BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2007/0157

BETWEEN:

CHIVERTON CONSTRUCTION LIMITED
JUNIOR CHIVERTON

Claimants

AND

SCRUB ISLAND DEVELOPMENT GROUP LIMITED

Defendant

Appearances:
Mr. Garvin Simonette, Mrs. Hélène Lewis of Simonette Lewis for the Claimants
Ms. Willa Liburd of O'Neal Webster for the Defendant

2007: February 22nd

JUDGMENT IN CHAMBERS

(Civil Practice and Procedure – application to strike out defence as disclosing no reasonable ground for defending the claim – CPR 2000 Part 26.3
Defamation – defence of qualified privilege – whether circumstances of the publication relevant
Tort of unlawful interference with trade – elements of tort – developing law – whether proper to strike out where facts in issue and law developing
Conversion – non admission of allegation no positive case for the defence asserted – whether good defence disclosed
Breach of construction contract – mixed issue of law and facts raised on defence – whether appropriate to strike out defence)

[1] **Joseph-Olivetti, J.**: - This is an application by the Claimants under CPR 2000 Part 26.3 to strike out the defence as disclosing no reasonable ground for defending the claim. It was filed on 7th December 2007 and is supported by the affidavit of Mr. Eric Williams, the Rt. Hon. Ralph O'Neal, and Mr. Junior Chiverton. The Defendant did not file any evidence.

[2] The short background to this action giving rise to this application is as follows. Scrub Island Development Group Ltd. ("Scrub") acting through its agent, Mainsail Development Group

LLC ("Mainsail") a property developer entered into a construction contract with Chiverton Construction Ltd ("Chiverton Construction") on or about 17th July, 2006. It is alleged that the contract is partly in writing and partly oral. The written part of the contract includes the AIA standard form of contract where the basis of payment is a stipulated sum. Essentially, Chiverton Construction had to build 5 retaining walls for Scrub at its development, the Marina Village on Scrub Island, British Virgin Islands which Scrub is carrying on this through its agents, Mainsail, and Virgin Islands Project Management, ("Virgin") a project management company. Scrub terminated the contract on 15th January, 2007, long after the date fixed for substantial completion and refused to allow Chiverton Construction back on the site.

[3] In brief, Chiverton Construction says that Scrub acted in breach of contract when it purported to terminate the agreement and Chiverton Construction is claiming damages for breach of contract, damages for conversion of its tools and materials, conspiracy and unlawful interference with its trade and defamation. The Second Claimant, Mr. Chiverton, is the managing director of Chiverton Construction and he too claims damages for defamation.

[4] Scrub in its Amended Defence ("A/D") denies that it wrongfully terminated the contract or breached it or that it is liable in conversion or for conspiracy and unlawful interference with trade or for defamation although it apparently admits making some of the statements attributed to it.

[5] Both counsel filed comprehensive submissions in this matter in which they referred to numerous authorities which included **Sime, A Practical Approach to Civil Procedure 8th Edn. Chapter 20**, **Keating on Construction Contracts 8th Edn**, **Hudson's Building and Engineering Contracts**, **Halsbury's Laws of England Vol. 43 (Reissue)**, **The White Book Service 2002 Vol. 1**, **Gatley on Libel and Slander 10th Edn.**, and **Clerk & Lindsell on Torts 19th Edn**. The court expresses its appreciation for this invaluable assistance. The court has considered all the submissions but will only refer to particular cases or submissions as it sees fit having regard to the nature of this application and to the approach adopted by the court which is to look at the law only in so far as is required to determine whether the Defence discloses a real prospect of success.

