REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

CIVIL APPEAL No. 185 of 2011

CV 2006-00106

BETWEEN

ARCELORMITTAL POINT LISAS LIMITED

APPELLANT/DEFENDANT

AND

ROTIV ENTERPRISES LIMITED

RESPONDENT/CLAIMANT

PANEL: **P JAMADAR JA**
G SMITH JA
M MOHAMMED JA

APPEARANCES:

S. Jairam SC, F. Al-Rawi,
appeared on behalf of the Appellant

S. Marcus SC, D. James,
appeared on behalf of the Respondent

DATE DELIVERED: 23rd September, 2016

I have read the judgment of Smith JA and agree with it.

P. Jamadar
Justice of Appeal

I too, agree.

M. Mohammed
Justice of Appeal

JUDGMENT

INTRODUCTION

1. The Respondent (Rotiv) sued the Appellant (Arcelormittal) for damages for breach of contract. The contract was a written agreement by which Rotiv agreed to provide substantial stevedoring services to Arcelormittal.

Arcelormittal counterclaimed against Rotiv for damages for breach of the same contract.

2. In a well-reasoned judgment, the trial judge, Tiwary-Reddy J, correctly identified the central issue in the case namely, whether, upon a proper construction of the contract, Arcelormittal guaranteed that it would provide Rotiv with "***a minimum quantity of finished product on a monthly basis, upon which (Rotiv) could expect to be remunerated***."[1]

[1] See paragraph 9 of the Judgment of Tiwary- Reddy J (the judgment)

3. Tiwary-Reddy J, resolved this issue in favour of Rotiv and then logically and sequentially dealt with the relevant issues in the case namely;

- Whether Arcelormittal breached the agreement?
- Having found that Arcelormittal breached the agreement, what remedy was available to Rotiv. Tiwary Reddy J found that Rotiv was entitled to damages with interest for breach of contract upon certain limited bases and ordered an assessment of these damages by a Master in default of agreement. Arcelormittal was also ordered to pay the prescribed costs of the action to be assessed by a Master.
- The Counterclaim of Arcelormittal was dismissed.

4. Arcelormittal has now appealed the judgment of Tiwary-Reddy J..

5. For the reasons that will appear in this judgment, we dismiss this appeal.

ANALYSIS

A. *The 'guarantee'*

6. Arcelormital carried on a substantial steel production business at its plant in Point Lisas, Trinidad. Rotiv provided stevedoring services at ports in Trinidad and Tobago, including the port at Point Lisas.

7. The contract between Arcelormittal and Rotiv involved Rotiv providing extensive and substantial stevedoring services to Arcelormittal. These services as defined in the scope of works in the contract included " ***all activities of Loading, Discharging, Transporting, Unloading, Stacking, Securing, Lashing, Counting, Tallying, Shifting and loading of Coils and Billets produced or imported by Arcelormittal on board ships as directed."***

"Also, any other activities associated with or related to the above activities such as but not limited to checking and verifying the correctness of tags attached to coils, any defects or

damages to coils before they are loaded and any activity required for the efficient performance of the contract." [2]

8. Rotiv claimed that by certain clauses in the agreement which dealt with Arcelormittal's production and dispatch rates of wire rod coils and billets, Arcelormital guaranteed that it would produce certain monthly minimum quantities of wire rod coils and billets. These minimum quantities of production would provide Rotiv with a minimum volume of work. This minimum volume of work would make the stevedoring contract viable and profitable and would also enable Rotiv to recover the large sums of money it needed to expend to discharge its obligations under the contract.

9. Arcelormittal's case was that these clauses which dealt with their production and dispatch rates were mere recitals and not guarantees. Therefore Rotiv could not rely on them to perform its part of the contract. Further, Arcelormittal alleged that it suffered losses as a result of Rotiv's under-performance/non-performance of the contract and it counterclaimed for these losses.

10. The trial judge recognized that the central issue in this case was the correct interpretation of the relevant 'guarantee' provisions in the light of the contract as a whole. She examined the relevant law for guidance in approaching this task. The trial judge cited several authorities which she relied on to approach the task of interpreting the provisions of the stevedoring contract. I would repeat 3 of these citations here.

