

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No.: CV2018-02910

Between

ALVIN CONSTRUCTION AND ENGINEERING SERVICES LIMITED

Claimant

And

COCOON LIMITED

Defendant

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

APPEARANCES:

Claimant: A. Hosein instructed by Mr. Pollard

Defendant: F. H. Masaisai and C. Braithwaite instructed by J. Farah-Tull

Date of Delivery: December 1, 2023

JUDGEMENT

[1] The Claimant Company is a service provider engaging in, among other services, fabrication of steel structures, tank repairs, mechanical, electrical and marine engineering, equipment rental, sandblasting and painting. At all material times, the Claimant Company was subcontracted by the Defendant Company's Marine Division to provide services to Cortez Subsea Limited based in the United Kingdom (UK). The Defendant is a contracting company engaged in the provision of fabrication services. At all material times, the Defendant Company was contracted by Cortez Subsea Limited.

[2] The Claimant Company pleaded that during the period August 17, 2017 to December 10, 2017 the Defendant Company through various purchase orders, entered into an Agreement with the Claimant Company for the Claimant Company to provide the following services to Cortez Subsea Limited:

- i. AR Head, Initiation Head, Flange Protection Shrouds.
- ii. Wet Buckle Recovery Head.
- iii. Space Bars.
- iv. Rental of one (1) Rigging Loft (September 15 to October 15, 2017).
- v. Rental of two (2) Rigging Lofts (October 16 to October 31, 2017).
- vi. Rental of two (2) Rigging Lofts (November 1 to November 30, 2017).
- vii. Rental of one (1) Rigging Loft (December 1 to December 4, 2017).
- viii. Rental of one (1) Rigging Loft (December 1 to December 10, 2017).
- ix. Drip Tray.
- x. Canoe.

- xi. Material (Rubber, Plate).
- xii. To line up two (2) Initiation Heads (September 19, 2017).
- xiii. To install two (2) Flange Protectors (September 20, 2017).
- xiv. Bolting – Drill Holes (September 11, 2017).
- xv. Sea Fastening Material (September 4, 2017).
- xvi. Pig Launcher and Receiver Works (September 4, 2017).
- xvii. Bolt Tension Works (October 5 and 6, 2017).
- xviii. Extra Load Test Charges on Pig Launcher/Receiver.
- xix. One (1), four (4)-Part nine (9) Tonne Sling (seventeen feet (17ft) long).

[3] After having received each purchase order from the Defendant Company and before each job was commenced an estimate/costing was provided by the Claimant Company to the Defendant Company for the cost of each job.

[4] After the Defendant Company received the costing for each job, instructions were given by the Defendant Company's Managing Director Mr. Antonio Donawa and Construction Manager, Mr. Roopchan Ramkallawan to commence each job.

[5] All of the jobs requested by the Defendant Company were completed within the stipulated timeline and in the manner as was agreed between both the Claimant Company and the Defendant Company and completion certificates were issued by the Claimant Company in respect of each job which were co-signed by representatives of both the Claimant Company and the Defendant Company.

- [6] All of the works listed hereinabove totalled the sum of two million one hundred and two thousand six hundred and sixty-seven dollars and sixty-five cents (\$2,102,667.65) and there was never a dispute as to this sum since the Defendant Company through its Managing Director Mr. Antonio Donawa was fully aware and in agreement with this sum.
- [7] The Defendant Company did make several cheque payments from time to time issued from various companies on account totalling the sum of one million five hundred and ten thousand dollars (\$1,510,000.00) leaving a balance due and owing for works, material and equipment supplied in the sum of five hundred and ninety-two thousand six hundred and sixty-seven dollars and sixty-five cents (\$592,667.65), Schedule of Accounts/Special Damages¹.
- [8] The last payment the Claimant Company received from the Defendant Company was the sum of twenty thousand dollars (\$20,000.00) which was paid via RBC Royal Bank of Trinidad and Tobago Cheque Number 016887 on December 20, 2017.
- [9] The Claimant pleaded that the Defendant Company is in breach of its contract in failing to pay the outstanding sum of five hundred and ninety-two thousand six hundred and sixty-seven dollars and sixty-five cents (\$592,667.65) which to date remained unpaid thereby occasioning the Claimant Company loss and damage.
- [10] The Claimant made several oral requests and issued written reminders via email to the Defendant Company requesting payment of the outstanding debt. The Defendant Company through its Managing Director Mr. Antonio Donawa acknowledged the outstanding debt and responded via email to the Claimant Company dated May 17, 2018 indicating that Cortez Subsea Limited is in the process of some sort of “execution of a due diligence engaged by their Equity Investor and as such would not be able to dispatch any payments until probably the end of June 2018”; however, to date the debt remains outstanding despite repeated promises to pay.