The Law on Striking Out a Statement of Case

[6] I shall start with the law. The power to strike out a statement of case (which by definition includes a defence) is set out in CPR 2000 Part 26.3. Here, the Claimants rely on 26.3(1)(b) and (c) which provides as follows:-

> "26 3(1) in addition to any other power under these rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –
>
> (a) ……
>
> (b) The statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim;
>
> (c) The statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; …"

[7] It is noticeable that Rule 26.3 unlike Rule 15.5 on summary judgment does not make any specific provision for the filing of evidence leading one to the conclusion that no evidence should be relied on but simply the pleadings. This was the undoubted position under similar provisions in the RSC 1970 where the court only considered the pleadings and only allowed evidence in relation to claims that the suit was an abuse of the process.[1] If one files evidence on applications to strike out under Part 26.3(1)(b) then to my mind this becomes more of a summary judgment application which certainly cannot have been the intention of the framers of the rules as separate provision is made for summary applications under Part 15 and for evidence to be led. I am bolstered in this view by para. 24.0.2 of the White Book where it is noted that the ambit of a summary judgment application is wider than one for striking out as in the former the court has to consider evidence whilst in the latter it considers only the pleadings before it. However, I note that Zukerman on Civil Procedure refers to an English practice direction to the effect that evidence may be adduced. See para. 8.33.

[1] See Slade L.J. at p. 314 B in Morgan Crucible Co. PLC v. Hill Samuel & Co.[1] On an application to strike out a pleading under R.S.C. Ord. 18r. 19 10(a), no evidence is admissible and since it is only the pleading itself which is being examined, the court is required to assume that each and every one of the facts pleaded (unless manifestly incapable of proof) is true and would be capable of proof at the trial. In some instances the court may regard the assumption as somewhat unrealistic but it nevertheless has to be made."

[8] I accept the submissions made for Scrub by learned counsel Ms. Liburd to the effect that the law on striking out under Rule 26.3.1(b) is akin to the law relating to summary judgment hence her reliance on **Three Rivers District Council and others v. Bank of England (No. 3)**[2]**.** See the Supreme Court Practice White Book 2001 Vol. 1 para. 3.4.6- "Overlap with Part 24 (Summary judgment). Many cases falling within r.3.4 also fall within Pt. 24 which provides for the summary disposal of claims or defences which have no reasonable prospect of success (see r. 24.2). The test to be applied in applications under ground (a) is the same as that applied in applications under Pt. 24 and therefore, at a hearing the court may treat an application under ground (a) as if it was an application under Pt 24 **(Taylor v. Midland Bank Trust Co. Ltd., (Court of Appeal, Civil Division, Transcript) July 21, 1999)."**

[9] **And at para. 24.2.3 White Book - it is explained: -** "The hearing of an application for summary judgment is not a summary trial. **The court at the summary judgment application will consider the merits of the respondent's case only to the extent necessary to determine whether it had sufficient merit to proceed to trial.** The proper disposal of an issue under Pt 24 does not involve the court conducting a mini-trial (per Lord Woolf M.R. in **Swain v. Hillman [2001] 1 All E.R. 91**. However, that does not mean that the court has to accept without thinking everything said by a party in his statements of case. In some cases it may be clear that there is no substance in factual assertions made by a party. If so, any issues which are dependent upon those assertions can be eliminated at an early stage so saving the parties the costs and delay of trying an issue, the outcome of which is already known *(cf.* **Glaxo Group Ltd. v. Dowelhurst Ltd.** [1999] All E.R. (d) 1288).

[10] In an application for summary judgment the applicant must establish that the respondent has no real prospect of successfully defending the action. What does this mean? In the **Bank of Bermuda Limited v. Pentium BVI Limited**[3] the Court of Appeal expressly approved the formulation of the test by Rawlins J. as he then was in the court of first instance. The learned judge held that the word "real" means that the court must determine whether there is a realistic as opposed to a fanciful prospect of success. He also held that

[2] [2001] 2 All E.R. 513
[3] ECCA 20th September 2004 and High Court BVI HCV 2002/0122

while a defendant does not need to show that his defence will probably succeed at trial the defence must be better than merely arguable and must carry some degree of conviction. This to my mind then this is the same test that we are called upon to apply under Part 26.3(1) (b). The Defendant does not have to establish that he will succeed only but that he has a realistic as opposed to a fanciful prospect of defending the claim. And I note the justification for the striking out rule as explained in Zukerman op. cit at para. 8.35- " it is important to stress that the justification of dismissal under this rule rests on the idea that no further investigation could provide any appreciable assistance to the task of reaching a correct outcome. It would be wrong to strike out a statement of case that presents an arguable claim or defence or where the case raises complex issues of fact or law. Accordingly, a statement of case should not be struck out if it raises an issue in an area of law that is in a state of uncertainty or development."

