[2017] JMCC Comm. 33

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2016CD00136

BETWEEN	**ASTON LACHMAN**	**CLAIMANT**
AND	**SURREY PAVING AND AGGREGATE COMPANY LIMITED**	**DEFENDANT**

OPEN COURT

Ms Michelle Smith instructed by Lewis, Smith, Williams & Company, Attorneys-at-Law for the Claimant

Mrs Jacqueline Cummings instructed by Archer, Cummings & Company, Attorneys-at-Law for the Defendant

Heard: 1st, 2nd and 8th November 2017

Contract – Oral – Terms – Whether contract for the sharing of earnings provided for sharing of retention payments

Evidence – Hearsay rule – Corporate entity - Whether a witness repeating information from a fellow employee as to the terms of an agreement he made offends the hearsay rule

LAING J

The Claim

[1] The claim is for damages for breach of an oral agreement and for an accounting. The Claimant, Mr. Aston Lachman is a Contractor and Businessman and the Defendant is a company incorporated under the Companies Act of Jamaica.

[2] The Defendant was contracted by the National Works Agency ("NWA") in or about 2005 to carry out construction on the RW023 Blue Mountain Buff Bay Valley Project in the parish of Portland (the "Project"). The Claimant at that time was employed by the Defendant as a supervisor on the Project.

[3] In or about 2011, the NWA assigned the Buff Bay Valley Project to the China Harbour Engineering Company ("CHEC"), which in turn subcontracted the Defendant to complete certain scope of works in relation to the Project (the "Works").

[4] It is the Claimant's contention that in or about the same 2011 his employment contract with the Defendant was terminated and that the Defendant thereafter entered into an oral agreement with the Claimant for him to supervise the Works (the "Agreement"). The Claimant asserts that it was a Mr Lewars, (who was the Field Project Manager and Senior Supervisor of the Works) who agreed the terms of the Agreement with him, on behalf of the Defendant.

[5] The Claimant asserted that the following represents the terms of the Agreement:-

> *(1) The Claimant will be the Defendant's sole subcontractor to supervise all the scope of work agreed between CHEC and the Defendant for the road works to be carried out at the RW023 Buff Bay Valley Project.*
>
> *(2) All monies earned and received by the Defendant from CHEC for the completed scope of works on the RW023 Buff Bay Valley Project will be deducted with the costs of any labour and material provided by the Defendant.*
>
> *(3) After the deduction of the Defendant's labour and material costs, 80% of the remaining balance of all monies earned and received by the Defendant from CHEC for the completed scope of works will be paid to the Claimant for his role in supervising all the scope of works for RW023*

Buff Bay Valley Project and 20% to the Defendant as a fee for securing the project.

[6] The Claimant explained that the payment for the Works was made pursuant to a series of ten payment certificates which reflected the amount of work that was being paid for at various stages of completion. The payment certificates would reflect that the retention payment (collectively the "Retention"), the performance payment (collectively the "Performance Payment") and a contractor's levy were deducted by CHEC as appropriate and the remainder paid to the Defendant. The contractor's levy was payable to the Government of Jamaica and there is no claim or issue raised in respect of this sum. From the sum paid to the Defendant, the Defendant would deduct the allowable expenses as per the Agreement and the Claimant would be paid eighty percent (80%) of the remainder.

[7] The Claimant asserted that in or about June 2015, the Defendant received the Retention and Performance Payment from CHEC and has failed and/or refused to pay the eighty percent (80%) to the Claimant, as agreed. The Claimant is therefore claiming that the Defendant has breached the Agreement and he has thereby suffered loss and damages as a result.

The Defence

[8] The Defence lacked the level of specificity that one would ordinarily have expected. The Defendant concedes that the Claimant was engaged to supervise the Works but the Defendant is resisting the claim on the ground that there was no agreement to pay the Claimant eighty percent (80%) of the Retention and/or Performance Payment. In this regard the issues joined between the parties which require resolution are very narrow.

