

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV2006-02313

BETWEEN

D. C. DEVELOPERS LIMITED

Claimant

AND

MANAGEMENT AND CONSTRUCTION CONSULTANTS LIMITED

Defendant

Before The Honourable Mr. Justice des Vignes

Appearances:

Mr. Ravindra Nanga instructed by Mrs. Lydia Mendonça for the Claimant

Mr. Colvin Blaize instructed by Mrs. Melina Blaize for Defendant

JUDGMENT

1. I have decided to award judgment for the Claimant against the Defendant for the sum of \$1,162,006.20 together with interest thereon from the 7th August, 2006 to the date of judgment at the rate of 6% per annum. My reasons for coming to this conclusion are set out hereunder.
2. By the terms of the agreement made between the Claimant and the Defendant dated 16th October, 2002, the Defendant guaranteed that the Project “shall be completed within the total cost given in the Cost Plan as may be adjusted, amended or extended in accordance with the provisions of the agreement.

3. The Defendant assumed direct responsibility for the execution of the works on the Project by Works Contractors and was obliged, inter alia, to:
 - (i) **Ensure that all items of work to be carried out by the Works Contractors are carried out in accordance with their respective obligations....**
 - (ii) **Provide continual supervision of the Project and perform and provide everything necessary for the organisation and management of the Project.....**
 - (iii) **Ensuring that the Project shall be completed within the total cost given in the Cost Plan and within the Construction Period as may be adjusted, amended or extended in accordance with the provisions of the Agreement.....**
 - (iv) **Ensuring that the Works Contractors comply with all their respective duties and obligations, statutory or otherwise.... and the Construction Manager shall be deemed to be in possession of the Site and shall be declared to be in control of the building operations thereon.**
4. Further, by clause 9 of the Agreement, the Defendant guaranteed the due performance and observance by the Works Contractors of all the terms and conditions of their respective Works Contract and agreed to be responsible for their failure to fulfil contractual responsibilities to the Claimant. Also, in the event of any breach of or non-compliance with a Works Contract by a Works Contractor, the Defendant was obliged to discharge and pay to the Claimant any damages sustained by the Claimant.
5. For the performance of the services described in the First Schedule, the Defendant was entitled to be paid a fee of \$4,671,263.00 (Second Schedule, Third Part) based on a Cost Plan of \$32,567.885.23.
6. Based on the evidence of the Claimant's Architect, Mr. Mc Lean as well as the evidence of the Claimant's Executive Director, Mr. Kamaluddin Mohammed, I accept that the total cost of the Project was increased above the Cost Plan. I also accept that in February 2004 Mr. Mc Lean issued a Final Certificate which, inter alia, set out the Contract Sum as \$36,552,421.05.

7. This Final Certificate was issued pursuant to Clause 5.5 and 5.6 of the Agreement and set out a Fee of \$4,999,783.16, being the sum of the amounts already stated as due in interim certificate. From this amount, there was deducted the amount of \$1,490,597.25, which was the difference between the sum of the amounts due and payable to the Works Contractors under the Works Contracts (\$33,043,164.25) and the Total Cost set out in the Revised Cost Plan (\$31,552,637.00). Mr. Mc Lean certified, therefore, that the balance due to the Claimant from the Defendant was \$1,490,527.25.
8. I do not accept the submission of Counsel for the Claimant that once Mr. Mc Lean has issued his final certificate, the amount stated thereon should be accepted by the Court without any further enquiry.
9. At the same time, however, I do not accept the submission of Counsel for the Defendant that this Final Certificate is invalid and therefore unenforceable. Under the terms of the Agreement, it was clearly agreed between the parties that the Architect was responsible for the issue of interim certificates stating the amount due to the Defendant on a monthly basis based on interim valuations made by the Claimant's Quantity Surveyor, wherever the Architect considered them necessary. The Agreement provided a formula for calculating the amount to be stated on the interim certificates and the Architect was also responsible for the issue of a Certificate of Practical completion, a Certificate of completion of Making Good Defects as well as a Final Certificate. In the discharge of these responsibilities, the Agreement did not specify that it was necessary for the Architect to consult with the Defendant and/or get its approval of the figures stated therein. In my opinion, therefore, the Architect was acting within the scope of his authority to issue the Final Certificate when he did, based on his own assessment of the information at his disposal and there was no requirement that the Defendant's prior knowledge, involvement or approval was required.
10. With respect to the amounts stated in the Final Certificate, I am of the view that I am entitled to examine those figures carefully in the light of the other evidence before me for the reason that Mr. Mc Lean only sets out therein the amount due to the Defendant according to the Interim Certificates and does not certify that this amount was in fact paid by the Claimant to the Defendant.
11. In those circumstances, I have to look elsewhere for the evidence of the amount actually paid to the Defendant.

