THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 01032-2015

BETWEEN

JANIEL AND ASSOCIATES LIMITED

Claimant

AND

ASHANA CIVIL MECHANICAL CONTRACTORS LIMITED

Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Garvin Ferrette for the Claimant

Mr John Heath and Ms Niala Narine for the Defendant

Date: 26 April 2018

JUDGMENT

1. This claim concerns a sub-contract between the claimant and defendant. The defendant had a contract with the Education Facilities Company Limited (EFCL) to construct the Monkey Town Government Primary School. The work was divided into blocks of work. The total contract cost was over $30 million. The defendant in turn sub-contracted certain works to the claimant. This was under an agreement dated 11 April 2011.

2. The agreement was to be until 30 June 2017. On 27 June 2017, with the sub-contracted work incomplete, the defendant terminated the contract with the claimant. The claimant sued for damages for breach of contract in the sum of $320,567.51 and special damages in the sum of $22,340.00.00. The claimant amended its statement of case claiming for $23,340.00 being the balance to be paid for materials, namely steel, and the sum of $98,431.52 for works done on Blocks A and C for which they were not paid. The claimant also claimed damages for breach of contract and loss of profit.

3. The defendant admitted the debt of $22,340.00 being due to the claimant, but denies the sum of $98,431.52 is owing.

4. It was somewhat odd that the claimant in its written submissions claimed the original sum of $320,567.51 as being payable. This was not consistent with its amended statement of case and demonstrated some confusion about the nature of its claim. They were entitled to advance the amended case they pleaded which is what the defendant was required to defend. By amending their pleading, they abandoned any claim to the $320,567.51 which they originally claimed.

5. In essence, the claimant says that they could not complete the work because they were often short on materials to be provided by the defendant. The defendant in turn says the claimant was not doing the work to a satisfactory level; there were delays by the claimant; and the claimant did not have sufficient workers on site. Accordingly, three days before the end of the contract, realising that it was impossible that the claimant could complete the work, the contract was terminated. The defendant's contract with EFCL was also terminated. They were paid just under $5 million for work they did and they lost big on the project.

6. There were two witnesses for the claimant and one for the defendant. The defendant had a counterclaim, but this was withdrawn at the trial with no order as to costs.

7. The onus was on a claimant to prove its case. This is a claim of breach of contract. The contract and the terms of it have to be proved; the breach must be shown; there must be no legal justification for the breach; the claimant must prove its losses.

8. Essentially the claimant has said it sent in an invoice for the sum claimed and the defendant did not pay it. However, the need for the payment is disputed. Thus the onus was on the claimant to prove that it had done the required work on blocks B and C as alleged and that either the agreed price for the work or the value of the work was in fact $98,431.52.

9. The claimant said there was a Payment Application showing this sum being due. However, the defendant points out that there is nothing on the document tendered into evidence which verifies this payment as being approved or acknowledged as due by the defendant. A look at the document confirms the defendant's position.

10. The claimant says the defendant's site engineer, Jayvee Dignos, pre-approved and signed off the works done by the claimant. However, the claimant produced no document which confirms this. In cross-examination, the claimant's witness, Mr Jayvee Alexander, accepted that the sum claimed was not pre-approved for payment.

11. The defendant's case was also that the process for payment was first the submission of a valuation by the claimant to the defendant; then an Interim Payment Certificate (IPC) would be prepared by Mr Dignos, which would be signed off by one of three of its managers. The IPC would then be submitted to the claimant. Based on this, an invoice would be prepared and submitted to the defendant for payment. The claimant referred to a Payment Application for the sum of $98,431.52. However, this document has no signature of any of the defendant's employees. How it came into existence is not explained and the defendant says it is not an authentic document. I found I could place no reliance on it.

12. There were some documents which were submitted which helps in identifying whether the defendant's contention that workers, to be provided by the claimant, were not available on the site. The time sheets submitted by the defendant show that at times the number of workers who ought to have been on site was not up to the numbers contemplated. At times there were 3 or even fewer workers. The claimant's explanation was that there was no work to do. However, we have no written documentation that any complaint was made about this. On the other hand, the defendant's witness says there were not enough workers. However, we also have no evidence in writing of any complaints which were made.

