious judicial time and that of the litigant.

...

57 Lindley, L.J. in the leading Court of Appeal case of the Attorney-General of the Duchy of Lancaster v. London and North Western Railway Company [1892] 3 Ch. 274, considered a similar order which allowed pleadings to be stuck **out** and dismissed on the ground of being frivolous and vexatious. The learned judge at page 277 said that:

> "It appears to me that the object of the rule is to stop cases which ought not to be launched - cases which are obviously frivolous or vexatious, or obviously unsustainable"

10. The gist of the plaintiff's complaint, as it relies on article 6.1 of the written contracts, is that it permits the contracts to be *amended or modified only by a written modification in accordance with Article 10.* They say that having regard to the fact

that the Defence at 8(i), 12(iii), 12(vii) and 12(xiii), attested to mutual agreements which transpired between the parties which were not reduced to writing, such oral agreements were invalid. Further, the plaintiff says, paragraphs 8(i)-(iv), 12(ii), 12(iv) of the defence addresses retention payments but the contract outlines at Article 4.1 that "*zero retention is applied to payments.*" The plaintiffs submit that the retention which was withheld was improperly done as the terms of the contract is binding and has not been modified. Finally they say that Article 12.4.1 requires the defendant to make payment to the plaintiff once the *Architect has issued a Certificate for Payment.* They submit that the Defence at 12(v), 12(viii), 12(ix)-(xi), 12(xiii) and 12(xiv) are unsustainable due to the onus the contract placed on them after the architect has issued certificates.

11. The plaintiff relies on the case of ***Inntrepreneur Pub Co (GL) v East Crown Ltd [2002] 2 Lloyd's Rep 611, para 7*** and **Rock Advertising Limited v MWB Business Exchange Centers Limited [2018] UKSC 24.** In ***Inntrepreneur Pub Co*** at paragraph 7 it provided that "any promises or assurances made in the course of negotiations shall have no contractual force, save insofar as they are reflected and given effect in the document." They say that ***Rock Advertising Limited*** is high authority for the proposition that any modifications not made in accordance with the terms of an entire contract clause amount in law to averments of Moral Modification in the contract, which is of no effect if it has not been placed within the contract which serves as a governing document for the transactions being carried out. In ***Rock Advertising Limited Lord Sumption*** stated as follows:

[7] At common law there are no formal requirements for the validity of a simple contract. The only exception was the rule that a corporation could bind itself only under seal, and what remained of that rule was abolished by the Corporate Bodies Contracts Act 1960. The other exceptions are all statutory, and none of them applies to the variation in issue here. The reasons which are almost invariably given for treating No Oral Modification clauses as ineffective are (i) that a variation of an existing contract is itself a contract; (ii) that precisely because the common law imposes no requirements of form on the making of contracts, the parties may agree informally to dispense with an existing clause which imposes requirements of form; and (iii) they must be taken to have intended to do this by the mere act of agreeing a variation informally when the principal agreement required writing. All of these points were made by Cardozo J in a well-known passage from his

judgment in the New York Court of Appeals in Beatty v Guggenheim Exploration Co (1919) 225 NY 380, 387-388:

> "Those who make a contract, may unmake it. The clause which forbids a change, may be changed like any other. The prohibition of oral waiver, may itself be waived. 'Every such agreement is ended by the new one which contradicts it' (Westchester F Ins Co v Earle 33 Mich 143, 153). What is excluded by one act, is restored by another. You may put it out by the door; it is back through the window. Whenever two men contract, no limitation self-imposed can destroy their power to contract again ..."

...

[10] In my opinion the law should and does give effect to a contractual provision requiring specified formalities to be observed for a variation.

[11] The starting point is that the effect of the rule applied by the Court of Appeal in the present case is to override the parties' intentions. They cannot validly bind themselves as to the manner in which future changes in their legal relations are to be achieved, however clearly they express their intention to do so. In the Court of Appeal, Kitchin LJ observed that the most powerful consideration in favour of this view is "party autonomy": para 34. I think that this is a fallacy. Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy. The real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed. There are many cases in which a particular form of agreement is prescribed by statute: contracts for the sale of land, certain regulated consumer contracts, and so on. There is no principled reason why the parties should not adopt the same principle by agreement.

...

[15] If, as I conclude, there is no conceptual inconsistency between a general rule allowing contracts to be made informally and a specific rule that effect will be given to a contract requiring writing for a variation, then what of the theory that parties who agree an oral variation in spite of a No Oral Modification clause must have intended to dispense with the clause? This does not seem to me to follow. What the parties to such a clause have agreed is not that oral variations are forbidden, but that they will be invalid. The mere fact of agreeing to an oral variation is not therefore a contravention of the clause. It is simply the situation to which the clause applies. It is not difficult to record a variation in writing, except perhaps in cases where the variation is so complex that no sensible businessman would do anything else. The natural inference from the parties' failure to observe the formal requirements of a No Oral Modification clause is not that they intended to dispense with it but that they overlooked it. If, on the other hand, they had it in mind, then they were courting invalidity with their eyes open.

12. The defendant's case is that as it relates to the claim for retention on Anchorage and OM, it was mutually agreed that the contract would be verbally altered and

that 2.5% would be deducted from monies already paid and on all future valuations. They say that in compliance with the agreement the plaintiff began voluntarily deducting retention from payment applications from both contracts. They say that the plaintiff cannot claim that the defendant wrongfully withheld retention when they were paid according to their invoice. They argue that by conduct and acquiescence the plaintiff accepted this verbal alteration and the retention should be held until all defects are repaired.