12. According to Mr. Mohammed in his witness statement, at paragraph 12, the Defendant was paid the sum of \$4,999,783.16 under the interim certificates. However, under cross-examination, Mr. Mohammed resiled from this position and stated that he only paid to the Defendant the amount stated in the Agreement and no more. That would mean that the amount paid to the Defendant was \$4,671,263.00, a difference of \$328,520.00.
13. Mr. Langton, on the other hand, stated at paragraph 12 of his witness statement that the Claimant only paid the Defendant the sum of \$4,378,012.00. Under cross-examination, however, he was confronted with the contradiction between the amount claimed in the Amended Defence and Counterclaim (\$1,223,581.00) and the amount stated in his witness statement (\$621,771.16) and could not provide any explanation for the figure stated in the Counterclaim. Further, he produced no evidence, such as cheques or interim certificates, to support his statement that the Defendant was only paid the amount of \$4,378,012.00 and was still owed \$621,771.16.
14. I also considered the Financial Statement signed by the Claimant and the Defendant in August 2004. In that Statement, reference is made under the heading "Variations" at 4.07, to "Increase in management fees----\$328,520.00". This confirms in my mind that as at August 2004, the Claimant had only paid the Defendant the original fee of \$4,671,263.00, leaving a balance due of \$328,520.00. Further, I am also satisfied that this amount was not paid by the Claimant to the Defendant at any time since the date of execution of the Financial Statement and that the Defendant is entitled to payment of that amount.
15. However, based on the said Financial Statement, I am also not satisfied that the Defendant has established that it is owed \$621,771.16 by the Claimant. This statement refers only to the increase in management fees of \$328,520.00 as a consequence of the increase in the contract sum and no mention is made therein of any other outstanding amount due from the Claimant to the Defendant.
16. Therefore, using the Contract Sum as certified by the Architect (and as substantially confirmed by the parties in the later Financial Statement), it is clear from the terms of the Agreement that this figure includes the amount due to the Defendant pursuant to interim certificates issued by the Architect. Based on Mr. Mohammed's evidence, which I accept, that the Claimant only paid the Defendant the amount due under the contract, that is \$4,671,263.00, this would mean that the total cost of the Project would be \$33,043,164.25 (the Amount paid to Works Contractors) + \$4,671,263.00 (Amount paid to the Defendant) = \$37,714,427.25.

