**[2024] JMCC COMM. 20**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE COMMERCIAL DIVISION**

**CLAIM NO. SU2019CD00292**

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| **BETWEEN** | **MECHANICAL SERVICES LIMITED** | **CLAIMANT** |
| **AND** | **ZDA CONSTRUCTION LIMITED** | **DEFENDANT** |

Ms Georgia Hamilton instructed by Georgia Hamilton & Co, Attorneys-at-law for the Claimant

Mr. Leonard Green & Mr. Nyron Wright instructed by Chen Green & Company, Attorneys at-law for the Defendant

**IN OPEN COURT Heard: 28th, 29th September, 18th October, 22nd November, 2023, 2nd February and 3rd May 2024**

**Breach of Agreement – Subcontractor Agreement - Liquidated damages- whether Claimant entitled to sums withheld as liquidated damages- What rate of interest should be imposed**

**STEPHANE JACKSON-HAISLEY J.**

**BACKGROUND**

**[1]** The Claimant Mechanical Services Limited (MSL) is a company engaged in the provision of plumbing and mechanical services such as designing and installing

mechanical systems for buildings. The Defendant ZDA Construction Limited (ZDA) is a company that carries out building construction and civil engineering. In or around the year 2017, ZDA entered into a construction contract with Sandals Resort International (Sandals) to provide labour, materials, equipment and services in connection with the construction of the AC by Marriot Hotel located in Kingston. On or about March 22, 2018, MSL entered into a subcontract with ZDA to provide plumbing and mechanical services as part of construction works that ZDA was contracted to carry out under its agreement with Sandals. The subcontract was slated to be for the sum of Jamaican Three Hundred and Eleven Million, Seven Hundred and Twenty-Four Thousand, Three Hundred and Forty-Three Dollars and Seventy-One Cents (J$311,724,343.71) which included an increased contract amount in the sum of Jamaican Forty-Four Million, Three Hundred and Ten Thousand, Six Hundred and Eight-Nine Dollars and Ninety-Four Cents (J$44,310,689.94) by way of change orders. Further, MSL claims interest on the amount due to the Claimant at a rate of 25.75% plus an additional 5% amounting to 30.75% per annum.

**[2]** According to MSL, they completed the works and submitted the revised final invoice to ZDA on August 5, 2019, following which Sandals took possession of the hotel. ZDA paid the sum of Jamaican Two Hundred and Sixty-Four Million, Six Hundred and Twenty-Three Thousand Nine Hundred and Twenty-Two Dollars and Seventy-Seven cents (J$264,623,922.77) on account of the works done however they have failed or refused to settle the outstanding amount.

**[3]** ZDA denies that the contract states that the works were to be completed for the sum alleged or that MSL is entitled to interest calculated at an unspecified rate and claim that the rate being charged is arbitrary, unfair, excessive and unjustifiable having regard to the delay in completing the mechanical services.

**[4]** ZDA has instead claimed that the contracted sum agreed between the parties is Jamaican Two Hundred and Twenty-Eight Million, One Hundred and Sixty-One Thousand, Three Hundred and Eighty-Six Dollars and Ninety-Three Cents (J$228,161,386.93) and that through MSL's delays in completing the project, it suffered loss which was conveyed by way of letter dated June 27, 2019. ZDA also claims that as a result of this delay, liquidated damages are payable in the sum of United States Twenty-Five Thousand Dollars (US$25,000.00) for each calendar day the project was delayed.

## CLAIMANT'S CASE

### Evidence of Kareem Blake

**[5]** Kareem Blake, a supervisor employed to MSL, was the first of two witnesses who gave evidence on its behalf. Mr. Blake testified that MSL commenced mobilisation of the project on January 3, 2018 even though the written subcontract was not yet executed. He also stated that the works involved installing the plumbing infrastructure and minor works in some of the tanks on the ground floor however, from the get-go, MSL experienced delays in executing the Project. He averred that the major cause of the delays had to do with the foundation not being properly compacted which had to be cleared before MSL could start the groundwork. He explained that the groundwork entailed installation of the bathroom plumbing for the lobbies, plumbing for the kitchen and the riser stacks to take the sewage away from the building and since this was not done, it stalled the project for several months.

**[6]** Mr. Blake further expressed that the failure to get the compaction of the foundation right also impacted MSL's ability to carry out works required to do the 'under slab' of the ground floor which threw-off everything since this is the central point for all the mechanical and plumbing works. He stated that the issue of the compaction of the foundation was a recurring decimal in the Minutes of the Bi-weekly Site Meetings and ZDA's persistent delays meant that MSL had to provide additional

manpower to service the project. Mr. Blake asserted that Sandals also supplemented ZDA's workers, and this was reflected in several of the Minutes of the Bi-Weekly Site Meetings. He highlighted that the effect of ZDA's delays caused a knock-on effect on MSL's ability to carry out the mechanical and plumbing works. During cross examination, Mr. Blake accepted that an email was sent where the Project Manager stated that MSL was holding up progress everywhere. He also admitted that MSL doubled the workmen on site after receiving this email to enable the workflow to increase.

**Evidence of Neville Glanville**

**[7]** Mr. Neville Glanville, the Managing Director of MSL gave evidence that MSL was nominated by Sandals after submitting a proposal for mechanical and plumbing work in the sum of Jamaican Two Hundred and Seventy Million, Two Hundred and Forty-Six Thousand, One Hundred and Thirty-Two Dollars and Eighteen Cents (J$270,246,132.18), however the contract was awarded for Jamaican Two Hundred and Twenty-Eight Million, One Hundred and Sixty-One Thousand, Three Hundred and Eighty-Six Dollars and Ninety-Three Cents (J$228,161,386.93) with provisions for variations.

