IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. CL. W. 182/1990

BETWEEN	WHITMAN ASSOCIATED LIMITED	PLAINTIFF
A N D	PAHK LIMITED	DEFENDANT

Norman Davis instructed by Myers, Fletcher & Gordon for Plaintiff.

Hugh Levy instructed by Hugh Abel Levy & Company for defendant.

Heard: 23rd, 24th and 25th June, 1993.

WESLEY JAMES, J

Plaintiff and defendant companies are engaged in engineering. In the case of the plaintiff it specialises in steel fabrication and construction, while defendant engages itself mainly in electrical and mechanical engineering and crane works.

Gary Cowan and Trevor Scott are the Managing Directors of the plaintiff and defendant respectively and are well known to each other.

The plaintiff's case as outlined by Gary Cowan is that shortly before mid-March 1989, the defendant through Trevor Scott and Linford McFarlane brought a set of fabrication drawings for filter tanks to Cowan and inquired whether the plaintiff would be interested in the fabrication of six (6) filter tanks.

The defendant was at the time seeking to obtain two (2) contracts from ALCOA. One in respect of the six (6) filter tanks and the other for construction of a structure to house the tanks. If the defendant was successful in obtaining both contracts, it would not be able to complete them on time.

By letter dated March 16, 1989, plaintiff advised the defendant that the quotation to fabricate the six (6) filter tanks would be at a cost of $197,120.00 each. (See No (i) of Exhibit I).

On the 3rd August 1989, the defendant wrote the plaintiff See No (ii) of Exhibit I. "We are pleased to inform you that we were awarded the contract to fabricate and erect six (6) filter tanks, three (3) of which we are sub-contracting to you for fabrication. As per your quotation dated the 16th March, 1989 your price was $197,120.00 each, therefore the total for three (3) tanks will be $591,360.00."

One would have thought that the language of this letter was clear and indicated what was required of the plaintiff.

Not so said Mr. Scott when asked what he meant/he wrote the letter referred to above as No (II) of Exhibit I. He said the letter meant that the plaintiff would fabricate the three (3) tanks, transport and erect them at a cost of $197,120.00 each or $591,360.00.

Mr. Cowan said that the plaintiff's bid would have been higher had it been that transportation and erection of the tanks were included and further he would have expected that to have been spelt out. (In the contract)

Mr. Cowan said plaintiff did not at that time have the equipment to erect the tanks, while the defendant had.

He further testified that while plaintiff was fabricating tanks the defendant requested that the plaintiff take on additional responsibilities, such as transporting and assisting in the erection of the tanks. The defendant would provide crane for lifting the tanks on site and agreed that on completion they would discuss payment for the additional work which is referred by both as "variances".

After the plaintiff had completed the tanks, the defendant was advised and they were transported to A.L.C.O.A. While the tanks were being installed on site there appears to have been a breakdown in the relationship between plaintiff and defendant. Mr. Cowan said he saw "some trouble brewing and he needed some answers before any further work was done and told Mr. Scott that he was not going any further with job unless he heard about money."

It is fair to say that up to that time the plaintiff had completed most of the original contract and had partially completed the additional contract.

Thereafter the plaintiff by letters dated 8th May 1990, 18th May 1990 and 28th May 1990 sought to meet with defendant to settle the outstanding amounts on the contract. (The letters being items 3, 4 and 5 of Exhibit I).

The letter of the 28th May 1990 contained an Invoice, (admitted in evidence as item No. 6 of Exhibit I) and a document referred to as "variance refilter tanks" and is in evidence as item No. 7 of Exhibit I).

On the invoice (item 6 of Exhibit I) it will be seen that there was a balance of $91,360.00 on the original contract to which was added $282,997.00 which figure represented the value of the additional contract called "variance" thus making a total of $374,357.00

After the invoice was submitted there was a meeting between Cowan and Scott. It would appear that there was agreement on some of the items in the document referred to as "variance re filter tanks". However, it will be appreciated that on the major item, that for transporting and erecting the three (3) filter tanks at a cost of $221,760.00 there was no agreement. The defendant flatly refused to entertain that item.

Indeed, this sum of $221,760.00 forms the greater portion of the plaintiff's claim.

After the meeting the defendant forwarded a cheque dated 31st July 1990 for $36,183.58 together with an undated hand written statement to the plaintiff (the undated statement being item No. 7 of Exhibit I).

Plaintiff acknowledged receipt of the cheque by their letter dated 1st August 1990. **(See item No. 9 of Exhibit I).**

In that letter the plaintiff stated in part. "I am not in agreement with your statement. However, we have already handed our file to our Attorney ..... who are now handling the matter."

When Mr. Cowan was cross-examined he stuck to his evidence in chief on the issues of what was required under the original contract and that he did the quotation from the drawings without the specifications.

He agreed that under normal conditions the specifications (Exhibit 2A) would be relevant, but as a sub contractor would be supervised by the defendant as the main contractor.

