Suit ... — Carlton — Whether contract with first or second defendant — which — Breach of contract — quantum.

Case referred to ... (illegible)

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. T 144 OF 1986

BETWEEN	TRIOTEC LIMITED	PLAINTIFF
A N D	CARLTON F. LIVINGSTON	FIRST DEFENDANT
A N D	C.F. LIVINGSTON ASSOCIATES LTD.	SECOND DEFENDANT

Emile George QC, W.K. Chin See QC and Andrew Rattray for the plaintiff instructed by Rattray, Patterson & Rattray.

Margaret Forte & Maurice Frankson for the Defendants instructed by Gaynair & Fraser.

Heard: June 5, 6, 7, 1991
December 9, 10, 12, 1991
November 5, 1992 &
June 18, 1993

Judgment

RECKORD J

The Writ and Statement of Claim in this action when originally filed claimed for damages for a breach of contract against the first defendant only. Consequent upon the defence filed that Carlton F. Livingston in his capacity as Managing Director of C.F. Livingston Associates Ltd entered into oral contract with the plaintiff to construct the roadways, the plaintiff applied for and was granted leave by me to amend its Statement of Claim and Writ naming C.F. Livingston Associates Ltd as second defendant.

In the mean while the second defendant had filed an action against the plaintiff (C.L. C 048/87) claiming a sum of money being balance and owing for work done. Both actions were consolidated and came before me for trial. Previously these matters came before Patterson J who, on the (17/12/90), adjourned the hearing with two days costs to be paid to Triotec Limited by C.F. Livingston Associates and that the action in Suit No. L 048/87 should be stayed until the costs were paid.

When the second defendant was added an amended defence and counter-claim were filed. However, the cost ordered not having been paid, I proceeded hearing

the evidence in Suit C.L. T 144/86 only, after ruling that the counter-claim and Suit C.L. C 048/87 be stayed pending the payment of costs ordered by Patterson J.

The plaintiff through its witness Sean Coley, a civil servant from the office of the Registrar of Titles, tendered in evidence Title to show that the land, subject matter of this suit, was registered on the 27th of February, 1984, in the name of the plaintiff's company with registered office at 4 Haining Road, Kingston 5 at Volume 1181 Folio 418, of the Register Book of Titles. Evidence also was given that on the 8th of March, 1984 part of this land was transfered to Carlton Fitzroy Livingston of 2 Abbeydale Avenue Kingston 10. Sub-division of the property was approved by the St. Andrew Parish Council and a pre-checked plan was provided from the Survey Department.

Miss Fern Chen, an Attorney-at-Law, testified that she was the beneficial owner of the shares in the plaintiff's company. She had known the first defendant since 1969 when she did legal work for him. She knew him as a road contractor. In 1983 herself and first defendant became intimate friends. That same year Triotec Limited acquired lands at White River in St. Ann which she proposed to develope. The company obtained formal approval and received specification from the Superintendent of Roads and Works, St. Ann Parish Council a copy of which Miss Chen handed to the first defendant and requesting of him a quotation for the construction by him of roadways in the sub-division in accordance with the specification. He gave her a quotation of $210,000.00.

In August, 1983, Miss Chen authorised the first defendant to proceed with the construction of roadways. He agreed to do so for the sum proposed and in accordance with the specifications. Construction period would be five (5) months. Construction started on the 18th of October, 1983. The first defendant asked Miss Chen to pay for materials supplied.

The first payment she made was on the 23rd of August, 1983, at the written instructions of the first defendant to one Mr. Max Mair. At the request of first defendant she made several other payments. The 27th of September, 1983 cheque for $22,900.00 in favour of C.F. Livingston Associates the second defendant; 1st November, 1983, $25,000.00 in favour of second defendant; 14th of November, 1983, $65,000.00 in favour of the second defendant. Over a period of several months

she had drawn some 14 cheques in favour of the second defendant and only two in favour of the first defendant. She also made cash payment to other persons for mason and plumming works, road workers wages, pickup hirage etc.

