REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2012-03331

BETWEEN

BREEZE MAINTENANCE SERVICES LIMITED

Claimant

AND

PHOENIX CONSTRUCTION & SUPPLIES LIMITED

Defendant

Before the Honourable Mr. Justice Robin N. Mohammed

Appearances:

Mr Kenneth Thompson for the Claimant

Mr Nigel Floyd for the Defendant

JUDGMENT

I. Background

[1] The circumstances of this case are an unfortunate yet common occurrence before the Courts, where parties proceed to conduct business with each other in a very informal manner. The issues of dispute arise out of an agreement made pursuant to various oral

discussions that were neither documented nor finalized. As a result, the outcome of this case rests largely on issues of weight and credibility rather than concrete proof.

[2] The undisputed facts are that the parties entered into an oral agreement on the 16th April, 2008 (the "Agreement") through Mr. Rory Orr on behalf of the Claimant and Mr. Lloyd Williams and Mrs. Norva Williams as directors of the Defendant. Pursuant to the Agreement, the Claimant provided a backhoe with registration number TCH 4203 to the Defendant. The precise terms of this Agreement are in dispute. However, it was clear that some form of consideration would be provided to the Claimant while the backhoe remained in the possession of the Defendant.

The backhoe was initially used by the Defendant to execute a project in Freeport for nine days between the 21st April and the 22nd May, 2008. During this period, the Claimant provided an operator for the backhoe by the name of Andre Farmer. The Defendant through its directors, however, expressed its dissatisfaction with Mr. Farmer's performance, which resulted in a variation of the Agreement to allow the Defendant to employ its own operator. Shortly after completion of the works in Freeport, on the 26th May, 2008, the Claimant delivered the backhoe to the Defendant for its own use under the Agreement. It was not until sometime in April, 2013 that the Defendant returned the backhoe to the Claimant.

Having received no consideration for nearly 5 years of use, the Claimant, on the 14th August, 2012, filed a claim against the Defendant for unpaid sums in the amount of $1,581,029.60. This figure was increased to $1,827,429.60 as at April, 2013.

[3] The Claimant's case is that the parties agreed to a daily rate of $1,400.00 for use of the backhoe, payment of which was to occur every 4 months from the 21st April, 2008, when the Agreement commenced. This daily rate was varied to $1,300.00 after the Defendant expressed its disappointment with Mr. Farmer's performance and agreed to employ its own operator. The backhoe was to be used from Monday to Saturday save that it was incumbent upon the Defendant to inform the Claimant of any particular day on which the backhoe was not used so that there would be no charge. In this regard, the Claimant maintains that at no time between the delivery of the backhoe to the

Defendant and the date of this claim, was it ever informed that the backhoe was not used on any day between Monday and Saturday.

On the Claimant's version, the parties also agreed that the Claimant would be responsible for the maintenance costs of the backhoe and, in the absence of any agreed sum, it estimated the yearly maintenance costs to be $36,000.00.

In an attempt to liquidate some of the debt, the Defendant on the 18th January, 2012 issued a dishonoured cheque in the sum of $14,490.00. This cheque was made pursuant to an invoice in respect of the initial 9 day period of work and is proof of the Defendant's acknowledgement of its indebtedness to the Claimant.

[4] The Defendant's case is materially different. It contends that the parties entered into an oral, long-term rental agreement with no agreed rental rate because the Claimant's proposal of $1,300.00 per day was not accepted. This is because the said proposal did not reflect a monthly long term rental consideration for long term use. Further, it was a term of the Agreement that the Defendant would have the responsibility of maintaining the backhoe at its own expense. Despite these agreed terms, the parties had not yet been able to agree to a suitable daily rate for use of the backhoe and as such, the Defendant proposed a daily rate of $500.00. This rate was never finalized between the parties. Further, it is the Defendant's case that the Claimant was made aware that the backhoe was not used every day from Monday to Saturday. Accordingly, the true amount outstanding is $209,000.00 based on a $500.00 daily rate with intermittent usage of the backhoe.

[5] The ultimate question to be determined by this Court therefore, is the amount that is due and owing to the Claimant. To make this finding, the Court must first consider the following preliminary issues:

II. Issues:

(i) What were the terms of the Agreement?

