[2025] JMCC COMM. 14

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2020CD00414

BETWEEN	**KONKI OVERSEAS JAMAICA LIMITED**	**CLAIMANT**
AND	**M & M JAMAICA LIMITED**	**DEFENDANT**

Mr. Garth McBean KC and Mr. Ronald Paris instructed by Paris & Co, Attorneys-at-law for the Claimant

Mr. Jerome Spencer, Ms Gillian Mullings and Ms. Abi-Gale Bryan instructed by Naylor & Mullings, Attorneys-at-law for the Defendant

Civil procedure – Breach of Contract- Whether the Defendant wrongfully terminated the Sub-contract- Whether the Claimant repudiated the Sub-contract- Whether the Claimant is entitled to damages for breach of contract- Loss of profit- Nominal damages

IN OPEN COURT

Heard on 2nd, 3rd, 4th, December, 2024 and 26th March and 8th May, 2025

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] This is a claim for damages for breach of a Sub-Contract entered into between the Claimant Konki Overseas Jamaica Limited (Konki) and the Defendant M & M

Jamaica Ltd (M & M). The Sub-Contract provided for the fabrication and installation of a perimeter fence at the Closed Harbour Beach Park in Montego Bay. The Claimant's contention is that the Defendant wrongfully terminated the Sub-contract. The Defendant's response is that the Claimant was in breach of the conditions of the Sub-contract and so the Defendant was justified in issuing a Notice of Default followed by a letter terminating the Sub-contract.

EVIDENCE ON BEHALF OF THE CLAIMANT

[2] The evidence on behalf of the Claimant was presented by Mr. Blandel Allen, the majority shareholder and Managing Director of the Claimant company who asserted that the conversation regarding the construction of the perimeter fence commenced in early 2018 and on May 3, 2018, he submitted a quote for the manufacture and installation of four hundred and twelve (412) metres of perimeter fences for the sum of Twenty-Three Million, One Hundred and Sixty-Seven Thousand, Six Hundred and Five Dollars ($23,167,605.00). This quote was for the construction of ten (10) gates valued at Eight Million, One Hundred and Five Thousand Dollars ($8,105,000.00) and thirty-two (32) posts valued at Nine Hundred and Ninety-Seven Thousand, Two Hundred and Forty Dollars ($997,240.00) thus making a composite quote of Thirty-Seven Million, Five Hundred and Ninety-Four Thousand, Three Hundred and Sixty-Nine Dollars and Forty-Two Cents ($37,594,369.42).

[3] Mr. Allen asserted that negotiations continued through email communication with the Defendant's representative Mr. Donnel Barnett and by December 20, 2019 and after a process of negotiations, further adjustments were made to the quotation by the Defendant reducing the length of the fence from five hundred and twenty-four (524) metres to four hundred and forty-eight (448) metres, as well as a five percent (5%) contractor's discount which further reduced the contract sum. The parties arrived at a final contract sum of Twenty-One Million, Six Hundred and Fourteen Thousand, Seven Hundred and Seventy-Seven Dollars and Sixty-Six Cents

($21,614,777.66). However, the Claimant refused to sign the document because it provided for a completion period of one hundred and twenty (120) days instead of one hundred and forty (140) days as agreed.

[4] Further discussions were had regarding the completion date, the length of the fence, the mobilization period as well as a Performance Bond and Mr. Allen asserted that he executed the Sub-Contract on February 11, 2020. He stated that after executing the Sub-Contract, adjustments were made to the completion period of one hundred and forty (140) days not by pushing back the commencement date from February 3, 2020 to February 24, 2020, but rather by moving the completion date from June 2, 2020 to June 23, 2020. This, Mr. Allen stated was in contradiction of the discussions had in email communication regarding the commencement date of the contract.

[5] Mr. Allen averred that he experienced issues with providing the Performance Bond to the Defendant and requested two (2) weeks' extension however on February 25, 2020, he received a call from Mr. Andrew Chong questioning their ability to supply the goods. In a bid to avoid the 'paranoia', he sent an email to Mr. Barnett on the same date stating as follows:

> ***"****To avoid the paranoia within the M & M Group due to the mobilization deposit request. After discussion with our overseas colleague we have decided not to take the deposit.*
>
> *We will manufacture the fence according to the contract provide working progress reports and submit samples upon request.*
>
> *Upon Bill of Lading notification that the goods is (sic) ship M&M Jamaica Ltd agree to forward a deposit of 50% of the contract value. In the meantime we will need to know the colour of the finish fence."*

[6] Mr. Allen asserted that Mr. Barnett responded on February 28, 2020 stating:

> *"Mr. Allen*

An attachment from the UDC specifying the colour of the fence came with this. See SI#188 attached which gives the colour for the grilles. Please indicate the substitute you are proposing to use for the protection and how much guarantee will be given?"