Cowan admitted that when he submitted the invoice he did not make certain deductions which ought to have been made. Such deductions include 2% of the original contract price of $591,360.00 that is $11,827.20 and also in respect of items on document called "variance re filter tanks." However, he agreed to a reduction on the following:-

Item 1 was	reduced	by	$ 3,000.00
Item 6	"	"	$ 4,800.00
Item 7	"	"	$ 2,200.00
Item 9	"	"	$ 882.00
Item 10	"	"	$ 625.00
Item 11	"	"	$ 9,600.00
			$21,107.00

Cowan's evidence that the total deducted from variance (omitting cost of transporting and erecting) is in the region of $20,000.00 is borne out from the above reductions.

Trevor Scott gave evidence on behalf of the defendant. He said that on being requested by ALCOA to fabricate on site six (6) sand filter tanks, he contacted plaintiff and asked them to work with defendant on the project. The project involved fabricating, transporting and erecting the tanks. Sandblasting and painting were also involved. Scott said he and one McFarlane, a work shop supervisor employed to defendant went to plaintiff company along with drawings and specifications for the tanks and presented drawings and specifications to Cowan. They looked at drawings and specifications and discussed how the tanks would be fabricated, transported and erected and also how the defendant would monitor the job.

Plaintiff was requested to give a quotation for the tanks, omitting in quotation sand blasting, painting, and the use of a crane for lifting tanks.

Scott told of how when he got the contract for the six (6) tanks that time was approaching so the defendant decided to give plaintiff three (3) of the tanks and they would build other three (3) tanks.

Scott said that when he wrote letter of 3rd August 1989 (item 2 of Exhibit I) he meant that plaintiff would fabricate transport and erect the three (3) tanks at a total cost of $591,360.00. Scott was then shown Exhibit 2B, a document called "basic of payment" and he agreed that the amount paid in respect of three (3) filter tanks was $774,000.00 to fabricate and install and that sandblasting was included in that figure.

However, in cross-examination he changed from that position and said that sandblasting was not included in that figure.

The defendant's crane was used in the eraction of all six (6) tanks. When tanks were erected, those fabricated by plaintiff had no nozzles and the plaintiff left the job saying they were not responsible for installing the nozzles.

The defendant said Mr. Scott installed the nozzles on those three (3) tanks at a cost of some $44,980.00 and informed the plaintiff that that sum would be deducted from the balance which according to defendant was then $79,000.00 (approximately).

The final portion of Scott's evidence in chief dealt with the following which the defendant claimed by way of set off.

(i) five (5) sheets of mild steel plates which defendant said were over supplied to plaintiff at a cost of $22,145.28

(ii) $867.20 for piloting plaintiff's vehicle to work site

(iii) $11,827.40 being consumption tax at the rate of 2% from contract price of $591,360.00 and a further sum of $564.20 for consumption tax on the payment of $36,183.58.

In relation to the meeting between himself and Cowan, a photocopy of item No. 8 part of Exhibit I (variance re filter tanks) was admitted in evidence as Exhibit 4.

Scott testified that he made notations in Cowan's presence.

In respect of item 2 of the schedule, he said the amount charged was reduced from $4,800.00 to $1,600.00. Item 4 reduced from $15,000.00 to $3,750.00.

With reference to items 8, 9 and 10 nothing was paid on any of them. These three (3) items would totalled $3,727.00. However, item 7 part of Exhibit I also contained variance figures.

Scott testified that ALCOA would have retained 10% of the total contract and that sum had not yet been paid as the plaintiff as sub-contractor had not signed the necessary document to enable such payment to be made. In cross-examination Scott said that his job, (contract) was to fabricate, transport and erect the three (3) filter tanks and that he expected plaintiff to do the same.

He however agreed that the letter sent by him to plaintiff specifically stated that plaintiff should fabricate three (3) tanks.

The other witness called on behalf the defendant was Linford McFarlane, a work shop supervisor in the defendant's employment. He testified that he accompanied Mr. Scott to Cowan's office, taking with them drawings and specifications

which were left with Cowan. He said he knew what was required of the plaintiff. Scott having explained it to Cowan. He said plaintiff should fabricate, transport, and erect the filter tanks on site. He did not agree that the work to be done in execution of the contract was fully set out in drawings.

Having reviewed the evidence tendered on behalf of the parties, it appears that the main area of dispute relates to the contract itself between plaintiff and defendant.

On a true construction of items I and II that is letters dated 16th March 1989 and 3rd August 1989 and part of Exhibit I, coupled with other evidence, primarily that contained in Exhibit 2B, I believe that Scott is either not speaking the truth or misled himself in his belief that to fabricate means to transport and erect as well.

Exhibit 2B called "Basic of Payment" (one of the defendants agreed Exhibits), gives the figure of $774,000.00 as that covered by the specifications to fabricate and install three (3) sand filter tanks. Scott's evidence is that sand blasting and crane work were not included in the figure of $774,000.00.

