[2024] JMCC Comm 36

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2019CD00350

BETWEEN CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED CLAIMANT

AND THE ATTORNEY GENERAL OF JAMAICA DEFENDANT

Construction contract – Disputes adjudicated - Contract terminated prior to completion – Adjudicator's rulings determined by court to be binding – Project manager failed to issue payment certificate - Whether death of project manager barred claim – Whether interest on overdue amounts to be compounded – Whether late submission of final account barred claim - Whether amounts already paid settled claim – Meaning of "prevailing commercial interest rate".

Denise Kitson K.C., Kevin Williams and Rachel Kitson instructed by Grant, Stewart, Phillips & Co. for the Claimant

Annaliesa Lindsay, Karessiann Gray and Rochelle Duncan instructed by the Director of State Proceedings for the Defendant

Heard: 1st, 2nd, 3rd & 8th May, 8th & 12th July and 18th October 2024.

In Open Court

Cor: Batts, J.

[1] The events giving rise to this claim reveal a long tortuous history which the Claimant's counsel concisely summarized in her opening statement. For

convenience I respectfully adopt that opening, with appropriate documentary references inserted and a few interlineations, as follows:

> *"A contract dated December 19th 1998 for construction of a Junior High School in Annotto Bay, St. Mary…* [The school] *was to be completed in twelve months. Construction began in February 1999* [The contract was for a fixed price of $49,488,878.60, see exhibit 1 page 275] *….it was almost completed when the Ministry unlawfully terminated the contract. The unlawfulness was already determined by Dr. Lloyd Barnett in an adjudication. He delivered several adjudications in the matter* [see exhibit 1 pages 475, 519 and, 524]. *The Defendant refused to honour the adjudications which indicated the methodology by which various items should be computed.*
>
> *…..*
>
> *The Ministry of Education indicated they were not accepting Dr. Barnett's adjudication. They wrote a letter[s] giving intent to refer to arbitration* [see, exhibit 1 page 488 and exhibit 2 pages 736 and 739]. *The letter(s) are written in 2001 however* [although an arbitrator was agreed, see exhibit 2 page 745] *no reference* [was] *made for arbitration to proceed*. [Correspondence ensued as the Claimant pressed for payment see for example exhibit 2 pages 737,738,740,742].
>
> *So Construction Developers Associates Limited filed an action to have the court say whether Dr. Barnett's rulings were final and binding* [see exhibit 2 page 746

et seq]. *In that matter Justice McDonald Bishop (as she then was) ordered judgment in default if a Defence was not filed* [see exhibit 2 page 781].

Justice Paulette Williams (as she then was) approved the order and ruled that judgment ought to be entered [see exhibit 2 page 785].

The Attorney General applied before Justice Glen Brown (now retired) to set aside the order of Justice Williams and he refused to do so [see exhibit 2 page 794]. *They went to the Court of Appeal which set aside Justice Brown's order and gave the Defendants time to file an affidavit in response* [see exhibit 2 page 815].

[The Defendant did not file an affidavit or defence having been advised that the matter concerned a point of law with no factual issues, see exhibit 2 page 820].

…*The matter was heard by Justice David Fraser ()as he then was) who decided that the adjudications by Dr. Barnett were final and binding* [see Formal Order with Declarations granted on the 12th November 2014, exhibit 1 page 710; Fraser J's reasons for judgment are at page 589 of exhibit 1].

Between 2014 and 2019 (when this action was filed), the parties were in further discussions [starting with a letter from the Claimant's attorney at law dated the 8th December 2014, see exhibit 1 page 576]*. It was not amicably resolved* [as the parties were unable to agree on the amount owed] *so the sum is now claimed and interest compounded.*

The documents show that Construction Developers Associates Limited compounded interest at the rate

> *charged for its commercial borrowing from its bank which was CIBC now First Caribbean…."*

[2] In her opening remarks counsel, for the Defence, urged that the late submission of final accounts for the project affects the computation of interest on the amounts outstanding. She also made the following submission: -