[7] Mr. Allen averred that on Sunday, March 1, 2020, the Project Coordinator, Mr. Andrew Chong sent an email under the subject head "Condition of Contract – Completion and Default" referring to Clause 5 of the Conditions of the Sub-contract Agreement and notifying that the Claimant is in default for failing to proceed with the works with reasonable diligence, delaying in providing the mobilization bond, failing to provide evidence of purchase of raw material, failing to provide evidence that the work had commenced and requested evidence that the work can be completed by June 23, 2020 by providing the following information by March 11, 2020:

a. Invoice from supplier
b. Timeframe to ship
c. Timeframe for your shipment to arrive to your factory
d. Timeframe to fabricate perimeter fencing
e. Timeframe to ship
f. Timeframe for shipment to arrive in Jamaica
g. Timeframe to deliver on site and
h. Timeframe for installation on site

[8] The formal Notice of Default was sent to Mr. Allen by email on March 2, 2020. However, on March 6, 2020, he received an email from Mr. Barnett indicating that only a mere schedule of Completion was sent when they needed to see confirmation that the material had been purchased or a confirmed order via an Invoice from a Supplier as indicated in the Notice of Default.

[9] Mr. Allen asserted that, on March 9, 2020, he sent an email to Mr. Andrew Chong attaching a proposed schedule for completion and on March 11, 2020 he sent Mr. Barnett an email attaching a photograph of the scaled down sample fence. He stated further that a skype message was exchanged with his Chinese supplier

indicating that the scaled down sample would be ready to be shipped to Jamaica on March 16, 2020 and that there would not be any delay in the production of the four hundred and forty-eight (448) metre fence since the virus had been controlled in China.

[10] Despite sending the requested information, Mr. Allen averred that a letter of termination of the Sub-Contract was delivered to the Claimant company on March 13, 2020. Mr Allen contended that the Notice(s) of Default that were emailed on March 1 and 2, 2020 were issued in breach of the Conditions of the Sub-Contract as the Claimant company was not guilty of suspending the completion of works nor of failing to proceed with the works with due diligence. He asserted that were it not for Mr. Chong requesting a scaled down sample, the fence would have arrived in Jamaica on March 26, 2020 and were it not for the spread of the virus outside of China, the Sub-Contract would have been successfully completed.

[11] Mr. Allen asserted that though he had obtained an invoice from Lilly & Associates International Freight Forwarders dated February 3, 2020 from which the Chinese Factory would deliver the Four hundred and forty-eight (448) metres galvanized metal fence, he did not disclose it to the Defendant since it was the Claimant's document and the ten percent (10%) mobilization payment under the Sub-Contract agreement was not paid. He further asserted that the Sub-contract did not provide for a mobilization period, rather it stipulated a mobilization payment which was never complied with.

[12] During cross-examination, Mr. Allen denied the Defendant's assertion that he failed to procure the required material and that there was any inaction between February 3, 2020 to March 1, 2020. He also denied Counsel's suggestion that he was aware that the Performance Bond was to be obtained at the commencement of the contract.

EVIDENCE ON BEHALF OF THE DEFENDANT

[13] Mr. Andrew Chong, the Project Coordinator of the Defendant Company gave evidence on its behalf. He asserted that M&M was awarded a public contract, the main contract being from the Urban Development Corporation Jamaica (UDC) which had strict guidelines as to the times of completion of the project. He asserted that in an effort to complete the construction under the main contract, M&M sought to sub-contract various aspects of the work to a number of sub-contractors and Konki was shortlisted to construct a perimeter fence grill that was required under the main contract. He asserted that at all material times, Konki was aware that there were provisions under the main contract for the completion of the construction project.

[14] Mr. Chong asserted that Konki was aware that the commencement date of the Sub-contract was February 3, 2020 and executed the Sub-contract on February 2, 2020. He stated that after executing the initial agreement, Konki requested an amendment of twenty-one (21) days to facilitate a mobilization period from the contract start date. However, though an objection was raised, the completion date was amended from June 2, 2020 to June 23, 2020. He indicated that the amended Sub-contract was initialled after Konki was notified that the Sub-contract would be offered to another sub-contractor if it was not executed.