When plaintiff made the quotation of $591,360.00 to fabricate three (3) filter tanks, Scott well knew that the defendant would be paid $744,000.00 a difference of $182,640.00 to fabricate and erect three (3) similar tanks, yet he gave evidence that they, the defendant, was going to do the same job on the other three (3) tanks for the same costs.

I find as a fact that no other meaning is to be ascribed to "fabricate" than that which the plaintiff understood it to mean. The contract, therefore was for the plaintiff to fabricate only the three (3) tanks. Because of the kind of informations contained in the "drawings" together with the fact that plaintiff would be supervised by the defendant during the fabrication of the tanks it was possible for the plaintiff to have made the quotation on the basis of the drawings alone. Even if Scott discussed fabrication, transportation and erection of tanks with Cowan, I find that such discussions did not form any part of the contract as evidenced in letter dated 3rd August 1989 between them.

I find that on the evidence of Cowan that subsequent to the foregoing contract that at the request of Scott on behalf of the defendant, the plaintiff undertook additional work for which it was agreed that on completion there would have been discussions in respect of payment for such work.

This additional work was by an oral agreement and involved the transportation and erection of three (3) filter tanks fabricated by plaintiff.

The amount claimed by the plaintiff for transporting and erecting the three (3) tanks is $221,760.00 (See item 14 on No. 8 of Exhibit 1). The defendant gave no evidence regarding this item as to whether the sum claimed is reasonable. Defendant's case rested on the basis that the sum claimed had formed part of and was included in the plaintiff's quotation for the three (3) filter tanks.

There is evidence before me that to fabricate and install three (3) tanks the defendant would be paid $774,000.00 See Exhibit 2B. This sum did not specifically mention "transportation" but on the evidence before me I think it is reasonable to infer that that amount included transportation. In arriving at this conclusion I am fortified by the evidence of Scott when he admitted in cross-examination that "sandblasting and crane work" were not included in the figure of $774,000.00. I would have expected him to say what if anything else was or was not included.

I would therefore award the plaintiff an initial sum of the difference between $774,000.00 and $591,360.00 as the gross amount payable by the defendant for transportation and erection (that is $182,640.00).

I think that in order that a balance if any may be arrived at in respect of the original contract, regard must be had to what was left unfinished by the plaintiff.

There is evidence from the defendant's Mr. Scott that the nozzles which were part of the original contract to plaintiff had to be put on by the defendant at a cost of $44,980.54. On this point the plaintiff's evidence is at best a guess as Cowan said in relation to the costs "I think it costs no more than $8,000.00."

I would therefore allow the sum of $44,980.54 to the defendant as costs for installing the nozzles. Both sides are in agreement that of the original (contract price of $591,360, $500,000 had been paid to plaintiff, thus leaving a balance of $91,360.00 as at 28th May 1990 (See Invoice of that date). From this balance of $91,360.00, I would deduct the $44,980.54 the costs of installing nozzles. There is another area of disagreement between the plaintiff and defendant regarding the quantity of mild steel sheets or plates which were over supplied. On this point I prefer the defendant's evidence to that of the plaintiff and allow for a deduction of $22,145.28. The plaintiff agreed that the consumption tax at the rate of 2% on the original contract should be allowed - this being $11,827.40.

The total allowed against the balance of $91,360.00 is $78,953.22, thus leaving a net of $12,406.78.

Turning again to the issue of variations on the original contract and in particular to those items which were adjusted on Exhibit 4 (omitting item 14 which has already been determined), it would appear that that record may represent a more concise account of the meeting between Cowan and Scott than Cowan's reliance on his memory: Taking the amount arrived by Scott, I would therefore allow the sum of $28,210.00 in addition to the amount of $182,640.00 for transportion and erecting the filter tanks making a gross sum of $210,850.00.

This figure should be reduced by $867.20 the costs for piloting services rendered by the defendant, the 2% consumption tax on $210,850.00 which calculates at $4,217.00. The nat result being $205,760.00. To this amount must be added the balance of $12,406.78 on the original contract, thus making a gross of $218,172.78. The parties agreed that the sum of $36,183.58 was paid to the plaintiff after they had handed over the matter to their Attorney-at-Law - this sum of $36,183.58 must be deducted from $218,172.78.

I would give judgment for the plaintiff on the claim and counter claim.

The plaintiff will have judgment for $181,989.20 subject to the retention of 10% by ALCOA on the basis of Scott's evidence which was unchallenged.

I have considered the evidence of the plaintiff as it relates to interest rates on fixed deposits and overdrafts in 1989.

I would award interest at the rate of 25% per annum to the plaintiff on the judgment as stated above with effect from the 1st August 1990 to the 20th December 1994.

The plaintiff will have costs to be taxed if not agreed.