Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1990/B 097

BETWEEN	**B.M.S. GENERAL CONSTRUCTION COMPANY (1989) LIMITED**	**PLAINTIFF**
AND	**THE ATTORNEY GENERAL**	**DEFENDANT**

B.E. Frankson and Hugh Thompson instructed by Miss Caroline D'Oyen-Fitchett of Gaynair & Fraser for the plaintiff.

Miss Nicole Foster and Curtis Cochrane instructed by the Director of State Proceedings for the defendant.

HEARD: December 8,9,10, 15, 16 and 19, 1997 and February 9, 1998.

WALKER J.

The Leicesterfield Primary School located at Leicesterfield in the parish of Clarendon was destroyed by fire some time during the course of 1988. The school which fell under the aegis of Government had to be re-built. Tenders were invited for carrying out this work and on January 31, 1989 a contract was entered into between the Ministry of Education (hereinafter referred to as "the Ministry") and the plaintiff company. This contract was priced at $2,613,400.65 and was for a period of 9 months. Thereafter Mr. Henry Morant, Managing Director of the plaintiff company, commenced work on the project after taking possession of the school premises in early February, 1989. Then dramatic events occurred. On or about February 9, 1989 a general election was held

which resulted in a change of Government and a new Minister of Education was appointed. As I find, a meeting was held at the Ministry on May 15, 1989. At that meeting which was attended by the Minister, other representatives of the Ministry and Mr. Morant, the Minister indicated his unwillingness for the plaintiff company to proceed any further with the Leicesterfield school contract. Then and there Mr. Morant was advised to submit for settlement the cost of work that had already been done. In this way it seems to me that the Minister evinced an intention to terminate the contract and to pay to the plaintiff whatever compensation was legally due in the matter. I am fortified, I think, in coming to such a conclusion by the contents of a letter from the plaintiff to the Minister dated May 19, 1989. That letter read as follows:

> "Sen Hon. Carlyle Dunkley
> Minister of Education
> Ministry of Education
> 2 National Heroes Circle
> P.O. Box 498
> Kingston
>
> Dear Sir,
>
> Re: Leicesterfield School Contract
>
> Further to our meeting at your Ministry on Monday May 15, 1989, attended by your Miss Patterson - Director of Project and Mr. Volney Bartley who sat in with me, I would like it to be placed on record that you have made it known that there seem to be a degree of political conflict and or situation, I then made myself abundantly clear that stories of that kind is unknown to me.
>
> My company had made and or put in place all that are relevant for the smooth execution of the works, however, you have advised me to prepare cost with particular reference to settlement and or withdrawl of the contract.

At that stage, I told you that my attorney will deal with the matter.

Yours,
B.M.S. General Construction Co. Ltd.
Sgd. Henry C. Morant
Chairman/Managing Director."

In due course the plaintiff submitted its claim to the Ministry. That claim proved unacceptable to the Ministry and the parties pursued negotiations towards achieving an amicable settlement of the matter. By letter dated September 13, 1989 from the Permanent Secretary, Ministry of Education, the plaintiff was invited to resume work on the Leicesterfield project on the basis of certain conditions including a contract period which would be extended from October 30, 1989 to July 31, 1990. By letter dated December 6, 1989 the plaintiff, through its attorney at law, advised the Ministry of the willingness of the plaintiff to resume the work, but on condition that before doing so the plaintiff would be paid compensation for loss already incurred. Hereafter negotiations between the parties broke down and the plaintiff resorted to court action by filing its writ of summons on April 10, 1990. Service of this writ of summons was effected on the same day. The writ was accompanied by a statement of claim which in its amended form particularized the plaintiff's claim for special damage as follows:-

"**PARTICULARS OF SPECIAL DAMAGE**

Contractor's profit (15%)	$392,010.10
Insurance premium paid for Employer's Liability	4,750.00
Insurance premium paid for Contractor's All Risk (Contract works)	$18,033.00

Insurance premium for Performance Bond	7,840.00
Site clearing	15,000.00
Visits to site by Technical Personnel from this company who carried out grade pegging for excavation	30,000.00
To retain technical Personal with specific reference to the proposed project	30,000.00
Monies advanced by Bank towards Contract	180,000.00
	$677,633.30

And the plaintiff claims damages and interest pursuant to the Law Reform (Miscellaneous Provisions) Act at such rate and for such period as this Honourable Court deems just."

Before me liability on the plaintiff's claim for breach of contract has not been denied. Furthermore, items 2,3,4,5 and 7 of the particulars of special damage were agreed as claimed and item 6 was agreed in a sum of $5,000.00. Item 8 was abandoned by the plaintiff during the course of this trial, leaving for determination by the court only item 1 - the plaintiff's claim for contractor's profit. This item was contested by the parties to the bitter end, if I might put it that way. So the question is whether item I is sustainable on the evidence.