**[8]** Mr. Glanville further stated that by Clause 3.8 of Article I of the agreement, MSL was entitled to a Mobilisation payment in the amount of Jamaican Twenty-Two Million, Eight Hundred and Thirty-Two Thousand, Three Hundred and Twenty-Five Dollars and Ninety-Five Cents ($22,832,325.95), however, there was a subsequent agreement between the parties which stipulated that MSL would accept a mobilization sum in the amount of Jamaican Twelve Million, Eight Hundred and Thirty-Two Thousand, Three Hundred and Twenty-Five Dollars and Ninety-Five Cents (J$12,832,325.95) in exchange for ZDA waiving the requirement for MSL to deliver a performance bond. This mobilization payment was received on April 3, 2018.

**[9]** Mr. Glanville asserted that on November 12, 2019, he received an email from Carrie Zhang, a representative from ZDA showing that the total value of the work provided was Jamaican Three Hundred and Eight Million, Six Hundred and Thirty-Two Thousand, Five Hundred and Seventy Dollars and Seventy-Seven Cents (J$308,632,570.77). The email also acknowledged paying to MSL the sum of Jamaican Two Hundred Sixty-Four Million, Six Hundred and Twenty-Three Thousand, Nine Hundred and Twenty-Four Dollars and Twenty-Seven Cents (J$264,623,924.27) and withholding the sum of Jamaican Seven Million, Seven Hundred and Fifteen Thousand, Eight Hundred and Fourteen Dollars and Twenty-Seven Cents (J$7,715,814.27) as retainage. A further sum of Jamaican Six Million, One Hundred and Seventy-Two Thousand, Six Hundred and Fifty-One Dollars and Forty-Two Cents (J$6,172,651.42) as contractor's levy as well as Jamaican Ten Million Dollars (J$10,000,000.00) in exchange for a waiver of the performance bond were also retained.

**[10]** Mr. Glanville stated that the sum of Sixteen Million, Two Hundred and Fifty Thousand Jamaican Dollars (J$16,250,000.00) was also withheld by ZDA as liquidated damages however, pursuant to Clause 3.4 of Art I of the Agreement, liquidated damages can only be assessed against MSL to the extent caused by MSL. On a proper review of the subcontract, it is Clause 3.4.1 of Article 3 with the subtopic 'Claims by the Contractor' which makes reference to the allegations of assessment of liquidated damages made by Mr. Glanville. He stated that the delays were caused by ZDA from the outset which were highlighted in the Minutes of the bi-weekly site meetings and that MSL had to compensate for delays that were affecting the project and had to make arrangements to bring in materials for duct work to be assembled on site. During cross-examination, Mr. Glanville stated that he was not made aware that ZDA had entered into an agreement to pay Ninety-Four Million Jamaican Dollars (J$94,000,000.00) in damages and that he became aware of the Final Closeout Amendment Agreement between Sandals and ZDA by accident just about a week before the final closeout. Mr. Glanville also

admitted that he was aware that a liquidated damages clause existed and it was tied to the Subcontract.

**[11]** Mr. Glanville further averred that ZDA failed or refused to settle amounts due in a timely manner, that MSL experienced issues in receiving full payments of its invoices and the tendency to wrongfully withhold payments due to MSL continued during the life of the contract. He stated that though invoices were submitted within a day of their date, ZDA was tardy in remitting payments. Mr. Glanville pointed out that by terms of the agreement, sums due from ZDA attract interest at a rate of 5% above the average rate paid by MSL on its overdraft facilities at Sagicor Bank. He further stressed that MSL has a longstanding relationship with Sagicor Bank and its overdraft facilities would usually be charged at rate of 38%, however when payments are not made within 30 days of its due date, the repayment attract a penalty of 44%.

**[12]** Mr. Glanville highlighted that MSL's final invoice dated August 5, 2019 was certified and delivered to ZDA after receiving a request from Sandals that all final claims should be submitted.

**DEFENDANT'S CASE**

**[13]** The sole witness on behalf of the Defendant was Mr. Xi Wang, the Managing Director of ZDA. Mr. Wang asserted that the subcontract between ZDA and MSL was executed on March 22, 2018 and though ZDA commenced its contracted work around December 2017, MSL joined the work around March 2018. Mr. Wang stated that though the scope of work and timelines for completion of the project were expressly stated in the subcontract, the Claimant was not meeting certain deadlines as a result of which the project ended six months after the date of completion.

**[14]** Mr. Wang further stated that a Final Project Closeout Amendment Agreement was negotiated between Sandals and ZDA for the sum of Jamaican Five Hundred and Ninety-Three Million, Five Hundred and Thirty-Nine Thousand, Seven Hundred and Forty-One Dollars (J$593,539,741.00) from which the subcontractors were to be paid. He averred that an expressed term of the contract was that any damage caused by the delay would be Ninety-Four Million Jamaican Dollars (J$94,000,000.00) however, the subcontractors would not be penalized and a direct procedure to apportion fault would be capped at Jamaican Sixteen Million Five Hundred Thousand Dollars (J$16,500,000.00).