By April, 1985, Miss Chen was not satisfied with the progress of how the job was executed and spoke to the first defendant several times about it. On one occasion while first defendant was in Florida she telephoned him requesting him to return and finish the job but he said he did not care about the roads. As a result of this she served notice on the first defendant terminating the contract by letter dated 26th April, 1985.

Miss Chen sought advice from Hill-Betty Engineers Ltd specialists in road construction and quantity surveyors Stoppi, Cairney & Bloomfield. The asphalt surface were cracking up and grass growing in the roadway from May, 1985. From this report she concluded that the roads had to be remedied. She had to pay for professional advice; $4,280.00 for engineers fees and $7,156.00 for Quantity Surveyors.

The first lot sold in the sub-division was to the first defendant. It was the best lot - he selected it and it was transferred to him personally and no Attorney fee was charged to him. She had expected roadways to be completed by 31st March, 1984 but this was not so. Various purchasers were constantly calling her concerning the completion of the road as at that time only marl surface was on the road. By April 1985, most of the roadway were asphalted - only one coat of asphalt had been applied to some of the roads.

Under cross-examination Miss Chen said she knew that first defendant had a company named C.F. Livingston Associates Ltd. but did not know that the company was a contractor and builder of roads until 1985. She agreed that she delivered a reconciliation accounts addressed C.F. Livingston Associates Ltd. for periods up to 22nd August, 1984 and 11th April, 1985. She also received invoice dated 20th August, 1984 addressed to Triotec Limited from second defendant concerning the White River project. She admitted that save for two cheques to first defendant personally, all the other cheques were drawn in favour of the second defendant. She thought that the second defendant was a Land Development Company. She agreed there was scarcity of cement in mid 1984. She also agreed that be-

cause of continuous rain between months of December 1983 to February 1984, this prevented construction during this period. This would extend the construction period.

It was suggested to Miss Chen "you know all along that you were contracting with C.F. Livingston Associates Ltd. for the construction of the roads." She answered "I deny that." She also denied that the first defendant was acting as an officer of the second defendant's company and that she is now saying it was first defendant for the reason that she believes that the second defendant is in no position to satisfy a judgment. It was typographic error made when she sent letter of the 22nd August, 1984 (Exhibit 20) to the second defendant.

In answer to the court Miss Chen said although the contract was with the first defendant, "I had made cheques payable to the second defendant because the first defendant had specifically asked me to make it that way so as to activate the company."

Mr. Lawrence Hill, Director of the firm of Hill Betty Engineers Ltd. said his company specialised in soil testing, material testing, foundation designs, road designs and testing. He carrying on work of this nature for twenty-nine (29) years. He holds BSc degree in Chemistry and BSc degree in Civil Engineering from Howard University. He did post graduate work in Micro qualilative analysis.

In 1985, his firm received a request from Stoppi, Cairney Bloomfield, Quantity Surveyors relating to certain defects in the roads at the White River Housing Scheme in St. Ann. Acting on his instructions his chief technician Dwight Myrie brought samples of the soil and sub-grade materials from the roadway. Myrie supplied him with a sketch indicating thickness of the asphalt and base course.

In May 1991, he visited the site with Myrie and observed the state of the roadway. He said that most of the road was dirt track with grass growing down the centre and sides. In most instances no asphalt was visible, he never saw any asphalt on most of the roads. If the roads had been constructed in accordance with the specifications he would not expect to see this. He expected a life time of at least 10 years for these type of roads without maintainence. The absence of asphalt suggested there was very poor bonding between the asphalt and

the base. If virgin soil was protruding through in 1985, this would suggest that the marl base was too thin - not properly compacted and that water had got down to the virgin soil. If asphalt was lifting in 1985, this indicated very poor construction procedure. His firm was paid $4,280.00 for this reference.