13. The claimant's witnesses also said there were variations. However, the contract itself specified that the agreement was the entire agreement. There was no document which supported this suggestion of variations. In the face of the written agreement, I am unable to accept the claimant's contention that there was a variation which impacted on the time that it was taking to do the works leading to the incomplete state of the contract as of 27 June 2011. The claimants also use this variation to suggest that further payments are due. However, they did not prove the variations.

14. The several gaps in the evidence on both sides made the task of fact finding a very difficult proposition as to who ultimately was responsible for the delays and non-performance of the contract. There were delays on the whole project which led to the defendant being terminated. This tended to suggest that the claimant's witnesses were correct when they said the materials on site were inadequate and that there was insufficient work to do. The claimant's witnesses were the ones on the ground as compared to Mr Whiteman who visited occasionally. They are therefore in a better position to indicate what was happening at the site.

15. That being said, it is also clear than 3 days before the contract between the parties was due to expire, the contract could not be completed. The contract would have ended incomplete. Neither side can be wholly to blame. There was fault on both sides. From the evidence I concluded that both sides did not hold up to their side of the bargain. The claimant did not have adequate workers on site at times and the defendant, at times, appeared not to be providing the means to advance the work on site.

16. It is, however, the claimant who has proceeded with this claim. It is therefore the claimant's duty to prove breach by the defendant sufficient to excuse their non-performance of their side of the bargain and its entitlement to payment or loss. There were some inconsistencies in the evidence presented by the claimant's witnesses and it has been demonstrated that the claimant did not have sufficient workers on site. The claimant had a responsibility to have their workers on site sufficient to do the work they were contracted to do. Had this been the case, the claimant could then make a case that they were ready and able to perform the contract but that it was the defendant who were not holding to its side of the bargain.

17. On the issue of damages, there was no previous fixed contract price. In any event, by its amended claim, the claimant did not claim for that. I have indicated the claimant either had to show what work was done or that they were entitled to some specific payment as claimed pursuant to some clause in the contract. There was nothing put forward in the claimant's case so that the amount of work done could be determined. The claimant could show also a debt owed by proving an acknowledgement of the debt for the sum claimed. This acknowledgement, the witnesses have not shown. There is a huge evidential gap between the pleaded case and the evidence of the claimant's witnesses.

18. The evidence of Mr Whiteman was that a valuation was prepared dated 16 June 2011 which showed 14% of the work had been completed to date valued just over $52,000.00 (para 18 of his witness statement). There is no comparative valuation by the claimant of the work which was done by the claimant.

19. The result of this is that even if it could be proved that the defendant breached the contract, there is still no evidence from which the court could value the work done by the claimant to award damages. What seems more likely, however, is that neither the claimant nor the defendant appeared to be in a position to complete their respective contracts. In effect the contract between the parties collapsed due to non-performance or inadequate performance. This was all the more reason for some quantification of the work done by the claimant.

20. I note that emails did pass between officials of the claimant and the defendant in the weeks after the contract ended. There was a demand for payment by the claimant and the defendant replied stating it would pay when it was able to. However, these emails did not set out specific figures by either side. Thus this also could not fix what was due for the work done.

21. There is, however, an acceptance by the claimant, through its witness, Mr Alexander, in cross examination, that the claimant had paid $60,000.00 and another sum of $16,400.00. This latter sum, according to the claimant, was for work done before the contract in question.

22. What the claimant has failed to prove is, how did this further sum of $98,431.51 arise. The defendant has admitted it owes $22,340.00 for materials. That is the only aspect of the claim for which the claimant is entitled to judgment. There is accordingly judgment for the claimant for the sum of $22,340.00. Interest will run on this sum at 3% per annum from 30 June 2011 to the date of judgment. The claimant is to pay prescribed costs based on the judgment figure and interest calculated to the date of judgment. Out of this sum for prescribed costs, the sum of $1,500.00 is to be deducted for the costs of the day on 1 June 2017 occasioned by the need to adjourn the trial for the non-attendance of the claimant's attorney. There is a stay of execution of 28 days.

Ronnie Boodoosingh

Judge