[11] With respect to striking out under Rule 26.3.1)(c) - abuse of process -the law is clear. An abuse of the court's process means using that process for a purpose or in a way significantly different from its ordinary and proper use. See White Book 2000 para. **3.4.3**. This ground is similar to the old ground of frivolous and vexatious. See **Simes** op. cit. and the author's reference to Stuart-Smith LJ in **Ashmore v. British Coal Corporation**[4] - "whether a statement of case is vexatious depends on all the circumstances of the case: the categories are not closed and the considerations of public policy and interest of justice may be very material".

[12] Let me say at the outset that having regard to my findings herein on the majority of the claims the Claimants have not satisfied me that the Defence offends against this rule and the application on this ground fails. I now turn to the claims as I will consider the pleadings in respect of each separately**.**

Defamation

[13] The allegation in brief is that certain named employees of Virgin acting on behalf of Scrub spoke words defamatory of the claimants to Chiverton Construction's employees between October, 2006 and December, 2006. See paras. 26 and 27 of the Statement of Claim ("S/C").

[4] [1990] 2 All E.R. 981

[14] A further allegation is made that between August 2006 and December 2006 certain of Virgin's employees spoke words defamatory of the claimants to various civil servants and public officers of the Labour Department and to the Honourable Ralph T. O'Neal the duly elected representative for the Ninth District. In particular that Chiverton Construction is not doing any work and that Chiverton Construction has been paid $200,000.00 and is deliberately refusing to pay its workers. See para. 28 & 29 S/C.

[15] In answer Scrub admits making part of the statements attributed to it in para. 26 but relies on the truth of the statement or alternatively on qualified privilege and or fair comment. See paras 34-40 of the A/D. Scrub in particular explains the circumstances in which its representatives met with the Hon. Ralph T. O'Neal. In brief a meeting was convened at his request in his capacity as a concerned district representative on behalf of aggrieved constituents, the Claimants.

[16] Mr. Simonette, learned counsel for the Claimants submits that having accepted that its agents made part of the statement and that on its own evidence the statement is untrue that all that is left is for the court to determine whether the words bear the meaning, attributed to them by the Claimants at paras. 27 and 29 S/C. as a matter of law. Further, that the defence of qualified privilege does not arise as Mr. O'Neal has deposed in his affidavit that when he met with Scrub's representatives he was not acting as an arbitrator or mediator. Counsel relied on **Gatley on Libel and Slander**.

[17] The law on qualified privilege was re-visited very recently by the Privy Council in **Edward Seaga v. Leslie Harper**[5]. Lord Carswell at para. 5 had this to say of the doctrine after looking at its history: - "It is founded upon the need to permit the making of statements where there is a duty, legal, social or moral, or sufficient interest on the part of the maker to communicate them to recipients who have a corresponding interest or duty to receive them, even though they may be defamatory, so long as they are made without malice, that is to say, honestly and without any indirect or improper motive. It is the occasion on which the statement is made which carries the privilege, and under the traditional common law doctrine there must be a reciprocity of duty and interest: *Adam v Ward* [1917] AC 309, 334, per Lord Atkinson. The development of the law is accurately and conveniently expressed in **Duncan and Neill on Defamation, 2nd Ed. (1983), para 14.04**: "From the broad general

[5] Privy Council Appeal 90/2006

principle that certain communications should be protected by qualified privilege 'in the general interest of society', the courts have developed the concept that there must exist between the publisher and the publishee some duty or interest in the making of the communication."