> *"In 2009 the very Claimant approached this Court about the nature of those adjudications 1, 3 and 5 being final and binding on parties. In that claim the Claimant did not seek to recover the sums they were certain of and which they had quantified prior to the 2009 claim in court. In these proceedings I submit not having pursued it then when they ought to have, it is our position that this court cannot determine whether they are entitled to those sums in these proceedings…"*

[3] Upon an objection being taken by King's Counsel, that there was no plea of res judicata or issue estoppel, the Defendant's counsel applied to amend the Defence to add, in paragraph 4, the words:

> *"Defendant will further say that the Claimant was aware of the sums outstanding on the adjudications which were ruled to be final and binding by Fraser J and chose not to pursue recovery of those sums in its 2009 claim. It is therefore an abuse of process for the Claimant to seek to recover those sums in this matter as such a claim is barred by the principle of Res Judicata."*

[4] Having heard submissions, I refused the application to amend. The application has come so late in the day that, if granted, it will result in unfairness and/or further delay. Unfairness, because the Claimant will be taken by surprise, and delay because an adjournment may be required to permit consideration of the new defence and its implications for the evidence to be called. In any event, on the facts of this case, that defence has no real prospect of success. To allow its articulation would merely waste judicial time. The issue of quantum, with which this claim is concerned, is separate and distinct from the issue of whether the adjudicator's rulings were binding. The latter was the question canvassed and answered in the litigation of 2009. This claim is for quantification of the amounts allegedly owed. The correspondence shows that, even after the binding nature of the adjudication was determined, the parties were unable to agree on the way the amount due was to be computed, see several letters at exhibit 1 pages 576, 599, 600, 607,609,611, 612,613, 615, 618,620, 621, 622, 633, 635, 640, 650, 660, 661, 662, 664, 665, 666, 673, 674, 678, 679, 680, 681, 695, 696, 698, 699, 700, 701, 702. It is significant that at no time during this exchange of correspondence, which included interventions from the parties' respective legal representatives, was it suggested that quantification of the claim ought to have been done at the time of the 2009 legal action. I therefore refused the application to amend as it was too late in the day and the point had no real prospect of success.

[5] Another issue, opened to by defence counsel, related to whether a Final Account was required and if so the timeline for its submission. The contract was entered into in 1998. It was to be completed in 12 months but was, for various reasons, extended until 2001. In 2001, as earlier indicated, several issues were referred for adjudication. The contract was terminated in 2001 prior to completion but after the adjudicator's decision. It is argued that, as a result, contractual obligations came to an end in 2001. The project manager opined that a final account should be submitted, see exhibit 1 page 517, but the Claimant did not immediately comply. A final account was not submitted until the 23rd November 2018, see exhibit 1 page 681. Therefore, counsel submitted:-

> *"[it was] far outside the contemplation, spirit and intent of the contract. In breach of contract and, perhaps making the claim inflated."*

Upon King's Counsel objecting, that this too was not pleaded, counsel withdrew the assertion of breach of contract saying instead that no contract was in existence at that time. In effect the case is that the right to be paid or make a claim for payment ended due to the failure to submit a final statement of account. Alternatively, the delay in submission should result in no interest being charged in the period.

[6] Counsel for the defence also opened to the fact that the project manager Morris Chin died before the final account was submitted. Therefore, there was neither a project manager nor a contract in existence, so the amount claimed is not binding on the Defendant.

[7] Counsel also opened to the following:

> *"Defendant says there were meetings in 2017. There was submission of $20,075,956.57 as principal outstanding. That was used by the Ministry to calculate an offer made in 2017 of 90 million dollars. This was paid in February 2018. So Ministry having paid denies the outstanding amounts claimed. There being no agreement as to the interest rate applicable and manner it is to be calculated.*
>
> *The time for interest, because if the principal is liquidated in February 2018 and, accrues on simple interest basis using commercial rate of borrowing when that is used sum claimed by Claimant is excessive and not binding on the Defendant. It is a matter of construction of contract. The contract does not provide*

for compound interest and shows a simple interest basis."

