IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. D055 OF 1993

BETWEEN	ASTLEY DOVE	PLAINTIFF
AND	ESTATE DEVELOPMENT COMPANY LIMITED	DEFENDANT

Terrence Ballantyne and Paul Beswick, instructed by Ballantyne, Beswick and Co., for the plaintiff.

Hugh Small, Q.C., and John Thompson, instructed by John Thompson and Co., for the defendant.

Heard on May 6 and 7, 1996; July 28, 1997, and September 16, 1997.

PANTON, J.

The plaintiff has been a civil engineer since 1964, and has worked in England and Jamaica. The defendant is engaged in the business of providing professional services in the construction and development industry.

Both parties had been in a contractual relationship with each other between 1986 and 1992.

The claim before the Court is for damages for breach of contract and for lost earnings. It is necessary that the history of the relationship between the parties should be given.

THE HISTORY

In July 1986, the plaintiff entered into a contract with the defendant for a period of eighteen months. That was followed in January, 1988, with one for two years. Finally, there was the contract for the period January 1, 1990 to December 31, 1992. Events that occurred during this latter contract period have led to the present suit.

The plaintiff was engaged by the defendant to provide the services of a consultant in the field of civil engineering, and to work on specific projects as required from time to time.

The 1986 contract made provision for remuneration at a specific rate per hour; however, where the total number of hours multiplied by the rate exceeded the sum of $5000.00 per month then he should be paid $5000.00. At the halfway stage of this contract, the general manager of the defendant wrote to the plaintiff advising him that the defendant was pleased with the contribution that he had been making in the engineering design section. The defendant, as a result, was increasing the rate per hour by $2.50 and increasing the maximum monthly payment to the plaintiff by $1000.00. In addition, the defendant offered a gratuity of 15% of the total contract price at the expiration of the agreement.

On October 2, 1989, the defendant by means of a memorandum from the manager of training and personnel to all senior staff, consultants and contract officers, advised as follows:

"With regard to the Consultants, their fees will be based on a percentage of the hourly rate paid to comparable professionals in a private sector consulting partnership".

This, it should be noted, was decided by the defendant during the contract for the period January 1, 1988 to December 31, 1989.

According to the memorandum, the defendant and many para-statal organizations had been finding it increasingly difficult to attract and retain professionals at the salary scales approved by the Ministry of the Public Service. **This decision was aimed at giving the defendant "added flexibility in recruiting staff", and at bringing "some order in the system of engagement and compensation".** Incidentally, on August 3, 1989, Mr.Clive Laidley, Executive Chairman of the defendant, had written to the plaintiff in the following terms:

"I wish to confirm our discussion of the 2nd August, 1989, regarding your request for the fees payable in your capacity of Consultant Engineer under the terms of your Contract Agreement with EDCO to be reviewed.

Effective January 1, 1989, EDCO is prepared to modify the fees payable and paragraph 2 is hereby modify (sic) as under:-

"The Company undertakes to pay the Consultant for his services at the rate of $57.50 per hour or part thereof, provided however, that should the total number of hours (approximately

160 per month) multiplied by the rate per hour exceed the sum of $9,200 per month, then the Consultant shall be paid the rate of $9,200 per month."

The other terms and conditions of the Contract remain unchanged. I wish also to confirm that in the event mutual agreement is reached for a re-negotiation of this Contract after the present one expires on the 31st December, 1989, **the fees payable at that time shall be based on the formula agreed on and linked to the fees paid to a Principal Engineer (Partner) in an Engineering Consulting Firm."**

THE 1990 TO 1992 CONTRACT

Under the terms of the contract that commenced on the 1st January, 1990, **the plaintiff was engaged as "principal consultant" at an "hourly rate representing 25% of the hourly charge prevailing from time to time for Directors/Partners in Consulting Engineering Firms as determined by the Association of Consulting Engineers, Jamaica (ACEJ)".** The rate on the 1st January, 1990, was $75.00 per hour or part thereof provided that should the total number of hours (approximately 160 per month) multiplied by the rate per hour exceed the sum of $12,000.00 per month then the plaintiff shall be paid the rate of $12,000.00 per month.

On February 20, 1991, the defendant's Executive Chairman, Mr. Laidley, advised the plaintiff in writing that the hourly rate had been increased to $125.00 with a maximum payment of $20,000.00 per month. This adjustment was acknowledged by the plaintiff in writing on February 25, 1991.

On February 6, 1992, the hourly rate was again adjusted - this time, to $250.00 with a maximum payment of $40,000.00 per month retroactive to January 1, 1992.

These adjustments were made as a result of written communications from the Association of Consulting Engineers, Jamaica, and in keeping with the terms of the contract.

The Association of Consulting Engineers wrote to the managing director of the defendant on the 29th June, 1992, advising of new rates which would be effective during the period July 1 to December 31, 1992. Consequently,the defendant's manager of personnel and training wrote to the defendant's director of finance and administration on July 20, 1992, seeking approval for the plaintiff to be paid at the rate of $437.50 per hour during that period.

