



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2021CD00525

BETWEEN	COLLEGE OF ENTREPRENEURSHIP & INNOVATION LIMITED	CLAIMANT
AND	KAYON CAMPBELL	1ST DEFENDANT
	STONE PLUS LIMITED	2ND DEFENDANT

Contract – Fixed price – Additional work done – Whether contract varied to increase price.

Matthew Phillips and Vanessa Wallace instructed by JNW Taylor & Associates for the Claimant

Sharon Usim, Deborah Martin & Kelly Hamilton instructed by Usim, Williams & Co. for the Defendants

Heard: 3rd and 4th April 2024

In Open Court

Cor: Batts, J.

[1] On the 4th April 2024 I made the following Orders:

- a) The Claim is dismissed
- b) Judgment for the Defendants against the Claimant
- c) Costs to the Defendants against the Claimant to be taxed or agreed.

I promised then to put my reasons in writing at a later date and this judgment is the fulfilment of that promise.

[2] This matter commenced by Claim Form on the 7th December 2021. The Claimant is a construction company and Dr. Shaun Wright its director. Dr. Wright had been employed to the 2nd Defendant but in or about April 2018 he asked that his salary be paid to the Claimant company, an entity owned and operated by him. By an agreement dated 18th March 2020 the 2nd Defendant was contracted by the Ministry of National Security to undertake certain renovation works, see exhibit 1B tab B. On the 16th March 2020, the 2nd Defendant subcontracted the Claimant to carry out the entirety of those renovation works, see exhibit 1B tab A. The curiosity that the date of subcontract preceded the date of the main contract by two days has not been explained. However, these facts were common ground by the parties. The subcontracted work was to be done for a fixed sum of \$7.5 million, see exhibit 1B, tab A. The Claimant company carried out the agreed upon works and received payment of \$7.5 million. The work was also certified as properly completed, see exhibit 1, tabs K and L.

[3] It is also common ground that, during the execution of the contract, there were omissions and additions to the scope of work. Discussions were had between the Ministry of National Security and Dr. Wright on behalf of the 2nd Defendant with a view to increasing the price for the contract. The Claimant submitted a Bill of Quantities for approved variation dated the 16th April 2020 totaling an additional sum of \$2,181,000, see exhibit 2. This document was erroneously dated the 20th March 2020, but that was clarified in examination in chief:

“Q. Please explain, barring the date of the document in paragraph 12 of your witness statement, where is the document referred to in paragraph 12

A. This is the document referred to in paragraph 12

Q. What is the date on this document?

A. April 16th

Q. The one in your hand

A. This is dated March 20th 2020. This is an error on this document, because the contract started the 16th of March so this would have been an error”

- [4] The 2nd Defendant thereafter endeavoured to have the Ministry agree to increase the contract price, see paragraph 11 of the witness statement of Kayon Campbell dated 26th June 2023. The Claimant asserts the Ministry granted this approval. The Defendants deny the grant of such approval. There is no documentary support that the proposed increase was agreed to either by the Ministry of National Security or by the 1st and 2nd Defendants. The documents in evidence suggest there was no such agreement see exhibit 1A tab I. The Claimant completed the works outlined in the Bill of Quantity, but has not been paid any additional amount. The Defendants assert that there was no approval to carry out those works at that price. The Claimant has been paid in full the amount due to it under the sub-contract in the agreed sum of \$7,500,000.
- [5] The Defendants accept that there were variations in the main contract which had affected the scope of work in the subcontract. The air conditioning work, for example, was taken out and formed the basis of a separate contract with another entity and the funds realized from that were used to cover the additions under the contract, see the evidence of Mr. Kayon Campbell. The 2nd Defendant received no further funds pursuant to the contract with the Ministry of National Security. Counsel for the Defendants submitted that even if further sums had been received it would not have had any bearing on the subcontract with the Claimant. This is because the subcontract was for a fixed price and payment was made. I am in agreement with this position.
- [6] This claim was commenced on the 7th December 2021 for breach of contract. Specifically for breach of contract as varied. There is no claim in quasi-contract or any equitable relief. The issue to be determined is what were the terms of the contract and were they varied.

[7] In amplification, of his witness statement, the 1st Defendant gave evidence which highlighted the nature of the contract the Claimant company had with the 2nd Defendant:

“Q. When you say this is a fixed contract with Stone Plus Limited, what does that mean?”

A. It means that the contract is fixed to a sum of money, in this case \$7,500,000

Q. Attached to the document signed by Mr. Wright and Mrs. Benjamin is a document called “Priced Bill of Quantities for Renovation Work”. The column marked ‘Rate’ has no information in it.

A. Yes

Q. Why is that?

A. Because in his contract, it is a fixed contract, it doesn’t carry rate. His job is to execute the scope of work that is in his contract.”

In cross-examination, he maintained this position:

“Q. Do you agree, that even without the Ministry approval, that Stone Plus Limited was still responsible to pay Mr. Wright for the additional work done?”