**[15]** Mr. Wang denies that interest should be charged in excess of Thirty percent (30%) when the delay in completion was not the fault of the Defendant however, he stated that the amount due and payable to MSL is Nine Million, Five Hundred and Sixty Thousand, Nine Hundred and Fifty-Four Dollars and Seven Cents (J$9,560,954.07).

**SUBMISSIONS ON BEHALF OF THE CLAIMANT**

**[16]** Counsel for the Claimant, Ms Georgia Hamilton submitted that one of the issues to be considered by the Court is whether or not, MSL provided the plumbing and mechanical works. She further submitted that this issue covers the sub-issues of (i) whether the subcontract allowed for variations (ii) the legal effect of such provisions, (iii) the value of the works carried out by MSL under the said subcontract, and (iv) the effect of the final accounting by Sandals. Counsel submitted that ZDA failed to show that the plumbing and mechanical works were not completed to satisfaction and expectation, however, there is the unchallenged evidence from the Claimant that the plumbing and mechanical work were done to satisfaction inclusive of variations which has been approved by the owners and valued at Jamaican Three Hundred and Eight Million, Six Hundred and Thirty-Two Thousand, Five Hundred and Seventy Dollars and Seventy Cents (J$308,632,570.77).

**[17]** Counsel submitted that of the amount approved, MSL has received the sum of Jamaican Two Hundred and Sixty-Four Million, Six Hundred and Twenty-Three Thousand, Nine Hundred and Twenty-Four Dollars and Twenty-Sven cents (J$264,623,924.27). Counsel averred that ZDA has agreed that retainage of Jamaican Seven Million, Seven Hundred and Fifteen Thousand, Eight Hundred and Fourteen Dollars and Twenty-Seven Cents (J$7,715,814.27) is now due to MSL and that ZDA has paid over contractor's levy of Jamaican Six Million, One Hundred and Seventy-Two Thousand, Five Hundred and Sixty-One Dollars and Forty-Two Cents (J$6,172,561.42). She submitted that the sum of Jamaican Thirty-Seven Million, Eight Hundred and Thirty-Six Thousand, Eighty-Five Dollars and Eight Cents (J$37,836,085.08) therefore remains due from ZDA.

**[18]** Counsel stated that the subcontract provides for interest at a rate of 5% above the average rates paid by MSL on its overdraft facilities. She further stated that the unchallenged evidence is that this average was the rate of 25.75% per annum and at times, the interest rate was as high as 38% per annum. Counsel countered that this interest rate should not be considered as a penalty clause especially in light of the fact that ZDA is seeking to enforce a liquidated damages clause of United States Twenty-Five Thousand Dollars (US$25,000.00) per day. Counsel relied on the authority of **El Makdessi vs Cavendish Square Holdings BV** and **ParkingEye Ltd vs. Beavis** [2015] UKSC 67, where the UK Supreme Court stated at paragraph 35 that:

> "*In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach."*

**[19]** Counsel also relied on **ZCCM Investments Holdings plc v Konkola Copper Mines plc** [2017] EWHC 3288 (Comm), where the Court found that an interest uplift of 10% which applied on default was not a penalty. Similarly, in **ICICI Bank UK plc v Assam Oil Co Ltd and other companies** [2019] EWHC 750 (Comm),

the Court found that an interest uplift of 4% attaching to the contractual rate of interest on default by the borrower did not amount to a penalty, as it was not out of all proportion to the lender's legitimate interests in the contract being performed. Counsel submitted that interest on default at 5% above its average overdraft rate cannot be considered a penalty.

**[20]** Ms Hamilton submitted that ZDA is not entitled to liquidated damages of United States Twenty-Five Thousand Dollars per day (US$25,000.00) as there is no correlation between the total sum being claimed and the alleged daily rate. Counsel averred that though ZDA is seeking to recover Jamaican Sixteen Million Five Hundred Thousand Dollars (J$16,500,000.00) as liquidated damages, its own evidence is that MSL was four (4) months late in achieving completion and this would amount to One Million Five Hundred Thousand United States Dollars (US$1,500,000.00) and not the sum being claimed.

**[21]** Counsel maintained that MSL should not be held liable for any delays as the evidence clearly shows that MSL commenced work on the project even prior to the subcontract being executed. She further stated that the evidence in the bi-weekly site meetings shows that, from as early as January 2018, ZDA was behind in the construction schedule and this continued throughout the project. Counsel submitted that MSL has always maintained that any delays in completion of the subcontract works were on account of delays caused by ZDA that had a knock-on effect on MSL's ability to perform.

**[22]** Counsel submitted that ZDA, having been in the construction industry since 2007, entered into a run of the mill contract and cannot in any way claim that it lacks sophistication when it clearly won a major construction contract to build the hotel now located on the project site, whilst MSL was merely one of its subcontractors. She submitted that the prevention principles as applied **in Holme & Another vs Guppy & Anor** (1838) 3 M&W 387 as well as on the confused legal drafting principles enunciated in **Bramwall & Ogden vs Sheffield City Council** (1983) 29

BLR 73) should assist the Court to find that the liquidated damages clause does not apply, as time had become at large, and the sole requirement was for MSL to complete within a reasonable time.

**SUBMISSIONS ON BEHALF OF THE DEFENDANT**

**[23]** Mr. Leonard Green, Counsel for the Defendant submitted that the issue to be determined is whether the Claimant breached the subcontract by failing to engage adequate workers for the project to meet completion deadline and as a consequence, is responsible for liquidated damages sustained by the Defendant. Mr. Green averred that the subcontract provides for the withholding of payment where the delay is caused by the subcontractor. He highlighted that the issue before the court is whether the delay is caused by the contractor of the subcontractor.

