[2021] JMCC COMM 49

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2018CD000372

BETWEEN	**PHILLIP WALTERS (Trading as L.A.B. Asphalt Spraying)**	**CLAIMANT**
AND	**STONE PLUS LIMITED**	**1st DEFENDANT**
AND	**KAYON CLIFTON CAMPBELL**	**2ND DEFENDANT**
AND	**NOTFOYA THOMPSON**	**3RD DEFENDANT**

IN OPEN COURT

Mr. Curtis Daniel Cochrane for the Claimant

Mr. Shantez R. Stewart and Ms. Kenisha Davis instructed by Stewart Law Attorneys-at-Law for the Defendants

Heard: November 2 – 5 2020 and April 22, 2021

Contract Law– Breach of contract– Construction of Contract–Services provided under seven separate contracts–Parol evidence rule

PALMER HAMILTON, J

[1] The claimant initiated proceedings against the defendants by way of claim form seeking to recover the sum of $8,360,200.00 allegedly owed to him pursuant to a total of seven contracts between himself and the 1st defendant company. The claimant also claimed interest at a rate of 10% per annum from 15 November 2017 being the expected completion date on the 1st agreement until the date of judgment, costs and attorney's costs.

[2] The claimant particularized the sum claimed as follows:

Work Done	Amount Claimed
Labour cost to spray 6600 gallons of MC Oil @ $400.00 per gallon	$2,640,000.00
Labour cost to spray 9000 gallons of asphalt (tar) @ 400.00 per gallon	$3,600,000.00
Sum to obtain and spread of gravel	$180,000.00
Total credits obtained from Chin's Construction Limited	$3,600,200.00
Total	$10,020,200.00
Less the value of 3400 gallons of MC Oil in storage bought for the Defendants but not used on their behalf	$1,360,000.00
Less the sum paid to the claimant by the 2nd defendant for work done as per Agreement dated 6 April 2018	$300,000.00
Total	$8,360,200.00

BACKGROUND

[3] The facts as set out by counsel for the defendant are accepted, with slight modification, as accurately presenting the background giving rise to these proceedings. Those facts are as follows. The claimant is a business man who owns and operates L.A.B. Asphalt Spraying of 15 Berry Drive, Spanish Town in the parish of St Catherine. The 1st defendant is a company duly registered under the laws of Jamaica with its registered business address at 1 Verene Avenue Kingston 10 in the parish of St Andrew. The 2nd and 3rd defendants are directors of the 1st defendant company.

[4] In or about 2017, the 2nd defendant was contracted by the Government of Jamaica to execute the Cane Haul Roads Rehabilitation Project (the Project) between Long Pond in the parish of Trelawny and the Appleton factory in the parish of St. Elizabeth. The Project was forecasted to be done in two phases.

[5] In or about 2017 the 1st defendant through the 2nd defendant engaged the services of L.A.B. Asphalt Spraying as a sub-contractor for the Project. The services were to primarily spray MC Oil, tar and spread gravel on roads in Elderslie in the parish of St Elizabeth.

[6] The claimant and the 1st defendant entered into several contracts regarding the Project which were as follows:

a. Agreement dated 13 November 2017;

b. Agreement dated 21 November 2017;

c. Agreement dated 28 November 2017;

d. Agreement dated 1 December 2017;

e. Agreement dated 3 January 2018;

f. Agreement dated 26 February 2018; and

g. Agreement dated 6 April 2018.

[7] The claimant stated that the defendants breached these contracts based on the non-payment for the services he rendered pursuant to the contracts and subsequently initiated proceedings for recovery of these sums. The defendants filed a defence to the claim and averred that the balance owing to the claimant as agreed by the parties in writing is $320,000.00 and not any other sum being claimed by the claimant.

THE CLAIMANT'S CASE AND SUBMISSIONS

[8] The evidence on behalf of the claimant was marshalled through his own evidence, along with that of Ms. Donette Johnson and the expert witness Mr. Kelvin Kerr.

[9] The claimant in his witness statement indicated that he met the 2nd defendant in or around 2017 and in October of that same year, the 1st defendant contracted his services to spray MC Oil, tar and spread gravel on roads in Elderslie in the parish of St Elizabeth.

[10] It was averred by the claimant that the 2nd defendant and himself agreed that the 2nd defendant would be responsible for the money to buy the MC Oil and tar and that he would pay the claimant for his labour at $480.00 per gallon to spray the MC Oil and $470.00 per gallon to spay the tar. The claimant claimed that these costs were subsequently renegotiated twice at the request of the 2nd defendant and the final agreement was that the claimant was to be paid $400.00 per gallon to spray the MC Oil and $400.00 per gallon to spay the tar. Based on the agreement dated 13 November 2017, the expected completion date was scheduled for 15 November 2017.