Under cross-examination he said in his twenty-nine (29) years of practise he had dealt with various kinds of specifications. The Parish Council had general specifications with minimum requirement which had to be followed. When he visited the site on one of the roads he saw "something like asphalt was originally there." From what he observed the asphalt was macadam, not barber green. The absence of sufficient thickness of base material would be critical to the failure of the roadway.

Paul Green, Quantity Surveyors of the firm of Stoppi, Cairney, Bloomfield with twenty-five (25) years experience testified that in May 1986 at request of the plaintiff he visited the White River sub-division site. In June, 1986 he prepared an evaluation of the work done and costs of remedial work required to complete the roads in accordance with the Parish Council's specifications. Estimated costs of remedial work in June, 1986 was $287,270.00. Due to escalation in material and labour costs, this was revalued in December 1990 to $685,514.00. The value of the work done was $294,101.40; the plaintiff had paid out $314,419.14 to defendant and others, an over payment of $20,317.74.

The evaluation was based on the assumption that the entire base had to be excavated. The entire area was asphalted when he visited in May, 1986. To complete this further construction a period of six (6) weeks would be reasonable time. It was his opinion that it would take a deligent contractor 4 - 5 months to lay down the roads.

Mr. Dwight Myrie the soil technician had been working at Hill-Betty Engineers for twelve (12) years. He went to the White River sub-division. He examined the entire road surface. He observed cracks in the surface and at two points he saw clay oozing through the pavement. He removed parts of the pavement at these points. He did compaction tests at ten points and prepared a sketch showing the points. The surface was poorly coated as the asphalted surface was easily removed from the sub-base. The sub-base was marl throughout the sub-division. He found unsufficient stone aggregate. He admitted that he had never

participated in the construction of a road.

This was the case for the plaintiff which was closed on the 12th of December, 1991 and adjourned for a date for continuation to be fixed by the Registrar.

When this matter came up for continuation on the 2nd of November, 1992, on the plaintiff's application, costs of remedial work was amended, the sum claimed for estimated to read $688,514.00 instead of $287,290.00.

Mrs. Forte then informed the court that the first defendant had been ill for sometime and was not then in the island and was applying for the matter to be taken out of the list. Mr. Chin See opposed the application as the matter had been fixed for continuation on 6th July, 1992 but taken out list because of defendant's illness and no medical report was seen.

The hearing was adjourned until the 3rd of Novemberto allow Mrs. Forte to obtain medical certificate. On the 3rd Mrs. Forte reported she had no success in obtaining medical report and asked for further time. She was given until the 5th November when she informed the court that despite all her efforts she had not received a medical certificate and was therefore unable to open the case for the defence as she had no witnesses.

Submissions

Mr. Chin See on behalf of the plaintiff submitted that the first defendant was undoubtly in breach of contract. The parties had contracted that the work was to be completed by end of March 1984 for a sum of $210,000.00. When this contract was terminated by the plaintiff on the 26th April, 1985, the plaintiff had made a total payment of $314,419.14 an over payment of $20,317.74 after escalation costs were taken into consideration. Before the contract was terminated the first defendant had left the island leaving much of the work to be done. It was a term of the contract that the work should have been taken over by the St. Ann Parish Council on completion but this had not been done. After 18 months, this five months contract had not been completed and no sufficient reason had been given for this vast delay.

As to quantum, the evidence given by the plaintiff's witnesses was unchallenged.

On the question of which of the two defendant was liable, Mr. Chin See submitted that on a balance of probabilities the court should find that it was

the first defendant with whom the plaintiff was dealing. They had a personal intimate relationship and she had no knowledge of the existence of the second defendant at the time when she entered into the contract with the first defendant.

Miss Chen had made cheques and sent statements to the second defendant after the contract was entered into and at the request of the first defendant in order to revive the second defendant.

The first defendant had chosen the best lot in the sub-division and a transfer was done to him personally, not to the company. Legal costing in relation to restrictive covenants owned by the first defendant was not paid by the first defendant but was debited on the road account. This was evidence that she was dealing with the first defendant, not second defendant. Again, the road account was debited the sum of $10,000.00 when at the request of the first defendant, the plaintiff drew a cheque payable to one Arthur Minott to satisfy a personal dealing between first defendant and Mr. Minott.