**[24]** Mr. Green contended that there is no evidence that supports the Claimant's case that the delay was not caused by its own negligence. He pointed out that the evidence presented by the Claimant is not an independent testimony and does nothing more than blame the Defendant for the delay and does not support the Claimant's assertion that the delay was not its own fault. He stated that the Defendant instead relies on the repeated request of the project manager to adequately staff the project to meet deadlines.

**[25]** Counsel admitted that monies are due and payable to the Claimant. He further stated that since the Defendant had to pay liquidated damages in the sum of Jamaican Ninety-Four Million Dollars (J$94,000,000.00) as a result of delays, the sum of Sixteen Million Five Hundred Thousand Jamaican Dollars (J$16,500,000.00) was also withheld from the Claimant as their portion of liquidated damages as they are truly the reason the project was not completed on the specified deadline.

**DISCUSSION**

**[26]** During the course of the trial several issues were raised, some of which were resolved during the trial process. Among the peripheral issues raised which were resolved are whether there was an agreement for an increase in the contract price, what is the value of the works performed by the Claimant and whether the Defendant is liable to pay the Claimant any sums in excess of the agreed price. Although initially the Claimant had alleged that the value of the works performed was in the sum of some Jamaican Three Hundred and Eleven Million, Seven Hundred and Twenty-Four Thousand, Three Hundred and Forty-Three Dollars and Seventy-One Cents (J$311,724,343.71), they later accepted the Defendant's position that it was in fact the sum of Jamaican Three Hundred and Eight Million, Six Hundred and Thirty-Two Thousand, Five Hundred and Seventy Dollars and Seventy-Seven Cents (J$308,632,570.77). Another issue is whether any amounts are due as retention. The parties seem agreed that the sum of Jamaican Seven Million, Seven Hundred and Fifteen Thousand, Eight Hundred and Fourteen Dollars and Twenty-Four Cents (J$7,715,814.27) is due as retention. Those issues were raised and ventilated during the course of the trial but the significant issue that remains to be determined is how to treat with the liquidated damages clause.

**[27]** In treating with this issue other issues arise such as whether there were in fact delays and to what extent and who is liable for the delays, whether the Defendant or the Claimant suffered losses as a result of the delay, whether the Claimant's delays were caused by the Defendant's delay and what is the effect of the Defendant's final statement of accounts which excluded any mention of liquidated damages.

**[28]** There is also the issue of interest and how it should be calculated and whether the Claimant is entitled to interest on the amount due under the contract and if so what is the applicable rate. Arising from those issues is the effect of the Claimant's

overdraft facility with the bank and the effect of the additional agreement to pay 5% interest above the overdraft rate and whether that is arbitrary, excessive and unjustifiable.

**[29]** After the trial was concluded, Counsel for the Claimant filed an Urgent Notice of Application for Court Orders on January 30, 2024 to amend the pleadings to facilitate a change in the interest rate being claimed from 25% to 43% on the basis that that rate is charged on the Claimant's overdraft facilities. The application came up for hearing on February 15, 2024 and was refused on the basis that to allow an increased rate would amount to a prejudice to the Defendant who would have had knowledge of the interest rate as pleaded and would be prejudiced if a higher interest rate is now substituted.

**The Liquidated Damages Clause**

**[30]** The main issue that remains to be resolved is whether the Defendant is entitled to withhold the sum of Sixteen Million Five Hundred Thousand Jamaican Dollars (J$16,500,000.00) as liquidated damages from the Claimant. There is no dispute that the parties entered into a subcontract on or around March 18, 2018. The Defendant's representative admitted in his evidence that monies are due to the Claimant and that payment was withheld from the Claimant on the basis that the Claimant caused extensive delays on the project as a result of which the owner retained payment due to the contractor for liquidated damages. The Claimant on the other hand claimed that the Defendant is the reason for the delay as they failed to ensure that the subcontractor could carry out the work in a timely manner. In determining the issue surrounding liquidated damages, it is essential to examine the terms of the clause and its significance.

**[31]** The liquidation clause at 3.21 in the Subcontract Agreement is quite extensive and states as follows:

> *Subcontractor acknowledges that timely completion of the Project is of the essence in the Agreement. In particular, subcontractor acknowledges and*

*recognised that subsequent to Substantial Completion of the Project the Owner/main contractor must coordinate and accomplish the move-in of its personnel and the installation and fixturing of the Owner Supplied Item /FF&E. Subcontractor further acknowledges that in order for the Owner/main contractor to complete the activities required to be performed by the owner/main contractor subsequent to Substantial Completion of Contractor's work and to avoid the consequent damages and expense that will result from such failure, the Work required by this Agreement must be Substantially Complete (as defined herein) no later than the Completion Date set forth above in this Article, subject only to Excused Delays as defined herein. The Subcontractor acknowledges and agrees that the Owner/main contractor will incur substantial losses and damages if the project is not Substantially Completed as at the date of the Completion date incurring, among other things additional fees to the Architect and other Owner's Consultants, additional fees and costs to be paid to the separate contractors and vendors who will be installing the Owner Supplied Items/FF&E, disruption to the additional costs associated with the moving of Owner's personnel and economic loss in the form of damages with respect to Owner's need to relocate Owner's personnel to other temporary locations because the project is not Substantially Complete. Because the exact amount of the Owner's damages in the event the Project is not completed within the times required by this Agreement cannot be readily ascertained as of the date of this Agreement and because both the Owner, Contractor and the subcontractor desire certainty with respect to their rights and obligations in the event the Project is not completed by the Completion Date, the parties agree that if subcontractor fails to achieve Substantial Completion by the Completion Date, except and only to the extent that such failure is due to an Excused Delay as defined herein, then subcontractor shall be liable for and shall pay the Owner/main contractor, and the Owner/main contractor may deduct from any and all payments due to the Contractor, the agreed and liquidated damages. Liquidated damages of $25,000 USD shall accrue for each calendar day that the Project is not Substantially Complete, beginning with the Completion Date, and continuing until the Project is Substantially Complete, except and only for those specific calendar days with respect to which such failure is due to Excused Delay, in which event the date on which the foregoing liquidated damages are imposed shall be extended, to the extent provided and as required by the terms of this Agreement, as a result of such Excused Delays.*