[9] The issue was raised during the trial as to whether Mr Lachman was an independent contractor when he was engaged to supervise the Works but both counsel agreed that this was not germane to the resolution of the dispute as to the terms of the oral agreement which forms the basis of the claim. For that reason the Court will not make any finding on that issue.

The evidence of Mr Chang

[10] The sole witness on behalf of the Defendant was Mr Leslie Chang who is its Managing Director and who has occupied this position for 25 years. He explained that retention is a standard obligation in construction contracts. Usually the party engaging the contractor will retain a percentage of the value of money owed to the contractor for work he had completed. This would be held for a specified period of time as a guarantee to remedy any defects during the period of the retention following completion. If there were no defects then the retention would be returned. If there were defects which are not remedied at the contractor's expense, then the retention would be applied to have these defects remedied. The Retention in this case was therefore in keeping with industry standards and was for a period of one year. There were no defects in the Works and the Retention was returned to the Defendant.

[11] Mr Chang also explained that CHEC as the main contractor on the Project provided a performance bond to the Government of Jamaica and the Performance Payment was the sum which CHEC charged the Defendant for having done so. This was a non-refundable payment to CHEC. He said that the Claimant misunderstood the nature of this payment and the Claimant was wrong in his evidence when he said it was a sum required to ensure performance within certain time limits. Accordingly, he said, that to the extent that the Claimant was claiming a percentage of the Performance Payment, the claim was clearly misconceived because it was not a refundable sum similar in nature to the Retention and was not returned.

[12] Mr Chang was cross examined as to why the difference in the nature of the Performance Payment as compared with the Retention which he asserted was not explained in the Defence or in his witness statement. His response was that he did not understand the claim for "performance monies" to be in respect of the Performance Payment as reflected on the performance certificates.

[13] Other than the "retention account" and the "contractors levy account", the only other deduction referred to on the payment certificates was the "performance account" and it seems reasonable to the Court that the Defendant ought to have understood the claim to be in respect of the Performance Payment. However, if doubt still persisted as to what performance the Claim referred, it was open to the Defendant to seek clarification by way of a request for further and better particulars. The assertion by the Defendant as to the non-refundable nature of the Performance Payment only arose during the cross examination of Mr Chang and was reflective of the meagre statement of case of the Defendant. That notwithstanding, the Court finds that the Claimant was not very convincing in his explanation of what the Performance Payment was. The Court recognizes that if Mr Chang's evidence is correct then the Claimant would not be entitled to any portion of the Performance Payment if he is successful on his claim. For this reason in the Court's analysis of the evidence emphasis will be paid and reference made primarily to the Retention only although similar considerations would apply to the Performance Payment were it refundable, or as the Claimant asserts, actually refunded.

[14] It is of tremendous significance that on his evidence Mr Chang never personally had any direct conversation with the Claimant about the Agreement. According to Mr Chang it was Mr Edwin Douglas the Financial Controller of the Defendant who interacted with the Claimant as to the terms and conditions of the Agreement. Mr Chang stated clearly that he was not present when the negotiations took place and his knowledge is based solely on what a director told him.

[15] Counsel for the Defendant submitted that because the Defendant is a corporate entity, Mr Chang could give evidence of the terms of the Agreement as evidence of the truth of what he asserts were those terms, based on what was told to him by another employee of the Defendant who was not called as a witness. Counsel submitted that this would not infringe the hearsay rule because of the way the rule applies to and operates in relation to corporate entities. The Court was not

provided with any legal authorities that support Counsel's submissions in this regard.