[11] The claimant alleged that he received the sum of $1,000,000.00 from the 2nd defendant to purchase the 5000 gallons of MC Oil he sprayed. The cost of the purchase amounted to $2,000,000.00 but he received credit in the sum of $1,000,000.00 from Chin's Construction Limited. He further averred that

subsequent sums of $500,000.00, $500,000.00, $999,900.00 and $999,900.00 received from the 2nd defendant to purchase tar and MC Oil fell short but he got credit from Chin's Construction Limited. The total credit obtained from Chin's construction Limited is $3,600,200.00. He disclosed to the court that the only amount he received for his labour costs was $300,000.00.

[12] Under cross examination the claimant indicated that when he entered into the contract with the 1st defendant company, he was not able to read and understand what was on the documents but he could sign his name. He stated that he was told what to do and he just signed documents presented to him. As for the seven contracts in question he was just told to "sign here" and he complied.

[13] Turning now to the evidence of Ms. Donette Johnson was limited to her giving credit to the claimant on six purchases made by the claimant. She issued receipts to the claimant for the purchases which indicated the payments made and the amounts outstanding on the purchases. She prepared an invoice in relation to the outstanding sum of $3,600,200.00 for the credit obtained by the claimant. Under cross examination she was unable to say whether or not the materials in question were purchased to use in relation to the contracts between the claimant and the 1st defendant. Ms. Johnson also stated that she was unaware if the receipts in question were written on the dates inscribed on the receipts.

[14] The evidence of the expert witness Mr. Kelvin Kerr primarily highlighted discrepancies in the seven contracts between the parties. Mr. Kerr gave his qualifications as, inter alia, a chartered Quality Surveyor, a member of the Royal Institute of Chartered Surveyors and a fellow of the Jamaica Institute of Quantity Surveyors and a partner in the firm of Davidson and Hanna.

[15] During cross examination, Mr. Kerr disclosed that as a cost Consultant Quality Surveyor, he has the knowledge and expertise to determine what reasonable costs are as presented. Having been guided by the cost of $400.00 per gallon for the tar,

the figures stated was not a reasonable assessment of the work. He indicated that the agreements contained consistent errors in their preparation.

[16] Mr. Kerr disclosed to the court that it is obvious that the agreements were not only inadequate but erroneously prepared. They made no reference to the breakdown of the costs for material and labour and in all cases they did not reflect the actual value of the works intended to be carried out and therefore led to a huge dispute of ambiguity. Mr. Kerr further stated that based on the values stated erroneously, it is obvious that those values paid accordingly would never complete the scope of the work carried out by the claimant. The 1st defendant would be at a great advantage.

[17] The majority of his evidence under cross examination related to his opinion that tar cannot be sprayed without MC Oil and as such, the cost of the MC Oil and the labour have to be a part of the overall costs of that activity. His calculations surpassed the amount being claimed by the claimant and based on his calculations, the amount due to the claimant under the seven contracts is $38,681,000.00.

[18] The majority of the submissions on behalf of the claimant concerned counsel's analysis of the evidence. In relation to the law, learned counsel submitted that there is ample authority for the use of a "collateral" contract to avoid the dilemma of "term" or "representation". Where parties enter into a written contract after one party has made oral assurances there are at least three possibilities:

1. The contract is contained wholly in the written document;

2. The contract is partly written and partly oral;

3. There are two contracts there being an oral collateral contract as well as the written contract.

[19] The case of **City and Westminster Properties (1943) Ltd v Mudd** [1958] 2 All ER 733 cited in support of this principle. Learned counsel indicated that in the first

case, it is possible that the assurances will give rise to liability under the law relating to misrepresentation, where they amount to a statement of fact. In many cases the second and third alternatives seem to appear to be treated as interchangeable. It was further submitted that where there are two contracts, it is possible to argue that the rights under the written contracts have been transferred and that those under the oral contract have not.

[20] In concluding his submissions, counsel stated that it is unusual for literate parties entering a written agreement to have one party read the agreement to the other. The court is asked to find that there was an oral contract between the claimant and the defendants and that this contract amounts to a collateral contract to the written contracts or, that there was a single contract, partly written and partly oral.