On July 30, 1992, Mr. Laidley, having had discussions with Miss Dawn Hamilton, the defendant's director of finance and administration, sent her a memorandum instructing her to communicate to the plaintiff that the defendant was not in a financial position to accommodate the new rate; and, further, directing her to either:

"(a) negotiate with Mr. Dove a continuance of his existing rate to December 31 after which it will be reviewed and the new rate negotiated

or

(b) if Mr. Dove is inflexible, that we pay him the new rate for the months of July and August and immediately exercise the Clause in his contract giving one (1) months (sic) notice for the termination of his contract on the grounds that we cannot now afford his services."

Clauses 5 and 6 of the contract contain provision for the termination of the contract. The direction given in (b) above is not covered by these clauses. Inability to afford the plaintiff's services is not one of the grounds listed for termination of the contract. However, "the winding up or closure of the company" would automatically result in the termination of the contract. It appears to me that the Executive Chairman was misguided in thinking that the contract could have been terminated as set out in (b) of his memorandum to Miss Hamilton. Whereas the 1986 and the 1988 contracts made provision for termination of the contract by either party giving one month's written notice, the instant contract did not include that provision.

The plaintiff and the director of finance and administration met on August 6, 1992. The plaintiff was not then aware of the existence of the memorandum from the Executive Chairman.

The plaintiff and the director of finance have given different versions of what was agreed at the meeting on August 6, 1992. On August 11, 1992, the director of finance and administration wrote to the plaintiff confirming that he would continue to receive payment at the hourly rate of $250.00 and that as a consideration for that concession the defendant would enter into a new contract

of employment with him in January, 1993. The duration of that contract would not form the subject matter of the instant letter, she wrote.

On December 7, 1992, the plaintiff wrote to the Executive Chairman suggesting that he cause the new contract to be prepared. The Executive Chairman apparently did not think it courteous to reply. Instead, according to the plaintiff, Mr. Joseph Aryee, the defendant's Chief Technical Director, made contact with the plaintiff saying that he had been instructed by the Executive Chairman to hold discussions with the plaintiff. Prior to their meeting, that is, on Christmas Eve, the director of finance and administration had written to the plaintiff to say that the defendant was negotiating projects with its major potential clients and that until the finalisation of those projects the defendant and the plaintiff would have to enter into an arrangement on a monthly basis "at least for the first couple of months of your contract period".

Mr. Aryee and the plaintiff had several discussions between the 5th and the 18th January, 1993. According to the plaintiff, Mr. Aryee and himself reached an agreement which he (Mr. Aryee) said he had been instructed by the Executive Chairman to conclude. This agreement would involve a further concession on the plaintiff's part, to reduce the hourly rate to 20% of the ACEJ rate.
On January 26, 1993, the manager of personnel and training wrote to the plaintiff setting out the proposed terms of the new contract. Three days later, the plaintiff replied rejecting the offer.

THE QUESTIONS FOR DETERMINATION

As I understand the pleadings, the evidence and the respective arguments of the parties, it appears to me that the questions for determination are as follows:

(1) Is any further compensation due to the plaintiff in respect of his services for the period July to December, 1992 ?

(2) Is any further compensation due to the plaintiff in respect of his services for January, 1993 ?

(3) Is there a just claim by the plaintiff for lost earnings, he having rejected the offer that was made to him on January 26, 1993 ?

So far as the first question is concerned, the contract document and the meeting between the plaintiff and Miss Hamilton on August 6, 1992, appear to be the most important matters for consideration. There is no doubt that the contract terms, if followed faithfully, would have resulted in the plaintiff being paid at the rate of $437.50 per hour for a maximum of 160 hours per month. The defendant's Executive Chairman was of the view that the defendant was not in a position to justify or defend the new rate, and "in light of this the guidelines given by both the Ministry of Finance and the Prime Minister, EDCO as a company could not afford the rates". It was against this background that Miss Hamilton was instructed to discuss the matter with the plaintiff.

Miss Hamilton stated in her evidence that she went into the meeting with the plaintiff to tell him that if he didn't agree to waive the increase, the defendant would terminate the contract with a month's notice. She gave him the two options that the Executive Chairman had set out and, according to her, he chose the lesser of the two evils.

The plaintiff said that Miss Hamilton asserted that the defendant was having financial difficulty and pleaded that he should waive the increase. He said that he agreed to waive the increase on condition that the defendant would undertake in writing that on the expiration of the existing contract, the defendant would enter into a contract with the plaintiff as of January 1, 1993, for not less than a year but for a period to be determined later.

I prefer the evidence of the plaintiff on what was agreed at the August 6, 1992, meeting. Having considered the demeanour of all persons who testified before me at this trial, I am satisfied that the plaintiff epitomises reliability. I formed the impression that he had an orderly and disciplined approach to his contractual obligations as well as to his employer. On the other hand, I formed the view that the defendant was dodgy and deceptive in its dealings with the plaintiff. That is the conclusion I have arrived at when I consider the roundabout method employed by the Executive Chairman to deal with the plaintiff. Why didn't he simply reply to the plaintiff's letter of December 7, 1992 ? Why have two different officers (Miss Hamilton and Mr. Aryee) deal with this simple matter ?