Mr Chang's evidence and the rule against hearsay

[16] The distinction is often drawn in a trial between original and hearsay evidence. In Halsbury's Laws of England, Volume 17, Hearsay, at paragraph 608, the following is stated:

> *"A fact is proved by original evidence when it is proved by oral testimony in the proceedings[1] from witnesses who have first-hand knowledge of that fact. If a witness lacks first-hand knowledge (that is, if he did not personally perceive or experience the fact or event in question, but has merely heard or read about it through statements made by others) any evidence he purports to give on that matter will be second-hand evidence and thus hearsay."*

[17] In Cross on Evidence, 6th Edition page 453, it is stated that "the rule against hearsay is one of the oldest, most complex and most confusing of the exclusionary rules of evidence". I doubt that this statement would be disputed with any vigour. A full exposition of the law in relation to the rule is clearly outside the scope of this judgment but for purposes of finding a convenient starting point I will adopt the succinct statement of Cross that, "*an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of any fact asserted".* Central to the question as to whether a statement offends the rule, is the purpose for which the statement is being tendered. In ***Subramaniam v Public Prosecutor*** [1956] 1 WLR 965 at 969 the Court expressed the view that:

> *"Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made."*

[18] Clearly the purpose of Mr Chang's evidence as to the terms of the Agreement was to establish the truth of the Defendant's assertion as to what the terms of the Agreement were. In these circumstances, any evidence flowing from Mr Chang

as to what the terms of the Agreement were, based on what he was told by a fellow member of the Defendant infringes the rule against hearsay and is inadmissible. It is not simply a matter of the weight to be attached to such a statement or such assertions. Based on the Court's ruling on the hearsay issue, Mr Chang's evidence as to what he was told were the terms of the Agreement was held to be inadmissible.

[19] Paragraph 9 of his witness statement reads as follows:

> *"As per the agreement, he was paid 80% of the NET VALUE of the works completed under his supervision while the company retained 20% for its part in financing the agreement. He was paid in full on all his invoices and no retention was made by the company from his invoice."*

Based on the application of the hearsay rule, it would not be permissible for Mr Chang to make a positive assertion on which the Court would be, properly entitled to rely as being true, that the payment to the Claimant was "*as per the Agreement*". This is so because Mr Chang could not of his personal knowledge say what the precise terms of the Agreement were.

[20] Even if Mr Chang's evidence as to the terms of the Agreement was not held to be inadmissible, his evidence was largely discredited. Paragraph 9 of Mr Chang's witness statement for example was proved in cross examination not to be accurate. Firstly, Mr Chang admitted in cross examination that the Claimant was not paid eighty percent (80%) of the net value of the works completed under his supervision, as he stated in paragraph 9. Net Value in this sense being understood to mean the money paid to the Defendant by CHEC, after CHEC made deductions to the retention and performance accounts as well as the contractors levy. What he was paid was eighty percent (80%) of the net value of the works completed under the Claimant's supervision, after the Defendant had also made further deductions to cover its share of the relevant expenses. This concession was inevitable because the fact that the Defendant made a deduction of its expenses was clearly evident from the various cheque requisitions and payment certificates. Secondly, Mr Chang also admitted that because of the

nature of the Agreement, (whereby the Claimant's payment was calculated after allowable deductions), the Claimant could not have submitted invoices for his services and did not in fact do so, therefore it is incorrect that he was paid in full on all his invoices.

[21] Mr Chang in cross examination said that what was told to him of the Agreement was in keeping with company policy. In re-examination he explained that the Defendant's incentive based agreements with employees do not include retention nor do they factor in indirect expenses such as the cost of overdraft facilities or the employment of professionals such as engineers or quantity surveyors as part of the Defendant's expenses to be deduced from the payment sum. It is rather curious, that the assertion that the Defendant's policies do not include the sharing of retention sums, was not pleaded in the Defendant's statement of case. It was also not included in Mr Chang's witness statement. Were this so, I would have expected that the Defendant would have made this assertion in the Defence and/or witness statement. Other than this assertion, no other evidence was given as to the existence of the policy or that it was strictly complied with. Furthermore, there was no evidence that Mr Douglas or Mr Lewars did not have authority to include the Retention in the Agreement as monies to be shared in accordance with the agreed percentages. I therefore do not find that there was any policy which precluded the Retention being included in the Agreement as being subject to sharing between the parties.