THE DEFENDANT'S CASE AND SUBMISSIONS

[21] The 2nd defendant was the only witness on the case for the defendants. In his witness statements the 2nd defendant outlined that in or about November 2017 several sub-contractors were invited to submit a quotation to supply and spray tar in relation to the Project. L.A.B. Asphalt submitted a quotation and was awarded the contract to carry out works in relation to the Project because he submitted the lowest quote.

[22] He disclosed that on behalf of the 1st defendant, he entered into seven agreements with the claimant between November 2017 and April 2018. These agreements refer to the supply and delivery of MC Oil in some instances and tar in others. All these agreements were signed by the claimant on his own free will and Ms. Shameka Benjamin also signed these agreements on behalf of the 1st defendant company. She was instructed to read the contents of the agreements to the claimant on each occasion and at no time when the contracts were being read to him did he dispute the contents of the agreement. He averred that the claimant accepted payment and carried out the terms of the agreements. The 2nd defendant proffered that at all material times, every written contract clearly stated the terms

and the scope of the work, that being, to supply material and to perform the labour by spraying.

[23] The 2nd defendant maintains that the claimant is only entitled to the sum of $320,000.00 as dictated in agreement dated 6 April 2018. He denied being aware of any agreement or credit arrangement between Chin's Construction Ltd and the claimant.

[24] Learned counsel for the defendants submitted that the court should construe the contract in its natural and ordinary meaning as the terms are clear and unambiguous. As such the 2nd defendant should be called upon to pay what he has accepted is due and has been willing to pay since. The cases of **Chartbrook Ltd v Perimmmon Homes Ltd** [2009] UKL 38 and **Wood v Capita Insurances Services Ltd** [2017] UKSC 24 were cited in support of this contention. Counsel further submitted that while commercial common sense is imperative in the interpretation of contracts, the starting point is the natural meaning of the language used in the contract and that commercial common sense cannot be relied on to undervalue the importance of the language of the term of the contract to be construed. The cases of **Arnold v Britton** [2015] UKSC 36 and **NHS Commissioning Board v Silvovsky & Anor** [2017] EWCA Civ 1389 were used to bolster this submission.

[25] Counsel indicated that the claimant did not indicate in his pleadings that he was illiterate and cannot now seek to rely on avoiding the contract based on inability to read at the time of signing. In essence he submitted that the plea of non est factum is not available to the claimant.

ISSUES

[26] The main issue that has to be resolved in this case can be stated as follows: is there evidence, including the possibility of parol evidence to find that the oral

discussions formed a collateral contract to the written agreements. The answer to this question will determine whether the claimant is entitled to the orders sought.

[27] I thank Counsel for their submissions and the supporting authorities which provided great assistance to the Court. I do not believe it necessary to address all the submissions and authorities throughout my judgment but will refer to them to the extent that they affect my findings.

LAW AND ANALYSIS

[28] Having considered the submissions of both sides, I undertook a review of the relevant law. The Honourable Mrs. Justice Wolfe-Recce in the case of **Barrington Scott Clarke v Kimesha Amelia Debbie-Ann Notice** [2021] JMSC Civ. 12 at paragraph 16 stated:

> *"There is a rebuttable presumption that where a contract has been reduced to writing, the Court ought not to look to parol evidence to qualify, add to, alter or contradict the terms of the agreement unless it can be shown that the written agreement does not form the entire contract. This principle is known in law as the parol evidence rule and was explained in the Halsbury Laws of England 5th Edition Volume 22 para 21 as follows:*
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> > *"Where the intention of the parties has in fact been reduced to writing, under the so-called 'parol evidence rule' it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show that an intention, or to contradict, vary or add to the terms of the document, including implied terms. This rule is not confined to oral (parol) evidence, but also excludes earlier extrinsic written matter, such as earlier drafts, preliminary agreements and prior correspondence"*

[29] I found guidance in the statements made at paragraph 20 by the Honourable Ms. Justice Simmons in the case of **Communtel Broadband Limited and Starcom Cablevision Limited v Alfred McKay** [2012] JMSC Civil 10. Simmons J stated as follows:

