



[2025] JMCC COMM. 26

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00522

BETWEEN	ARC SYSTEMS LIMITED	CLAIMANT
AND	CARRIS KONG	DEFENDANT
AND	CARRIS KONG	ANCILLARY CLAIMANT
AND	ROCKWILL CONCRETE SERVICES LIMITED	ANCILLARY 1ST DEFENDANT
AND	ARTHUR WILLIAMS	ANCILLARY 2ND DEFENDANT

Ms. Jacqueline Cummings instructed by Archer Cummings & Co. for the Claimant.
Mr. Robert Moore for the Defendant.

**Civil procedure- Breach of Contract- Whether a valid contract exists between the
Claimant and the Defendant- Law of Agency- Remedies for breach of contract**

IN OPEN COURT

Heard on: 19th and 20th May and 31st July 2025

STEPHANE JACKSON-HAISLEY, J.

INTRODUCTION

- [1] This is a claim to recover the sum of Six Million, One Hundred and Twenty-Nine Thousand, Eight Hundred and Eighty-One Dollars and One Cent (\$6,129,881.01) due and outstanding for cement invoiced and supplied by the Claimant, ARC Systems Limited (ARC) to the Defendant Carris Kong.
- [2] Mr. Kong accepted being invoiced but denied receipt of the cement. He has instead countered that he merely acted as an agent of the Claimant in the sale of the cement to Rockwill Concrete Services Limited (Rockwill) and Arthur Williams, its Managing Director who are both joined as Ancillary Defendants in this claim. Mr. Kong in the Ancillary Claim is claiming indemnity or contribution in respect of the claim against him.

CLAIMANT'S EVIDENCE

- [3] Mr. Lackie Horne, one of the Directors of ARC asserted in his evidence that throughout the year 2009, Mr. Kong contracted with ARC for the supply of cement. He averred that the total sum invoiced and supplied to Mr. Kong amounted to Six Million, One Hundred and Thirty Thousand and Eighty-One Dollars and Thirty-One Cents (\$6,130,081.31).
- [4] Mr. Horne asserted that a term of the agreement was that Mr. Kong would pay interest at the rate of 1.5% per month on all invoices which are sixty (60) days overdue. As a consequence of failing to settle the outstanding sum, a demand letter was issued by ARC's Attorneys-at-law on December 22, 2010 to Mr. Kong, formally demanding payment of the outstanding sum of Seven Million, Two Hundred and Sixty-Eight Thousand, One Hundred and Two Dollars and Eighty-Nine Cents (\$7,268,102.89). He asserted that to date, Mr. Kong has not settled the outstanding invoices.

[5] During cross examination, Mr. Horne accepted Counsel's suggestion that there is no written document that sets out the terms on which the cement would be supplied to customers, however he asserted that aside from an invoice provided to customers, there is no written contract with customers for the supply of cement. When it was suggested to him that none of the invoices has Mr. Kong's signature as receiving the cement, he asserted that the cement was invoiced to Mr. Kong who asked his bearer to collect. Mr. Horne also admitted Counsel's suggestion that since he was not present at the alleged meeting between Mr. Horne, Mr. Terrelonge and Mr. Kong he could not speak to the details of any alleged agency contract. He also admitted that proper checks were not made with ARC's accountant to confirm whether other payments were made since the filing of the claim in 2010.

DEFENDANT'S EVIDENCE

[6] Mr. Kong in his witness statement filed August 5, 2014 averred that in or about March 2009, he was approached by servants and or agents of ARC to assist in the selling of imported cement coming from China. He indicated that at a meeting with Mr. Horne and Mr. Terrelonge, it was agreed that the cement would not be sold directly to Rockwill and Mr. Arthur Williams but would be invoiced in his name and delivered directly to Rockwill who is to make payment to a specified BNS account.

[7] He averred that cement totalling Ten Million, Seven Hundred and Forty-Six Thousand, Two Hundred and Fifty-Five Dollars and Fifty-Seven Cents (\$10,746,255.57) was supplied to Rockwill to be used to construct a school in Steer Town in the parish of St. Ann. Mr. Kong asserted that Rockwill paid for a portion of the cement supplied and at a meeting convened in the latter part of 2010, a promise was made to settle all outstanding amounts.

[8] Mr. Kong denied being indebted to ARC and asserted that since the Ancillary Defendants utilized the cement they should be held liable.