(ii) Who was responsible for the maintenance costs of the backhoe and the amount of those costs?

(iii) What were the terms of the varied Agreement?

(iv) Whether the Defendant ever informed the Claimant that the backhoe was not used on some days?

III. Law & Analysis:

The terms of the Agreement:

[5] The learning suggests that in matters such as this, which largely concern issues of disputed facts, the Court must determine the more probable version of events in light of the evidence. To do so, the Court must check the impression of the witness's evidence against the: (i) contemporaneous documents; (ii) the pleaded case; and (iii) the inherent probability or improbability of the rival contentions. (**Horace Reid v Dowling Charles and Percival Bain**[1] cited by Rajnauth-Lee J (as she then was) in **Mc Claren v Daniel Dickey**[2])

[6] In the absence of any contemporaneous documents to confirm the terms of the Agreement, the Court must check the parties' evidence against their pleaded case to expose any inconsistencies that would make their case less probable.

[7] The Claimant's case was airtight as to the terms of the Agreement. It maintained its pleadings in the evidence of Rory Orr that the relevant terms of the Agreement were as follows:

a. That the Defendant would pay the Claimant $1,400.00 per day for rental of the backhoe.

b. That actual payment would occur every 4 months from the commencement date.

c. That the Claimant would be responsible for the maintenance costs of the backhoe which it estimated at $36,000.00 per year[3].

[1] Privy Council Appeal No. 36 of 1897
[2] CV 2006-01661
[3] Para 4(e), 6 & 12 of Rory Orr's witness statement.

d. That the Backhoe would be operated by the Claimant's driver, Andre Farmer, for an initial 9 day period between the 21st April, 2008 and the 22nd May, 2008, thereafter the backhoe would be delivered to the Defendant on the 26th May, 2008.

[8] Rory Orr added, in his evidence-in-chief, that the backhoe was to be used by the Defendant for 6 days per week or from Monday to Saturday and that the Defendant would inform the Claimant if the backhoe was not used on any of those days and there would be no charge. There were no contradictions in the Claimant's evidence at trial.

[9] The Defendant's case however was not consistent throughout. Norva raised a number of facts in her written and oral evidence that were not pleaded, such as:

(i) That Rory Orr informed her that he had no storage space for the backhoe and as a result, the Defendant offered to store the backhoe at its property in Aranguez in consideration for permission to use the backhoe from time to time as required[4].

(ii) That there was no other remuneration due in consideration to the Claimant[5].

(iii) That when Rory Orr approached the Defendant for storing the backhoe, the Defendant offered to use the backhoe during a 9 day period of work in Freeport to test the competence of the driver provided by the Claimant and that the daily rate for this 9 day period was $1,400.00 which resulted in a total of $14,490.00[6].

(iv) That Rory took his backhoe home after that and then discussions began for a long term rental agreement[7].

[10] Based on this evidence, counsel for the Defendant submitted that there were two separate agreements between the parties and that the principal long term agreement was for the storage of the backhoe at the Defendant's premises.

[4] Paras 5 – 9 of Norva's witness statement.
[5] Paras 5 – 9 of Norva's witness statement.
[6] NOE page 27, Lines 9 – 18.
[7] NOE page 27, Lines 9 – 18.

[11] However, for the reasons set out below, the Court finds that neither of these submissions have been supported by the pleaded facts and evidence and are therefore, not inherently probable.

[12] <u>That there was more than one Agreement between the parties</u>:

The two submitted arrangements were as follows: (i) for the rental of the backhoe for the 9 day job in Freeport at $1,400.00 per day and (ii) for a long term lease and maintenance agreement for which no daily rate was ever agreed[8].

As submitted by counsel for the Claimant in response, the Court agrees that the Defendant's pleadings only make reference to one Agreement, being for a long term rental where no rental rate was agreed[9]. Further, no evidence of these two arrangements were adduced in Norva's witness statement. Rather, she only made reference to one agreement that occurred in a meeting between the parties on the 26th May, 2008[10]. The date of this purported long-term agreement was also contradicted in the Defendant's pleadings where the Defendant made admissions to the Claimant's pleadings of an oral agreement on the 16th April, 2008. Finally, the Defendant cannot now submit that there were two separate agreements when it already admitted in its pleadings that the Agreement of the 16th was varied on the 26th May, 2008. [11]

These inconsistencies severely weakened the Defendant's case on this issue.