*Subcontractor acknowledges that it has discussed and reviewed with the Owner/main contractor the nature and extent of the damages that the Owner/main contractor is likely to incur in the event the Work is not completed within the time required by the Agreement, and based upon a reasonable approximation of the Owner's and main contractor's damages in such event and constitute agreed and liquidated damages, and are not a penalty. The parties agree that the Owner's and main contractor's exercise of its option under this Agreement to use and occupy all or any portions of*

*the Project prior to substantial completion shall not toll, waive or diminish in any way the liquidated damages for which Contractor is responsible under this Agreement. Owner agrees that the liquidated damages set forth herein shall be the only damages recoverable by the Owner/main contractor as a result of the subcontractor's failure to achieve Substantial Completion of the Work by the Completion Date. However, subcontractor acknowledges and agrees that the liquidated damages set forth above apply only to damages resulting from the subcontractor's failure to achieve Substantial Completion of the work by the Completion date and do not limit or preclude Owner/main contractor from recovery of any damages of any kind, type or nature to the extent they result from any other breach of contract, negligence or other action or omission of Contractor or its subcontractor, including but not limited to any defective, substandard or deficient construction.*

**[32]** Of particular note is clause 3.30 which states:

*The subcontractor must fully understand the project construction period requirement, should be willing and able to cooperate with the contractor to complete the project construction.* ***The subcontractor should be willing to pay the project delay loss of (25,000 USD/DAY) if the project is delayed by the cause of the subcontractor and also including the loss to the main contractor.*** (emphasis mine).

**[33]** The effect of a liquidated damages clause has been reflected in a number of judicial decisions. The authority of **Cavendish Square Holding** relied on by the Claimant is instructive. At paragraph 34, the Lords opined that:

> "Although the penalty rule originates in the concern of the courts to prevent exploitation in an age when credit was scarce and borrowers were particularly vulnerable, the modern rule is substantive, not procedural. It does not normally depend for its operation on a finding that advantage was taken of one party. As Lord Wright MR observed in **Imperial Tobacco Company (of Great Britain) and Ireland v Parslay** [1936] 2 All ER 515, 523:
>
> > "A millionaire may enter into a contract in which he is to pay liquidated damages, or a poor man may enter into a similar contract with a millionaire, but in each case the question is exactly the same, namely, whether the sum stipulated as damages for the breach was exorbitant or extravagant ..."

**[34]** The construction of liquidated damages clauses was the subject of discussion in the case of **Buckingham Group Contracting Ltd v Peel L&P Investments and Property Ltd** 204 ConLR 221, 204 ConLR 221 [2022] EWHC 1842 (TCC) where the Court explored the effect of a liquidated damages clause. The facts are somewhat similar to the case at bar. The Court considered allegations of errors in the contract as well as two sets of rates being claimed for liquidated damages. At paragraph 35, the Court cited the case **Triple Point Technology Inc v PTT Public Co Ltd** [2021] UKSC 29, (2021) 197 ConLR 1, [2021] AC 1148 at paragraph 74 for a definition of liquidated clause:

> *'A liquidated damages clause is a clause in a contract which stipulates what amount of money will be payable as damages for loss caused by a breach of the contract irrespective of what loss may actually be suffered if a breach of the relevant kind (typically, delay in performance of the contract) occurs. Liquidated damages clauses are a standard feature of major construction and engineering contracts and commonly provide for damages to be payable at a specified rate for each week or day of delay in the completion of work by the contractor after the contractual completion date has passed. Such a clause serves two useful purposes. First, establishing what financial loss delay has caused the employer would often be an intractable task capable of giving rise to costly disputes. Fixing in advance the damages payable for such delay avoids such difficulty and cost. Second, such a clause limits the contractor's exposure to liability of an otherwise unknown and open-ended kind, while at the same time giving the employer certainty about the amount that it will be entitled to recover as compensation. Each party is therefore better able to manage the risk of delay in the completion of the project.*

**[35]** In **Triple Point Technology Inc.** the Lords found that:

> *“In accordance with commercial reality and the accepted function of liquidated damages, parties agreed a liquidated damages clause so as to provide a remedy that was predictable and certain for a particular event (here, as often, that event was a delay in completion). The employer did not then have to quantify its loss,*