[22] The documentary evidence in the form of the first three payment certificates showed that the percentage split after all the allowable deductions were seventy percent (70%) to the Claimant and thirty percent (30%) to the Defendant. The suggestion was made to Mr Lachman that the Agreement was initially for a 70:30 split and afterwards he asked for it to be changed to 80:20. This position was not pleaded nor was it in the witness statement of Mr Chang.

[23] The evidence of the Claimant was that he was asked and he did agree to the 70:30 split as reflected in the three cheque requisitions notwithstanding the fact

that the Agreement from its inception provided for a 80:20 division. He explained that he accepted these payments because there was an understanding that the payments would revert to the originally agreed 80:20. I do not think that the issue as to whether the agreement was initially for a 70:30 split affects the Court's determination as to whether money to be shared included the Retention. However. The Court accepts the Claimant's explanation on this issue based on the Court's view of Mr Lachman's credibility which will be addressed in greater detail elsewhere in this judgment.

[24] Counsel for the Defendant submitted that although there was a deficiency in the oral evidence adduced on behalf of the Defendant, the documentary evidence supported its case. Counsel for the Defendant asked the Court to note that on the third payment certificate being issued, the total of the Retention deductions had been met and that the Claimant signed in agreement to the amount that he was paid. Counsel submitted that if it were intended to include the Retention in the Agreement as money to be shared, then it is more probable that the Defendant would have also retained a portion of the money, in the form of a retention. This would have ensured that the Claimant also bore the risk which existed as a result of the Retention. I do not agree with Counsel's analysis on this point, because, as I will explain below, if the Retention is a part of the money to be shared, then the Claimant will in any event bear some of the risk of it being "lost" to CHEC, or more accurately, not returned.

[25] Counsel for the Defendant submitted that if the Retention was a part of the money to be shared under the Agreement, then one would reasonably expect that a portion of the payments due to the Claimant following the various cheque requisitions would be retained by the Defendant. If this was not done and there were any defects discovered in the Works, it is only the Defendant that would have had to face the expense of any remedial work. However this analysis does not lend any support to the argument that if the Defendant alone was to bear the risk of remedial works, it would not have agreed to the Retention having been included in the Agreement.

[26] If the Retention was not included in the Agreement, then the Claimant would not have had an added incentive to ensure that the project was completed without defects. If the Claimant's earning was limited to only a percentage of the net amounts excluding retention, once he got his payment as per the final certificate number ten, it would have been of no relevance to him what transpired afterwards, for example, whether the Defendant may have had to expend significant sums in order to remedy defects and/or lost the Retention as a result of CHEC applying it or a significant portion of it to the defects if they were not remedied by the Defendant. If the Claimant did not have any interest in the Retention, he could simply have ensured that the work was of a sufficient quality just in order to get the certificates issued so that he could get his percentage of the payments. However, if the Retention was included in the Agreement, then there was a shared risk. Such an arrangement would have provided an attractive incentive for the Claimant to ensure that there would be no defects since he would be entitled to eighty percent (80%) of whatever portion of the Retention that was returned. Presumably, the possibility of increased earnings would fuel his drive to ensure excellence. On this analysis, which the Court finds to be more commercially sensible and more probable, including the Retention in the Agreement does not inure only to the benefit of the Claimant. It is a matter of common sense I think, that in addition to the twenty percent (20%) share of the Retention that the Defendant would receive, when it is returned, the Defendant would also obtain a positive reputational value from completing a project free of defects or with limited defects. There is therefore sensible and practical bases for the Defendant to agree that all the earnings, including the Retention, should be shared

[27] Counsel for the Defendant also placed reliance on the Claimant's response to an answer posed by the Court, in which he admitted that there was no specific discussion as to the Performance Payment or Retention at the time of the Agreement. Counsel submitted that having made this admission and having signed the cheque requisitions accepting the payments indicated, the Claimant cannot now assert that the Retention was a part of the Agreement and that he is

entitled to any sum other than the sum he accepted. Counsel submitted that the Claimant bears the burden of proving that the payments he received were not full and final payments representing his total emoluments for his involvement in the Works, whether pursuant to a contract of service or a contract for service.