A. No, we have a fixed contract”

[8] In closing submissions, Counsel for the Claimant pointed to the fact that the 1st Defendant provided evidence that the contract with the Ministry was for a price of \$14,069,760. This the Defendant subcontracted to the Claimant for \$7,500,000. The 2nd Defendant therefore had a surplus of \$6,569,760. Counsel for the Claimant submitted that the price of the additional work amounted to \$2,181,000. The 2nd Defendant company therefore had ample money, left over within the original contract, to compensate the Claimant company. I did not find this to be a convincing argument. The principle of privity of contract prevents the Claimant

from claiming any benefits, which the 2nd Defendant may obtain, from its agreement with the Ministry of National Security. The Claimant company was contracted by the 2nd Defendant to do a job for a fixed price. Whether or not the Defendant company had more money in reserve is immaterial to that fact. Only a variation of the written contract could change the amount due.

[9] There is no evidence of an agreement, whether oral or writing, to vary the written agreement. Variation of a contract requires an agreement between the parties to the contract. In cross examination of the Claimant's witness the following exchange occurred:

"Q. This document that you have referred to, exhibit 2, this is prepared by you?"

A. Correct

Q. In an effort to cause a variation in the contract to give you more money?"

A. Disagree with the wording

Q. If accepted you would have gotten more than the 7.5 million?"

A. Yes

Q. Would be a variation in the contract?"

A. Yes

Q. Based on the documents it would be a variation in the Ministry contract?"

A. Can't speak to that

Q. Based on the document?"

A. Yes

Q. You sent document to Miss Benjamin?"

A. Yes

Q. You did not get approval for the variation?

A. The only response I got was an acknowledgment of the variation

Q. Acknowledgment of the receipt of the document?

A. Yes

.....

Q. Your contract was never varied in writing?

Judge: What about paragraph 15 of his witness statement?

Q. I suggest, as regard to paragraph 15 of your witness statement, the Bill of Quantity dated 16th April 2020 is the document at tab C of Exhibit 1(b), referred to in paragraph 15 of your statement

A. Yes I agree

Q. This Bill of Quantity for variation actually came in under budget by \$23.83

A. No, something is not correct

Q. The document you have is the one in paragraph 15, so I move on. You were copied on the email because you were the project manager for Stone Plus?

A. Yes

Q. At the same time you were the subcontractor

A. There is a bit of a conflict there

Q. You were copied as a project manager as you said in your witness statement at paragraph 15

A. Okay, yes

Q. And this was at the same time you were the subcontractor

A. Yes

Q. The contract you say was varied between yourself and Stone Plus, you have anything in writing to show that variation?

A. No, not in writing”

[10] The above evidence makes reference to the Bill of Quantity dated the 16th April 2020, exhibit 2. It was prepared by the 2nd Defendant and sent to the Ministry of National Security by the Claimant. The exchange provides no confirmation of an approval of the requested variation. It is imperative to underscore Dr. Wright’s dual role as, both the director of the Claimant company and, the project manager of the 2nd Defendant. As such, he possessed a unique insight into the contractual arrangements and obligations between the 2nd Defendant and the Ministry of National Security, and was privy to communications between them. The following exchange in examination in chief of the 1st Defendant is also relevant:

“Q. Were there any efforts had with the Ministry with a view to change the value of the contract? A. From Stone Plus?

Q. From Stone Plus

A. There was a time we tried based on information given to us by Mr. Wright to increase the value and the Ministry declined.

Q. Who led those discussions with the Ministry?

A. Dr. Sean Wright”

I accept this evidence.

[11] Dr. Wright therefore directed the Claimant company to proceed with the additional works without the requisite written authorization. Consequently, the Claimant company cannot be entitled to compensation for unauthorized works as they were undertaken without any approval from the Ministry. I find as a fact that the

Defendants never agreed orally or in writing to a variation in the price of the subcontract with the Claimant. They would only have done so if the Ministry agreed to vary their contract. This the Ministry clearly had not done.

[12] Counsel for the Claimant also made reference to the 1st Defendant's admission that there was additional work which increased the scope of the contract. He posited that just by that admission alone it would be difficult to say that this contract would continue to be a fixed price contract. However, Mr. Campbell's evidence was that what had been added versus what had been omitted from the contract ultimately resulted in a decrease in the value of the contract. I accept this evidence. The burden of proof is on the Claimant, and there is no evidence, sufficient to satisfy me on a balance of probabilities, that changes to the contract were such as to increase its value.

[13] The Claimant's attorney also relied upon the evidence of an expert, Mr. Dean Burrowes. That expert's report does not entirely support the Claimant's case. The following entries from the expert report, dated February 22, 2024, see exhibit 1B tab D, are noteworthy:

"10.2 Pricing of the Sub-contractor's works should be done using only the rates in the agreement between Stone Plus Limited and The College of Entrepreneurship and Innovation Limited and not from the Bill of Quantities forming part of the original Contract between Stone Plus Limited and The Ministry of National Security"

...

10.4 The College of Entrepreneurship can claim no standing except that of a domestic subcontractor i.e., an employee of Stone Plus Limited and can only demand to be paid for works executed under their agreement with Stone Plus Limited.

...

*10.6 My visit to the site after the lapse of two (2) years, may not allow for a fair and comprehensive identification of works executed, as some items would most likely be covered up and others may be altered by users of the building. **Having not visited the site, I cannot offer an opinion verifying any part of or all or the works having been completed.**" [emphasis added]*

[14] Even if the expert had found that the work done was valued more than the price agreed, this would not negate the fact that the contract had not been varied, the price of which was fixed at \$7,500,000. I observe also that there is no evidence of a contract with the 1st Defendant. In the result, on the evidence and, for the reasons stated above the Claimant cannot succeed.

**David Batts
Puisne Judge**