[9] During cross examination, Mr. Kong accepted Counsel's suggestion that he agreed for the invoices to be in his name. He also admitted that he is aware that Rockwill has a different account from him and that of the twenty (20) invoices exhibited, only three (3) mentioned Rockwill as all the others are in his name. He denied Counsel's suggestion that he was never employed as an agent of ARC but instead asserted that he was acting upon instructions from Mr. Horne and Mr. Terrylonge to dispose of the cement as it was time sensitive and losing strength. He disputed the suggestion that the cement was delivered to him and not to Rockwill and he pointed out that ARC's own delivery truck delivered the cement, as such ARC should be aware of the delivery point.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[10] Counsel for the Claimant Ms. Jacqueline Cummings asserted that the issues for the Court to consider are:

- (a) Was there an agreement between ARC and Carris Kong?
- (b) Did Carris Kong receive cement from ARC?
- (c) Did Carris Kong receive invoices from ARC for the supply of cement?
- (d) Is there a debt owed by Carris Kong to ARC for cement supplied to him?
- (e) Are the Ancillary Defendants and Carris Kong jointly and severally liable for the debt owed to ARC?

[11] As it relates to the first issue, Counsel submitted that there is a binding agreement between ARC and Mr. Kong for the supply of cement. She asserted that he was not acting as an agent of ARC as alleged. Counsel relied on the decision of **Keith Garvey v Ricardo Richards** [2011] JMCA Civ 16 citing from paragraphs 10 -12 where Harris JA opined that an agreement is not a binding agreement unless there is evidence of an agreement, consideration and an intention to create legal relations. Counsel submitted that there is evidence to support that the Claimant

and Defendant had the requisite intention to enter into a contractual relationship and that there was consideration.

- [12] Ms. Cummings highlighted that Mr. Kong admitted receiving all the invoices supplied for the cement however, he denied that the cement belonged to him as he was assisting in an agency capacity. Counsel pointed out that all the invoices bear the name and address of Mr. Kong and all were signed by him in acknowledgment of receipt of the goods. She urged the Court to accept that Mr. Kong received the invoices.
- [13] Counsel submitted that Mr. Kong is indebted to ARC for the cement invoiced, supplied and received by him and he is liable for the principal sum of Six Million, One Hundred and Thirty Thousand and Eighty-One Dollars and Thirty-One Cents (\$6,130,081.31) plus interest at 1.5% from October 2009 to May 2025 totalling Seventeen Million, One Hundred and Ninety-Four Thousand, Three Hundred and Sixteen Dollars and Twenty-Three Cents (\$17,194,316.23). Ms. Cummings asserted that the total now outstanding is Twenty-Three Million, Three Hundred and Twenty-Four Thousand, One Hundred and Ninety-Seven Dollars and Twenty-Seven Cents (\$23,324,197.27).
- [14] Ms. Cummings submitted that despite Mr. Kong's assertion that the Claimant supplied the cement to a third party he is required to pay the debt as he accepted that the invoices were billed to him. She relied on the authority of **Shem Waisome v British Caribbean Insurance Company Limited** [2020] JMSC Civ 122 to support her position on the doctrine of privity of contract. She asserted that the agreement was between the Claimant and Defendant only for the supply of cement and the Defendant cannot now seek to impose the debt on a third party to escape liability as they were never a party to the contract. Ms. Cummings argued that the Ancillary Defendants should not be found to be jointly and severally liable with the Defendant for the debt owed as they were never a party to the contract.

[15] Ms. Cummings refuted the assertion of any agency agreement between ARC and Mr. Kong. She indicated that ARC is one of only three (3) large commercial entities of its kind in the island and has its own sales department. She contended that there would be no need for ARC to acquire Mr. Kong's services as an agent as it would be absurd for such an established company to be asking one of its own customers to sell cement to a delinquent customer.

[16] Counsel submitted that Mr. Kong is not a credible witness. She asked that the Court reject the suggestion that he is naïve as he is a businessman in excess of twenty-five (25) years and should be *au fait* with the cement business. Counsel submitted that under an agency agreement, invoices would be billed in the customer's name and the agent's name would appear at the bottom of the document.

[17] Counsel asked the Court to find that interest at the rate of 1.5% per month is applicable on all invoices which are sixty (60) days overdue and that the Claimant is entitled to interest on all invoices submitted which remain unpaid until the debt is satisfied. Counsel pointed the Court's attention to **National Commercial Bank Staff Association v National Commercial Bank Jamaica Limited** [2017] JMSC COMM 30 which dealt with interest on Judgment in respect of a commercial agreement and asked the Court to exercise its discretion and award the Claimant interest at the commercial rate of six percent (6%).