(i) In **Investors Compensation Scheme Ltd v West Bromwich Building Society Ltd (1998) 1 All ER 98 at 114** Lord Hoffman stated: "***Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.***"

(ii) In **BCCI (S.A) v Ali No.1 (2002), 1AC 251 at 259** Lord Bingham stated: ***"…To ascertain the intention of the parties the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all the relevant facts surrounding the transaction so far as known to the parties."***

[2] See Part 1.1 of the Contract

(iii) In **Mannai Investment Co. Ltd v. Eagle Star Assurance Life Co. Ltd [1997] A.C 749 at 771** Lord Steyn explained: ***"In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable commercial person will construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of the language…."***

11. The trial judge was very alive to the fact that she was required to interpret the relevant 'guarantee' provisions in the context of the contract as a whole with special regard to: (a) the parties' relationship and the relevant facts surrounding the formation of the contract and (b) in the case of a commercial contract as this was, with due regard to the way in which a reasonable commercial person would sensibly construe the provisions of the contract.

At paragraph 35 of the judgment, the trial judge correctly summarized her task as "***the question the Court should be asking is what would a reasonable person understand the parties to mean by the words of the contract. The answer to this question always presumes that the reasonable man is informed in that he has knowledge of the surrounding circumstances and the factual matrix***."

12. The trial judge then examined the relevant provisions which were in contention here. These were the following clauses. (These clauses were not numbered in the agreement but were assigned numbers based on their sequence in the agreement).

Clause 5 "***The Company*** (Arcelormital) ***is producing at the rate of 65,000 MT average wire rod coil per month and coils are in average 2.00 MT bundles***."

Clause 7 "***Approximately 60,000-65,000 MT of wire coil are expected to be dispatched to foreign customers and about 3000-3500 MT for local customers per month."***

Clause 8 "***The contractor will also perform the function of sorting and cutting selected billets in preparation for shipment…This quantity will be approximately 15,000 MT or more per month."***

These three clauses allegedly "guaranteed" that Arcelormittal would produce at least (a) 60,000 to 65,000 metric tons of wire rod coils per month for shipment abroad and 3,000 to 3,500 metric tons of the same wire rod coils for local customers and (b) 15,000 metric tons of billets per month for shipment.

13. The trial judge then examined certain other clauses in the contract, namely:-

(a) Part 2 of the agreement. These clauses obligated Rotiv to provide all equipment and personnel for the stevedoring work mentioned in the scope of work. Part 2 also stipulated that Rotiv was to provide coverage for 24 hours a day, 7 days a week and further that, Rotiv would provide any other additional equipment to perform the contract as necessary.

(b) Parts 4 and 5 of the agreement provided for minimum dispatch/loading rates for Rotiv and stated that Rotiv may be required to exceed these rates as needed.

14. The trial judge then proceeded to interpret clauses 5, 7 and 8 (the guarantee clauses) in the light of the legal principles mentioned before, and repeated here, namely:

i. the context of the contract as a whole;
ii. the relationship between the parties and the special circumstances surrounding the formation of the contract;
iii. the context of the reasonable commercial person.

15. In applying these principles to the facts of this case, the trial judge considered the following 6 factors. These factors incorporated the legal principles in varying degrees.

16. Firstly, the trial judge rejected any purported distinction between mere recitals and operative clauses in the contract.[3]

Arcelormittal contended that the guarantee clauses which dealt with their production and dispatch rates were of a different nature to the operative clauses. Arcelormittal argued that these alleged operative clauses dealt with matters like payment and loading rates, the provision of equipment and penalties for delayed performance. Further the words "guarantee" were used in relation to Rotiv's loading and work rates but not for Arcelormittal's production and dispatch rates.

