[2018] JMCC Comm 24

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2014CD00127

BETWEEN	**CEAC SOLUTIONS LIMITED**	**CLAIMANT**
AND	**NATIONAL WORKS AGENCY**	**1ST DEFENDANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

Contract-Variations-Whether work done-Evidence by video link- Whether witness to affirm.

Georgia Hamilton, Roxanne Bailey instructed by Georgia Hamilton and Co for Claimant

Carla Thomas instructed by the Director of State Proceedings for the Defendants

IN OPEN COURT

HEARD: **21st, 22nd May, 24th May 2018 and 13th July 2018**

COR: BATTS, J

[1] On the first morning of trial Claimant's counsel indicated a readiness to proceed. Counsel for the Crown applied to set aside an order, I had recently made, for evidence to be taken by video link. She contended that there had been an insufficient basis to make the order. I asked her to indicate an alternative to evidence by video link if this trial were to proceed. Her answer was inadequate. I also enquired whether the third party, who was to be present when the evidence was taken, was agreeable. The Crown Counsel stated that she was unable to say if the proposed third party was indeed the Consul General of Jamaica. In my

view, the order having been made on the 18th May 2018, it is unacceptable that on the morning of the trial, 21st May 2018, the Crown's legal representative was still unable to say who was the Consul General of Jamaica in Texas. I dismissed the application by the Crown to set aside the order, made on the 18th May 2018, for evidence by video link. I also refused permission to appeal the ruling. I indicated that the trial would proceed.

[2] The Claimants counsel indicated the following exhibits would go in by consent:

Exhibit 1 Bundle 1 Documents

Exhibit 2 Bundle 2 (These were eventually all agreed)

Exhibit 3 Defendant's Bundle of Documents (except pages 64-67).

[3] Present by video link, on the first morning of hearing, were Ms. Elizabeth Taylor, nominated by the Consul General to oversee proceedings, Mr. Khalfhai Fulherton the Consul General, and Mr. George Knight a witness for the Claimant. Mr. Knight was asked to wait out of hearing.

[4] Claimant's counsel gave a brief opening to the claim which relates to a consultancy agreement and a follow-on agreement to it. In the year 2010 the follow-on agreement was varied by Variation Orders 1, 2, 4, and 5. These related to services provided otherwise than those rendered during the extension period. The claim is for J$9,336,196.63 with interest at the contractually agreed rate. The contract is delineated in United States dollars but with a fixed rate of exchange. The Claimant's first witness was Mr. George Knight. He gave evidence by video link.

[5] After a pause to locate a bible, the witness indicated that he preferred to affirm because of his religious beliefs. When I enquired of his reasons the following exchange occurred:

> *"Witness: I prefer to do affirmation because of my religious belief. I am a Christian. I have never sworn on the bible.*

Judge: *Does not seem to me you have any conscientious objection. We will get a bible. Do you object to that?*

Witness: *Okay then your honour."*

It was apparent to me that the witness would rather not have taken an oath. This was not however due to a religious belief or tenet, at any rate none that he was able to articulate. He had no conscientious objection merely a personal preference. The witness was therefore sworn.

[6] His witness statement dated 11th April 2018 stood as his evidence in chief. He is a civil engineer and stated that he had been an employee of the National Works Agency until February 2013. He was then Director of Regional Implementation and Special Projects. His responsibility included implementation of projects assigned to him. He described the consultancy agreement, which was entered into between the Claimant and the Defendant. It was to provide "technical support services on the Palisadoes Shoreline Protection Works." China Harbour Engineering Company Ltd was responsible for the construction. He was the director in charge with responsibility for construction and to oversee the implementation of the project.

[7] There was, he said, a follow-on contract and another consultancy agreement signed in September 2010. He was also the director in charge of that. The agreed sum under the follow-on contract was U$258,130.35, converted at the exchange rate agreed of U $ 1: J $85.60, amounting to J$21,667,957.96.