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[18] Counsel for the Defendant, Mr. Robert Moore suggested that the issues for the Court to consider are (i) whether an agreement/contract exists between the Claimant and Defendant, and (ii) whether the Defendant is an agent of the Claimant.

[19] Mr. Moore submitted that although the Claimant has claimed that a term of the agreement for sale and purchase provides for payment of 1.5% interest on all overdue balance, it did not disclose such a contract. He submitted that there is no written agreement between the Claimant and Defendant and instead countered that the invoices in and of themselves should not be construed as a contract. He urged the court to consider that if any contract exists, it is between the Claimant and Rockwill. Counsel relied on paragraphs 9 and 10 of **Equilibrio Solutions (Jamaica) Limited v Peter Jervis & Associates Limited** [2021] JMSC 12 and submitted that in the absence of a written document and the lack of intention to create legal relations, there is no valid contract.

[20] Counsel maintained that Mr. Kong is an agent of ARC and quoted the law on agency found in PG Watts and FMB Reynolds, Bowstead & Reynolds on Agency (Sweet & Maxwell) 22nd Edition, October 2022 Supplement) which states that the legal connotations of agency exist where:

- a. A voluntary appointment by one party (the principal) of the other (agent)
- b. The appointment is in respect of a specifically defined thing and can be broad enough to confer general authority.
- c. The scope of the agent's authority is delineated by the principal.
- d. The authority bestowed upon the agent is to do things in the name of the principal and on their behalf.
- e. Legal agency requires a third party and the agent binds the principal in respect of a third party.

[21] Counsel submitted that on a balance of probabilities, the Claimant has not established that it contracted with Mr. Kong and argued that there is no breach of duty or liability on the part of the Defendant. He advanced that the Claimant should have obtained the evidence of Mr. Norman Horne, who is still a Director of ARC as well as Mr. Terrylonge to refute Mr. Kong's assertion of the agency arrangement

and that they acted on ARC's behalf when they met with him. Mr. Moore asserted that the invoices came about because Mr. Kong agreed to assist the Claimant

- [22] He urged the Court to accept Mr. Kong's version of events, that there is no concoction of a story and that he is a witness of truth. He asserted that there is no evidence that Mr. Kong or his bearer collected the cement though he acknowledged being billed for the goods. He further asserted that there is no evidence that Mr. Kong made any payments as the evidence that should be patently clear from ARC's accounts department is that Rockwill made the payments.
- [23] Mr. Moore also submitted that interest should not be allowed on the payments at the commercial rate and asked the Court to exercise its discretion as provided by Section 3 of the Law Reform Miscellaneous Provisions Act

ISSUES

- [24] The main issues to be determined by the Court are as follows:
 1. Whether a valid contract exist between the Claimant and Defendant?
 2. Whether the Defendant acted as an agent of the Claimant?
 3. Whether the Defendant is in breach of the contract and if so, what is the appropriate remedy?

DISCUSSION

Whether a valid contract exist between the Claimant and Defendant

- [25] The law is clear that for a contract to be binding, all the essential terms, offer, acceptance, consideration and an intention to be legally bound must be present. There is no dispute that no written document stipulating the terms of the sale of

cement existed between the Claimant and Defendant. Similarly, no written agency agreement existed between the parties. Mr. Kong is asking this Court to accept that an oral arrangement was made between himself, the present Chairman and a former Managing Director of ARC whereby he is alleged to have been charged with the responsibility of selling cement to Rockwill on behalf of ARC.

- [26] The Claimant's argument is that this position is absurd as a commercial entity, the size of ARC, would not have asked one of its customers to operate in an agency capacity when it has its own sales department. Further, Counsel contended that it is unbelievable that this commercial entity, one of only three of its kind in the island, would be offering its product through an agent to a delinquent customer.
- [27] In the absence of a written document, the Court will have to consider firstly whether a valid contract existed between the parties. The authority of **Keith Garvey v Ricardo Richards** relied on by Counsel for the Claimant is instructive. At paragraph 10, Harris JA opined that:

it is a well – settled rule than an agreement is not binding as a contract unless it shows an intention to create legal relationship.

Generally, three basic rules underpin the formation of a contract, namely an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain there must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence."