[15] Mr. Chong averred that the Sub-contract was made available for execution on January 31, 2020 which provided sufficient notice for a start date of February 3, 2020. He stated that an email requesting the delivery time and the installation time for the fencing was sent to Konki on January 24, 2020 and that email made it clear that a performance bond would be required to access a fifty percent (50%) deposit on the sub-contract work. He contended that Konki was not forthcoming with the Performance Bond and informed M&M that they would be funding the purchase of the material without the fifty percent (50%) deposit since there was a delay and

would reimburse them after the materials were shipped. During cross-examination he accepted that the fifty percent (50%) deposit was important to fund the mobilization of the sub-contract to carry out work which would include procurement of material. He accepted that he expected that Mr. Allen would 'upfront' the deposit and also admitted that he was aware that Mr. Allen was experiencing challenges getting the bond. He also accepted the fact that forgoing the deposit changed the position of the urgent need for the bond and admitted that Mr. Allen made a request for another two weeks to provide the bond.

[16] He asserted that the Notice of Default was delivered to Konki on March 1, 2020 as a result of inaction and contended that the Notice of Default required Konki to produce an invoice from the supplier that the materials had in fact been purchased as well as a timeframe for specific work up to completion. The Notice required that the default be remedied within ten (10) days, however at no point was an invoice presented or alternatively confirmation that the purchase order was processed. He stated that he came to the conclusion that Konki was unable to commence work for which it had not procured the required material and on that basis, the work under the Sub-contract was suspended as a result of the delay which would inevitably impact the completion date of the Sub-contract.

[17] During cross-examination, Mr. Chong indicated that after the Sub-contract was terminated, another sub-contractor was engaged to carry out the installation of the perimeter fence and that was concluded early November 2020.

[18] He stated that M&M was forced to move to another sub-contractor so that it could be in a position to fulfil its obligations under the main contract. He contended that the Sub-contract was properly terminated and M&M has no further obligations to Konki.

[19] Mr. Donnel Barnett's evidence basically replicated the evidence given by Mr. Chong. He testified that he was the Project Manager at the material time and

asserted that a draft of the Sub-contract agreement was given to Konki on February 2, 2020 where a request was made for an amendment to include an additional twenty-one (21) days to include the time for completion to account for the mobilization period from the contract start date. He stated that in facilitation of this request M&M changed the completion date for the sub-contract from June 2, 2020 to June 23, 2020.

[20] He averred that on February 25, 2020, Konki made the decision that they would advance their own monies for the mobilization of raw material as they were unable to provide the Performance Bond within the requisite time. Consequent to the breach and no remedy being provided, he reiterated that the Sub-contract was terminated as Konki failed to proceed with the works with reasonable diligence.

[21] Mr. Barnett also accepted that there is no stipulation for a Performance Bond in the Sub-contract but indicated that it was required for the purpose of the deposit. He also accepted that the new sub-contractor took four (4) months to complete the project on the basis that material was unavailable from their supplier.

CLAIMANT'S SUBMISSIONS

[22] In commencing his submissions, King's Counsel for the Claimant, Mr. Garth McBean quoted paragraphs 23-032 to 23-038 in Chitty on Contracts, 24th Edition where the author dealt with variation of contracts. Paragraph 23-032 states as follows:

> *"The parties to a contract may affect a variation of the contract by modifying or altering its terms by mutual agreement…..a mere unilateral variation by one party to the other, in the absence of any agreement cannot constitute a variation of the contract."*

Paragraph 23-034 under the caption "Consideration" the author states:

> *"The agreement which varies the terms of an existing contract must be supported by consideration. In many cases, consideration can*

be found in the mutual abandonment of existing rights or the conferment of new benefits by each party on the other."

[23] King's Counsel submitted that the evidence in the emails which have been accepted by the parties supports the Claimant's contention that there was an understanding that the commencement date would be adjusted from February 3, 2020 to February 24, 2020. He contended that there is no email or other document which refutes or denies that there was such an understanding. King's Counsel submitted that the failure to amend the contract to reflect what the parties intended and agreed constitutes a unilateral variation of the contact and a breach of contract by the Defendant.

[24] King's Counsel contended that the failure to pay the ten percent (10%) mobilization sum amounted to a breach of contract. Further that the mobilization sum was payable on the signing of the contract and was not conditional or subject to the provision of the bond by the Claimant. He asserted that this mobilization sum was required to purchase raw materials and since it was not paid, it affected the Claimant's ability to efficiently acquire raw materials and amounted to a breach of the contract.

[25] King's Counsel further asserted that there is no correspondence indicating that the Claimant was experiencing challenges in obtaining the bond. He referred to the email dated February 13, 2020 from Mr. Allen to Mr. Barnett which states *"The bond is in the process of being finalized and is awaiting the signed contract"*. He asserted that when Mr. Allen realized that he faced challenges in obtaining the bond, he requested a further two (2) weeks however instead of granting that request, a default notice was issued.