17. When I take into account that Mr. Mc Lean's Final Certificate certifies that the Contract Sum is \$36,552,421.05 (as confirmed by the Financial Statement signed by both parties in August 2004), it would mean that the cost of the Project exceeded the Contract Sum. The amount of that excess would be $\$37,714,427.25 - \$36,552,421.05 = \$1,162,006.20$, which is \$328,520 less than the amount of \$1,490,526.20 stated in the Final Certificate.
18. The Defendant has argued that the Claimant is not entitled to succeed because the Claimant failed to adduce evidence of any amendment to the cost plan prior to the issue of the Final Certificate by the Architect. Further, the Defendant argued that the Works Contractors bypassed the Defendant by sending their requisitions directly to the Claimant who then paid the Contractors directly, without the advice and/or recommendations of the Defendant. I reject both these arguments as being without merit.
19. Under the terms of the Agreement, the Defendant was responsible for the overall supervision of and performance of the Works Contractors. The fee payable to the Defendant was precisely for performing the services set out in the First Schedule and the general obligations set out in Clause 2 of the Agreement. In my opinion, therefore, apart from the fact that these issues were not raised on the pleadings, it does not lie in the mouth of the Defendant to contend that it could not be held liable under its guarantee because it was not aware of the amendments to the scope of works. It was the duty of the Defendant to *provide continual supervision of the Project and perform and provide everything necessary for the organisation and management of the Project including ... the execution and completion of the Project by the Works Contractor...* and to ensure that the Works Contracts were performed in accordance with the designs and in compliance with the terms of the contract. When I look carefully at the evidence of Mr. Langton, he did not state that he was not aware of alterations to the original scope of works but only that *"in/or around the early part of the year 2003, the Works Contractors bypassed the Defendant Company and began to send their requisitions to the Claimant who then started paying the Works Contractors directly, without seeking the advice and/or recommendations of the Defendant Company."* Since it fell within the scope of the Defendant's responsibilities to ensure that the Works Contractors performed their obligations under their contracts, I am of the view that the Defendant cannot rely on its own default in monitoring the performance of the Works Contractors to avoid the consequence of being held liable for the cost overrun. It is significant that the Defendant has not produced any correspondence to the Claimant complaining about this breach of contractual

procedure and what I am left with are the bald assertions of Mr. Langton that the Defendant should be entitled to rely on this breach of procedure to avoid liability under its guarantee.

20. Further, the Financial Statement signed by both parties in August 2004 expressly took into account variations in the contract, such as omissions and additions, with a net value of \$3,984,536.04. This figure included a figure of \$328,520.00 for an increase in management fees. To my mind, the Defendant cannot approbate and reprobate at the same time. It cannot maintain a claim for the payment of the increased management fees, which have been calculated on the value of the variations and at the same time, seek to avoid liability for the cost overruns on the basis that the Works Contractors were being paid directly by the Claimant. By its signature on the Financial Statement, the Defendant effectively waived any possible objection it might have had with regard to any breach of procedure by the Works Contractors.
21. In the circumstances, I am prepared to find that the Defendant is liable to the Claimant for the amount of \$1,162,006.20 pursuant to the terms of the guarantees given in the Agreement and that the Defendant has failed to prove its Counterclaim.
22. I would grant judgment for the Claimant against the Defendant for \$1,162,006.20 and dismiss the Defendant's counterclaim.
23. With respect to the issue of interest, the evidence is that although the Final Certificate is dated 15th February, 2004, the Defendant was not notified of the contents of same at that time. At paragraph 6 of the Statement of Case, the Claimant alleged that the Final Certificate was delivered to the Defendant on the 9th February, 2006. However, neither Mr. Mc Lean nor Mr. Mohammed gave evidence to support this allegation or of any other date when the final certificate was delivered to the Defendant. In his witness statement, Mr. Langton stated that he became aware of the said certificate in or about January 2005.
24. In all the circumstances, in the exercise of my discretion to award interest on the amount due and owing by the Defendant to the Claimant, I do not consider that it would be fair and just to order the Defendant to pay interest from the date of the Final Certificate or January 2005 or even February 2005. I am of the opinion that an appropriate date from which interest should be computed is the date of the commencement of this action, namely 7th August, 2006. Accordingly, I will award the Claimant interest on the sum of \$1,162,006.19 from the 7th August, 2006.

25. With respect to the rate of interest to be applied up to the date of judgment, the Agreement did not contain any express provision for the payment of interest. Therefore, it is a matter for the exercise of my discretion. Since no evidence was led by the Claimant as to applicable bank rates of interest, I am not minded to award interest at the rate of 12% per annum as claimed by the Claimant. I consider that a fair rate of interest is 6% per annum and will award interest at that rate from the 7th August, 2006 to the date of judgment.
26. I will also order the Defendant to pay to the Claimant prescribed costs of the Claim and the Counterclaim, to be assessed in accordance with Rule 67.5 of the Civil Proceedings Rules, assessed in the sum of \$190,000.00. Stay of execution for 42 days.

Dated this 12th day of January, 2012

**André des Vignes
Judge**