The Defence

- [11] The Defendant Company denied that it contracted the Claimant Company to perform any works on its behalf and contended that the Claimant Company was contracted by Cortez Subsea Limited and was paid for such works by Cortez Subsea Limited. The Defendant Company categorically denied that a contract ever existed between itself and the Claimant Company and

¹ Statement of Case pages 8-9

asserted that their role was limited to locating local contractors for Cortez Subsea Limited, a UK company which had no offices in Trinidad.

- [12] The Defendant Company averred that they acted in the capacity of agent for Cortez Subsea Limited in hiring the Claimant Company and that the Claimant Company was aware at all material times that the Defendant Company was Cortez Subsea Limited's agent. It was admitted that the Claimant Company was hired to perform certain contract works but insisted that the request and hiring was done on behalf of its principal Cortez Subsea Limited. The Defendant Company also admitted that it sent purchase orders to the Claimant Company and received an estimated cost for each job to be executed by the Claimant Company in its capacity as agent for Cortez Subsea Limited.
- [13] It was denied that the Defendant Company's Managing Director Mr. Antonio Donawa and Construction Manager Mr. Roopchan Ramkallawan instructed the Claimant Company to commence each job upon receipt of the estimate; the process employed upon receipt of said estimate was that the Defendant's Managing Director Mr. Donawa forwarded the estimate to Cortez Subsea Limited who then issued instructions to the Defendant Company through its Manager whether or not to accept the Claimant Company's estimate and commence the job. It was averred that neither Managing Director nor Manager was authorised to issue instructions to the Claimant Company to begin any works without the instructions of their principal Cortez Subsea Limited.
- [14] The jobs were requested by Cortez Subsea Limited. The Defendant Company was instructed by Cortez Subsea Limited to confirm that the Claimant Company completed jobs in a timely manner and same was done. The Defendant Company was also instructed to inspect works done by the Claimant Company and if same was done to issue completion certificates and same was done.
- [15] The Defendant Company agreed that the Claimant Company undertook works valued in the sum of two million one hundred and two thousand six hundred and sixty-seven dollars and sixty-five cents (\$2,102,667.65) pursuant to instructions received from the Defendant Company. It was pleaded however that all payments made to the Claimant Company for all such works were made by Cortez Subsea Limited. It was therefore denied that the Defendant Company owed the Claimant Company any monies since it was merely Cortez Subsea Limited's agent as the Claimant Company was aware at all times.

Evidence

[16] The Parties filed one Witness Statement each and were cross-examined at trial.

The Claimant's Evidence

Alvin Goolcharan

[17] Mr. Goolcharan filed a Witness Statement as well as a Supplemental Witness Statement and was cross-examined at trial. Additional evidence adduced in his Supplemental Witness Statement indicated that further payments had been made to the Claimant Company since the filing of his original Witness Statement.

[18] Mr. Goolcharan testified that it was an industry norm that jobs contracted for, can only proceed when the consent of the contracting party is given to the contractor. As a result, he ensured that he obtained the consent of either the Managing Director or Project Manager of the Defendant Company before proceeding to execute any of the jobs outlined in the purchase orders from the Defendant Company. Upon completion, completion certificates were signed by representatives of both Parties verifying that the contracted works had been completed in accordance with the terms of the said purchase orders.