[26] King's Counsel asked the Court to consider the engagement of new sub-contractors who took eight (8) months to complete the contract and then to weigh that against the Claimant's contract which was terminated only one (1) month after the contract was executed. He also asked the Court to consider that the Claimant had to forgo the mobilization sum which was due on execution as well as the fifty

percent (50%) deposit resulting in the absence of the bond. King's Counsel urged the Court to consider that the Claimant has satisfied most of the requirements in the Notice of Default with the exception of the invoice from the supplier and this was not required under the Sub-contract.

[27] King's Counsel submitted that the Claimant is entitled to compensation for the loss of his bargain. He contended that the general principle if there is a breach is that the innocent party is to be compensated by putting the party in the position they would have been in had the contract been performed. King's Counsel relied on the Court of Appeal authority of **Gregory Duncan v Orville Palmer** [2021] JMCA Civ 30 to support his position that for breach of contract, the aim of the court is to, as far as money can, put the Claimant in the position in which he would have been, had the contract been performed.

[28] In further submissions on the issue of Damages, King's Counsel submitted that the fact that an assessment of damages would be difficult because of an evidential deficiency in relation to the loss, is no reason for the Court to award no damages or nominal damages. He relied on the case of **Jamalco (Clarendon Alumina Works) v Lunette Dennie** [2014] JMCA Civ 29 where Phillips JA after citing extensively from McGregor on Damages stated that "the standard of proof is therefore not one of certainty, but one of reasonable certainty, which only demands evidence in respect of which existence of damages can be reasonable inferred". Similarly, in the case of **Garfield Segree v Jamaica Wells and Services and National Immigration Commission** [2017] JMCA Civ. 25, Morrison JA (as he then was), in concurring with Phillips JA in the **Jamalco v Lunette Dennie** case had this to say:

> *"In such a case the jury must do the best they can, and it may be that the amount of their verdict will really be a matter of guesswork. But the fact that the damages cannot be assessed with certainty does not relieve the wrong-doer of the necessity of paying damages for his breach of contract."*

[29] Taking into account the authorities relied on, King's Counsel articulated that although there is no evidence of the precise expenses incurred by the Claimant and therefore no certainty, the Court could reasonably infer expenses to include the mobilization fee stated in the Sub-contract which was ten percent (10%) of the contract price. He highlighted that the mobilization fee is a pre-estimate of the expenses to be incurred in mobilizing the contract. The mobilization fee amounted to Two Million, One Hundred and Sixty-One Thousand, Four Hundred and Seventy-Seven Dollars and Seventy-Six Cents ($2,161,477.76) and when deducted from the contract sum, the balance is Nineteen Million, Four Hundred and Fifty-Three Thousand, Two Hundred and Ninety-Nine Dollars and Ninety Cents ($19,453,299.90). This he submitted is the sum for loss of profit.

DEFENDANT'S SUBMISSIONS

[30] Counsel for the Defendant, Mr. Jerome Spencer drew the Court's attention to the text Keating on Building Contracts 5th Edition for an explanation as to what constitutes a building contract. He continued by quoting from the dicta of Daye J in **Harbour v Palmyra Resorts Spa Ltd. and Palmyra Properties Ltd**. [2012] JMSC Civ 44 where it was stated that before a term is implied into a written contract a court should exercise care. He also referred to Viscount Dilhorne in **Swiss Atlanique Societe d'Armement Maritime S.A. v N.V. Rotterdamache Kolen Centrol** [1996] 1 W.L.R. 944 as authority for the law on fundamental breach and with a focus on the distinction between a fundamental term and a fundamental breach. He contended that a fundamental breach arises when as a consequence of a particular act or inaction, the performance of the contract becomes something totally different from that which was contemplated by the parties. Counsel submitted that it's the Claimant's inaction or delay which caused the fundamental breach of contract which entitled the Defendant to repudiate the contract.

[31] Counsel submitted that the main consideration of whether an act or inaction constitutes a fundamental breach of contract becomes a question of fact and degree in all the circumstances of the case and where it has been determined that a fundamental breach has occurred, a party is entitled to repudiate the agreement. Further, that a delay in the completion of building works can cumulatively lead to a fundamental breach which goes to the root of the contract and causes a termination.