According to my understanding where, as in the instant case, an owner's breach results in termination of a contract, a contractor may claim for, and be entitled to, loss of profit on the remaining contract work. Whether the contractor will have such a claim and,

if so, the extent of that claim will depend upon the profitability of the contractor's contract prices. In this scenario it is always open to an owner to rebut a contract's claim for loss of profit on the ground that the terminated contract was not, in fact, profitable (see ***I.N. Duncan Wallace on Construction Contracts: Principles and Policies in Tort and Contract at p. 118***). In order to succeed in a court action the contractor must be able to establish by evidence that the contract prices for work that remained to be done would, as a matter of fact, have been profitable. Of course, this will depend primarily on the adequacy of the original estimation and pricing of the cost of the contract, rather than on any percentage of profit used at the time of pricing. The calculations and evidence to establish a claim for loss of profit on a terminated contract must necessarily involve deducting from the notional contract value of the whole project if completed all sums previously paid and the estimated cost to the contractor of completing the unfinished work, in order to determine if any further sum by way of profit can be recovered (see ***Hudson's Building and Engineering Contracts, 11 Edn., Chapter 8 at p 1070***). Applying these principles, which I accept and adopt, to the instant case, in order to determine whether or not this plaintiff has a valid claim for loss of profit one must have regard to the general level of profitability of the plaintiff.

In the instant case it was the undisputed evidence of the plaintiff's witness, Valric Coley, a professional quantity surveyor, that he prepared the plaintiff's tender and factored into it a contractor's profit of 15%. Indeed, this is the basis on which the plaintiff computes its present claim for loss of profit. But a claim of this nature computed on such a basis can be misleading inasmuch as there can be a considerable difference between

expected and actual profit. It is actual profit that is important. Does the evidence suggest that, on a balance of the probabilities, the plaintiff would have realised an actual profit from this project had it been completed? That is the crucial question. Mr. Morant was examined and cross-examined at length as to the operations of the plaintiff company's business, and the work that had already been done on the project prior to termination of the contract. As to the work already done, I recorded a portion of Mr. Morant's evidence in the following terms:-

> "By starting project I mean we were shown site by chief architect of Ministry of Education Mr. Lucius Craigie We did site clearing immediately. Prior to this we secured some technical persons such as a site engineer, a foreman carpenter, a steel man in a similar category, a foreman mason, a specialist surveyor. Then we proceeded to lay out the site. After this we proceeded to excavation. At a very far advanced stage of excavation work we were challenged by people who lived adjacent to the site. They claimed that we were building on their lands. I informed the Ministry of Education through the Permanent Secretary of the problem. Ministry sent Mr. Craigie to resolve matter. Mr. Craigie discovered that claim of people was valid. As a result we had to re-position the site. We had to back - fill the area that had already been excavated and re-start excavation in a southerly direction as against an easterly direction originally taken. After re-establishing the batter boards we purchased lumber and started prefabrication of these works at my head office in May Pen."

Against this was the evidence of the defendant's witness, Lucius Craigie, which I accept. Mr. Craigie's evidence was to the effect that he saw no evidence of excavation when he visited the site of the project subsequent to the cessation of work and, further, that the department of the Ministry of Education which was headed by him gave no approval for

lining out which was a pre-requisite for the start of excavation work on this project. I find that no work was done on this project beyond the re-establishment of batter boards in the process of re-positioning the building site. In particular, I find that no excavation work was done by the plaintiff up to the time of cessation of the work. As regards the progress of the project at that time Mr. Morant said it was "way ahead of schedule". Where the business operations and financial affairs of the plaintiff company were concerned Mr. Morant was unable to produce any documentary evidence to support the spoken word which, in my opinion, was not enough. The plaintiff company kept books but he produced no books. The plaintiff company paid for goods by cheques but he could produce no returned cheques for goods purchased. The plaintiff company received receipts for monies expended for goods purchased but he could not produce a single receipt. Except for Mr. Morant's bald testimony, there was no evidence of past business ventures of the plaintiff company that had been profitably undertaken as projected by tender. In short there was, altogether, no cogent evidence in proof of a track record of profit making to which the plaintiff company could justifiably lay claim. As a witness, Mr. Morant was, himself, quite unconvincing. He contradicted himself on occasions, and I would go so far as to say that wherever Mr. Morant's evidence conflicted with the evidence of the witnesses for the defendant I preferred that of the latter. In the circumstances I find that the plaintiff has not proved its claim for loss of profit and, accordingly, that item is disallowed. By way of special damages the plaintiff is, therefore, entitled to an amount of $80,623.20 less a construction levy of 2% as provided for in clause 39 of the contract between the parties. After deduction of this levy the sum due becomes $79,010.74. The

claims for interest which I am prepared to award at the rate of 2% per month specified in the Appendix to the contract. I interpret this provision for the payment of interest on overdue amounts to be a payment of simple interest and, therefore, to equate to a payment of interest at a rate of 24 % per annum. I am prepared to award the plaintiff such interest.

In the result there will be judgment for the plaintiff for the sum of $79,010.74 with interest thereon at a rate of 24 % per annum from April 10, 1990 to the date of this judgment.

Costs to the plaintiff to be agreed or taxed.