[3] See paragraph 38 of the Judgment

However, no distinction was made between the force and effect of any part of the contract. Further, as the trial judge also noted, the guarantee clauses were in a part of the contract which also contained stipulations and provisions about rights and obligations and language that was in imperative terms. This was not consistent with mere recitals.[4]

17. Second, the trial judge found that there was no necessary conflict between the alleged recitals/ guarantee clauses and the alleged operative clauses.[5] Arcelormittal contended that a minimum production rate somehow conflicts with specific payment for services rendered in other parts of the agreement. The trial judge correctly realised that there was no such conflict. In fact Arcelormittal's guaranteed minimum production rate complimented the clauses which addressed Rotiv's payment rate. As I stated at paragraph 8 above, Arcelormittal's guarantee of a minimum production and dispatch of wire rod coils and billets meant that Rotiv was guaranteed a minimum volume of work. This minimum volume of work guaranteed Rotiv a minimum volume of payment/income from Arcelormittal. This income in turn would make the contract viable and profitable so that Rotiv could recover the large sums of money it needed to expend to discharge its obligations under the contract. This complimentary reading of Arcelormittal's guaranteed production and dispatch rates and Rotiv's payment terms fits in well with the scheme of the contract. The trial judge's finding that there was no conflict between the guarantee clauses and Rotiv's payment terms cannot be faulted.

18. Third, the true link between Rotiv's loading and dispatch rates and Arcelormittal's production rates was aptly stated paragraph 41 of the judgment (and I quote):

"***The Claimant*** (Rotiv) ***is expected to be able to keep abreast with the Defendant's*** (Arcelormittal) ***output and with the market demands for the Defendant's*** (Arcelormittal) ***product."***

The trial judge correctly interpreted the contract in a business like manner. It was not feasible to match a mathematical or exact future production by Arcelormittal to the exact provision of future stevedoring services by Rotiv. These quantities could only be estimated or approximated. The real intention was to match, in a general way, Rotiv's loading and dispatch

[4] See paragraphs 38 and 39 of the Judgment
[5] See paragraphs 39 and 40 of the Judgment

rates to Arcelormittal's production and dispatch rates. The trial judge also aptly stated this as follows:

"The minimum loading and dispatching rate corresponds to the estimated/approximated production, dispatch and loading rate represented/warranted or guaranteed by the Defendant (Arcelormittal) ***in clauses 5,7,8 and 9.21."***

19. Arcelormittal attempted to argue that their contractual production rate was not a mathematical match to Rotiv's contractual dispatch and loading rates. While we do not accept the correctness of Arcelormittal's mathematical calculations, it would make no difference to the outcome, for, as the trial judge indicated above, the aim of the parties was not to match the two rates mathematically but to provide in a general way for Rotiv to keep abreast of Arcelormittal's output.

20. Fourth, Rotiv needed to rely on the guaranteed production rates of Arcelormittal to be able to appreciate the manpower and equipment resources it would need to perform the contract. As such the guarantee clauses were a necessary gauge for both parties to fathom their duties and obligations under the contract. The trial judge stated this in terms that the guarantee clauses "***gave life and meaning***" to other Parts of the agreement.[6]

As the trial judge went on to explain,[7] the guarantee clauses were (in my words) "a gauge" for Arcelormittal to know what to expect from Rotiv as the basic equipment and manpower needed and, if necessary, to justify increases from Rotiv as the need arose. It also allowed Rotiv to estimate its basic manpower and equipment needs and if necessary to increase them as the need arose.

Again, this interpretation of the 'guarantee clauses' is in keeping with the principles mentioned above.

21. Fifth, the trial judge took specific note of some "***background knowledge available to the parties at the time of the making of the agreement***" to shed ***"light on the way the agreement is to be construed"***, namely:-[8]

[6] See paragraph 42 of the Judgment
[7] Ibid
[8] See paragraph 44 of the Judgment

The present contract was for the provision of stevedoring services to cover the period 30th April 2003 to 30th April 2006. However, prior to this Rotiv and Arcelormittal had successive contracts for similar services from since 1993.

There were no clauses like the guarantee clauses in any of those contracts. Their inclusion is this contract suggests that they were meant to have some binding effect on the parties.

Further, at the date of the contract both parties well knew that (a) Rotiv did not have the resources necessary to perform the contract at the level now requested, and (b) Rotiv would be given a grace period of 4 months to come up to speed. Therefore, the inclusion of Arcelormittal's production rates in the written contract was a recognition of the need for Rotiv to have a minimum revenue stream to enable them to recover their outlay in bringing their operations up to speed.