[32] Counsel advanced that at all material times, time was of the essence of the agreement despite the absence of the specific phrase in the agreement. He quoted Cheshire, Fifoot & Furmston's Law of Contract (14th Ed.) at page 14 where the authors explained that:

> *"In short, time is the essence of the contract if such is real intention of the parties and an intention to this effect may be expressly stated or may be inferred from the nature of the contract or from its attendance circumstances."*

[33] Mr. Spencer urged the Court to consider dicta of Sykes J (as he then was) in **Khiatani Jamaica Ltd., Khiatani v Sagicor Bank Jamaica Limited** [2018] JMSC COMM 10 where Sykes J (as he then was) made the point that:

> *"…what equity was saying is that merely to say that an act should be done by a certain date in and of itself may be insufficient to make time of the essence. Equity was also saying that there may be circumstances – even if there is no explicit term making time of the essence – that may in fact make time of the essence."*

[34] Counsel submitted that the relevant authorities are illustrative of the principle of time being of the essence and that a determination of such an issue will be subject to the facts and circumstances of the case. He contended that there was a failure on the part of the Claimant to produce the invoice from its suppliers, which by that date was the singular most important item, as without the raw material, nothing could be fabricated or installed on site.

[35] As it relates to the measure of damages, Counsel submitted that the onus is on the Claimant to prove and the Claimant had a duty to mitigate its loss by intercepting the supplier and instructing them against going through with the shipping of the material. Counsel submitted that if the Court is minded to award damages, all the costs incurred after March 13, 2020 in relation to the Sub-contract should be deducted as the Claimant was on notice that the contract was terminated and at that point had a duty to mitigate its loss.

[36] Mr. Spencer contended that Mr. Allen lacked credibility, that he was evasive when he indicated that part of the fabrication would be done in Florida then said all would be done in Florida.

[37] Counsel contended that the Sub-contract was rightfully terminated by the Defendant and the Claimant is not entitled to now recover damages on the basis of wrongful termination. It is also contended that the Claimant has not sustained loss of any breach of contract nor are they entitled to pure economic loss however, all the Claimant would be entitled to is nominal damages since there is no evidence of Special damages which must be specifically pleaded.

[38] Counsel made further submissions on the measure of damages, urging that the claim for loss of profit must fail as no evidence was adduced by the Claimant to substantiate the claim. Reliance was placed on the previously cited case of **BMS General Construction v The Attorney General** CL 1990/B097 where Walker JA (as he then was), stated:

> *"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 sum by way of profit can be recovered*".

[39] Mr Spencer contended that the Claimant having adduced no evidence as to its general profitability, the anticipated costs associated with the completion of the work, the amount factored for profit in the Claimant's pricing for the job or past business ventures undertaken by the Claimant and the profits earned from those ventures, the Claimant is not entitled to any sum for loss of profit.

ISSUES

[40] The main issues that need to be resolved are:

i. Whether the Defendant wrongfully terminated the sub-contact?

ii. Whether the Claimant is entitled to damages for breach of contract?

DISCUSSION

Whether the Defendant wrongfully terminated the Contract?

[41] There is no dispute that the parties entered into a contract and had the intention to be legally bound. There is also no question that there has been a breach of this contract. The question as to which party breached the contract is one that must be resolved. The Defendant has accepted that it was at its instance that the Sub-contract was terminated but has averred that it was entitled to do so, as the Claimant without lawful justification suspended execution of the contracted works and/or failed to proceed with the works with due diligence, therefore the Claimant is in default.

[42] Counsel on behalf of the Defendant has argued that based on Mr. Allen's evidence regarding the spread of the coronavirus in China they would not have been able to complete the contract in any event. I do not find merit in this contention as Mr Allen gave evidence of arrangements to fabricate the goods in Florida. Although there was some inconsistency in this regard, I do not find that he was so discredited to the extent that this has been proved to be untrue. The contract did not make any stipulation as to where the goods would originate from or where they were to be

fabricated so it would have been open to the Claimant to look at other options and based on the terms of the contract, there was no need to disclose specifically the origin of the materials.

[43] According to the Defendant, the Sub-contract should have commenced much earlier and the Claimant delayed in securing the bond that was necessary for the Sub-contract to proceed. King's Counsel on behalf of the Claimant has contended that the Defendant was at fault in its failure to pay the mobilization sum of ten percent (10%) and that this amounts to a breach of contract. Further that, this was payable on the signing of the Sub-contract and was not conditional or subject to the provision of the bond by the Claimant. It was contended that it was the fifty percent (50%) deposit that was payable on receipt of the acceptable bond. Although nothing in the Sub-contract speaks to a Performance Bond, it can be gleaned from the email communication that a bond was initially required on the provision of the fifty percent (50%) deposit.