Finally Mr. Chin See submitted that the first defendant had not shown that he intended to challenged the plaintiff. His conduct was one of total surrender. He could not challenge the veracity of the evidence called by the plaintiff. He asked for judgment in the terms of the amended statement of claim.

Mrs. Forte, for the defendants, submitted that the plaintiff ought not to be believed when she testified that she only knew in February, 1985 that the second defendant was a company which built roads. She referred to Exhibit 20 dated the 22nd February 1984 which showed it was a reconciliation account between Triotec Ltd. and C.F. Livingston Associates Ltd. This was made by Miss Chen herself. Exhibit 21 dated 21st February, 1984, was an invoice from the second defendant to the plaintiff in respect of the White River sub-division. If in fact the contract was with the first defendant why did not Miss Chen, an experienced Attorney reply that the plaintiff had no account with the second defendant. Mrs. Forte asked the court to note that from the evidence, several payments were made by the plaintiff to the first and second defendant. Of these, fourteen payments were made by cheques to the second defendant totaling $224,549.00 as against two payments to the first defendant totaling $22,000.00. The first cheque

under the contract was to the second defendant for $22,000.00. This was one month after contract. The first cheque paid to the first defendant was on the 14th March, 1985 for $12,000.00 and the second on the 22nd April, 1985 for $10,000. There was abundance of evidence that the contract was with the second defendant.

Re Damages

Mrs. Forte submitted that the basis for damages for breach of contract was to provide compensation of for the breach. But this was qualified by the duty to mitigate the loss. She referred to the judgment of the House of Lords in British Westinghouse Electric Manufacturing Co. v. Underground Electric Co. London (1911 - 1913) AER (reprint) at page 63.

The plaintiff was not entitled to charge the defendant with any greater sum than which was reasonable needed to be expended for the purpose of making good the loss and the date for assessment was a reasonable time from the breach and not at the date of judgment. On the plaintiff's evidence remedial work was seen necessary from May 1985 yet it was 13 months later, in June 1986, that the plaintiff obtained an evaluation of work necessary. This was too late. Mrs. Forte submitted as for the re-evaluation done in December 1990, she said this was totally unreasonable and not something that could have been in the comtemplation of the parties.

Findings

The plaintiff contends in this action that it contracted with the first defendant to complete the roadways by the end of March 1984. It was forced to terminate the contract on 26th April, 1985 as up to then work had not been satisfactorily completed.

The first defendant had pleaded that any part played by him in this contract was as servant of the second defendant not in personal capacity and further that the work was completed in accordance with the specifications laid down and that the delay was due to circumstances over which he had no control.

The issues for the court to determine therefore are:

(1) With whom did the plaintiff contract;

(2) Was there a breach of the contract;

(3) What damages did the plaintiff suffer.

There is unchallenged evidence from Miss Chen that she met the first defendant for the first time from as far back as 1969 when she did legal work for him. That in 1983 she formed the company Triotec Ltd which acquired lands at White River which she proposed to sub-divide. Miss Chen and the first defendant became intimate friends and knowing that he was a road contractor and builder she consulted him for a quotation for the development of the sub-division. Most of the discussions took place at Miss Chen's home during his frequent visits. This was an oral contract. No documents passed between the parties to inidcate to the plaintiff that it was dealing with a company. Although Miss Chen knew of the company C.F. Livingston Associates Ltd. she thought it was a Land Development Company not a company for building roads.

Miss Chen is an Attorney-at-Law and Notary Public. As such she is an officer of the court. She spent several hours in the witness box during which I took the opportunity to observe her demeanour especially under cross-examination. I accepted her as a witness of truth. I believed her when she explained that she made the payments to the second defendant because the first defendant had specifically requested her to do so in order to activate the second defendant.