*which might be difficult and time-consuming for it to do. Parties had to be taken to know the general law, namely that the accrual of liquidated damages came to an end on termination of the contract. After that event, the parties' contract was at an end and the parties had to seek damages for breach of contract under the general law. Parties did not have to provide specifically for the effect of the termination of their contract. They could take that consequence as read. The liquidated damages clause did not need to provide for it. The parties might out of prudence provide for liquidated damages to terminate on completion and acceptance of the works so as to remove any question of their being payable thereafter. But if they did, it was unrealistic to interpret the clause as meaning that if that event did not occur the contractor was free from all liability for liquidated damages, and that the employer's accrued right to liquidated damages simply disappeared. It was much more probable that they would have intended the provision for liquidated damages to cease on completion and acceptance of the works to stand in addition to and not in substitution for the right to liquidated damages down to termination. Reading the clause in that way met commercial common sense and prevented the unlikely elimination of accrued rights. There was nothing to suggest that the aim of the parties in the present case was that the entitlement to liquidated damages should be limited to the situation where Triple Point was late in completing its work, but depended on whether it finished the work and PTT accepted it. By contrast it was perfectly natural that the parties should seek to put an end date on the accrual of liquidated damages to prevent a party who had accepted the performance of work from continuing to demand liquidated damages. In the instant case, art 5.3 on its true construction provided for liquidated damages if Triple Point did not discharge its obligations within the time fixed by the contract irrespective of whether PTT accepted any works which were completed late. The function of the words was to provide an end date for liquidated damages on acceptance of the works by PTT to ensure that in that event there was no further claim for liquidated damages in respect of the relevant delay. But it did not follow that there were to be no liquidated damages if there was no such acceptance. To reach that conclusion would be to render the liquidated damages clause of little value in a commercial contract. The appeal would* accordingly be allowed on [2022] 2 All ER (Comm) 93 at 95 the availability of liquidated damages issue.

**[36]** What is clear from an examination of these authorities is that liquidated damages clauses are a standard feature of construction contracts and provide a predictable and certain remedy for an event, in this case for a delay. Further, that they should be strictly construed as *contra proferentum* and that effect should be given to the

natural and ordinary meaning of the words used. The Court should however examine the clause to ensure that it does not operate as a penalty. This was the essence of the decision of the Court in the **Bramwell & Ogden Ltd v Sheffield City Council** where it was made clear that where the liquidated damages clause could exceed substantially the actual loss sustained it would operate as a penalty which is a position the Court should guard against.

**[37]** Based on this liquidated damages clause, the subcontractor should have had the understanding, having executed the subcontract agreement, which was presumably explained by its Attorney, that liquidated damages will be withheld for loss due to any delay as a result of either the fault of the subcontractor or the main contractor. The Defendant has alleged that liquidated damages was withheld from sums due to it from the owner and it is on this basis that a portion of the liquidated damages was also withheld from the payment due to the Claimant. They argue that the delay was for six (6) months, that the sum of Ninety-Four Million Jamaican Dollars (J$94,000,000.00 was withheld for the Claimant's share of the damages caused by the delay and the Closeout Agreement provided that subcontractors would not be penalised and capped the amount due to subcontractors, Synergy and the Claimant at Sixteen Million Five Hundred Thousand Jamaican Dollars (J$16,500,000.00).

**[38]** It is the Claimant's contention that from the outset, the Defendant impeded its ability to carry out its work on the project. The Claimant's also submitted that in any event, the sums withheld do not accord with the daily rate of United States Twenty-Five Thousand Dollars (US$25,000.00) stipulated in the subcontract agreement, taking into consideration the alleged period of delay.

**[39]** At the essence of the liquidated damages clause is the question of delay and to whom it is attributable. When the clause is strictly construed it means that the payment should be made if the project is delayed by the cause of the subcontractor. Therefore, there must be proof of the subcontractor's culpability for

the subcontractor to be liable in liquidated damages. The issue as to the subcontractor's culpability turns largely on the question of credibility.

**[40]** The Claimant's case is supported by its witnesses Mr Neville Glanville and Mr Kareem Blake and the Defendant's case is supported by Mr. Xi Wang. All these witnesses were subject to cross-examination. On behalf of the Claimant, it was averred that the cause for the delay has been evidenced in the bi-weekly site meetings. During cross examination, Mr. Glanville admitted that the project was delayed for four (4) months, however applying the daily rate charged for liquidated damages does not amount to the sum of Sixteen Million Five Hundred Thousand Jamaican Dollars (J$16,500,000.00) which was withheld. I found that the evidence on the Claimant's case was largely supported by the documentary evidence and both witnesses corroborated each other. Mr Blake seemed knowledgeable in the affairs of the company as did Mr Glanville.

**[41]** On the other hand, Mr Wang in a lot of instances was unable to recall important details of what transpired during the transaction. He was also inconsistent in some regards. In his witness statement he indicated that the Claimant delayed substantial completion by six months whereas in his evidence on cross-examination he said they were four months late in achieving substantial completion. This was not a trivial issue; in fact, it went to the root of the case as it is on the basis on substantial completion that liquidated damages are to be claimed. The Claimant witnesses on the other hand were consistent as to the date of substantial completion and they averred that substantial completion took place on May 17, 2019 some 105 days after the expiration of the construction period under the contract. The Claimant's witnesses remained resolute and consistent throughout the evidence whereas Mr Wang evidence reflected some areas of inconsistency and was not always supported by the documentary evidence.

**[42]** The subcontract that governed the relationship between the parties provided for the commencement date to be December 1, 2017, however the Claimant's

services were not contracted until March 22, 2018. There was no provision in the contract that took this into contemplation and made allowance for it. The Claimant did not have access to the site nor was any provision made for the Claimant to commence any of the works required under the contract on December 2017.