13. Further, says the defendant, there was no breach of Article 4. 1 as the plaintiff was in breach of:
    a) Article [16. 2. 1. 2], by not paying subcontractors for materials or labour in accordance with the respective agreements between the Contractor and subcontractors. They say that this was discovered before payment was made but after the certificate for payment was signed.
    b) Article 8. 4.1, which provides that the contractor will pay for all materials and services necessary for the proper execution and completion of the work.
    c) Article 12.2.1 as the plaintiff failed to provide supporting data substantiating the right to the payment request for $178,219.00 at least ten days before the payment was due when requested. This figure includes the sum of $72,960.00 which was the second payment for the elevator from Basden Elevator Company Limited and this was subsequently paid directly to the company by the defendant.

14. The defendant argues that around the time of the payment request for $178,291, discussions had already commenced between the parties with respect to the defendant taking direct responsibility for some elements of the Contract which may have been unknown to the architect at the time the certificate was signed. The defendant says that the claim for $178,291 does not take into account the sum of $72,960 paid to Basden Elevator. Additionally the defendant points to its counterclaim for $93,756.64 in special damages and for an amount to be quantified on general damages to include the cost to repair defective work, interest, and cost.

They say that these sums amount to $166,716.64 and do not account general damages.

15. I am not satisfied that the claim of the plaintiff is unsustainable. Having regard to the threshold observed by the Court of Appeal in ***West Island Properties Limited,*** the claim advanced must be unsustainable and the remedy of striking out is reserved for the unarguable, exceptional cases which are obviously frivolous and vexatious. I am not satisfied that this case falls in that category. This is not the trial of the action but an application to strike out. It is not for me at this stage to settle factual issues

16. I am not deterred in my view by the dicta expressed in the case of ***Rock Advertising Limited***. In that case, whilst the question for consideration was the efficacy of the parties agreeing to modify the terms of the agreement, ***Lord Sumption*** nonetheless acknowledged that the existence of these clauses were not undefendable and equitable principles would still have the last word. At paragraph 16 of the judgment he states:

> [16] The enforcement of No Oral Modification clauses carries with it the risk that a party may act on the contract as varied, for example by performing it, and then find itself unable to enforce it. It will be recalled that both the Vienna Convention and the UNIDROIT model code qualify the principle that effect is given to No Oral Modification clauses, by stating that a party may be precluded by his conduct from relying on such a provision to the extent that the other party has relied (or reasonably relied) on that conduct. In some legal systems this result would follow from the concepts of contractual good faith or abuse of rights. In England, the safeguard against injustice lies in the various doctrines of estoppel. This is not the place to explore the circumstances in which a person can be estopped from relying on a contractual provision laying down conditions for the formal validity of a variation. The courts below rightly held that the minimal steps taken by Rock Advertising were not enough to support any estoppel defences. I would merely point out that the scope of estoppel cannot be so broad as to destroy the whole advantage of certainty for which the parties stipulated when they agreed upon terms including the No Oral Modification clause. At the very least, (i) there would have to be some words or conduct unequivocally representing that the variation was valid notwithstanding its informality; and (ii) something more would be required for this purpose than the informal

promise itself: see *Actionstrength Ltd v International Glass Engineering In Gl En SpA* [2003] 2 AC 541, paras 9 (Lord Bingham), 51 (Lord Walker).
(Emphasis added)

17. As regard the issue of the finality of Architect's certificate, the Court of Appeal's decision in ***Jason Thompson v David Solomon et al. Nos. 38 & 39 of 2010*** is also instructive. ***Allen P***. delivering the decision of the majority at paragraphs 61-63 states:

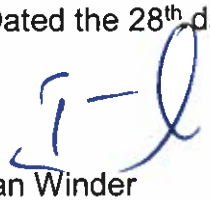
> 61. After considering the above authorities, it seems to me that it matters not whether the satisfaction of the architect as expressed by the final certificate is an overriding requirement, or simply an added protection of the owner, for in the absence of express words that the parties intend to confer immunity on the contractor and override the implied obligation of the contractor to carry out the work in a good and workmanlike manner, the contractor is liable for defects in the work despite the final certificate.
> 62. In that regard, the contract is expressly silent, and there is no wording from which any such implication may reasonably be made. Indeed, the words of clause 8 of the contract expressly say that the cost of the work shall not include the contractor's correction of defective work, which suggests that the intention was not to absolve the contractor from responsibility for defective work.
> 63. In the premises, on a true construction of the contract, I find the final certificate does not confer immunity on the contractor for defective performance of the contract and I would dismiss the appeal.

This issue is therefore clearly a matter which will require careful consideration by the trial judge after hearing the evidence and the arguments. I cannot say that the defendant's position is unsustainable or unarguable and fit for striking out.

18. The plaintiff has advanced evidence, by way of email exchanges, to support its claim that there was an agreement between the parties to vary the terms of the contract. Whilst the contract imposes the obligation to pay upon the presentation of the architect certificate, I am not satisfied that it precludes a contracting party from refusing to pay where the certificates are clearly erroneous or upon some equitable basis such as fraud, estoppel and acquiescence.

19. I am satisfied therefore that this is not a proper case for the exercise of the summary jurisdiction to strike out the claim but a matter which raises issues to be tried. Having so found, I am also satisfied that it cannot be said that there is no defence to the claim, which is the test for summary judgment under Order 14 of the Rules of the Supreme Court. In all the circumstances therefore, the plaintiff's Summons is dismissed. I order that the plaintiff do pay the defendant's reasonable costs to be taxed if not agreed.

Dated the 28th day of July 2020



Ian Winder

Justice