Accordingly, the first issue to be resolved is answered in favour of the plaintiff, that is, I find that the contract was entered into with the first defendant, and not the second defendant.

Other evidence which supports the finding that the plaintiff was dealing with the first defendant inhis personal capacity are as follows: At his request the best lot in the sub-division was transferred to him.

The costs of legal work done by Miss Chen for the first defendant in connection with his personal residence was charged to the construction of roads in the sub-division. The said road account was debited in the sum of $10,000.00 when at the request of the first defendant Miss Chen paid this amount to Mr. Arthur Minott in settlement of a personal account.

With regard to the second issue, the evidence is that construction commenced

on the 18th of October, 1983, to be completed within five months, that is, by end of March, 1984. Miss Chen acknowledged that heavy rains in the area of the sub-division between December 1983 and February 1984, caused delay in the roads construction. She also agreed that in 1984 there was a shortage of cement for a period. Notwithstanding these delays Miss Chen was not satisfied with the progress. She spoke to the first defendant on several occasions. She eventually called him by telephone at his home in Florida USA about the incompletion of the roads and he replied that he did not care about them. This prompted her to terminate the contract. This contract estimated to be completed within five months had not been finished after eighteen months. No explanation has come from the first defendant as to the inordinate delay. I find that the first defendant was in serious breach of his contract which entitled the plaintiff to terminate same.

The final issue to be settled is the question damages.

> "The fundamental basis for the assessment of damages for a breach of contract is to provide compensation for the pecuniary loss which naturally flows from the breach, but this principle is qualified by a second which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming in respect of any part of the damage which is due to his neglect to take such steps. This second principle, however, does not impose on the plaintiff an obligation to any any step which a reasonable and prudent man would not ordinarily take in the course of his business."

<u>See The British Westinghouse Electric and Manufactoring Co. Ltd. case (Supra)</u>

In June 1986, the costs of remedial work necessary to complete the job in accordance with the specifications was $287,270.00. That same work if done in December 1990 would cost $688,514.00.

In the amended statement of claim, the last mentioned sum is the amount now being claimed by the plaintiff. The plaintiff saw the necessity for remedial work from May 1985. Within a reasonable time from then steps should have been taken to remedy the faults.

From the evidence of Mr. Lawrence Hill of the firm of HillBetty Engineers Ltd. his firm received a request from Stoppi, Cairney Bloomfield Quantity Surveyors

and he sent his chief soil technician Dwight Myrie to the White River sub-division Mr. Myrie went there in November 1985, and took samples from the roads. Subsequently Mr. Paul Green Quantity Surveyor with the firm of Stoppi, Cairney, Bloomfield, visited the site. This was in May 1986, he presented his report in June 1986 as to the amount needed for the necessary remedial work.

Mrs. Forte's complaint that she waited for thirteen months before obtaining an evaluation appears unjustified. The plaintiff had to depend upon expert advice. Even after termination of the contract the parties were corresponding up to August, 1985. The original sum of $287,270.00 to complete the work in June, 1986, cannot therefore be said to be unreasonable in the circumstances. However, how can the plaintiff justify its claim for the cost of remedial work in December 1990. It was under a duty to take reasonable steps to mitigate its loss. No explanation has been given to the court for its neglect. This therefore debars the plaintiff from obtaining any further damages.

Having resolved the issues, the judgment is summarised as follows: As against the first defendant there shall be judgment for the plaintiff with damages assessed as set out hereunder:-

Amount over paid	$ 20,317.00
Costs of remedial work	$287,270.00
Quantity Surveyor's fees	$ 7,156.00
Engineer's fees	$ 4,280.00
	$319,023.00

Costs to the plaintiff to be agreed or taxed.

As against the second defendant there shall be judgment against the plaintiff. The first defendant to bear the costs incurred by the second defendant.

Case referred to
British Westinghouse Electrical Manufacturing Co. v. Underground Electric Co. London (1911-193) All ER (reprint) 63.