- [28] Both parties have accepted that invoices were prepared in the Defendant's name. Counsel for the Claimant asserted that the only contractual arrangement that exists is for the Defendant to pay the amount outstanding for cement invoiced in his name and for which he has failed to settle. The Defendant accepted that the invoices are in his name however, he denied the assertion that the cement was delivered to him. Counsel for the Claimant has asked this Court to consider that the invoice

itself, operates as a contract. Counsel for the Defendant asserted in the absence of a written document the Court should consider that the Defendant was acting in an agency capacity on behalf of the Claimant and that no contract existed between the Claimant and the Defendant.

[29] The authority of **RTS Flexible Systems Ltd. V Molkerei Alois Muller GmbH & Co. KG UK (Productions) 2010** 3 ALL ER 1 sets out the applicable test for determining whether there is an intention to be legally bound. Paragraph 45 of the Judgment states as follows:

“whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon what was communicated between them by words or by conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations.”

[30] The Defendant has not denied knowledge of the invoices. In fact, it is evident that he was fully knowledgeable of each purchase of cement as well as where they were delivered. At one instance when Counsel suggested that the cement purchased on a particular invoice was shipped to Portland, Mr. Kong's response was that the cement went to a site that Rockwill has in Portland. He also admitted Counsel's suggestion that he is aware of where most of each purchase of cement was delivered. Mr. Kong acknowledged facilitating the purchase but stated that it was based on instructions from Mr. Norman Horne.

[31] On the facts, there is sufficient evidence to draw the conclusion that there was an agreement between the parties in relation to the sale of cement from ARC, that there was consideration and that there was an intention to be legally bound. I accept that despite there being no written, formal contract, based on the

arrangement the parties had and the invoices exhibited, there existed a contractual obligation between the parties. The scope of the contract is what is in issue which touches on the issue of whether the Defendant was merely acting as an agent of the Claimant.

Whether the Defendant acted as an agent of the Claimant.

[32] Counsel for the Defendant asserted that the obligation was based on an agency agreement as Mr. Kong was acting on instructions he obtained from servants and/or agents of ARC. Counsel referred the Court to PG Watts and FMB Reynolds, Bowstead & Reynolds on Agency (Sweet & Maxwell) 22nd Edition, October 2022 Supplement), however based on the authority relied on, there must be specific appointment by one party to another. Paragraph 1-001 Bowstead & Reynolds on Agency 17th Ed Sweet & Maxwell 2001 defined an agency relationship as follows:

- (1) *Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so as to act or so act. The one on whose behalf the act or acts are to be done is called the principal. Any person other than the principal and the agent may be referred to as a third party.*
- (2) *In respect of the acts which the principal expressly or impliedly consents that the agent shall so do on the principal's behalf, the agent is said to have authority to act; and this authority constitutes a power to affect the principal's legal relations with third parties.*
- (3) *Where the agent's authority results from a manifestation of consent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party, such authority is called apparent authority.*
- (4) *A person may have the same fiduciary relationship with a principal where he acts on behalf of that principal but has no authority and*

hence no power to affect the principal's relationship with third parties. Because of the fiduciary relationship such a person may also be called an agent.

[33] In **Mark Kitson and Olga Kitson v Alcovia Development Company Limited** [2016] JMSC Civ 138 Justice Dunbar-Green considered a dispute over whether a party operated as an authorised agent. At paragraph 98 she opined that

"[98] In my view, Mr. Carr's activities must be viewed in the context of his relationship as the claimants' relative and Mr. Duncan's trusted friend and seeming informal business associate. He could reasonably be seen as a trusted 'fixer' 'gofer' or 'middle person'. I have also considered that in none of their exchanges did either party refer to Mr. Carr as the claimants' agent. It was only Mr. Carr who presented himself in that capacity."

[34] At paragraph 101, Dunbar-Green J. came to the conclusion that:

"[101] The claimants would be liable for Mr. Carr's actions only if, by their general conduct, he had been held out to the defendant as someone who had the authority to negotiate terms on their behalf (see Swiss Air Transport Co Ltd v Palmer [1976] 2 Lloyd's Rep 604). I have seen no basis for finding that this was the case either at the time of the initial meeting between the claimants and Mr. Duncan or afterwards."

[35] The authorities cited show that the scope of the agent's authority must be delineated by the principal. The Claimant has stoutly refuted all suggestions about agency. The Claimant has downright disputed any form of such arrangement. There is no evidence of a specific appointment, neither is there any scope of any authority being delineated.