[19] Mr. Goolcharan also stated that the Defendant Company paid for the contracted works with cheques from various companies; he indicated that this was a typical practice in the construction industry to settle outstanding debts by assigning payment from one debtor to another creditor.

[20] This witness reiterated that prior to the receipt of the Defendant Company's Defence, no indication had been given by the Defendant Company that it had been acting on under an agency agreement with Cortez Subsea Limited; indeed, that at the time when the contract for services had been entered into between the Parties, Cocoon Limited did not advise the Claimant Company that such agency between it and Cortez Subsea Limited existed. Goolcharan testified further, that Cortez Subsea Limited has never contacted the Claimant Company. He asserted that all dealings relating to the contracted works were with Messrs Donawa and/or Ramkallawan².

[21] In cross-examination, the witness was confronted with his Statement of Case by which he pleaded that 'the Defendant Company through various purchase orders entered into an

² Paragraph 21 of the Witness Statement of Alvin Goolcharan filed on March 24, 2021

Agreement with the Claimant Company for the Claimant Company to provide the following services to Cortez Subsea Limited'³ and his evidence by which he testified that he had not been aware of Cortez Subsea Limited before the institution of this Claim; he stated in response that this averment in his Statement of Case was false as was his Evidence in Chief⁴ where he repeated the statement.

[22] This witness acknowledged that he had not replied to the Defendant Company's plea regarding the agency which it alleged existed between itself and Cortez Subsea Limited. He stated further, that he was not aware that any agency existed between the Parties. Mr. Goolcharan completely contradicted his case by later admitting that since 2017 he was aware that Cortez Subsea Limited was the client in receipt of the contracted works. He acknowledged that the completion certificates on which he relied in support of his case also indicated that the client for whom the jobs had been done was Cortez Subsea Limited. In answer to Counsel for the Defendant Company he accepted that there was no written contract between himself and the Defendant Company; he described the relationship between Messrs Donawa, Ramkallawan and himself as 'informal'. He agreed that the purchase orders were the earliest record of the contractual relationship between the Claimant Company and the Defendant Company and that in these documents Cortez Subsea Limited as well as Cocoon Limited appear on the purchase orders.

[23] He further admitted that other documents attached to the Claimant Company's Statement of Case were addressed to Cortez Subsea Limited by the Claimant Company. These included Costing Sheets, Estimates and an Invoice for payment in which the Claimant Company described Cortez Subsea Limited as the client.

Evidence for the Defendant

Antonio Donawa

[24] Mr. Donawa, Managing Director of the Defendant Company, testified that he is in charge of Procurement, providing services for clients and acting in the capacity of an agent for foreign companies seeking either the Defendant Company's services or that of other companies. He stated that in 2017 the Defendant Company was hired by Cortez Subsea Limited to act as agent for them in order to source and provide suppliers, fabrication works and personnel to facilitate a

³ Paragraph 3 of the Statement of Case

⁴ Paragraph 7 of the Witness Statement of Alvin Goolcharan

project being carried out by Cortez Subsea Limited. This project was expected to take twenty-eight (28) days.