With this specific knowledge of the parties at the time of the contract, the trial judge found it "***glaringly obvious***" that the guarantee clauses were meant to have more than the force of mere recitals.

This conclusion cannot be faulted.

22. Sixth, the trial judge had before her the contradicting evidence of the witnesses in respect of their understanding of the guarantee clauses at the time of the agreement and she preferred Rotiv's evidence over that of Arcelormittal's.[9] The advantage of the trial judge in seeing and hearing the witnesses is to be given due precedence and we will not lightly interfere with this.[10] A fortiori, in this case we note that in the cross examination of one of Arcelormittal's witnesses, Mr. B. Rao who was the General Manager of Logistics, he specifically admitted that the reason that Arcelormittal's production rates were included in the contract was to guide both parties in the performance of the contract.[11] This supports the judge's conclusions that the guarantee clauses were not mere recitals but were clauses upon which both parties relied as mentioned before. As such, those clauses were true guarantees that Arcelormittal would produce wire rod coils and billets at a minimum rate, thus guaranteeing a minimum amount of work and hence remuneration to Rotiv under the contract.

[9] See paragraph 47 of the Judgment
[10] See generally *Beacon Insurance Company Limited v Maharaj Bookstore Limited* [2014] UKPC 21
[11] See the Transcript of Day 3 of the trial at pages 64, 55 and 54

23. The trial judge's approach to the interpretation of the guarantee clauses was not clearly wrong. In fact, we go further and say that on the facts before her, the trial judge's interpretation of the guarantee clauses was the correct one. We see no reason to overturn this interpretation.

24. A point to note is that at the hearing in the Court of Appeal some concern was expressed as to whether the trial judge had regard to matters subsequent to the making of the contract to interpret the effect of the guarantee clauses. Specifically, there were 3 written documents dated 20th August, 1st November and 3th November 2004 which dealt with matters after the April 2003 contract which seemed to admit Rotiv's interpretation of the guarantee clauses.

Research on this issue was a main cause of the delay in this appeal.

However, as I demonstrated above, these written documents formed no part of the trial judge's interpretation of the guarantee clauses. Neither did she refer to events subsequent to the formation of the contract to interpret the clauses.

In her judgment, the trial judge correctly summed up her application of the legal principles of interpretation as "***having examined the Agreement in its entirety, and having considered the background information available to the parties at the time of the making of the Agreement, this court is of the opinion that hypothetical reasonable parties, having the same background knowledge as the parties before the court will interpret Clauses 5, 7 and 8 of the Agreement*** (the guarantee clauses) ***as terms/ representations made by*** (Arcelormittal) ***upon which*** (Arcelormittal) ***expected*** (Rotiv) ***to act/rely on and upon which any reasonable person in*** (Rotiv's) ***position would have acted/ relied on."*** [12] (My emphasis)

B. *The Proof of the Breach of the Guarantee*

25. Having resolved the central issue in the case in favour of Rotiv, the trial judge recognized that the other issues in the case would be easily resolved. The first such sub-issue was whether Arcelormittal was in breach of its guarantee to provide a minimum quantity of finished product for Rotiv to load and dispatch.

[12] See paragraph 46 of the Judgment

26. Rotiv's evidence was that Arcelormittal's production of wire rod coils and billets fell short throughout the life of the contract. To back this up Rotiv produced the 3 documents referred to above; namely a letter from Rotiv dated 20th August 2004 and 2 internal memoranda from Arcelormittal dated 1st November and 3rd November 2004. In these documents Arcelormittal admitted to significant shortfalls in production which, as they acknowledged, made the stevedoring contact "non-performing".

This combination of Rotiv's evidence and the admissions of Arcelormittal, enabled the judge to conclude that there was obvious proof of Arcelormittal's breach of the contract.[13]

C. *Rotiv's Loss*

27. The second sub-issue that the trial judge addressed was, what was the remedy available to Rotiv for Arcelormittal's breach of contract.