[36] The Defendant gave evidence that he was approached by Mr. Horne to assist in selling cement and that it was agreed that the cement sold to Rockwill would be invoiced in his name. He asserted during cross-examination that this arrangement

was put in place as Rockwill was a delinquent customer. Counsel for the Defendant argued that the Claimant should have called Mr. Norman Horne to refute the assertion of any sort of agency agreement and that it is not disputed that Mr. Kong would visit Mr. Horne at his home as they were friends and submitted that Mr. Kong's evidence that there were meetings offsite remains unchallenged.

- [37] It would certainly have strengthened the Claimant's case if they had called Mr. Norman Horne to give evidence refuting the allegation that Mr. Kong was the Claimant's agent. Mr. Lackie Horne accepted that Mr. Norman Horne was and still remains chairman of the company. The Claimant has asked the Court to find that it is absurd for a commercial entity in business in excess of twenty-eight (28) years to obtain an agent to sell its products to a delinquent customer. The issues raised by the parties turn on credibility and must be determined on a balance of probabilities.
- [38] It has not been denied that the Defendant and Mr. Norman Horne had some sort of association, however, I agree with Counsel for the Claimant that it would be impractical for the Claimant to obtain the services of a friend of the Chairman to carry out the company's core functions of selling cement to one of its customers. Mr. Kong has admitted that he agreed for the invoices to be put in his name. Having done so, he ought to have appreciated the responsibility of doing so. I find it to be more probable than not that the reason he agreed to have the invoices in his name was because he accepted that he was responsible for the payment of these invoices. I accept the unchallenged evidence that Rockwill was a delinquent customer of the Claimant. I find it is very unlikely that ARC would have engaged Mr. Kong as their agent simply for the purpose of supplying cement to Rockwill, a delinquent customer.
- [39] In those circumstances I find it to be more likely than not that Mr. Kong agreed to be an agent of Rockwill so that Rockwill could have the benefit of ARC's cement on credit and that is the reason he agreed to have the invoices placed in his name.

In those circumstances, on a balance of probabilities I accept that he was an agent of Rockwill and not ARC and so he is responsible to pay the sums for the invoices billed in his name. Mr. Kong in his Ancillary Claim, averred that the cement was delivered directly into Rockwill's possession and control and they accepted it and has failed or neglected to pay for the goods. I am of the view that Mr. Kong operated as an agent of Rockwill and so Mr. Kong could only succeed against the Ancillary Defendant.

Whether the Defendant is in breach of the contract

- [40] Having obtained the invoices in his name and failing to settle the outstanding sum, Mr. Kong is in breach of the contract and is required to pay the outstanding sums as set out on the invoices.
- [41] The Claimant is claiming the sum of Twenty-Three Million, Three Hundred and Twenty-Four Thousand, One Hundred and Ninety-Seven Dollars and Twenty-Seven Cents (\$23,324,197.27) representing the principal sum of Six Million, One Hundred and Twenty-Nine Thousand, Eight Hundred and Eighty-One Dollars and One Cent (\$6,129,881.01) plus interest at the rate of 1.5% on any overdue balance over sixty (60) days. Counsel for the Claimant asserts that interest for the period October 2008 to May 2025 stands at Seventeen Million, One Hundred and Ninety-Four Thousand, Three Hundred and Sixteen Dollars and Twenty-Three Cents. (\$17,194,316.23).
- [42] Alternatively, Counsel has urged the Court to consider that this is a commercial matter and asked the Court to exercise its discretion and award interest at the commercial rate of 6% per annum. Counsel relied on the authority of **National Commercial Bank Staff Association (bringing the claim in a representative capacity on behalf of all the members of the Association) v National Commercial Bank Jamaica Limited** [2017] JMSC COMM 30 where Sykes J (as he then was) dealt with the issue of interest being charged at the commercial rate.

Counsel for the Defendant asserted that the Claimant having failed to establish its case, is not entitled to interest. This being a commercial contract, I am prepared to make an order, taking into account the principles set out in the **National Commercial Bank Staff Association** case, and order that interest be accorded at a rate of 6% per annum.

[43] My Orders are as follows:

1. Judgment for the Claimant against the Defendant in the sum of \$6,130,081.31 plus interest at the rate of 6% per annum from the date of filing of the claim to the date of payment.
2. Cost to the Claimant to be agreed or taxed.

.....
Stephane Jackson-Haisley
Puisne Judge