[8] He stated that several Variation Orders were issued changing the scope of work under the 2010 contract. He said,

> *"These orders were given, and the services performed on the mutual promise that the sums owed under the variations would be payable to CEAC. These Variation Orders were prepared on 21 June 2012, 21st April 2011, 13 April 2011 and 31st January 2012. The Variation Order dated 31st January 2012 had no value"*

[9] Mr. Knight further stated, and this was subsequently agreed by the Defendants' witness, that the date on the Variation Order did not necessarily reflect the date the work was done. He said,

> *"This is usually not an issue as the focus is having the work done and then having the paper trail catch up after. In such cases, the Variation Orders would be prepared and signed by the parties some time after."*

At paragraph 13 of his witness statement he said,

> *"13. For the avoidance of doubt, the services covered under Variation Orders 1,2,4, and 5 were separate from the extension of the follow-on contract for the period April 2012 to December 2012 as well as the additional scope of works that were agreed to be performed by CEAC during the extension period. The sum of U$ 202,665.20 equivalent to J$17,604,941.12 did not include the sum of $8,405,910.09 being the value of the services under variation Orders 1,2,4, and 5."*

[10] I have spent some time on the evidence in chief of this witness because it goes to the root of the claim. He is a former employee of the Defendant. He was the person in charge of the project. He signed the Variation Orders.

[11] The Defence to the Claim in its amended form asserted that $17,604,941.12 was agreed upon as the total amount to be paid for all variations. Paragraph 9 of the Amended Defence is as follows:

> *"Paragraph 11 to 13 of the Further Amended Particulars of Claim are denied. The Defendants will say that the total sums paid to the Claimant represent the total compensation for certified work done which comprised the sum of $22,438,626.31 under the 2009 contract and the sum of $38,175,074.22 under the 2010 contract. The Defendants will contend that the difference of $1,097,824.85 which was not paid represents work which was not done by the Claimant in relation to Geometrical Investigations and Seagrass and Mangrove Plans. This was a result of revision of the scope of works that had not been approved and which were consequently removed from the Claimant's 2010 contract. The Defendants will rely on the Summary Evaluation Sheet prepared in relation to Payment Certificate No 11 as well as Payment Certificate No 11, which are attached hereto. The Defendants will further contend that the 1st Defendant has paid all monies payable to the Claimant in accordance with the terms of the contracts. In the circumstances, the Defendants deny that they are indebted to the Claimant as alleged or at all."*

[12] That being the defence it was rather surprising that more time was not spent cross examining Mr. Knight. When cross-examined he admitted that there was nothing written on the Variation Orders to indicate the works had already been carried out. He also admitted that contrary to his evidence in chief he had not signed the Variation Order dated 21 June 2012 (Exhibit 2 Tab Q). He indicated that to the best of his recollection the work was done prior to the Variation Order being signed. In re-examination it was made clear that Variation Order #5 (21 June 2012) had his name on it but someone signed for him. That person was the Quantity Surveyor who worked in the witnesses' department.

[13] The Claimant's next witness was Mr. Christopher Burgess. His amended witness statement dated 11 April 2018 stood as his evidence in chief. This statement indicated he is a Civil Engineer and Managing Director of the Claimant. He detailed the circumstances of entry into the contract as well as the follow-on agreement of 2010. This involved among other things the planning, regulatory liaison, removal and relocation of mangroves and sea grass. At paragraph 34 he says.

> *"Variation Orders 1, 2, 4 and 5 were all prepared and signed sometime after the differing variations to the follow on consultancy agreement had been agreed upon between the respective representatives of the Claimant Company and NWA. In this industry this is not unusual and, in my over 24 years experience as a practicing engineer, this is quite common place."*

[14] At paragraph 48, the witness explained that Variation Order number 6 did not include Variation Orders 1, 2, 4, and 5. This was for "accounting purposes."

At paragraph 50 he says,

> *"By my calculations the total value of the 2009 consultancy agreement, the 2010 follow-on consultancy agreements as well as the variations to an extension of the follow-on consultancy agreement is the sum of JMD $70,127,435.48. Of this amount the Agency has paid the sum of JMD$60,791,238.85 to CEAC leaving a balance of JMD$9,336,196.85."*

[15] The cross-examination of this witness was ineffective. Efforts were made to have the witness agree that the Variation Orders were not reflective of additional

work. The witness was adamant that it did and that they were not subsumed in Variation Order # 6. The following telling exchange occurred:

> *"Q: Do you agree nothing in Variation Order re works that shows it is different from March 14 2012 letter.*
>
> *A: Please repeat*
>
> *Q: Repeated, in relation to environmental monitoring*
>
> *A: Are you asking me if entire monitoring is Variation Order #5 is same contemplated in 14th March letter.*
>
> *Q: Yes*
>
> *A: Variation Order #5 is speaking to 2010 contract. Having benefit of foresight in March 14 proposal was more detailed. I cannot say it is the same.*
>
> *Q: What is there to show it is different*
>
> *A: The author of Variation Orders who gave evidence earlier, can expend on that"*

[16] In her opening the Defendant's counsel stated that the Defendants:

> *"intended to prove that total amount due to the Claimant for all variations to consultancy agreement (2010) was $17,604,941.12 as set out in Variation Order # 6. This was the final agreement signed by both parties."*

[17] To this end the Defendant called one witness, Mr. Andrew Sturridge. Karlene Brown's witness statement dated 6 April 2018 was adduced as amended (by deleting paragraph 4) and without calling her for cross-examination.