[8] I have focused on the respective openings to demonstrate that the issues, notwithstanding the several expert reports, evidence and voluminous documentation put before me, are rather narrow. Having refused the application to plead res judicata/issue estoppel the questions for this court are:

a. Whether the death of the project manager, and the late submission of the final accounts, are either fatal to or have unlawfully inflated the claim;
b. The interest rate applicable
c. Whether the contract permits the compounding of interest
d. Whether the payment of $90 million by the Defendant liquidated the sum due and therefore precludes any further claim.

I will treat with the issues seriatim.

[9] The issue of the effect of the death of the project manager gives rise to the question who was the project manager? Clause 1 of the contract (exhibit 1 page 79) defined project manager:

"The Project Manager is the person named in the Contract Data (or any other competent person appointed by the Employer and notified to the Contractor, to act in replacement of the Project Manager) who is responsible for supervising the execution of the Works and administering the Contract."

It is manifest that the named project manager was "*Morris Chin/Rivi Gardner,*" see exhibit 1 page 114. I find that this is a reference to the firm bearing that name and hence either or both gentlemen in that firm could act as project manager. Therefore, when Mr. Morris Chin died it did not mean there was no project manager.

[10] On the related question of the submission of a Final Account I do not see how this affects the Claimant's entitlement to be paid. The contract deals with final accounting in clause 57.1 (exhibit 1 page 98) which reads as follows:

> *"57.1 The Contractor shall supply the Project Manager with a detailed account of the total amount that the Contractor considers payable under the Contract before the end of the Defects Liability Period. The Project Manager shall issue a Defects Liability Certificate and certify any final payment that is due to the Contractor within 56 days of receiving the Contractor's account if it is correct and complete. If it is not, the Project Manager shall issue within 56 days a schedule that states the scope of the corrections or additions that are necessary. If the Final Account is still unsatisfactory after it has been resubmitted, the Project Manager shall decide on the amount payable to the Contractor and issue a payment certificate."*

[11] The clause therefore states the time for submission of an account with direct reference to the Defects Liability Period. That is defined in the Conditions Of Contract, exhibit 1 page 79, as: - *"...the period named in the Contract Data and calculated from the Completion Date".* The completion date "is the date of completion of the works," see exhibit 1 page 78. It means there is no obligation to submit a Final Account where the contract has not been completed. The more

so because there is no provision, with respect to the submission of a final account, where the contract has been terminated. Termination of the contract is defined and treated with in clause 59, see exhibit 1 page 98 et seq. Importantly clauses 60.1 and 60.2 say that upon termination the Project Manager "*shall*" issue a certificate for the value of work done, material ordered and, cost of removal, see exhibit 1 page 100.

[12] The absence of a requirement for submission of a final account where the contract was terminated prior to completion, is not surprising. Each claim as the contract went along was cumulative. Therefore, the last claim submitted, and certified for payment by the project manager, reflects the amount due as at that date. In this regard the evidence of Mr. Hector Diston, during examination in chief, is instructive: -

> *"Q: When you look at page 92 of the large bundle, clause 43, what if anything would these paragraphs, 43.1 and 43.2 have to do with your claim for under-certification?*
>
> *A: Before going to 43, 42 is relevant. Clauses 42 and 43 prescribe how claims are to be made, how it is to be certified and within what time and in the event of late payments, how it is to be handled. So I just want to take you through that. The contract in clause 42.1 says that the contractor shall submit to the project manager monthly statements of the estimated value of work, less the cumulative amount previously certified. Then 42.2 says the project manager shall check the Contractor's monthly statement and certify the amount to be paid to the Contractor. Now we go to 43.1 which states "Payments shall*

> *be adjusted for deductions for advance payments and retention. The Employer shall pay the Contractor the amounts certified within 28 days of the date of each certificate. If the Employer makes a late payment, the Contractor shall be paid interest on the late payment in the next payment." Let me pause there. When I was reading 42.1 it says [reads]. Cumulative is the key word. So in the construction industry, when the contractor makes his monthly valuations it is always cumulative. So one, then two, then three, cumulative value of work done. So to determine what is due to the contractor at that particular time, let us say valuation number 3, once the project manager certifies an amount then you have to less previously certified amount to determine what is due to the contractor on that particular payment certificate. You always have to less the previously certified amount. So when you less it you're going to come up with an amount and that is the amount which ought to be paid within 28 days."*

The Claimant is entitled to be paid for the work done once certified. It is irrelevant whether a document, known as a final account, was prepared if certificates for payment were already issued. There is no contractual provision which renders submission of a final account a precondition to payment if the contract is terminated prior to completion.