> *"With respect to whether evidence may be adduced pertaining to the discussions between parties prior to the conclusion of a written agreement, the general rule is that extrinsic evidence may not be given to contradict or vary its effect.* ***Such evidence may only be used to show that the written agreement did not represent the whole bargain and may be admitted to show that the written agreement does not correspond with the prior oral agreement between the parties.*** *This was confirmed by Lawrence J in Jacobs v. Batavia and General Plantations Trust [1924] 1 Ch 287 at 295. The learned Judge said: "…parol*

evidence will not be admitted to prove that some particular term, which had been verbally agreed upon, had been omitted (by design or otherwise) from a written instrument constituting a valid and operative contract between the parties". This rule shows that the court is concerned with the manifested intention of the parties as evidenced by their written agreement. There are however exceptions to this rule and such evidence may be admitted in the following circumstances: -

i. To show whether there is a valid contract;

ii. To show the true nature of the contract. However the written agreement will not be rectified to correspond with an oral one if that would amount to a variation of the former;

iii. To show that the contract is invalid due to duress, fraud, mistake, illegality or misrepresentation." [my emphasis]

[30] At paragraphs 62 to 64 in the case of **Joshua Jaddoo v Sugar Industry Authority** [2021] JMCA Civ 9 the Honourable Mrs Justice of Appeal McDonald-Bishop posited the following: -

"The parol evidence rule, taken in its purest form, is that once the parties have reduced to writing the contract that they intend to contain the final and complete statement of their agreement, then evidence to contradict, vary, add to or subtract from its terms, or the terms in which they have deliberately agreed to record any part of their contract, is not admissible. The purpose behind the rule is that the parties went to the trouble to put their agreement in a single written contract and so evidence of past agreements or terms that are not in the written contract should not be considered in interpreting it. There are, however, several recognised exceptions to this rule.

As the learned authors of Chitty on Contracts, twenty-sixth edition, volume 1 at paragraph 847, explained:

> *"... [T]he parol evidence rule is and has long been subject to a number of exceptions. In particular, since the nineteenth century, the courts have been prepared to admit extrinsic evidence of terms additional to those contained in the written document if it is shown that the document was not intended to express the entire agreement between the parties. So, for example, if the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement... **It cannot therefore be asserted that, in modern times, the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference in the document. 'The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties'**." (Emphasis added)*

The learned author further noted at paragraph 848:

> *"It follows that the scope of the parol evidence rule is much narrower than at first sight appears. It has no application until it is first determined that*

> *the terms of the parties' agreement are wholly contained in the written document. The rule 'only applies where the parties to an agreement reduce it to writing, and agree or intend that the writing shall be their agreement'. Whether the parties did so agree or intend is a matter to be decided by the court upon consideration of all the evidence relevant to this issue. It is therefore always open to a party to adduce extrinsic evidence to prove that the document is not a complete record of the contract."*

[31] From the above-mentioned authorities, I garner that the parol evidence rule may only avail the claimant if he is able to show that the seven written contracts did not represent the whole bargain between himself and the 2nd defendant and that they did not correspond with the oral agreements that they had. In determining whether there was in fact any conversation where promises were made by the 2nd defendant to buy the MC Oil and tar, all the circumstances of the case must be looked at, as well as all the evidence presented before the court. It is a matter of credibility whether such conversations did in fact occur between the claimant and the 2nd defendant, especially in the light of the 2nd defendant's denial that these conversations took place. I had the opportunity of hearing viva voce evidence from the claimant, the witnesses called on his behalf and from the 2nd defendant and I assessed their demeanour.

[32] At first instance and in keeping with the law on written contracts, it would appear rational to hold that the claimant should be held bound by the contracts in the light of his signature and the absence of a formal plea of non est factum on his part. However, upon deeper analysis of the totality of the evidence, his signing of the contract, without more, cannot properly be held to be the end of the matter as the circumstances surrounding the execution of the contracts are of significant relevance. This is especially against the background of the evidence that the written contracts that were signed were to have had retrospective effect, following a course of dealings between the parties, which included the claimant having commenced work before there was any written contract in place.

[33] I have to take into consideration the fact that the contract was prepared and presented to the claimant for his signature in the circumstances that he explained. Pertaining to the evidence as to those circumstances, I reject the evidence of the

2nd defendant that he was unaware that the claimant could not read and I accept the claimant as a reliable witness of truth in this regard. The evidence of the 2nd defendant that the claimant had a friend guide him in the signing of the contract was not put to the claimant in cross examination and the claimant did not have an opportunity to refute or confirm this aspect. I reject that aspect of the 2nd defendant's evidence as well. I have had regard to the demeanour of the claimant. He was not able to neither give intelligent thought to certain questions asked of him in cross examination nor appreciate certain words used by counsel. In my view, respectfully, he was not capable of constructing the contents of the contract without assistance. Even if I were to accept that the contents of the contract were read over to the claimant, the terms of the contract are so vague that the claimant would not have been put on notice that the sums stated therein would not represent the value for the scope of work carried out by him.