[28] I do not find that the Claimant's admission that there was no specific discussion as to the Performance Payment or Retention adversely impacts the Claimant's case. The Claimant's response must be viewed in the context of his evidence that the Agreement was for him to receive eighty percent (80%) of the balance of all monies earned from CHEC after the allowable deductions including the Defendant's labour and material costs. If this was a term of the Agreement as he asserted, then there would be no need to specifically mention the Performance Payment or the Retention since these would naturally be subsumed within the concept of "*all monies earned.*.." as he understood it.

Disposition

[29] The Claimant's case has been clearly set out and the presentation of his case was consistent with his statement of case. This was a case which required the Court to make a finding as to the terms of an oral agreement which is sometimes a challenging task. The Court obtained limited assistance from the documentary evidence, but in the end was also impressed by the evidence of the Claimant and his demeanour in cross examination. He struck me as someone who was being honest in his responses even where he could well have embellished the evidence in order to support his claim. An example of this is evident in his admission that there was no specific reference to the Performance Payment or the Retention at the time of the Agreement. I have addressed this point in the preceding paragraph of this judgment. Having assessed the Claimant's testimony, I accept his evidence that the Agreement was for him to have eighty percent (80%) of the remaining balance of all monies earned and received by the Defendant from CHEC for the completed scope of Works, after the relevant deductions. I therefore find that the Retention constituted a portion of the monies

earned and as a consequence was included in the scope of the Agreement. This being so, the Claimant is entitled to eighty percent (80%) of the Retention which Mr Chang has admitted that the Defendant received from CHEC. Because the nature of the Performance Payment being non-refundable payments was not pleaded or otherwise raised before Mr Chang made that revelation in the witness box, the Claimant did not have the opportunity to explore this point. In such circumstances it is the Court's view that it would not be fair to simply accept Mr Chang's testimony on his point without more. The Court is of the view that the Defendant should provide an accounting in respect of any Performance Payment it received, (if any). Counsel for the Defendant assured the Court that this would not prove to be burdensome since no payments were in fact received.

[30] The Claimant has also claimed commercial interest from the date of the breach. There was no evidence as to the time within which the Defendant should have paid over the Claimant's portion of the Retention because as the Court's findings demonstrate, the parties not having specifically discussed the Retention, would not have negotiated a time for payment of it to the Claimant. In these circumstances, the Court is of the view that the interest awarded should run from the date of filing of the claim. The Court is also of the view that the Claimant would be adequately compensated by an award of 3% per annum pursuant to section 3 of the **Law reform (Miscellaneous Provisions) Act.**

[31] Fort the reasons stated herein the Court makes the following orders:

1. Judgment for the Claimant on the Claim.

2. The Defendant is to pay the Claimant the sum of $2,550,649.37 which represents 80% of the retention amount of $3,188,311.71 which the Defendant was refunded by China Harbour Engineering Company in relation to the Defendants subcontract on the Buff Bay Valley Project, plus interest at the rate of 3% per annum from 19th May 2016 to 8th November 2017 the date of judgment and thereafter at the statutory rate of 6% per annum until the judgment is satisfied.

3. The Defendant is to provide the Claimant with an account of any Performance Payment it received from China Harbour Engineering Company in relation to the Defendant's subcontract on the Buff Bay Valley Project, and the Defendant is to pay the Claimant 80% of any such sum.

4. Costs of the Claim to the Claimant to be taxed if not agreed