[13] In this case, however, the Claimant submitted a final account, see exhibit 1 page 681. It was correctly sent to Mr. Rivi Gardner who is the other partner in the firm named as project manager, see paragraph 9 above. The amount stated as being due, as at the 23rd November 2018, was $10,616,601,058.33. The project manager failed to treat with that document.

[14] As regards the matter of whether interest ought to be compounded, the relevant provision in the contract is clause 43, see exhibit 1 page 92, it reads as follows:

> *"43.1 Payments shall be adjusted for deductions for advanced payments and retention. The Employer shall pay the Contractor the amounts certified by the Project Manager within 28 days of the date of each certificate. If the Employer makes a late payment, the Contractor shall be paid interest on the late payment in the next payment. Interest shall be calculated from the date by which the payment should have been made up to the date when the last payment is made at the prevailing rate of interest for commercial borrowing for each of the currencies in which the payments are made.*
>
> *43.2 If an amount certified is increased in a later certificate or as a result of an award by the Adjudicator or an Arbitrator, the contractor shall be paid interest upon the delayed payment as set out in this clause. Interest shall be calculated from the date upon which the increased amount would have been certified in the absence of dispute."*

The interpretation of the clause flummoxed me until I heard the evidence of Mr. Diston. He said:

“Q: So do you just accept what he certifies? What happens if there is an under-certification?

A: Then there is a dispute. But what I want to point out is when you look at the contract it does not speak to either simple interest or compound interest. The only thing it says is that payment is to be made at the prevailing rate of interest for commercial borrowing, that is what 43.1 says. And just looking with a casual eye on the contract, it does not say simple or compound interest so what is happening here, when you take a deeper dive in 42 and 43 you realize that what it is actually saying is that because the certificates are cumulative, the amounts that ought to have been certified, and were not certified, interest would apply to those amounts. Let us say for arguments’ sake in certificate number 3 that there were some amounts that ought to have been certified that wasn’t certified. In certificate number 4, interest amounts would be included in that claim, certificate number 4.

Q: Meaning the interest from the previous one?

A: From the previous, yes that ought to have been certified that was not certified. So in 4 you would have some interest amounts. In 5 if it is still not certified, interest again on interest, so as we go along it accumulates. So when you check the effect of that, its actually a compounding effect. So the contract did not have to necessarily say compound interest or simple interest, just by way of how it operates. So when you deduct previous amounts, it is going to have principal, it is going to have interest amounts, everything in one.

> *You’re going to apply the interest amount to that, it’s not separated at all.”*

It is apparent that although the word “*compound*” is not used the parties agreed that interest was to be computed in a manner that had a compounding effect.

[15] On the question of the rate, to be applied, the contract is clear. Clause 43.1 exhibit 1 page 92, says *“…the prevailing rate of interest for commercial borrowing for each of the currencies in which the payments are made.”* The Claimant led evidence of interest rates charged by its own bank, see exhibit 1 pages 547 to 551. I hold however that this is not what was intended. The clause specifies that the applicable interest rate is the “*prevailing*” commercial rate. This implies a nationally recognized benchmark or average market rate. That information is usually provided by the Bank of Jamaica and is the most appropriate. This is not a claim of interest as damages and there is no evidence that the Claimant incurred such rates because of the contract being terminated. The rate their bank charged applied to overdrafts, and/or money borrowed, by the Claimant. The Claimant is entitled to interest at the rate or rates provided for in the contract that being the prevailing commercial rate for borrowing. I therefore will apply the prevailing borrowing rates for commercial loans set out in the statistics provided by the Bank of Jamaica (BOJ).