In the Statement of Case, Rotiv claimed:

i. General Damages, and

ii. Special damages under 3 heads, namely:

(a) Loss of earnings during the period of the agreement;

(b) Expenses incurred to obtain the required contractual capacity;

(c) Loss of prospective earnings.

28. The trial judge made an order for the damages and costs to be assessed by a Master in default of agreement. [14]

However, with respect to the special damages claimed the trial judge made the following findings. Since the cross appeal against the findings has been withdrawn I will only deal with these items in a summary manner.

29. Re the claim for (a) loss of earnings. Arcelormittal had given contractual notice of termination of the contract by letter dated 27th April 2005. Under the contract, this was a 3 month notice, so that the contract came to an end on 27th July 2005. The loss of earnings was to be

[13] See paragraphs 48 and 49 of the Judgment

[14] See paragraph 50 of the Judgment

calculated from the date of commencement of the agreement (30th April 2003) to its date of termination 27th July 2005.[15]

Re claim (b) Expenses incurred to obtain the required contractual capacity. This was not granted as it would have resulted in a double recovery pursuant to learning in **Mc Gregor on Damages 17th Ed 2003 para 2-0-8** and the case **Cullinane v British Rema Manufacturing Company Ltd [1954] 1 QB 292.[16]**

Re claim (c) Loss of prospective earnings. This was dismissed since the contract was duly terminated as provided for in the written agreement. Hence there was no prospective loss.[17]

D. *An Amendment to the Statement of Case*

30. At the Court of Appeal, Arcelormittal sought to challenge an amendment to Rotiv's Statement of Case that the trial judge granted. This Amendment was granted on the first day of the trial, namely, 31st October 2007. Arcelormittal contended that this Amendment should never have been granted since it was made much too late (some 3 years after the first Case Management Conference) and there were no changes of circumstances to permit the same.

In my view, there is no need to deal with the merits of this challenge as it does not affect the findings on this appeal.

31. Arcelormittal argued that the Amendment introduced 2 new matters to Rotiv's case:[18]

i. An alternative case that the guarantee clauses were representations;

ii. Changes to the case for special damages and future loss.

32. With respect to (i), the alternative case that the guarantee clauses were representations.

The Amended Defence recognized that this new pleading was raising a new case based on the doctrine of misrepresentation.[19] The trial judge never addressed this case of misrepresentation, so that this Amendment made no difference to the outcome of the case.

[15] See paragraph 51 of the Judgment
[16] See paragraphs 52-54 of the Judgment
[17] See paragraph 55 of the Judgment
[18] See paragraph 22 of Arcelormittal's submissions filed on 13th January, 2015
[19] See paragraph 2A of the Amended Defence

Further, and in any event, Rotiv's original, unamended Statement of Case did plead that Rotiv relied on the guarantee in the clauses as terms of the contract.[20] This case was expressly upheld by the trial judge and we have affirmed the same. Any references by the trial judge to a case based on the representations as a separate issue was an alternative to this and would not change the outcome of this appeal.

33. With respect to (ii), changes to the case for loss and damages, we note that Rotiv's original, unamended Statement of Case pleaded their special damages as the difference between Rotiv's estimated receipts from guaranteed loading and the actual receipts from loading in the sum of $22,383,247.72.[21] The Amended pleading claims a total loss of $20,347,830.72; some $2 million dollars less. Even if the Amendment were disallowed, the assessment of damages for loss of earnings can proceed on the original claim that is $2 million more.

Further, the Amended Claim included sums for (i) Expenses incurred to obtain the required contractual capacity, and (ii) loss of prospective earnings. As stated above,[22] both these claims were disallowed by the trial judge. There is no need to address these amended claims.

E. *The Counterclaim*

34. The third sub-issue in the case was Arcelormittal's Counterclaim. Arcelormittal attempted to pursue a claim against Rotiv for losses it suffered because of Rotiv's alleged under performance/ non- performance of their stevedoring services under the contract.