[18] Mr Andrew Sturridge's witness statement, dated 14 January 2018, asserted that which the Defendant's attorneys intended to prove. At the end of cross examination however a rather different picture emerged. Mr. Sturridge is a project manager employed to the Defendant. In 2010 he was assigned as resident engineer to the Palisadoes Shoreline Project. He was allowed to amplify his witness statement and said:

> *"Q: Show witness Mr. Burgess' amended statement paragraph 48, variation Order #6 "accounting purposes only" comment on that*

A: Not only did Messrs Sturridge Downer and Hunter signed but also Earle Patterson, who was at time our Senior Director at NWA. The said sentence about becoming necessary because without this in place Mr. Burgess could not receive any further payment from the agency. It was attached to following consultancy agreement approved by cabinet."

That cabinet decision is written on Variation Order #6.

If Mr. Burgess is suggesting that the only purpose was for accounting I disagree. Against the backdrop that it served as a recording instrument that sometime in the future or deciding on a resolution formed we could draw back on the document.

Those integral in spearheading the project had demitted office and so you wanted continuity so they could pick up records and follow through with any intent on reconstructing the contract value. The Variation Orders 1-5 that were not included, the reason they were deducted was to allow payment to go through. We made an attempt to pay what we thought was the full value. On reaching accounts it was returned against the understanding that we did not have written authorisation for those values.

How system is structured we get cabinet approval for U$253,000. In hindsight we should have gone to cabinet for more, so that was the glitch in the system."

[19] That circuitous answer, to my mind, amounts to an admission. Indeed, and as became clear in the course of cross-examination, the Defendant's witness was acknowledging that the Claimant was contracted to do additional work without the requisite approval for the additional payments. There is no evidence that the persons who contracted the Claimant had no authority so to do. In any event it is clear they had the ostensible authority.

[20] The Defendant's witness, when cross-examined, admitted that it is the norm in such contracts for variations to be agreed on the spur of the moment.

"Q: Yes or no, your attorney can clarify, the nature of the industry is that variations can be agreed in spur of the moment

A: Yes work on relationship built on trust. In our construction industry things can be dynamic. Time is of the essence. Decisions in the field that may affect scope. Make change agree and move on. Then work out finer details once pen put to paper.

Q: Paper work sometimes follow

A: Yes, yes standard. A variation order results from decision. This paper just concretises what was agreed."

At the end of a very detailed cross-examination, in which the witness more or less admitted that the work contracted for had been done, the following exchange occurred,:

"Q: You agree on Variation Order 1,2,4 and 5 the amounts stated were stated as approved variations

A: Yes they would have been approved

Q: Approved by

A: The board NWA, the CEO."

[21] In light of that evidence one may have understood if the Defendants' representative consented to judgment. This did not occur. Counsel embarked on submissions. "He who asserts must prove", and as such, it was submitted that it was for the Claimant to prove the work had been done and that there was a breach of contract. It was submitted there was no evidence that the works in variation Orders 1-5 were done in the previous 9 months period. The submission ended as follows:

"I submit absence of clear evidence; the court should reject Claimant's evidence that works totally separate from the works approved for extension period for which $17 million was to be paid. Submit that if there is uncertainty ought to be clear. If there is confusion ought to be evidence.

In any event even if money is due it is not clear that what is being claimed is what was due. It would have to be measured, so give them zero."

[22] It, to the contrary, is clear to me, and I find on a balance of probabilities that the Claimant is entitled to the amount claimed. The oral and documentary evidence satisfies me that the Claimant did the work it was contracted to do. For avoidance of doubt let me say that I accepted Mr. George Knight and Mr. Christopher Burgess as witnesses of truth. The Variation Orders 1 to 5 records the agreed price for work done. Variation Order 6 reflected amounts to be paid for work done prior to the work which was recorded in Variation Orders 1-5. This

occurred because the paper work, in relation to the agreed variations, was prepared after not before the work was done.

The Defendants are in consequence liable to the Claimant.

[23] Judgment is therefore entered for the Claimant against the Defendants as follows:

(1) $9,336,196.63 with interest at a rate of 7% per month for 1st March 2013 until the debt is paid in full.

(2) Costs to the Claimant to be taxed or agreed.

David Batts
Puisne Judge