**[43]** According to the Defendant, the cause for the delay was attributable to the Claimant in its failure to increase the staff complement, despite requests by the Defendant for them to do so. The request was made on several occasions to include at a biweekly progress meeting on June 7, 2018 where the Claimant stated that they would double the staff compliment in an effort to curb the delay. However, the Claimant failed to do so and the issue was again raised in a meeting on July 5, 2018. They submitted that it was the insufficient workforce that caused the delay. According to the Claimant they increased the workflow to a sufficient level.

**[44]** During the trial several images were tendered into evidence to show the nature of the work being done. The images were intended to demonstrate some defect in the workmanship. The Claimant has insisted that any delay on their part in terms of installation of plumbing supplies was due to the Defendant not providing the necessary material for them to do so. I found the Claimant's evidence surrounding this issue to be more convincing than that of the Defendant. The Defendant has asked the Court to say that the Claimant's work was not up to standard but in order for the Court to act on this they would have had to present some evidence from someone who can speak to the quality of the work done and its impact on delay and the execution of the project. This was not done.

**[45]** I am of the view that the delay was occasioned by a combination of factors and that the cause of the delay could not be laid solely at the feet of the Claimant. It has therefore not been proved that the project was delayed solely by the cause of the subcontractor. In fact, on a balance of probabilities, I prefer the evidence led on the Claimant's case and accept that it is more likely than not that what happened was that the delay originated with the Defendant and that the effect of their delay

caused a knock-on effect on MSL's ability to carry out the mechanical and plumbing works within the required time.

**[46]** In the evidence of Mr. Xi Wang, he asserted that a Final Project Closeout Amendment Agreement was negotiated between the client that is Seeray Holdings and ZDA dated April 18, 2019 during which negotiations ZDA was not represented by any attorney-at-law and the terms of the agreement drafted by Seeray's lawyers. ZDA was pressured to come to some negotiated agreement with the client based on the substantial delay caused by the sub-contractors and in particular the Claimant. However, on Mr Wang's own evidence, he is not a person lacking in experience in the building industry and in any event, it would have been incumbent on him to ensure that the company was properly represented so therefore no concessions can be made in favour of the Defendant for any alleged negotiated position that was arrived at.

**[47]** The Defendant has admitted that the Claimant is owed the sum of Jamaican Nine Million, Five Hundred and Sixty Thousand, Nine Hundred and Fifty-Four Dollars and Seven Cents (J$9,560,954.07) however, it did not state how that figure was arrived at or the purpose of the sum. The Defendant has also exhibited a letter dated June 27, 2019 addressed to the Claimant stating that the current payment due to the Claimant is Jamaican Seven Million, Three Hundred and Twelve Thousand, Three Hundred and Eighty-Eight Dollars and Twenty-Nine Cents (J$7,312,388.29). There is also no indication that this sum is in addition to the sum of Jamaican Nine Million, Five Hundred and Sixty-Thousand, Nine Hundred and Fifty-Four Dollars and Seven Cents (J$9,560,954.07) which was already admitted or whether this is the only sum being admitted as due and payable to the Claimant. In short, the calculations indicated by the Defendant do not add up.

**[48]** On the other hand, the calculations set out by the Claimant make more sense. In the Further Amended Claim Form, the Claimant alleged that in reliance on invoice number 1803901017109 dated 5th August 2019 they were seeking the sum of

Jamaican Thirty-Eight Million, Four Hundred and Ninety-One Thousand, Two Hundred and Seventeen Dollars and Seventeen Cents (J$38,491,217.17) however, they resiled from this position based on an agreed variation between the Claimant and the Defendant. They are seeking the sum consistent with what the Defendant's representative accepted as the final invoice in a spreadsheet dated November 22, 2019. It was the position then that the value of the work provided by the Claimant was in the sum of Three Hundred and Eight Million, Six Hundred and Thirty-Two Thousand, Five Hundred and Seventy Dollars and Seventy-Seven Cents (J$308,632,570.77) as opposed to the sum of Jamaican Three Hundred and Eleven Million, Seven Hundred and Twenty-Four Thousand, Three Hundred and Forty-Three Dollars and Seventy-One Cents (J$311,724,343.71) pleaded in the Claim. The Defendant has failed to put forward any evidence to refute the Claimant's entitlement to this sum as being the shortfall and sums owing to the Claimant.

**[49]** The Defendant in its Defence set out Particulars of the Claimant's breach as amounting to the sum of Jamaican Twenty Million, Five Hundred and Fifty-Nine Thousand, Two Hundred and Twenty-Six Dollars and Seventy-Five Cents (J$20,559,226.75) however during the course of the evidence they did not lead any conclusive evidence to substantiate their entitlement to these sums as a set off or otherwise. Additionally, in the Defence they sought to say that the work was not completed to their satisfaction and expectation however they also did not seek to support this by way of evidence during the presentation of the Defence. The Defendant's only witness Mr Xi Wang focused his evidence on the liquidated damages clause and the calculation of the balance as being Jamaican Nine Million, Five Hundred and Sixty Thousand, Nine Hundred and Fifty-Four Dollars and Seven Cents (J$9,560,954.07) without setting out how he arrived at this figure. The liquidated damages clause remained the main issue in terms of determining the question of liability and the apportionment.