- [25] He asserted that he had known the Claimant Company's Mr. Goolcharan for a period of fifteen (15) years and entered into a verbal Agreement with him as agent of Cortez Subsea Limited to effect certain fabrication works for the benefit of the latter named company. Donawa testified that he explained to Goolcharan during discussions prior to the commencement of the contract that Cocoon Limited had been hired by Cortez Subsea Limited and was acting as its agent for the purpose of this contract. As previously pleaded, Mr. Donawa stated that Cortez Subsea Limited issued instructions to the Defendant Company to acquire quotations for the different services to be provided by the Claimant Company whereupon Cortez Subsea Limited would review the estimates and determine whether the cost would be revised or the works proceeded with. Once approved, the Defendant Company would then prepare the purchase order. Upon completion of the contracted job, the Defendant Company would inspect the work, approve the completion certificate issued by the Claimant Company and forward it to Cortez Subsea Limited who would transfer the payment to the Claimant Company.
- [26] This arrangement continued until Cortez Subsea Limited's project was delayed and disrupted by the passage of Hurricane Irma. The result was that they could no longer make timely payments; the Defendant Company agreed to accept delayed payment and communicated the problem to contractors on the project. In an effort to ameliorate the situation, the Defendant Company assisted by having its debtors issue payments directly to the Claimant Company. He also told the Claimant Company that it could not accelerate payments since it was only the agent.
- [27] In cross-examination, he acknowledged that the purchase orders issued by the Defendant Company do not state that Cocoon Limited is the agent of Cortez Subsea Limited. He revealed that Mr. Ramkallawan was Cortez Subsea Limited's employee – he was never employed by the Defendant. Mr. Donawa accepted that the Claimant Company never billed Cortez Subsea Limited directly nor did he ever ask the Claimant Company to do so; all Estimates/Invoices were sent to the Defendant Company. He acknowledged that he had not disclosed any document evidencing an agency between the Defendant Company and Cortez Subsea Limited.

Analysis and Conclusion

[28] It must first be noted that the Claimant Company did not respond by way of Reply to the Defendant Company's plea that it contracted as agent of Cortez Subsea Limited and not on its own behalf; this plea required a response so that the issues between the Parties could be clearly defined⁵. The failure of the Claimant Company to file a Reply to the Defence that the Defendant Company contracted with it as agent, amounted to a failure to challenge this assertion by way of alternate facts; as a result, the Claimant Company was not permitted at trial to raise any new facts in response to this plea or cross-examine the Defendant Company's witness on this issue⁶. The agency was therefore not challenged.

[29] At the outset, the Claimant Company pleaded that it entered into an Agreement to provide services to Cortez Subsea Limited⁷. This assertion was repeated by its witness Mr. Goolcharan in his Evidence in Chief⁸. In cross-examination, Mr. Goolcharan disputed the accuracy of his Evidence in Chief and pleading, labelling them as false. He acknowledged that the completion certificates for the jobs that the Claimant Company had effected, named Cortez Subsea Limited as client; further, that these completion certificates had been signed by the Claimant Company's employees and seen by himself. In answer to Counsel, Mr. Goolcharan admitted that he was aware that Cortez Subsea Limited was the client on whose behalf it had performed the contracted works since 2017 and that this fact was evident from the completion certificates for the jobs that the Claimant Company executed as well as other documents. Mr. Goolcharan revealed that invoices submitted to Cocoon Limited for work done also had the name Cortez Subsea Limited in the heading of said documents. This evidence establishes on a balance of probability that the Claimant Company was aware that the Defendant Company was acting on behalf of Cortez Subsea Limited as agent from the inception of the contract. The credibility of the Claimant Company's case was undermined by:

- a. The inconsistency between the pleaded case and evidence at trial on the issue of whether the Claimant Company was aware from the beginning of the Agreement between it and the Defendant Company that Cortez Subsea Limited was the client on whose behalf the work had been contracted.

⁵ **Blackstone's Civil Practice 2014**, paragraph 27.2

⁶ **Nanan v Toolsie** CV2011-04210 paragraph 27 per Justice Jones

⁷ Paragraph 3 of the Statement of Case

⁸ Paragraph 7 of Mr. Alvin Goolcharan's Witness Statement

- b. The inconsistency between Mr. Goolcharan’s Evidence in Chief and cross-examination on the issue of his knowledge, gleaned from the documents submitted and signed by the Claimant Company’s agents that Cortez Subsea Limited was the principal on whose behalf the Defendant Company had commissioned the contracted works.
- c. The admission of Mr. Goolcharan, during cross-examination, that the Claimant Company had been aware since 2017 that Cortez Subsea Limited had been the client on whose behalf it had executed the subjected works.
- d. The failure, by the Claimant to reply to the Defendant’s plea of agency raised in its Defence.