[18] Having regard to this statement of law, the Hon. Ralph T. O'Neal's interpretation of his role at the meeting is not determinative of the issue as to whether this defence of qualified privilege can be made out by the Scrub. The court is entitled to hear all the evidence relating to the circumstances in which all the statements were allegedly made to determine whether Scrub had an interest to protect in making the statement/statements and whether the recipients had an interest in receiving it/them and the issue of malice. Accordingly, in my judgment, Scrub has a realistic prospect of defending this claim, even if the words complained of are untrue and could be taken to have the meaning ascribed to them by the Claimants, which I must make clear for the avoidance of any doubt; the court has formed no opinion on at this stage.

Unlawful Interference with Trade

[19] The allegations at para. 33 to 36 S/C are that prior to 15th January 2007, Mainsail and Virgin conspired and combined together wrongfully and with the sole and dominant intention of injuring Chiverton Construction by damaging or destroying its business.

[20] The acts complained of are:- in breach of contract refusing to pay Chiverton monies lawfully due; slander as claimed, encouraging Chiverton Construction workers to leave their employ (no particulars given), attempting to lure workers away by offering them jobs (no particulars), conversion of Chiverton Construction's tools.

[21] Further, in para. 36 Chiverton Construction claims that Scrub knew that it had entered into contracts with labourers and that with intent to injure, Chiverton Construction had procured and induced the labourers to break their contracts (no particulars given).

[22] Scrub denies these allegations. In particular it says that it paid all monies certified by valuations 1 through 3 of SID67; it did not offer employment to any of Chiverton Construction's workers; that it puts Chiverton Construction to proof that it is the owner of the tools and material which it is alleged Chiverton converted and relies on its defence to the defamation claim in respect of the alleged defamatory statements.

[23] Chiverton Construction says that Scrub has admitted making part of the offending statement and therefore the allegations under this claim are ipso facto made out and that Scrub is liable under this head. This submission of course must fail in any event having regard to my ruling on the defamation claim.

[24] However, one must also consider the law on this specific tort. The law on the tort of unlawful interference is explained at Clerk & Lindsell op. cit. para. 25 -88:- "Unlawful interference with economic and other interests. There exists a tort of uncertain ambit which consists in one person using the unlawful means with the object and effect of causing damage to another. In such cases, the claimant is availed of a cause of action for this, "clearly recognised" but "relatively undeveloped tort" which is different from those so far discussed for example in **J.T. Stratford & Son Ltd. v. Lindley & Anor. v. Lindley**[6] two of their Lordships gave, as an alternative ground of their decision that an injunction should lie, the fact that the defendants had used unlawful means to interfere with the business of the claimants ..."in addition to interfering with existing contracts the respondents' action made it practically impossible for the appellants to do any new business with the barge hirers."

[25] It was not disputed that such interference with business is tortuous if any unlawful means are employed. Such "interference with business" does not require proof that existing contracts have been broken or interfered with; but the cause of action exists only when the defendant has brought about the damage by use of unlawful means. Interference with contract or with trade or business or other material interests by unlawful means is therefore a 'genus' tort, which includes indirect and direct interferences with those interests. The essence of the tort is deliberate interference with the claimant's interest by unlawful means and the intention to injure must be a contributing cause of the claimant's loss.

[26] To my mind this claim as already remarked is to a large extent premised on the correctness of Chiverton Construction's submissions on the defamation claim. If therefore the defence to the defamation claim has a real prospect of success as I have held then it follows that so does the defence to this claim and I so hold. Furthermore, it is obvious from the passage cited that this is a new area of law and one that ought best to be ventilated at a full trial as issues of fact need to be determined as well. See too Supreme

[6] [1965]A.C. 269

Court Practice op. cit. para 3.4.2: - "However, it is not appropriate to strike out a claim in an area of developing jurisprudence, since, in such areas, decisions as to novel points of law should be based on actual findings of fact (**Farah v. British Airways plc, The Times** January 26, 2001, CA)".

Conspiracy

[27] The law on conspiracy is elucidated on in **Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitchand Others**[7] cited on by Ms. Liburd. The editorial note at p. 143 B sums up the position: - "It is an actionable wrong for two or more persons to combine together for the purpose of injuring another, if damage results to that other from the combination, and the real purpose of the combination is to injure the other."