[34] In my judgment, there is no contest that the written contracts were unilaterally prepared by the defendant company and then presented to the claimant for signing. The evidence from the claimant has established that the agreements did not contain what both parties had conclusively discussed, intended and finally agreed upon to be included in it. The fact that there were several errors and inconsistencies contained in the contracts presented to the claimant for his signature indicates that they were not perfect.

[35] The claimant's conduct and discussions with the 2nd defendant, at the time of and shortly following the execution of the contracts do give rise to the reasonable conclusion that the contracts that were signed were not intended by the parties to represent a final agreement. The contracts were very vague and apart from those dated 26 February 2018 and 6 April 2018 they did not reflect the actual value of the works intended to be carried out by the claimant. I find that that those values paid according to the contracts do not adequately reflect the scope of the work carried out by the claimant but instead they were in fact given to the claimant for the purchase of the MC Oil and tar. This would reasonably explain the claimant's conduct of purchasing the MC Oil and tar on credit at the hardware. I find that this

was done in furtherance of the promises and assurances made by the 2nd defendant. A contrary analysis would result in the defendants obtaining an unfair advantage under the contract resulting in an unjust enrichment.

[36] On the totality of the evidence, it cannot be said then that the parties have gone through the trouble of negotiating and then reducing their final agreed terms, containing what they both intended in the written contracts presented. In my view, it would not be fair, in all the circumstances, to use the fact that the claimant eventually treated the final contracts as being applicable to his engagement to deprive him of the benefit of having the sums due and owing to him being paid by the defendants. Therefore, the parol evidence rule would avail the claimant in the circumstances.

[37] I found the claimant to be credible in his account to the court and his evidence reliable. I accept his evidence over that of the 2nd defendant. I believe he spoke the truth about these conversations he had with the 2nd defendant in relation to the 2nd defendant's promise to buy MC Oil and tar. The 2nd defendant, on the other hand, was not forthright and at various intervals, could not recall important and basic details of the contract.

[38] As a result of the forgoing analysis, I find that the claimant is entitled to the orders sought. However, as it relates to the award of interest, I find the admonitions given by the Honourable Mr. Justice Lennox Campbell (as he then was) in the case of **Casilda Silvest and Leon Whitfield Samuels v Rupert Ellis and Devon Thomas** [2015] JMSC Civ 63 instructive. Campbell J at paragraphs 18 to 20 said:

> *"The court has a discretionary power to award interest. Several cases, highlight that coupled with the discretionary nature of awarding interest, a successful party is not entitled to an award of interest as of right, but such an award will be dependent on the circumstances of the particular case…*
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> *The aim of awarding interest is not to punish the Defendants. Forbes J, in the case of **Tate & Lyle Food & Distribution Ltd v Greater London Council & Anor** [1981] 3 All E.R. 716 at page 722, is apposite. He said:*
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> > *"… I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his*

> *money. I think the principle now recognized is that it is all part of the attempt to achieve restitutio in integrum. One looks, therefore, not at the profit which the defendant wrongly made out of the money he withheld (this would indeed involve a scrutiny of the defendant's financial position) but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow the money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates.* ***The correct thing to do is to take the rate at which the plaintiffs in general could borrow money." [Emphasis added].***
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> *The applicable rate may be determined by adducing oral or documentary evidence. The rate so determined would naturally contemplate the vagaries of the money market, as it applies to the plaintiffs generally. In British Caribbean Insurance Company Limited v Delbert Perrier, at page 354, Carey J.A, laid down the following important guidelines. He said:*
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> > *"this leads me to venture the rate which a judge should award in what may be described as commercial cases. It seems to me [to be] clear that the rate awarded must be a realistic rate if the award is to serve its purpose. The judge, in my view, should be provided with evidence to enable him to make that realistic award. In the case just cited, evidence was in fact led by the plaintiff, but I can see no objection to documentary material being properly placed before the judge. Statistics produced by reputable agencies could be referred to the judges to enable him to ascertain and assess an appropriate rate."*

[39] I have not been provided with evidence which would assist me in making a realistic award and I find that the circumstances of the case did not present any novel factor that would warrant the court awarding above the standard commercial rate. The court in exercising its discretion, grants an award of interest in the sum of 6% per annum.

ORDERS

1. Judgment for the claimant in the sum of $8,360,200.00 with interest at a rate of 6% per annum from 15 November 2017 to 22 April 2021.

2. Costs to the claimant to be taxed if not agreed.