[44] On February 25, 2020, the Claimant sent an email to Mr Barnett indicating that they have decided not to take the deposit. King's Counsel on behalf of the Claimant submitted that since the Claimant agreed to forgo the fifty percent (50%) deposit, there was no longer any need for a bond. I find that there is merit in this submission.

[45] During cross-examination, it was admitted by both the Defendant's witnesses Mr. Barnett and Mr. Chong, that the deposit was intended to allow the sub-contractor to purchase raw materials and so Mr. Barnett accepted that in light of the fact that Mr. Allen had agreed to forgo the mobilization sum and the deposit of fifty percent (50%), the bond was no longer required.

[46] Therefore**,** I do not agree that the failure to pay the ten percent (10%) deposit amounts to a breach of contract as the Claimant gave unchallenged evidence that he agreed to forgo both the ten percent (10%) mobilization payment and the deposit. It is also clear to me that his agreement to do so was influenced by the

fact of his own failure to obtain the bond. The issues regarding the bond, the deposit and the mobilization fee arose during the negotiation process and were resolved to the extent that the Claimant was no longer required to provide the bond and the parties had moved beyond that when the contract was signed. So the Claimant's failure to provide the bond did not amount to a breach of contract. In order to address the question as to which party breached the contract, it is essential to first determine what was the date of commencement of the contract.

[47] On behalf of the Defendant, it was argued that although not expressly provided for time was of the essence. I agree that based on the nature of the contract, an inference can be drawn that time was of the essence so it would have been incumbent on the Claimant to act with diligence. The written Sub-contract reflects a completion date of June 2, 2020 which was deleted and the completion date of June 23, 2020 inserted. The commencement date of the Sub-contract was slated for February 3, 2020, however this commencement date predated the execution of the contract by both the Claimant's representative and the Defendant's representative. The Claimant's representative contended that he delayed in signing the Sub-contract as he requested an amendment to the commencement date which would allow him to mobilize the project and obtain raw material. His evidence is that he was forced to execute the contract before it was amended because he didn't want to lose out on the contract. His assertion is based on the email dated February 12, 2020 at 6:07am from Mr. Donnel Barnett indicating that he needed the signed contract to take to the office by the next day.

[48] The Sub-contract Agreement expressly provided that the completion period was February 3, 2020 to June 23, 2020. The Completion and Default Clause was subject to "reasonable notice to commence being given by the project manager". According to the Claimant, there was an understanding that the commencement date would be adjusted or varied from February 3, 2020 to February 24, 2020 and that this is evidenced by the emails between them. As at February 3, 2020, there

seemed to have been an understanding that there was to be a deposit by the Defendant before the work would commence.

[49] In addition to that, it is accepted that although the Agreement had a commencement date of February 3, 2020 the Agreement was not signed until February 11, 2020. Mr. Allen by way of email dated February 11, 2020 to Mr. Barnett referred to the signing of the contract on said date and his understanding that Mr. Barnett would "*amend February 3rd 2020 as the beginning of the contract to include the 21 day you promise to adjust*". Mr. Barnett in response on February 12, 2020 simply responded that if he *"don't get the signed copy of the contract to take with me to the office tomorrow and have the bond in place by this Friday, then I will have to follow the directive of my superiors and move on to the next person*". From the train of emails, it seems it was after that on February 14, 2020 that Mr. Barnett sent the signed contract to Mr. Allen. Thereafter they continued discussions by email about the item to be supplied and the bond to be provided.

[50] I accept that it was not until February 11, 2020 that the signed Sub-contract was returned to the Claimant and this supports the Claimant's contention that there was an understanding that the commencement date would be amended to February 24, 2020 as otherwise it would mean that the contract was signed after the agreed date of commencement. I therefore accept the Claimant's version that there was an agreement to vary the commencement date to February 24, 2020.

[51] It is in that context that I will consider whether in light of a February 24, 2020 commencement date, the Claimant was in breach of the Sub-contract. Counsel for the Defendant contended that the Claimant was in breach of Clause 5 of the Sub-contract and that that warranted a termination of the contract. The contention is that the Sub-contract is time sensitive and from all indications the Claimant had not procured the necessary material to carry out the work up to a month after executing the contract. Clause 5 of the Sub-Contract headed Completion and Default, stated as follows:

The sub-contractor shall complete the works in a period stated herein together with any duly authorised extensions thereof subject to reasonable notice to commence being given by the Project Manager. Any loss or expense incurred by the Contractor which is attributable to the failure of the sub-contractor to complete or perform the works ordered shall be charged to the sub-contractor. If the sub-contractor shall make default in any of the following:

- ***i. Without reasonable cause suspends the execution of the sub-contract works.***
- ***ii. Fails to proceed with the works with reasonable diligence.***
- ***iii. Refuses or neglect to remove or replace defective of improper materials or workmanship.***
- ***iv. Commits an act of bankruptcy, goes into liquidation or a Receiver is appointed or makes an arrangement with creditors.***

Then, if such default continues for ten days after a notice in writing sent by registered or recorded post stating the default has been given to the sub-contractor then the Contractor may by notice given by similar means immediately determine the employment of the sub-contractor.