[30] The inconsistencies noted above also caused me to conclude that Mr. Goolcharan was neither credible nor reliable; in the circumstances I did not accept his evidence that the Claimant Company was unaware that the Defendant Company was the agent of Cortez Subsea Limited at the time that the Parties entered into the said Agreement. I am of the view that based on the pleadings, especially the Statement of Case, the exhibits to the Statement of Case – particularly the estimates and completion certificates signed by the Claimant Company’s representatives and the oral evidence all support my conclusion that the existence of a principal as well as its identity was disclosed to the Claimant Company from the inception of the said Agreement.

[31] The law regarding the liability of an agent to a third party is set out in⁹ **Halsbury’s Laws of England**¹⁰ as follows:

“156. Where a person makes a contract in his own name without disclosing either the name or the existence of a principal, he is personally liable on the contract to the other contracting party, though he may be in fact acting on a principal’s behalf. He will continue to be liable even after the discovery of the agency by the other party, unless and until there has been an unequivocal election by the other contracting party to look to the principal alone. The agent will also be liable where he holds himself out as agent for a named person, but is in fact acting as agent for an unnamed person. Where the contract

⁹ Paragraph 44 of the Defendant’s Submissions filed on May 18, 2021

¹⁰ Fifth Edition, Volume 1

is not written but oral, the question whether the agent is personally liable must be determined in the context of the background against which the contract was made.”

158. *“Where an agent in making a contract discloses both the existence of and the name of a principal on whose behalf he purports to make it, the agent is not, as a general rule, liable on the contract to the other contracting party, ...but personal liability may be imposed upon him by the express terms of the contract, by the ordinary course of business, or by usage...”*

163. *“Where an agent is directed by his principal to pay a third person any money which he has received or is about to receive on his principal’s behalf, he is not in general responsible to the third person if he fails to do so, notwithstanding the fact that the money is received by him from the principal for the express purpose of paying it over to the third person, or that his failure to comply with the direction is a breach of duty towards his principal. The agent renders himself personally liable, however, if he assents to the direction and the assent is communicated to the third person, or if he enters into an unconditional undertaking to pay the money to the third person or to hold it on his behalf. In this case he is not discharged from liability by the subsequent bankruptcy of the principal, or the purported revocation of his authority to pay. If the direction is not a mere authority to make the payment amounts to an assignment of a specific fund, or a charge upon it, the agent, upon receiving notice of the assignment or charge, becomes liable to the third person for the amount due to him thereunder. The agent will not, however, be deprived thereby of any right of lien or setoff which accrued before he received such notice.”*

[32] Any contract made by an agent with the authority of his principal may be enforced by or against the principal where his name or existence was disclosed to the other contracting party at the time when the contract was made¹¹.

¹¹ **Halsbury’s Laws of England Volume 1 (2017):**

“Where the principal is undisclosed, the authorised contract of the agent may also as a general rule be enforced by or against the principal. If, however, the agent contracts in such terms as to imply that he is the real and only principal, evidence to contradict the terms of the contract will not be admitted. Whether he has contracted in such terms or not depends upon the construction of the particular contract. Where an agent contracts in his own name but not in terms which are consistent only with his having done so as principal, oral evidence may be admitted to prove the identity of the principal.”

[33] Given my finding that the Defendant Company disclosed to the Claimant Company the fact that it was acting on behalf of a principal and the evidence, including documentary evidence that the Claimant Company was aware of this fact, I hold further that the principal Cortez Subsea Limited and not the Defendant Company is liable for the outstanding debt of four hundred and seventy-two thousand six hundred and sixty-seven dollars and sixty-five cents (\$472,667.65). The fact that payment for works done by the Claimant Company were made by the Defendant Company does not affect the existence of the principal/agent relationship since it is lawful for an agent to make payments to a third party on the direction of his agent as happened here. The Defendant Company here did not give an unconditional undertaking to pay Cortez Subsea Limited's debt nor was a fund assigned to it by the principal to make payments to the Claimant Company – in the latter circumstances the Defendant Company would have been liable to pay the debt.