[13] <u>That the agreement was for storage of the backhoe</u>:

At the outset, the Defendant's case is undermined by the fact that this evidence was not pleaded. Further, the following evidence given by Mrs. Williams at trial makes this allegation inherently improbable:

> *"**When Mr. Orr approached us for storing his backhoe and for uses at our convenience, we were about to go to Freeport to do a short pipe laying. The records would state as I said, we took 9 days**. We offered to*

[8] Para 3 of the Defendant's submissions.
[9] Para 3 of the Claimant's submissions in reply.
[10] Para 4 of Norva's witness statement.
[11] Para 8 of Defence.

use the backhoe during that period to execute the work and to see the competence of the operator he provided. That is the 9 days at $1,400.00 that reflected $14,490.00. ***Mr. Orr took his backhoe home after that****. That's when discussions started for a long term rental…*[12]"

The passage above implies that an agreement for storage was reached before the work in Freeport commenced on the 21st April, 2008. This directly contradicts her witness statement where she stated that the agreement for storage occurred in a meeting held on the 26th May, 2008 or after the works were completed in Freeport.

Secondly, no explanation was given as to why Mr. Orr would take the backhoe back to his premises after the 9 day period of work if, as she claims in her oral evidence above, the parties had already agreed that the Defendant would be storing the backhoe.

Thirdly, based on (i) above and the likelihood that there was only one Agreement between the parties on the 16th April, 2008, the terms under which the 9 day period of work in Freeport was conducted are therefore the only terms agreed on by the parties. Therefore, the Defendant's admission at trial, that a daily rate of $1,400.00 was used for the 9-day period is strong evidence that it was more probable that the parties had agreed to a fixed daily rental rate for the duration of the Agreement. Further, Mrs. Williams also admitted under cross-examination that the invoice issued by the Claimant in the sum of $14,490.00 in relation to the initial 9 day period of work was consistent with a $1,400.00 daily rate[13]. She then admitted that the Defendant's dishonoured cheque was issued as settlement of this invoice[14] thereby evidencing the Defendant's acceptance of the $1,400.00 daily rate.

[14] Based on the above, the Court finds that there was only one Agreement made on the 16th April, 2008 that the Defendant would rent the backhoe for its own use at a daily rate of $1,400.00. This Agreement was then varied on the 26th May, 2008.

[12] NOE page 27, Lines 9 – 18.
[13] NOE Page 15, line 15.
[14] Line 29.

Maintenance of the backhoe:

[15] The Claimant's case was that one of the terms of the Agreement was that it would be responsible for the maintenance of the backhoe but that no sum was agreed. However, because the backhoe was relatively new, it estimated that $36,000.00 per annum would be a reasonable sum[15]. No contemporaneous documents however, were provided in support of its case. At paragraph 14 of Mr. Orr's witness statement, he purported to deduct the maintenance costs from the sums he claimed were due and owing from the Defendant. Although not fully explained in its pleadings or evidence, this method of quantifying the debt suggested that there was an arrangement whereby the Defendant would bear the initial expenses for maintaining the backhoe while the backhoe was in the Defendant's possession and the Claimant would then reimburse the Defendant for those costs. Such an inference is further supported by the fact that the backhoe was in the Defendant's possession for the duration of the Agreement, which makes it more probable that the Defendant would have had to be responsible for its maintenance on a daily/monthly basis. Indeed, that is the essence of the Defendant's case on this issue—that the parties agreed that the Defendant would keep possession of the backhoe and incur the necessary expenses, which it particularized in a schedule of costs.

[16] The Court, therefore, needs to decide two issues: (i) whether the Claimant was ultimately responsible for reimbursing the Defendant for the maintenance costs of the backhoe; and (ii) the amount of the maintenance costs.