The commencement by the sub-contractor of any of the works which are the subject of this order will be on the express understanding that they will be proceeding with such works solely in accordance with the terms and conditions herein.

[52] I must therefore consider whether the Defendant unjustifiably terminated the contract or whether the Claimant without reasonable cause suspended the execution of the Sub-contract works or whether the Claimant failed to proceed with the works with reasonable diligence and what is the effect of this Notice of Default.

[53] The issues regarding the deposit and the bond having been settled, it would have been expected that the Claimant would commence the work by February 24, 2020. The Notice of Default was sent on March 1, 2020 less than a week later. The first default identified was that the Claimant had suspended the works. Clause 5

stipulated that it is subject to reasonable notice to commence being given by the Project Manager. Mr. Chong indicated in his evidence that by virtue of the express provisions of the written Sub-contract being made available to Konki for signing on January 31, 2020, that was sufficient notice of the commencement date expressly stated as February 3, 2020. I am of the view that this does not constitute notice to commence. The Defendant has failed to provide evidence of giving reasonable notice to commence, followed by commencement and then followed by a suspension of the works so I reject the contention that the Claimant suspended the works. This brings me to the alternative position averred which is that the Claimant failed to work with reasonable diligence. This must therefore be judged from the date of commencement which I have accepted to be February 24, 2020.

[54] It is the Defendant's case that the Claimant failed to proceed with the works with reasonable diligence, was notified of the default and given ten (10) days to rectify the default. The Claimant's response to that is that Sub-contract was terminated approximately one (1) month after the signing with over three (3) months left for completion despite the Claimant having satisfied most of the requirements in the default notice letter. King's Counsel also asked me to consider the fact that the other sub-contractor that was engaged by the Defendant completed the contract in November 2020, some eight (8) months afterwards so this suggests that the undue haste with which the Defendant acted in terminating the contract was not justified. I am of the view that the time taken by the other party to complete the contract may suggest that the Defendant's haste in terminating the contract with the Claimant was unnecessary but really has no bearing on the terms of the contract between the Claimant and the Defendant and so cannot influence my decision herein. What is essential here is whether the Claimant herein failed to act with the diligence required in the context of the terms of the Sub-contract.

[55] The case of **West Faulkner Associates v Newham London Borough Council** [1994] EWCA Civ J1110-631 relied on by the Defendant supports the fact that where a contractor is required to perform regularly and diligently, the employer

could terminate the contract if the contractor failed to proceed regularly and diligently with the works.

[56] The Notice of Default was sent on March 2, 2020 less than seven (7) days after the commencement date. It is in written form as required under Clause 5. It was delivered to the Claimant's office and although this was not consistent with the requirements under Clause 5 for it to be sent by registered post or recorded post, no significant issue was taken with this as it was in fact received by the Claimant. The Notice pre-supposed that there was either suspension or lack of due diligence. The Defendant having failed to prove that there was suspension of the works must prove on a balance of probabilities that the Claimant acted without due diligence. If the Defendant fails to prove this then the Notice of Default would not be valid.

[57] The Notice required the Claimant to provide evidence of commencement of the works and evidence that the works will still be completed by June 23, 2020. Mr. Allen on behalf of the Claimant on March 9, 2020 sent a Schedule to the Defendant. According to the Defendant, the Schedule did not satisfy all the requirements hence by March 13, 2020 the letter of termination was justifiably sent. During cross-examination of Mr. Chong, he at first said the Schedule did not address any of the items requested in the Notice of Default but when confronted with the specifics of what he requested and the response in the Schedule he resiled from that position. He agreed that in response to his request for a time frame, the Schedule said that the finished fence would be shipped to Montego Bay on May 6, 2020 and would arrive on June 4, 2020. He thereafter accepted that it addressed the time frame. He also accepted that it addressed layout and installation of the fence. He denied however that it addressed wharfage and clearance. Mr. Barnett responded to say the requirements were not met without indicating specifically what requirements they were referring to.

[58] There is some inconsistency in the evidence led on behalf of the Defendant and I found the Claimant's case to be more credible generally. Based on the evidence

of Mr. Barnett, Mr. Allen had in fact supplied some of the requirements under the Default Notice. However, in my view that is not determinative of the issue. If the Defendant fails to prove either suspension or lack of due diligence on the part of the Claimant, then the Defendant would not have had any basis to issue the Notice of Default.