[16] These issues having been decided the computation of the amount due can follow as there were not many factual issues. The parties have helpfully, but without prejudice, agreed the BOJ statistics on interest, see the affidavit of Rachel Kitson filed on the 31st May 2024. They also provided alternate calculations for my consideration. The Claimant’s bundle of calculations was filed on the 30th July 2024 and the Defendant’s on the 2nd August 2024. I accept as correct the Claimant’s calculations at “B” in its bundle of calculations. The approach is consistent with my above stated decisions, a proper application of the adjudicator’s rulings and the evidence of the Claimant’s witnesses. In that regard the cross-examination of the

Defendant's expert skillfully exposed, his ignorance of some germane facts and, some contradictions. When the monthly average lending rates for commercial credit, as published by the BOJ (attachment E to the affidavit), are applied the total due is $471,483,972.68 as of March 31, 2024. The starting principal amounts as at October 2001 are gleaned from schedules to the final account submitted in 2018, see exhibit 1 page 601 to 606, which I find reflects a correct application of the adjudicator's decisions. Importantly the total principal amount is $1,348,667.00 less than the total claimed in the final valuation (number 28) dated the 5th October 2001, which the project manager declined to process, see exhibit 1 pages 511,515 and 517. The breakdown of my award is set out in the Table below:

Summary of Claim (Compounded at Bank of Jamaica rates for commercial loans up to March 31, 2024)		
	Breakdown of starting principal amount and starting date	Principal + Interest Compounded up to March 31, 2024
Loss and/or Expense due to Extension of Time	$12,857,529.62 (October 25, 2001)	J$177,792,198.62
Labour. Fluctuations	$2,092,278.85 (October 25, 2001)	J$56,747,187.26
Overheads	$2,432,229.00 (October 25, 2001)	J$65,967,380.26
Handling Charges	$797,124.91 (October 25, 2001)	J$21,619,774.31
Amount in Certificate #26 & 27 Wrongly Withheld	$3,825,000 (October 25, 2001)	J$106,304,500.24
Wrongful Termination Damages	$1,489,326.33 (July 3, 2001)	J$43,052,931.99

Total (principal and interest) due	**J$23,587,954.47**	**J$471,483,972.68**

The interest rates vary from as high as 22.76% (January 2004) , to a low of 9.05% (August 2022). The calculation took into consideration the $713,024.53 NHT payment made by the Defendant on May 18, 2016, as well as the $90,000,000 payment on February 12, 2018, see exhibit 1 page 679 and annexure 1 page 4 of the Claimant's calculation schedule, which I find is the correct approach. It is therefore evident that, although payments were made by the Defendant, there is still a balance due to the Claimant.

[17] The award may seem extraordinarily high, it is therefore appropriate that I advert to three matters. First, Jamaica and Jamaicans are subject to the rule of law. This means citizens, the state and its agents must obey the law. The law of contract requires that contractual obligations be honoured. In this regard I reiterate the position stated in the case of **Chevron Caribbean SRL v The Attorney General [2013] JMSC Civ 93 (unreported judgement dated 19th July 2013)** at para 34**.** Secondly, the Claimant alleged that it suffered greatly due to the failure of the state to honour its bargain, see letter dated 17th October 2017 (exhibit 1 pages 674 to 677. The third and last point is that the state's legal adviser, by letter dated 21st August 2002, issued a note of caution and recommended that the amount claimed be placed in escrow, see exhibit 1 page 540. I sincerely hope that advice has been heeded.

[18] In the event, and for the reasons stated in paragraphs 1 to 16 above, there will be judgment as follows:

(i) Judgment is entered in favor of the Claimant against the Defendant in the amount of $471,483,972.68.

(ii) Interest will run on the judgement sum at 10.24 percent per annum (being the BOJ stated average rate on commercial credit on 31st March 2024 exhibit E to the affidavit of Rachel Kitson filed on the 31st May 2024) and, pursuant to the provisions of the Law Reform (Miscellaneous Provisions) Act, until the judgment debt is paid in full.

(iii) Costs to the Claimant, to be taxed if not agreed.

David Batts
Puisne Judge