This claim was not maintainable because of the trial judge's findings (which we support), that it was Arcelormittal who were in breach of the contract by failing to provide Rotiv with a minimum guaranteed amount of finished product for handling. It was this breach that rendered the contract non performing or unprofitable for Rotiv and which affected their ability to provide the necessary stevedoring services. Put another way, the result of Arcelormittal's own breach of contract was their own alleged loss. On the present facts, it would be quite wrong for Arcelormittal to create the breach of contract and then to recover the losses they suffered as a result of this same breach from Rotiv.

[20] See paragraphs 7,8,9 and 10 of the Original Statement of Case
[21] See paragraph 11 of the Original Statement of Case
[22] See paragraph 29 supra

35. The trial judge cited the relevant law at paragraph 12 of her judgment where she correctly stated that "***each party must co-operate with the other contracting party so that the latter can discharge his obligations under the contact. One party cannot prevent or disable the other from performing the Agreement and then rely on the other's non-performance as cause for termination for breach***."

We find no fault with the decision to dismiss the Counterclaim.

36. However, for the sake of completeness, I will deal with the specifics of the counterclaim, but in a summary manner.

37. The counterclaim comprised of 3 items:

i. Repayment for advances to Rotiv,
ii. Repayments for rental of machinery,
iii. Contractual liquidated damages.

38. Re (i) repayment for advances to Rotiv. The background information of this alleged claim is that when Rotiv realised that the contract was non performing, they attempted to negotiate a weekly payment from Arcelormittal which was based upon the guarantee clauses. There were to be adjustments to the actual payments to Rotiv according to the quantities actually handled by Rotiv. Arcelormittal made some payments and then, as the trial judge found, unilaterally decided to treat these payments as advances that were recoverable from Rotiv. This is the basis of this counterclaim for the repayment of advances.

Rotiv consistently disputed this claim and the trial judge had all the facts before her, heard and saw the witnesses testify and preferred Rotiv's version of the events. She found that Arcelormittal's action was an arbitrary attempt to introduce new terms into the contract and she rejected this claim. However, she correctly recognized that these advances had to be taken into account in reduction of the damages payable to Rotiv. This would be done at the assessment of damages.

The trial judge was best placed to make this finding on the facts before her and we cannot find fault with her reasoning.

In any event, even if this "loss" was somehow an advance, as I stated before,[23] the real cause of this loss was Arcelormittal's own breach of the guarantee clauses and it would not be maintainable as a breach of contract against Rotiv.

39. (ii) With respect to the rental of machinery claim. The background information is that Arcelormittal hired machinery to complete its stevedoring commitments especially so toward the latter stages of the contract. They now claim this back from Rotiv. Interestingly enough, as the trial judge noted, Rotiv's attorney-at-law acknowledged its willingness to pay for these rental charges once verified.[24] This would be a matter for the assessment of damages.

However, it would be wrong for this claim to proceed as a counterclaim because as I stated before, this claim was a result of Arcelormittal's own breach of the guarantee clauses.

Further, as the trial judge recognized, there may be an element of this claim that was not recoverable in any event.[25] This would be in relation to extra machinery rental by Arcelormittal during the first 4 months of the contract. The parties had given Rotiv this period to come up to speed with respect to the equipment requirement and even encapsulated this in the contract at Part 2.1. In the words of the trial judge which we approve, "***The Defendant*** (Arcelormittal) ***cannot now turn back around and say that from the inception of the Agreement the Claimant*** (Rotiv) ***failed to meet the stipulated minimum machinery requirement."***[26]

40. (iii) The claim for liquidated damages. Arcelormittal attempted to invoke Part 18.4 of the Contract which permited Arcelormittal to recover liquidated damages at the rate of $100US per hour for any production loss caused by delays of Rotiv in removing wire coil from the finishing end of the Rodmill. The claim under this head of loss is for $65,000 US.

The trial judge decided that this claim was again the result of Arcelormittal's own breach of the guarantee clauses and cannot be maintained.[27] We find no fault with this conclusion.

[23] See paragraph 34 supra
[24] See paragraph 57 of the Judgment
[25] See paragraph 61 of the Judgment
[26] Ibid
[27] See paragraph 62 of the Judgment

CONCLUSION

41. We dismiss this appeal and affirm the orders of the trial judge. We will hear the parties on the question of costs.

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G Smith

Justice of Appeal