IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. 2006 HCV 01759

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| BETWEEN | EXPLOSIVE SALES AND SERVICES LIMITED | CLAIMANT |
| AND | JOSE CARTELLONE CONSTRUCCIONES CIVILES S.A. | DEFENDANT |

Ms. Daniella Gentles instructed by Livingston, and Levy for Claimant.

Mr. Rudolph Smellie instructed by Daley Thwaites and Company for the Defendant.

**Heard: 21st and 22nd October, 2009, CAV 6th November, 2009**

**Coram: D. O. McIntosh, J**

Claimant seeks to recover monies from the defendant for work done at the defendant's quarry in St. Ann during the months of July to November of 2005. The defendant maintain that the claimant has been paid in full for the work which was done.

The defendant contend that this issue turns on how much work was done by the claimant and more precisely, on how the work done by the claimant should be measured.

Both parties had a contractual agreement and clause 6 of that agreement is the pillar on which the defendant depends.

It reads:

"On the first five days of every month the parties will perform all the measurements of the work performed on the previous month. (The) Contractor shall notify the Subcontractor of the date for the measurement to be made. If the Subcontractor does not concur on the measurement arranged dates, (the) Contractor will perform the measurements, at its only (own) judgment. Blasted sections which produce bigger rocks than what is accepted, according to clause 9(e) shall not be included in the measurements until that situation is corrected.

The issuance of (the) Subcontractor's certificate and the correspondence invoice, will always be done on or before the date of the approval of (the) Contractor's interim Certificate and will necessarily include only the quantities approved by the Engineers Representative, according to the profiles and the cross sections."

Two aspects of this clause of the contract did not take place during the months that claimant did work.

1. The work was invariably not measured within the first five (5) days of the month after it was done.

2. The measurement was not done according to the profiles and cross sections method.

The importance of the work being measured within the first five days of the succeeding month is significant when one considers that the defendant purports to measure the work done from July to October at the end of November.

To measure the work at that time could not possibly produce an accurate result.

Both parties agree that the measurement of the work during the contract period was done on the basis of measurement of area and assumed depth of materials removed.

The unchallenged evidence of the claimant is that this method was used because of:

(a) At the time, neither party has the capacity or ability to measure by profiles and cross sections.

(b) Using this area method of measurement may have been the most accurate method of measure but it could suffice for want of a better one.

(c) The method used is an approved method.of measurement used in the Industry.

(d) He believed that the method of measurement in contract was really for the perview of the persons to whom Jose Cartellone was employed.

Both parties agree that it was the defendant who did the measurement. The claimant accepted those measurement and made up his invoices based on those measurement.

The defendant made partial payment on those invoices and when the claimant threatened to stop working reassured the claimant that he would be paid in full.

At the end of the contract the defendant sought to apply measurement by profiles and cross section to work done from July to October, 2005. This Court regards this move as a Ruse on the part of the defendant to avoid payment for work done by the claimant, knowing full well that the quantity would have depreciated tremendously.

On a Balance of Probabilities this Court will find that the claimant was not paid in full for the work that he did and will enter judgment for the claimant on his claim as follows:

US$131,198.32

JA$72,198.36

Interest at 6% from the 12th May, 2006 to 21st day of October, 2009.

Costs to be the Claimant to agreed or taxed.