COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/01106

BETWEEN

HUBERT THOMAS FOWLER

T/A GUARANTEE CONSTRUCTION

Plaintiff

AND

THE CENTRAL BANK OF THE BAHAMAS

Defendant

Before Hon. Mr. Justice Ian R. Winder

Appearances: **Donovan Gibson for the Plaintiff**

Ferron Bethell with Camille Cleare for the Defendant

RULING

WINDER J

This is the application of the defendant (the Bank) for the striking out of the claim of the plaintiff (Fowler). Fowler's claim seeks damages for breach of a roof construction contract.

1. The action was brought by Fowler by generally indorsed Writ of Summons dated 5 November 2020 identifying himself as a contractor "trading as Guarantee Construction". The Statement of Claim dated 7 January 2020 pleaded that by letter dated 4 September 2017, the Bank accepted a proposal from Fowler to "conduct a rehabilitation of the concrete underdeck of the Defendant's roofing system" at a cost of $838,088.49. The claim alleges that payments are outstanding on the contract in the amount of $64,315.00 as well as an agreed overtime amount of $51,376.51.

2. The Bank defended the claim in a Defence filed on 2 March 2021. The Bank pleaded, inter alia, that it did not enter into an agreement with Fowler but with a company called Guarantee Construction Company Ltd. (Guarantee). It further pleads that there was no overtime agreement and that any outstanding sums claimed under the contract were not paid as the work performed by Guarantee were substandard.

3. Notwithstanding the pleaded challenge to Fowler as a contracting party, the Bank has applied by Summons dated 9 March, 2021, pursuant to Order 18, Rule 19(1)(a) and (d) of the Rules of the Supreme Court, and under the Court's inherent jurisdiction, seeking an Order striking out the Writ of Summons as disclosing no reasonable cause of action

and an abuse of process on the ground that there is no privity of contract between the Fowler and the Bank.

4. The Bank contends, at paragraph 3-9 and 13 of its written submission, as follows:

> 3. The Defendant contends, and has pleaded in its Defence, that the AIA Agreement was entered into between Guarantee Construction Company, a company incorporated under the laws of the Commonwealth of The Bahamas on 24 April, 1991, wherein "Hubert Fowler" was expressed to be its President and Director.
> 4. By letter, dated 12 July, 2017, Guarantee Construction Company (not Hubert Fowler) submitted a proposal with respect to the Defendant's roof repair project in the aggregate sum of $838,088.49. The proposal was on Guarantee Construction Company's letterhead, with logo, and was signed by Hubert Fowler on behalf of "Guarantee Construction Co."; not "trading as" Guarantee Construction Company.
> 5. By letter, dated 4 September, 2017, the Defendant wrote to "Mr. Hubert T. Fowler, Guarantee Construction Ltd." accepting Guarantee's proposal and stated "The above project will be a joint effort between your company and Specialized Roofing Installations (SRI) who will be responsible for the removal of the Bank's existing membrane roof….".
> 6. On 9 March 2018 the AIA Agreement was clarified to reflect that the lump sum value of the AIA Agreement would be corrected to $838,088.49. The clarification document expressly stated that the AIA Agreement was between the Defendant and "Gaurantee (sic) Construction Company (Contractor)".
> 7. It should also be noted that the Application and Certificate for Payments were all submitted in the name of Guarantee Construction Company and variously signed by either "H. Fowler" or "Philippa Pinder".
> 8. Further, all payments made by the Defendant were made by direct deposit to the account of Guarantee Construction Company at Commonwealth Bank, being account number 12570004017.
> 9. The Court should also take cognizance of the fact that the initial demand letter written by the Plaintiff's counsel on 20 July, 2020, to the Defendant unequivocally stated: "We represent Guarantee Construction Company." Additionally, Counsel's letter of 15 October, 2020, expressly refers to "Our client: Guarantee Construction Company".
> …
> 13. A search of the Companies Registry discloses that Guarantee Construction Company Limited was struck off the registered on 23 August, 2019, and to-date has not been restored.

5. An executed AIA Agreement has not been produced by either party. Fowler contends that he entered into the contract personally trading as Guarantee Construction and that nowhere in the documents is there is there any reference to a limited company. Fowler says that whilst the use of the name Guarantee Construction ***Company*** in on some of the documents none of the references use the word limited to suggest a limited company. Further, Fowler says that on 18 September 2017, shortly after the acceptance of the proposal and prior to any payment of moneys under the agreement, upon the request of the Bank, they forwarded copies of the following documents:

(i) VAT Certificate,

(ii) Valid Business License,

(iii) National Insurance Certificate and

(iv) Tax Compliance Certificate

Fowler says that these documents *"clearly stated that [Fowler] was* ***trading as*** *Guarantee Construction."*

6. The nub of the Bank's case is that "*every indicia of evidence in this matter points to the fact that the Defendant entered into the AIA Agreement with Guarantee Construction Company Ltd, which was a company reputed to be in good standing at the material time"*. They say that the claim brought by Fowler should be struck out as he is not the contracting party.

7. This application raises the grounds under Order 18 Rule 19 (1) (a) and (d) of the Rules of the Supreme Court. 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.

8. 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 decision of the Court, stated at paragraphs 15 and 30 as follows:

> **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:
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> > "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.
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> …
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> 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.
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> …
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> 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.
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> …
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> **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.
> …

9. Order 18 Rule 19 (1) (a) provides for a dismissal of the claim where it discloses no reasonable cause of action. Under Rule 19 (2) no affidavit evidence is permissible in support of such an application. A simple review of the Statement of Claim alone must demonstrate that no cause of action is evident. This ground raised by the Bank is not viable as Fowler's claim for breach of the agreement is evident in the Statement of Claim. He claims to be the contactor and contracted with the Bank in his capacity as such. This is clearly a cause of action and whether this can averment stands to proof is a matter for different ground under Order 18 Rule 19(1).

10. Order 18 Rule 19 (1) (d) deals with cases which are said to be an abuse of the process of the court. Whist there could be some confusion as to whether a company was being engaged by the Bank or whether Fowler was personally engaged via his trade name, I am not satisfied that the claim could be described as an abuse of the process of the Court, having regard to the principles outlined in ***West Island Properties***. This

category of cases is reserved for cases which are groundless and an abuse of the process of the Court. It must also be a plain and obvious case.

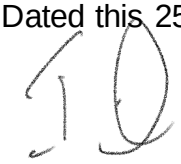
11. No executed agreement has been provided and whist there is a reference to Guarantee Construction Company there is no reference to Guarantee Construction Company ***Ltd.*** There was no certificate of incorporation provided to the Bank by Fowler at the time the roofing contract was entered into. It is also to be noted that the Bank had Fowler's business license in its possession, at the time of the entry of the agreement. This business license, which was current at the time, was in Fowler's personal name trading as Guarantee Construction. Upon this contract Fowler claims to have received well over $700,000 towards the reconstruction of the Bank's roof. Whilst the Bank may have had ample reason to construe that the reference to company in the contractors representations was to a corporate entity rather than simply a business, it is not the only possible interpretation. It could not be said to be a plain and obvious case. I am therefore not satisfied that this is a matter to be determined on a summary basis.

12. As the Bank has pleaded this issue of privity as an issue to be joined in its Defence, I will hold that this matter would be better determined when the court has had the benefit of the evidence at trial. In the circumstances therefore I dismiss the Bank's Summons.

13. I order that the costs of the application be Fowler's costs in the cause.

14. I will set the case management conference to be heard on 15 November 2021 at 10:00am.

Dated this 25th day of October 2021



Ian R. Winder

Justice