[17] With respect to (i), considering that the Claimant was at all times under the impression that it contracted to reimburse the Defendant for its maintenance costs, I do not think that the Defendant had the intention of denying its entitlement to such a discount from its debt. Rather, by virtue of its pleaded case, I believe the Defendant was merely arguing that it, and not the Claimant, incurred the initial expense of maintaining the backhoe while the backhoe was in the Defendant's possession. I will therefore accept the Claimant's version that the Claimant agreed to reimburse the Defendant for its maintenance costs.

[15] Para 6 & 12 of Rory Orr's witness statement.

[18] This leaves the all-important question of whether there was any agreed upon sum. Neither party challenged the other's quantum of maintenance costs under cross-examination. Mrs. Williams merely sought to clarify that the Claimant's estimate of $36,000.00 was a yearly figure and then proceeded to ask Mr. Orr whether he owned any other backhoes[16]. Mr. Thompson only asked of Mrs. Williams whether it was possible to produce all these documents for maintenance costs when the backhoe was supposed to be relatively new[17] and Mrs. Williams replied in the affirmative. Accordingly, the differing figures representing the maintenance costs averred by both parties remained unchallenged.

[19] In considering the inherent probability of each party's version, I find that the Claimant's evidence on this issue was less convincing. Bearing the burden of proof, I do not find it sufficient to merely say that no sum was agreed and as a result, it unilaterally estimated the sum of **$36,000.00** per year and proceeded to apply this arbitrary figure to its calculations. Rather, the Defendant's schedule of costs seemed a more reliable document notwithstanding its many deficiencies, such as the lack of any date, signature or particulars as to how these figures were quantified. Based on the Defendant's schedule, the average monthly costs for maintenance from June, 2008 to December, 2011 amounted to **$2,742.43**, which, reflected a lower monthly maintenance cost than estimated by the Claimant and which is, in any event, favourable to the Claimant.

The varied Agreement:

[20] Both parties agreed in their pleadings that the Agreement was varied to allow the Defendant to employ its own driver to operate the backhoe. However, the variation with respect to the daily rate is disputed as the Claimant contends that it was reduced to $1,300.00 but the Defendant denies that the parties ever agreed to this daily rate.

[21] At trial, Mr. Rory Orr maintained his case on behalf of the Claimant and further added that part of the varied Agreement was that the Defendant would be allowed to keep possession of the backhoe at its premises.

[16] NOE Page 19, line 4.
[17] NOE Page 23, line 18.

[22] Norva gave evidence that the Claimant proposed a daily rate of $1,300.00 on the basis that the Defendant provide its own driver and maintained the backhoe. She stated that this proposal was never agreed to because *"…it did not reflect a long term rental consideration, which is a different basis from a daily usage rate."* At trial, she maintained that the variation to $1,300.00 per day was never finalized[18]. In the alternative, she alluded to the fact that she proposed a monthly rental of $16,000.00 and a daily rate of $500.00, which was the industry norm in circumstances where the Claimant does not provide an operator.[19]

[23] Counsel for the Defendant submitted that it was implausible that the Defendant would initially agree to a daily rate of $1,400.00 but later aver that the industry norm is $500.00 and I am inclined to agree with this submission.

[24] What was also contradictory is that the Defendant, after already agreeing to a $1,400.00 daily rate at the commencement of the Agreement, would argue that its refusal of the Claimant's proposal of $1,300.00 per day was on the basis that it reflected a daily rate and not a monthly long term agreement.

[25] Notwithstanding these improbabilities, the Court is not yet convinced of the Claimant's version that the parties agreed to vary the daily rate to $1,300.00. Having admitted that this proposal was never agreed to, the Claimant has not proven that a daily rate of $1,300.00 should be applied to the varied contract. Accordingly, the Defendant's version, that no such daily rate was agreed to and accordingly, it is willing to be indebted under the varied contract based on a $500.00 daily rate must be accepted by the Court.

[26] The Court therefore finds that the parties agreed to a daily rate of $1,400.00 for the work at Freeport for the first 9 days and that a daily rate of $500.00 would be applied from the 26th May, 2008 onwards.

[18] NOE Page 16, line 31.
[19] Para 14 of Norva's witness statement.

The usage of the backhoe by the Defendant?

[27] The Claimant's case was simply that it was never informed by the Defendant that, as at the date of the claim, the backhoe was not used on any day between Monday and Saturday pursuant to the Agreement[20].