[28] On the facts here by Scrub and in the context of the whole case as pleaded it is difficult to see how that claim for conspiracy by Chiverton Construction could be sustained.

Conversion of Chiverton Construction's Tools

[29] Chiverton Construction pleads that when it was not on the site its contract with Scrub was unlawfully terminated and so too its licence to enter on the site thus it was unable to recover tools and materials it had on site. See para. 24 S/C and para. 25 S/C where the tools and materials are itemized. It refers to letter dated 15th May, 2007 written on its behalf to Scrub's lawyers and annexed to the S/C as CC8. This letter says in part in relation to the tools and materials: - "Notwithstanding requests for return of same, your client has continually refused our client access to the site for the purpose of retrieving its tools." It goes on to ask for the replacement costs of the property. Apparently there was no response to this letter.

[30] Scrub pleads that it does not know whether Chiverton Construction is the owner of the tools and materials and puts them to proof. See para. 33A/D. Noticeably, Scrub does not deny that the tools and materials were on the site, or that they have any claim or lien on them or that they believe another person is entitled to ownership. Their case seems to be that they simply do not know if Chiverton Construction is the owner. This is in the context

[7] [1942]1All ER142

of Chiverton Construction having worked for them and presumably with those tools. It is an easy and not unreasonable inference to draw that the tools Chiverton Construction were using on the site were theirs.

[31] Chiverton Construction is relying on conversion by keeping or refusing to return goods. In **Clerk & Lindsell on Torts 19th Edn. para. 17-22** this form of conversion is explained thus: - "the ordinary way of showing a conversion by unlawful retention of property is to prove that the defendant having it in his possession refused to surrender it on demand. Indeed such a demand is generally a precondition of the right of action for detention: the mere unpermitted possession of another's chattel is not as such a conversion of it. Normally, though not exclusively, this form of conversion is used where an owner seeks **to recover his goods or their value** from a wrongful possessor, there being no proprietary action equivalent to that existing in other systems of law for this purpose. For this reason this head of liability is wide: on principle, any detention clearly adverse to the rights of the owner, such as an assertion of a lien that does not exist will suffice to establish it."

[32] To my mind, Scrub's pleading on this claim amounts to a bare denial and no more. This is not a defence as it puts forward no positive case to refute Chiverton Construction's allegations. Merely saying that the Claimant is required to prove or is put to strict proof or words to that effect **without more** does not assist. See CPR 10.5 which speaks to a defendant's duty to set out its case and in particular Rule 10.5(5) which provides that if the Defendant does not admit allegations made by the Claimant or denies them and does not put forward a different version of events it must state the reasons for resisting the allegations.

[33] Chiverton Construction alleges that the tools and materials are theirs and as Scrub has put forward no positive case to refute their ownership or possession the claim must succeed. The letter can easily be viewed as a demand even if no particulars of the demand/ demands were set out in the S/C. Accordingly, Chiverton Construction is entitled to judgment on this claim. It is seeking the value of the items having regard to the time that has elapsed. The value is disputed. In conversion the usual remedy is the return of the goods or their value if they are damaged or cannot be returned. Accordingly, the pleadings to this head of claim are struck out and judgment to be entered for Chiverton Construction for return of the goods and for damages to be assessed. Scrub is to give access to the

site to Chiverton Construction to facilitate it recovering its property as particularized in the S/C within 7 days of the date hereof, both parties are to carry out an inventory of the items at the time of delivery. If Chiverton Construction is of the view that any items are missing or damaged then it must file affidavit evidence within 14 days of the inventory and Scrub has leave to reply by affidavit within 10 days. Damages claimed to be assessed upon application on a date to be fixed by the court office.