There is, it appears to me, ample room for concluding that the defendant was not being straightforward. And I so conclude.

I refuse to believe that the plaintiff would have agreed to waive the increase unless there was something of worth to come later. I accept that he was promised, in return for his act of waiving the increase, the security of a new contract of at least a year's duration, with the hourly rate to be calculated in the traditional way; that is, on the basis of the ACEJ rates. Indeed, the discussions with Mr. Aryee focussed on the percentage of the ACEJ rates that would be acceptable to the plaintiff. I find that the letter of August 11, 1992, signed by Miss Hamilton was an incomplete record of what had transpired at the meeting.

The letter dated January 26, 1993, setting out the new terms for the re-engagement of the plaintiff's services was, in my view, a breach of faith on the part of the defendant. There was, in my view, a contract formed on the 6th August, 1992, when the plaintiff waived his right under the contract. The plaintiff paid the price of a loss of income in return for the defendant's promise as conveyed by Miss Hamilton that the plaintiff would be re-engaged by the defendant for at least a year and that the ACEJ rates would form the basis for the calculation of remuneration. The defendant did not keep its word. It has breached the contract by offering a monthly salary, which method of remuneration had not been contemplated during the discussions on the waiver.

The law on the point is, in my view, quite clear. It has been such for at least eighty years. **In Dunlop Pneumatic Tyre Co. Ltd. v. Selfridge & Co. Ltd. (1914-15) All E. R. Rep. 333 at 335, Lord Dunedin said:**

> "I am content to adopt from a work of SIR FREDERICK POLLOCK (POLLOCK ON CONTRACTS (8th Edn.)),to which I have often been under obligation, the following words as to consideration:
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> > "An act of forbearance of one party, or the promise thereof, is the price for which the promise of the other is bought, and the promise thus given for value is enforceable"(ibid. at p.175)."

On the basis of my findings in this respect, the plaintiff is entitled to the sum of $180,000.00 which he had waived for the period July 1, to December 31, 1992.

In relation to the second question for determination as set out earlier, it follows that the situation would be the same for the month of Janauary, 1993, as the defendant continued to use the services of the plaintiff while negotiations were taking place. In his claim for the unpaid portion of his remuneration for January, 1993, the plaintiff has, it appears to me, made a further concession. During negotiations, he agreed to a rate of 20% of the ACEJ rates. However, there was no contract on that basis. So, it would seem to me that he would have been entitled to compensation at the rate that existed under the contract that ended on December 31, 1992. By that reasoning, he would have been due for January the

sum of $437.50 x 160 = $70,000. He has been paid $40,000. The balance due is $30,000. The plaintiff has, however, claimed only $16,000 based on a rate of $350.00 per hour.

It is quite obvious to me that the plaintiff, in his dealings with the defendant, operated "on principle". I cannot say that the defendant did likewise.

As far as the third question is concerned, that is to say, the lost earnings, the plaintiff's duty to mitigate his loss has to be considered. The plaintiff made, in my judgment, serious efforts to mitigate his loss. He had been lulled into a false sense of security by the defendant only for the latter to eventually renege on its promise. The plaintiff applied for several positions, including a teaching position at the College of Arts, Science and Technology. He did not rely only on advertisements. It has to be borne in mind that during the period that the plaintiff worked for the defendant, he was not permitted to do private consultancy; hence, he had no clients to whom he could have turned for work. The setting up of a private practice would, in any event, he said, take some time.

The plaintiff's efforts at seeking employment did not bear much fruit in terms of the financial returns. For the entire 1993, his net earnings (excluding that received from the defendant) amounted to $142,810. These earnings came after the beginning of August,1993. For all practical purposes, the plaintiff had been left "high and dry" until August,1993.

If the defendant had kept its word the plaintiff would have earned $672,000 for the year, that is, at the rate of $56,000 per month, using the reduced rate of $350 per hour.

I am of the view that the plaintiff's duty to mitigate his loss prevents him from succeeding fully so far as the lost earnings claim is concerned. I am of the view that three months would have been a reasonable period for which he should be compensated. In the circumstances, the period would be from February to April, 1993. His earnings would have been $168,000 for that period. He in fact did some work which he valued at $24,000 during the period. His ill luck stayed with him as he was not paid for it. However, he still has the right to bring an action against the offending employer to recover what is due. That sum has to be deducted from the $168,000. The amount that I find as reasonably due for lost earnings is therefore $144,000.

On the basis of the findings that I have made, judgment is hereby entered in favour of the plaintiff for $340,000.00. This sum is made up as follows:

$180,000.00 (balance due for July- December,1992)
$ 16,000.00 (balance due for January, 1993)
$144,000.00 (lost earnings).

Interest is awarded at the rate of 25% per annum (as agreed by the parties) on $196,000.00 from February 1,1993, and on $144,000.00 from April 30,1993.

The plaintiff is awarded costs which are to be agreed or taxed.