[28] The Defendant maintained that the parties were in communication from time to time and that it *"...was fully aware that the backhoe was not used six days a week but rather only on the days when there was need for the backhoe which was from time to time.[21]"*

[29] At trial, Mr. Thompson for the Claimant did not challenge the Defendant's evidence on this issue. He only sought to solicit from Mrs. Williams the exact amount of days that the backhoe was used by the Defendant and was not successful in obtaining a helpful response: *"...one week it might use four days, another week it might use five, another week it might use two, as and when required.[22]"* (sic). Mrs. Williams admitted that she was aware of Mr. Howell's evidence that he operated the backhoe *"...almost every day"* and that some days he worked overtime and conceded that that she failed to particularize the days on which the backhoe was not used.

[30] In opposition, Mrs. Williams directly challenged the Claimant's evidence on this issue by putting it to Mr. Orr that his evidence that the Defendant never informed him that the backhoe was not used every day was erroneous.[23]

[31] I therefore find that the Claimant has failed to prove that he was not informed that the backhoe was not used every day from Monday to Saturday. In the alternative, Mrs. Williams was unable to give evidence of the exact amount of days it was used during the week. In light of this, the most persuasive evidence on this issue therefore, is the unchallenged evidence of Mr. Howell that he operated the backhoe *almost* every day.

[32] For the purpose of calculating the outstanding monies, the Court therefore estimates that the backhoe was used on an average of at least 5 days per week, every week from May, 2008. However, although Mr Howell's evidence was that he was employed with the

[20] Para 8 of the Statement of Case, para 9 of the witness statement & NOE Page 16, line 30.
[21] Para 9 of Defence, para 13 of witness statement.
[22] NOE Page 20, line 45.
[23] NOE Page 16, line 27.

Defendant only until December, 2010, the Defendant has adduced in evidence a **"schedule of maintenance costs"** that runs from June, 2008 to December, 2011[24]. In fact, in the Defendant's unagreed bundle of documents, where it purports to set out the expenses of the backhoe TCH 4023 for the month of December, 2011, there is an invoice from **CD's Tractor Services** whereby the Defendant Company purchased "2 Front Tyres" for the sum of $3,600.00 on the 20th December, 2011[25]. The only logical conclusion from this evidence was that the Defendant was still using the backhoe as at this date and possibly intended to use it for a period thereafter.

[33] In this regard, from the Defendant's own evidence, the Court finds that the backhoe with registration number TCH 4023 was used by the Defendant from the 26th May, 2008 until at least the 31st December, 2011.

The amount due and owing to the Claimant:

[34] It is not in dispute that the Defendant owes money to the Claimant under the Agreement. However, the sum is yet to be finalized[26].

[35] The Claimant has claimed for outstanding monies up until April, 2013 when the backhoe was returned by the Defendant. However, it provided no evidence to show that there was any agreed term that it would be paid under the Agreement until the day that the backhoe was returned by the Defendant.

[36] The Defendant did not challenge the fact that it returned the backhoe in April, 2013. However, its willingness to settle in the sum of only $209,000.00 based on a $500.00 daily rate meant that the Defendant's case was based on only 418 days of use of the backhoe from the 26th May, 2008.

[37] In determining the extent of the usage, the Court notes Mr. Howell's unchallenged evidence on behalf of the Claimant that he worked for the Defendant on the backhoe until December, 2010[27]. However, as reasoned above, the most persuasive evidence on this issue is the **"schedule of maintenance costs"** supported by the invoices and receipts

[24] Attached as 'A' to Norva's witness statement
[25] At page A 414
[26] NOE Page 26, line 14.
[27] Para 2 Rueben Howell's witness statement.

contained in the Defendant's unagreed bundle, which shows that the Defendant was purchasing tyres and therefore, accruing expenditure in maintenance of the backhoe as late as December, 2011.

[38] Based on the above, I do not find that the Claimant has convinced this Court that it is entitled to receive payments until April, 2013. The evidence proves that the backhoe was used almost every day per week from the 26th May, 2008 until December, 2011, which in any event, amounts to more than the 418 days claimed by the Defendant. I therefore find that the Defendant is liable for outstanding rent for use of the backhoe for 5 days per week from the 26th May, 2008 until the end of December, 2011.