Breaches of Contract

[34] These are pleaded under 5 distinct heads: (1) Unlawful acts of prevention in breach of the implied term to co-operate with and not to prevent the contractor from carrying out the contract works. The acts relied on are failure to deliver the site with completed excavations and footings; failure to deliver to the site the building materials required by Chiverton Construction; unlawfully ejecting Chiverton Construction from the site. (2) failure to pay for variations, (3) unlawfully omitting works from the contract works; (4) unlawful termination of contract; (5) repudiation of the contract based on the 4 grounds advanced. Scrub addresses the alleged breaches at paras. 9-32 A/D.

[35] In defence to the failure to deliver the site allegations, Scrub (at paras. 9 -11 A/D) denies that there was an express contractual term to hand over the site for the location of each retaining wall complete with all excavations and footings. It says that Chiverton Construction failed to prepare a construction schedule in accordance with Articles 3.10 and 9.1.2 of the contract and that it handed over locations with footings and excavations cut when required which was reasonable having regard to the nature of the work.

[36] Whether the alleged obligation to hand over the site, complete with excavations and footing exists and whether it was breached is a matter of mixed law and fact which calls for investigation at a full trial. One will have to construe not only the relevant contractual provisions but also consider the factual circumstances. In particular, I take into account the nature of the works and the argument of Scrub that it was not contemplated that all locations would be handed over at once. One will also have to consider the impact of the alleged failure of Chiverton Construction to submit a construction schedule in determining whether there was a breach.

[37] With respect to the alleged unlawful termination and repudiation, these are also mixed questions of law and fact calling in particular for the construction of the relevant provisions of the construction dealing with termination and in particular section 14.2 of the General Conditions of Contract. See para. 28A/D where Scrub relies on its right to terminate under the contract and/or at law. I note too that the law on the subject is not without ambiguity. According to **Keating op. cit. para. 10-003** a forfeiture clause must be properly complied with as the courts construe them very strictly. However, that must be read in the light of **Hudson's Building and Engineering Contracts op. cit. para. 12-004 p. 1245** where it is stated that a contractual determination which may fail by reason of failure to comply with contractual notice may be "rescued" if it can qualify as an effective common law determination on the same facts. Section 14.2 on its face appears to reserve the common law rights of termination. And on the pleadings Scrub is relying on its rights under the contract as well as at common law. This is not an untenable position on the facts pleaded.

[38] The same holds true of the other acts relied on to establish breach of contract – they all call for construction of the contract and for findings on disputed questions of facts. This therefore is clearly not a matter to be dealt with under Part 26.3 as it calls for full investigation at trial both on facts and on the law. The Amended Defence cannot be regarded as groundless or showing no reasonable prospect of success. I bear in mind that a defendant is not required to prove at this stage that his defence **will succeed** only that he has a real as opposed to a fanciful prospect of success. I emphasise the admonitions in the case law that one should be chary of deciding disputed facts on affidavits and that striking out should only be allowed in clear and obvious cases as it is the right of every litigant to a fair trial by an impartial tribunal. The issues raised herein call for the interpretation of written documents among them an AIA standard form of construction contract and involve questions of law which are not at all straightforward and call for findings on disputed facts. I therefore accept Ms. Liburd's submissions that this is not a fit matter to be dealt with under Part 26.3 and that Scrub has **reasonable** grounds for defending this claim.

Conclusion

[39] To sum up, in my judgment, for the reasons given it cannot be said with the necessary degree of certainty that Scrub's defence is groundless or bound to fail and that there is no justification for a trial as Scrub has reasonable grounds for defending all the claims save that relating to conversion. Therefore, the application to strike out the Amended Defence except that in relation to the claim for conversion is dismissed and judgment entered for Chiverton Construction for the return of the goods and damages to be assesses as provided in para. 33 hereof. I also remark that we ought as judges to pay more heed to the admonition that the judge should stop the case if it is apparent that there will be lengthy arguments on facts and law as this is oft times a clear indication that matters require full investigation and ventilation at trial.

[40] The Claimants must pay three-quarters of Scrub's costs to Scrub to be assessed upon application under CPR 65.11 if not agreed. And, Scrub must pay Chiverton Construction's costs on the conversion claim to be assessed if not agreed such assessment to take place after or at the same time as the assessment of damages.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands