

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Cv. 2010-01142

BETWEEN

JUDE QUNIN

CLAIMANT

AND

CKID CONSTRUCTION LIMITED

DEFENDANT

BEFORE THE HONOURABLE MR. JUSTICE SEEPERSAD

Appearances:

The Claimant appeared in person

Ms. Francine Wilson for the Defendant

JUDGMENT

Procedural History

By Claim Form and Statement of Case dated the 24th February, 2010, the Claimant commenced proceedings against the defendant. The Defendant filed a defence with no counter claim and the claimant filed a Reply. An agreed bundle of documents was also filed and one witness' statement was filed on behalf of the Claimant and the Defendant respectively.

The Trial was held on the May, 2012. On the morning of the trial, the Claimant indicated that he would be representing himself, and having filed a Notice of Change of Attorney he indicated he was ready to proceed.

Agreed Facts

The parties entered into an oral contract on or about the 25th March, 2008. The salary was \$4500 per month together with travel and phone allowances.

Matters in dispute

(1). Salary

The claimant's claim is for salary for the period of May 2009 to October 2009 in the sum of \$27,000.

The defendant's contends that in or about the month of May 2009 the claimant was involved in a vehicular accident involving the defendant's motor vehicle and for which the defendant's insurer was obliged to make certain payments as a consequence of which the defendant suffered a loss of its no claim bonus, incurred an increase in its insurance premium for \$814.74 to \$1,823.20 and expended money on repairs to its motor vehicle. Further, the Defendant contends that the Claimant did not work after May 2009 and that he was not entitled to any salary payment.

(2). Commission payments

The claimant contends that the oral contract provided for:

- i. a commission of 15% of the total profits made on all new construction projects acquired by him;
- ii. a commission of 10% of the total profits made on all existing projects that were managed by him; and
- iii. a commission of 5% on all debts collected.

The Claimant claimed the sum of \$46, 651.44 on account of commission payments due to him as at May 2009.

The defendant contends that no such agreement existed. The defendant avers further that it agreed to pay and did pay an incentive commission to the claimant for any new work that he brought into the company and that the incentive commission was to be determined solely by the defendant and based on the claimant's performance. Accordingly, the Defendant contended that no money is owed for commission or work undertaken up to May 2009.

(3). Acquisition of subcontract from HAJI

i. The claimant states that, he entered into discussions with HAJI about the possibility of subcontracting the defendant to carry out a number of their construction projects. He contends that he was an agent of the defendant at all material times and with its authority, negotiating and acting on its behalf. After numerous meetings with HAJI the defendant was awarded the contract on or about mid August 2009 to perform site clearance work on the Lower Cumuto Early Childhood Care and Education Centre.

ii. The claimant contends that subsequently and resulting from his negotiations with HAJI the defendant was awarded 3 subcontracts for construction of Early Childhood Care and Education Centers including La Horquetta, Aranguez and Lower Cumuto, and that the defendant agreed to pay to him a 25% commission of these projects and that he is entitled to the sum of \$375,000. The Defendant contends that there was no such agreement to pay a 25% commission and further that these contracts which were awarded in October, 2009 were not to be considered new contracts secured by the Claimant.

(4). Recovered Debts

The claimant contends that it was a term of the contract that he would recover a 5% commission on all debts recovered for the company and claims the sum of \$5,650.00. The defendant contends that there was no agreement that the claimant be paid a commission for each positive response to a debt collection letter issued by him.

Ultimately, the resolution of all issues in dispute required an assessment of the evidence and in particular an assessment of the witnesses' credibility so as to determine which version of events was more probable than not. In assessing the credibility of each witness's version of the facts the

court paid regard to the dissenting speech of *Lord Pearce* in the House of Lords in **Onassis v Vergottis [1968] 2 Lloyd's Rep. 403 at p.431**. *'Credibility' involves wider problems than mere 'demeanour' which is mostly concerned with whether the witness appears to be telling the truth as he now believes it to be. Credibility covers the following problems. First, is the witness a truthful or untruthful person? Secondly, is he, though a truthful person, telling something less than the truth on this issue? Thirdly, though he is a truthful person telling the truth as he sees it, did he register the intentions of the conversation correctly and, if so, has his memory correctly retained them? Also, has his recollection been subsequently altered by unconscious bias or wishful thinking or by over-much discussion of it with others? Witnesses, especially those who are emotional, who think that they are morally in the right, tend very easily and unconsciously to conjure up a legal right that did not exist. It is a truism, often used in accident cases, that with every day that passes the memory becomes fainter and the imagination becomes more active. For that reason a witness, however honest, rarely persuades a Judge that his present recollection is preferable to that which was taken down in writing immediately after the accident occurred. Therefore, contemporary documents are always of the utmost importance. And lastly, although the honest witness believes he heard or saw this or that, is it so improbable that it is on balance more likely that he was mistaken: On this point it is essential that the balance of probability is put correctly into the scales in weighing the credibility of a witness. And motive is one aspect of probability. All these problems compendiously are entailed when a Judge assesses the credibility of a witness; they are all part of one judicial process. And in the process contemporary documents and admitted or incontrovertible facts and probabilities must play their proper part.'*

In attempting to resolve the issue of credibility the court found that the application of the following tests was helpful: ¹

- (1) was the witness's evidence consistent with what was agreed or clearly shown by the other evidence, to have occurred;
- (2) was there consistency with what the witness said or deposed to on prior occasion or was there any contemporaneous document generated by the witness which supports the witness's version of the events;
- (3) was there consistency or a lack thereof within the witness's own evidence;
- (4) was the witness credible with respect to incidental and surrounding matters which were not necessarily germane to the issues at hand; and
- (5) did the witness having regard to the manner in which he gave his evidence leave with the court the impression that his evidence was truthful.

The aforementioned tests are and should not be viewed as being exhaustive, nor does the court have to weigh each test equally. They are merely useful guides which can and did assist the court in assessing the evidence and coming to a conclusion as to which version of events was more probable in the circumstances.

Salary

1. The relevant issue to be determined was whether the claimant was entitled to salary and allowances from May, 2009 to October, 2009. The claimant in his pleadings stated that he was employed to manage the Marketing Department, but he admitted in cross-examination that he was employed on a part time basis and that he was allowed to carry on his personal business ventures while working for the defendant. The court did not find favour with the claimant's lack of candour in his pleadings and his attempt to convey the impression that he was a full time employee.

¹ The business of Judging – Select Essays and Speeches by Tom Bingham

2. The pleadings also did not disclose that \$2, 250 was paid to the claimant towards salary for the month of May 2009 and in cross-examination, the claimant accepted as being

correct the schedule of payments received by him as evidenced in the schedule of payment form exhibited at **Tab 4 d** of the bundle of documents.

3. The evidence provided by the claimant generally did not assist the court in resolving the issues in this case as there were many inconsistencies found in his case. For instance:

i. *Paragraph 5 of the claimant's Statement of Case stated:*

"The Claimant provided his services and the defendant company in pursuance of the agreement provided remuneration for same until sometime in or about the month of May 2009, when the defendant company suddenly refused to pay to the Claimant, the standard salary, allowances and commission owed and due to him."

ii. Immediately after he stated at paragraph 6 that:

"Notwithstanding the sum of twenty one thousand one hundred and sixteen dollars and eight four cents (\$21,116.84) which was paid to the claimant by the defendant company in pursuance of the first agreement, the defendant company continued to breach the agreement and refused to pay the Claimant the standard salary, allowances and commission owed and due to him from the month of June 2009 to 12th October 2009."

iii. The claimant at Paragraph 6 of his Witness Statement stated:

"The defendant failed to uphold the oral agreement for the period of April 2009 to October 2009 amounting to \$79,301. 44 which represents unpaid salaries and allowances. The defendant has ignored the many request made on my behalf from my attorney at law."

3. Notwithstanding the claimant's various versions of events, the payment schedule exhibited at **Tab 4d** of the agreed bundle clearly shows that the claimant received \$2,250. towards salary for the month of May 2009. The claimant's credibility therefore, was

somewhat diminished by the inconsistency and apparent uncertainty of his claim as regards the period for which salary and allowances were outstanding.

4. In the circumstances it was safe to conclude, as the Court did conclude, that the claimant's last salary payment, albeit not for the entire agreed amount, occurred in the month of May 2009. It was also reflected in the document at **Tab 4d** that a loan payment was received by the Claimant in the sum of \$3000 on 29th May, 2009.
5. There was no evidence that the loan was repaid by the claimant and accordingly the court was prepared to apply this sum to the unpaid balance of salary due to the claimant for the month of May 2009. When such an application was made an unaccounted surplus of \$750 was applied to the claimant's credit. Accordingly, no salary payment was due to the claimant for May 2009.
6. The other issue to be determined was whether the claimant was entitled to salary for the period of June to October 2009. The defendant sent two letters to the claimant in June and July of 2009 and these letters were annexed to the agreed bundle as **Tab 4 O and 4 P**. The letters were very instructive, and the court paid great attention to the contents of same.
7. Neither of the two letters that were sent to the claimant terminated the claimant's employment. In fact, the tenor of the letters clearly show that the defendant still treated with the claimant as an employee. By letter dated 30th June, 2009 the defendant also sought to vary the claimant's terms of employment by stating that he would no longer be entitled to the monthly payment of \$4500.
8. It is trite law that a party cannot by himself make a contract. Likewise, a party cannot by himself vary a contract. This is known as the principle of mutuality of contract where it is said that there must be *consensus ad idem* between the parties. The universally accepted position on unilateral variation of contracts can be found in the Guyanese cases of Nobrega v Attorney-General (1967) 10 WIR 187 and Guyana Sugar Corporation v

Seeram Teemal (1983) 35 WIR 239. In the latter case, *Massiah JA* quoted from Durga Persaud v Toolsie Persaud Ltd (unreported) where *Persaud JA* stated:

“To vary a contract, or to enter into a new contract there must be agreement on both sides, or as it has been described, *consensus ad idem*.”

9. The defendant could not therefore unilaterally alter the claimant’s remuneration and the court therefore found that the defendant was obligated to pay to the claimant the monthly sum of \$4,500 for the period of June 2009 to 12th October 2009 the 12th being the date on which the claimant resigned. This sum amounted to \$18,000 for June to September and \$1,742. for the period 1 – 12 October 2009.
10. The court is constrained to point out that it accepted the defendant’s evidence that motor vehicle, PBT 4176 was returned in October 2009 by the claimant. The court also noted the defendant’s representation to the claimant in its letter dated 30th July 2009 that a daily rental charge would be applied to the vehicle. The defendant, however, failed to file any counter claim seeking any rental sums for the vehicle nor did the defendant plead that rental sums were due and owing by the claimant up until October 2009 and that sum should be set off against any amounts which were found to have been due and owing to the claimant. There was also no evidence before the court to suggest that the claimant was under the terms of employment, responsible for all costs associated with any damage to the motor vehicle.
11. The court got a general sense from the exhibits tendered and oral testimony led that the irregular course of dealing between these parties was driven by the defendant’s eagerness to offer the claimant the opportunity to earn some money, rather than from any serious or significant business or commercial consideration. The court’s view in this regard was reinforced by the defendant’s omission to counterclaim for the losses suffered (including loss of use of the vehicle) and expenses incurred by the defendant company owing to the claimant’s involvement in two vehicular accidents with the defendant’s company car.

12. Accordingly there can be no set off against the monies owed to the claimant by the defendant on the account of salary for the period of June to October 2009, save for the surplus sum of \$750 for May 2009. The court therefore found that the defendant must pay to the claimant, the amount of \$18,992. by way of salary due to the claimant for the period June, 2009 to 12th October 2009 with interest thereon at a rate of 3% percent from 30th June 2009 until repayment.

Consideration of Issues

Commissions up until May 2009

13. The issue to be determined was what were the terms of the contract between the parties as it related to commission payments. In determining this issue the court applied the aforementioned ‘credibility’ tests, to assess the credibility of each witness’s version of events. The evidence and in particular the cross examination of the claimant demonstrated that commission payments were in fact paid on both existing and new projects at a rate varying from 5% and 10%. By letter dated 30th June 2009 the defendant at paragraph 3 stated:

“...Note that Educational Facilities and NBN to name a few has been under CKID clientele for over a period of years, you did not bring in any other job than Off Track Betting, yet you were given the opportunity to draw commission from these projects.”

14. This evidence was inconsistent with the defendant’s case that it agreed to pay an incentive commission **only** on new projects, since it clearly paid commission on existing projects that the claimant worked on.

15. The next issue to be resolved was, what percentage of commission was the claimant entitled to on existing and new projects. The claimant accepted commission payments from the commencement of his employment until May 2009, without registering any complaint or issuing any query whether oral or written in relation to the sums which he believed to be owing to him under the terms of contract as outlined by him, and at no time did he receive commission payments of 15%.

16. If the claimant believed that he was entitled to commission payments as outlined, one would have expected that each time he received a payment which was not in accordance with his understanding of his entitlement, he would have brought the issue to the attention of the defendant. The claimant only complained of balances owed on commission subsequent to the deterioration of his relationship with the defendant.

17. The court noted also that the claimant failed in his statement of case to outline that he had received commission payments from the date of his employment until the end of May 2009. It is only in his reply to the defence that he admitted having received those payments. Further, in cross-examination, Counsel for the defence took the claimant through a detailed mathematical exercise by comparing figures as in the bundle at **Tab 4d** and **4q** and it was demonstrated and he accepted that he was paid 5% to 10% on all of the projects. The claimant had issued demand letters to the defendant subsequent to the breakdown of their relationship and the figures in both letters were different from each other and from the sums claimed in this action.

18. The claimant also failed to provide any evidence or to assist the court in determining what a new contract or an existing contract was. The court wishes to point out that in letter dated 30th July 2009 the defendant specifically stated that the only new contract brought in by the claimant was the Arima Race Club (Off-track betting) project. There was no evidence before the court that the claimant responded in writing to this letter or challenged the defendant's assertions. The court therefore, accepted that portion of the defendant's evidence as it related to incentive commission payments and found that on a balance of probability that the contract terms did not make specific provisions for the payment of commission and that, that issue was left solely to the discretion of the defendant.

19. Accordingly the court found that the defendant did not owe the claimant the commissions payments claimed for the work done on:
 - I. Arima Race Club;
 - II. Barataria Junior Secondary School;

- III. Piccadilly Primary School;
- IV. Monkey town Government Primary school;
- V. Erin Road Presbyterian School; and

Commission after May 2009

20. The court found on the evidence as stated aforesaid, that despite the breakdown of the relationship between the parties after May 2009, the defendant continued to treat the claimant as its employee and in addition it continued to entertain discussions about the possibility of the claimant managing an entire projects at a commission of 25%.
21. However, the court found there was no second oral agreement which provided for the claimant to be paid a 25% commission of the total profits made on all sub-contracted projects acquired by the claimant. There is no documentary evidence to support that there was ever any such agreement and the court accepted the defendant's evidence that this was merely a request made by the claimant. Given the tenor of the unacknowledged letters written by the defendant in June and July, it is highly unlikely that the defendant would have agreed to pay a 25% commission on all new projects and it is clear that around June, 2009 the defendant had concerns as to the claimant's performance.
22. The court accepted the defendant's contention that as a result of the claimant's repeated requests to manage an entire project at a rate of 25% commission, the claimant was allowed to manage a site clearance project at Lower Cumuto, a project the defendant obtained from HAGI/Byucksan Company Limited. The Court noted that HAJI was contracted by Education Facilities Company Limited (hereinafter referred to as EFCL) to build schools and could only subcontract to subcontractors who were approved by EFCL. By letter dated September 03, 2009 which formed part of the agreed bundle, EFCL wrote to the defendant's Managing Director informing him, that the company was successful in respect of its application for Pre-Qualification for the Repairs and Maintenance Programme and that the company would be placed on a Register of Pre-qualified contractors.

23. The Court found that the effort for registration was done not by the claimant but by the Managing Director of the company.
24. The evidence that came out in cross examination revealed that the defendant company became a subcontractor of HAJI as a result of the joint efforts of the claimant and other employees of the defendant including the defendant's Managing Director.
25. Therefore the contracts that were obtained from HAJI could not be viewed as being a new contracts brought in by the claimant. Even if they were under the claimant's terms of employment, the issue of commission was solely at the discretion of the defendant and as stated, the Court did not find that there was any subsequent variation of these terms.
26. The court found that a 25% commission was paid to the claimant for the management of site clearance at the Lower Cumuto project, but that payment was limited to that particular project and not future projects. The evidence revealed that the claimant actually managed the clearance work at Lower Cumuto and as a result he would have been paid for the work he had done. The court found that the 25% commission payment to the claimant was not an indication that the terms of the original agreement were varied but that it was merely a "one-off" arrangement.
27. The claim made by the claimant for commission on the HAJI contract to build three Early Childhood Centres at La Horquetta, Aranguez and Lower Cumuto cannot be allowed since there was no agreement for him to earn 25% commission on these projects. Further the court was provided with no evidence as to the profit actually generated by these projects nor was there any evidence that the claimant managed or worked these projects in the manner that he did on the Lower Cumuto clearance project. Accordingly, the claimant's claim for the sum of \$375,000.00 being a 25% commission on the projects at La Horquetta, Aranguez and Lower Cumuto has to be dismissed.

Debts Recovered

28. On this issue the court does not accept the claimants claim that he is entitled to 5% commission on debts recovered from Linda Bada and National Broadcasting Network. The claimant has failed to adduce any evidence to support his claim and as such the court accepts the defendants' position on the issue. The evidence revealed that the issuing of demand letters was part of the claimant's duty. Accordingly, the claimant's claim for the sum of \$5,650. must be dismissed.

Decision

1. The claimant's claim for the sum of \$46, 651.44 being commission payments on Arima Racing Club, Barataria Junior Secondary School, Piccadilly Primary School and Monkey Town Government Primary School projects is dismissed.
2. The claimant's claim for the sum of \$375,000. being commission payments for the Early Child Care projects at La Horquetta, Aranguuez and Lower Cumuto is dismissed.
3. The defendant shall pay to the claimant the sum of \$18,992. being the salary owed to the claimant for the period June, 2009 to 12th October, 2009 and interest shall accrue on the said sum at a rate of 3% per annum from the 30th June, 2009 until repayment.
4. There shall be a stay of execution of 42 days.
5. Having regard to the fact that both parties attained some level of success in this action the court orders that each party shall bear its own costs.

Dated this day 21st of May 2012

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Frank Seepersad
Judge