[39] Accordingly, my findings are as follows:

(i) That the daily rate for the 9 day period of work in Freeport was $1,400.00, which brought a total of $12,600.00 exclusive of VAT;

i. The Court notes that while the invoice adds 15% VAT to the above figure, the Claimant's claim does not include VAT in its figures.

(ii) That the daily rate was varied and a suitable sum to be charged would be $500.00 from the 26th May, 2008 onwards;

(iii) That the Defendant maintained the backhoe in the amount of $119,924.29 from June, 2008 to December, 2011;

(iv) That the Claimant would reimburse the Defendant for its expenses incurred in relation to the maintenance of the backhoe;

(v) That the Defendant used the backhoe on an average of 5 days per week from the 26th May, 2008 to the 31st December, 2011 pursuant to the Defendant's schedule of maintenance costs and the supporting documents contained in the unagreed bundle.

III. **Disposition:**

[40] Accordingly, the Court finds that the amount due and owing to the Claimant is as follows:

(i) **9 days** of work in Freeport @ **$1,400 per day** = **$12,600.00**;

(ii) **$500.00** per day or $2,500.00 per week from the 26th May, 2008 to the 31st December, 2011 *(which amounts to approximately 187 weeks and 4 days)* = **$469,500.00**;

(iii) Less maintenance costs in the sum of **$119,924.29** from June, 2008 to December, 2011;

(iv) Total amount damages due and owing = **$349,575.71**

[41] The Claimant in its Claim Form and Statement of Case has also claimed **interest** on any sums awarded to it at such rate and for such period as the Court thinks fit. Taking all the circumstances into account, especially the fact that the Claimant has been denied income from since May 2008 but also considering that the Claimant has not complied with **CPR Rule 8.5(3)(b)(i)-(v)**, i.e. omitting to include on the Claim Form details of the basis of its entitlement to interest; the rate; the period for which it is claimed; the total amount of interest claimed to the date of the claim; and the daily rate at which interest will accrue after the date of the claim, this Court is of the opinion that the Claimant is entitled to interest at the rate of **3%** per annum from the date of filing of the Claim to the date of this judgment, in pursuance of the Court exercising its discretion under **section 25 of the Supreme Court of Judicature Act Chap. 4:01**.

[42] Interest on the damages awarded should therefore be calculated by the following formula: $349,575.71× 3% × (5 yrs. 59 days, i.e. from 14th August, 2012 to 12th October, 2017) = $349,575.71× 3% × 1885 (days) ÷ 365 = **$54,160.29.**

[43] The Claimant will also be entitled to recover costs of pursuing this litigation. Recoverable costs will be calculated on the prescribed scale pursuant to **CPR Part 67.5(2)(a)**, i.e. on the amount ordered to be paid by the Court. In this regard, the **"value"** of the claim must be decided, which, according to the Privy Council Appeal in **Benoit Leriche v Francis Maurice [2008] UKPC 8**, per Lord Carswell at paragraph 18 of the judgment, must include the sum awarded for interest up to the date of the judgment. As such the value of the claim will be $349,575.71 + $54,160.29 = **$403,736.00.**

[44] Recoverable costs on the scale of prescribed costs in accordance with **Appendix B** of **CPR Part 67** for a claim the value of which is **$403,736.00** are quantified in the sum of **$61,873.60.**

[45] In light of the above analyses and findings, the Order of the Court is as follows:

ORDER:

1. **Judgment be and is hereby awarded for the Claimant against the Defendant for damages calculated in the sum of $349,575.71.**

2. **The Defendant shall pay to the Claimant damages awarded in the sum of $349,575.71.**

3. **There shall be interest on the said sum of $349,575.71 at the rate of 3% per annum from the date of the filing of the Claim to the date of this judgment (i.e. from the 14th August, 2012 to the 12th October, 2017) calculated in the sum of $54,160.29.**

4. **The Defendant shall also pay to the Claimant costs of the Claim quantified on the prescribed scale in the sum of $61,873.60.**

Dated this 12th day of October, 2017

Robin N. Mohammed
Judge