**[50]** The parties were aware of the essence of the liquidated damages clause. Having not met the stipulated deadline for the completion of the hotel, Sandals withdrew sums from ZDA Construction Limited, who has in turn sought to withdraw a portion of that sum from Mechanical Services Limited, the subcontractor. A term of the agreement was that the contractor's share of the damages caused by the delay would be Ninety-Four Million Jamaican Dollars (J$94,000,000.00). Further that the sub-contractor would not be penalized and a direct procedure to apportion fault and capped the amount due to subcontractors Synergy and MSL at Sixteen Million Two Hundred and Fifty Thousand Jamaican Dollars (J$16,500,000.00). It was in keeping with this arrangement that ZDA prepared a final cost account. Mr Wang indicated that the Claimant was not in agreement with the terms intended to share the cost of delay. There was no obligation on the Claimant to share this cost.

**[51]** In any event ZDA has not led any evidence to show how this amount was arrived at. In fact, Mr Wang ends by saying that it is not the fault of the Claimant. On Mr. Wang's own account, the substantial delay was not only caused by the Claimant. On his own account the Claimant was never involved in this process of negotiation. How then could he expect the Claimant to be bound by this agreement? He has mentioned on more than one occasion the fact that ZDA was unrepresented. At the time on ZDA's own account they had been involved in the business of construction for well over a decade.

**[52]** This was ZDA's decision to negotiate without any representation and so any disadvantage occasioned because of that would have to be absolved by ZDA and not passed on to a party which was not a party to those negotiations. It is my view that the total sum of Sixteen Million Five Hundred Thousand Jamaican Dollars (J$16,500,000.00) should not have been applied against the Claimant. There is no evidence as to how the calculations were done to arrive at the figure and no basis on which the Court can say it should be given effect. What also stands out is at the time the Defendant presented its final invoice there was no mention of this sum

owing as liquidated damages. I formed the view that this arose primarily because of the Claimant's position in relation to the sums owed.

**[53]** It is also of note that there was no provision in the agreement for there to be any extension of time resulting from any delay. The absence of such a clause affects the impact of the liquidated damages clause to the extent that no reliance can be placed on it. This is consistent with the approach taken by the Court in **Bramall & Ogden Ltd v Sheffield City Council** which emphasizes the strict construction of contractual clauses. I am therefore of the view that the Defendant is not entitled to claim or deduct liquidated damages.

**[54]** I accept therefore the value of the works performed by the Claimant to be in the sum of Jamaican Three Hundred and Eight Million, Six Hundred and Thirty-Two Thousand Five Hundred and Seventy Dollars and Seventy-Seven cents (J$308,632,570.77). I also accept that the total sum paid by the Defendant amounts to Jamaican Two Hundred and Sixty-Four Million, Six Hundred and Thirty-Two Thousand, Nine Hundred and Twenty-Four Dollars and Twenty-Seven Cents (J$264,623,924.27). Having paid over the contractor's levy of Jamaican Six Million, One Hundred and Seventy-Two Thousand, Five Hundred and Sixty-One Dollars and Forty-Two Cents (J$6,172,561.42), the sum of Jamaican Thirty-Seven Million, Eight Hundred and Thirty-Six Thousand, Eighty-Five Dollars and Eight Cents (J$37,836,085.08) is now due to the Claimant.

**Interest**

**[55]** The Claimant has sought interest in accordance with the clause in the subcontract which is that sums due under the contract would attract an interest rate of 5% above the average rates paid by the Claimant on its overdraft facilities. In the further Amended Claim, the Claimant averred that its overdraft facility arrangement with Sagicor Bank Limited attracts an interest rate at 25.75% per annum and so they would be entitled to interest on the overdue sums at a rate of 30.75%. The Defendant did not attempt to refute this by way of any evidence led on their behalf.

In fact, they had agreed to the document being tendered into evidence demonstrating that on July 24, 2019 a temporary overdraft facility was granted by Sagicor Bank to the Claimant which provided for an interest rate of 38% and a penalty of 44%. At the close of evidence, the Claimant filed a 2nd Further Amended Claim Form and Particulars of Claim attempting to increase the rate on the overdraft facility from 25% to 38%. This was not allowed. The Claim for interest remains at 30.75%. The Defendant has argued that this interest provision operates as a penalty.

**[56]** Despite the Defendant's averment that the interest provision is punitive, no evidence has been led to show that the formula for calculating interest amounts to a penalty. The Claimant during the course of the transaction had brought the fact of the overdraft facility to the Defendant's attention by way of a reminder of what the contract provided for. The cases **of ZCCM Investments Holdings plc and ICCI Bank UK plc** relied on by the Claimant support their position that an agreement to impose an interest uplift on default sums, without more, does not operate as a penalty. I therefore agree with the Claimant that in this case the uplift of 5% on the sums owing cannot be regarded as a penalty and therefore the Court is empowered to grant interest of 5% over the overdraft rate. The next question is what exactly is this rate? Although the overdraft facility evidences a rate of 38% and this document was agreed by the Defendant, the Claimant is not entitled to this rate as in the pleadings what is sought is a rate of 25.75% plus 5%. This is all the Court is prepared to grant.

**[57]** My orders are as follows:

1. Judgment for the Claimant in the sum of J$37,836,085.08 inclusive of retainage of $7,722,050.41 plus interest at a rate of 30.75% on the sum of $30,719,166.76 from the date due which is May 22, 2019 to the date of payment.

2. Interest on the retention sum of $7,722,050.41 at a rate of 30.75% from June 1, 2020 to the date of payment.
3. Costs to the Claimant to be agreed or taxed.

**.....**
**Stephane Jackson Haisley**
**Puisne Judge**