The Registration of Local Agents of Foreign Governments or Foreign Enterprises Act¹²

[34] The Claimant Company submitted that the failure of the Defendant Company to register the agency between itself and a foreign entity – Cortez Subsea Limited, renders the agency an illegality; as such, the Defendant Company cannot rely on said agency to escape liability to pay the outstanding sums due under the said Agreement. It was further submitted that the fact that the issue of the illegality of the agency had not been pleaded or raised before submissions does not prevent the Court from considering the issue once it was brought to my attention. It was submitted further, that the Court ought not to allow the Defendant Company to rely on an illegal contract since it would be contrary to public policy to do so.

[35] While the Claimant Company ought properly to have raised the issue of illegality in either its Statement of Case or Reply, its failure to do so is not an absolute bar to my considering the issue. The Court will take notice of illegality if it appears either on the face of the contract on which the Claimant Company is suing, or from evidence brought before it by any party and in those circumstances, even if the Defendant Company has not pleaded the illegality, once it is brought to the attention of the Court, the issue overrides all questions of pleadings. Where the contract is not *ex facie* illegal, as a general rule the Court will not entertain the question of illegality, unless it is specifically pleaded and the Court is satisfied that it has before it all relevant fact concerning the contract and its setting¹³. Applying this principle to the facts of this case, the Agreement was not in writing neither was the agency contract. The Claimant Company derived a

¹² Chapter 19:08

¹³ **The Attorney General of Trinidad and Tobago v Mootilal Ramhit and Sons Contracting Limited** Civ App No. P031 of 2018

pecuniary benefit from the contract to the tune of several hundred thousand dollars in circumstances where, as I have already held, the Claimant Company was aware that the client was Cortez Subsea Limited, a foreign company and the Defendant Company was acting as its agent. In light of this knowledge, the failure of the Claimant Company to answer, by way of reply the Defendant Company's averment that it was Cortez Subsea Limited's agent is all the more surprising. The evidence and pleadings before me indicate that the Claimant Company was aware of the breach of the **Act** but decided to participate in the breach for profit. Given the apparent complicity of the Claimant Company in the illegality, this Court ought not to assist the Claimant Company in enforcing what would be an Agreement based on an illegal agency¹⁴.

[36] The Claimant Company also submitted that the Defendant Company failed to disclose any documents to support the agency it claimed existed between itself and Cortez Subsea Limited; it further submitted that in light of this omission, the Court should not find in its favour on this issue. I am of the view, that the Claimant Company itself disclosed evidence which, on a balance of probability, establish not only the existence of an agency, but that this fact was disclosed to the Claimant Company. I bear in mind that the onus of proof that the Claimant Company and the Defendant Company contracted as principals lay on the Claimant Company and not the Defendant Company; the Claimant Company having adduced evidence which supported the Defendant Company's contention that he was Cortez Subsea Limited's agent, I find that there is no merit to this argument.

[37] In the circumstances, I make the following Orders:

- i. The Claimant Company's case is dismissed.

¹⁴ Paragraph 102 **Port Authority of Trinidad and Tobago v Nyree Alfonso and others** CV2018-03315, in **George and Others v Royal Exchange Assurance Corporation** 1900 2 QB 214 the Claimants sued the Defendant on a policy of Maritime Insurance which was illegal; the Defendant challenged the Claim on several grounds but did not plead the illegality of the policy. Kennedy J, in the course of his judgement opined:

"It appears to me that when upon the trial of an action the Plaintiffs' case, as happens here discloses that the transaction which is the basis of the Plaintiffs' claim is illegal, the Court cannot properly ignore the illegality and give effect to the claim..."

He further stated:

"... Their Counsel argued that the illegality was not pleaded by the Defendants; in my opinion that makes no difference... No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to have arisen out of a contract or transaction which is illegal, if the illegality is duly brought to the attention of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Claimant proves the illegality, the Court ought not to assist him."

- ii. The Claimant Company to pay to the Defendant Company prescribed costs on the sum of four hundred and seventy-two six hundred and sixty-seven dollars and sixty-five cents (\$472,667.65).

Joan Charles

Judge