[59] In determining whether the Defendant was justified in sending the Notice of Default it is important to examine the stated basis as contained in the Notice itself. This lack of due diligence must be considered in the context that this is a contract that was expected to span between one hundred and twenty (120) days and one hundred and forty (140) days. According to the Claimant it had commenced work on the project. He highlighted that it was always its intention which was communicated to the Defendant to fabricate the entire grill fence abroad and ship to Jamaica for installation. Therefore, there was no expectation or intention that there would be any construction on site prior to the fabrication of the fence.

[60] On a balance of probabilities, there is no evidence to suggest that the Claimant failed to act with due diligence after the parties had signed the Agreement. I therefore find on a balance of probabilities that there was no basis to issue a Notice of Default and therefore the termination of the Sub-contract by the Defendant was not justified. The Defendant was the party in breach of the contract and is therefore liable to the Claimant.

Whether the Claimant is entitled to damages for breach of contract?

[61] In determining whether the Claimant is entitled to damages for breach of contract, the starting point must be the measure of damages. With respect to the measure of damages in contract, the often-cited case of **Robinson v Harman** [1848] 1 Exch. 850 evinces the seminal principle that ‘where a party sustains a loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed’.

[62] This principle on measure of damages is succinctly stated in the Text McGregor on Damages seventeenth edition at paragraph 2-002 to be as follows:

> *"Contracts are concerned with the mutual rendering of benefits. If one party makes default in performing his side of the contract, then the basis loss to the other party is the market value of the benefit of which he has been deprived through the breach. Put shortly, the claimant is entitled to compensation for the loss of his bargain. This is what may best be called the normal measure of damages in contract*."

[63] Parke B in **Laird v Pin** 151 E.R. 852 at page 69 stated

> *"The measure of damages, in an action of this nature, is the injury sustained by the plaintiff by reason of the defendants not having performed their contract. The question is how much worse is the plaintiff by the diminution in the value of the land, or the loss of the purchase-money, in consequence of the non-performance of the contract? It is clear he cannot have the land and its value too*".

[64] This principle has been endorsed in a number of judicial decisions and at the highest level. The Court of Appeal case of **Gregory Duncan v Orville Palmer** cited by King's Counsel, which constituted an appeal of my decision to make an award for damages for loss of bargain, reiterated the relevant principles on measure of damages as follows:

> *"[93] As counsel for the respondents has correctly stated, in compensating a claimant for breach of contract, the aim of the court is to, as far as money can, put the claimant in the position in which he would have been, had the contract been performed. This principle was acknowledged in* ***Jamalco (Clarendon Alumina Works) v Lunette Dennie****, at paragraph 18 of the judgment of then President of the court, Panton P.*
>
> *[94] In McGregor on Damages, 17th edition, paragraphs 22-034-22-037, the authors look at the normal measure of damages, and, relying on Laird v Pim, state that this measure would usually be the contract price less the market price at the contractual time fixed for completion. There could also be consequential losses and incidental expenses*."

[65] If the contract had been performed the Claimant would have stood to gain Twenty-One Million, Six Hundred and Fourteen Thousand, Seven Hundred and Seventy-

Seven Dollars and Sixty-Six Cents ($21,614,777.66) The question then is whether he is entitled to the full sum under circumstances, where short of entering into negotiations with the overseas company he did nothing more. To compensate him for the entire contract amount would be akin to overcompensation.

[66] In the Particulars of Claim, the Claimant sought Damages for loss of profit and breach of contract. If the contract had been performed, the Claimant would have expended some amount of money in securing the fence from overseas. It would have been incumbent on the Claimant to provide an estimate of the funds he would have spent in securing the fence and deducting that from the entire amount so as to demonstrate his profit. Having not done that, it is left for the Court to speculate and to come up with a figure.

[67] The requirement to provide material on which the Court can act is set out in McGregor on Damages at paragraph 1154 where the following is extrapolated at page 755:

> *"On the measure of damages where the owner acts so as to bar completion there appear to be surprisingly no English cases. General principles would put the normal measure at the contract price less the cost to the builder of executing or completing the work. In calculating the builder's costs the indirect as well as the direct costs must be included, especially "overheads*".

[68] In the case of **One Step (Support) Ltd. v Morris Garner and another** [2018] UKSC 20 the Court set out what the approach should be in determining the measure of loss sustained as follows:

> *"38. Evidential difficulties in establishing the measure of loss are reflected in the degree of certainty with which the law requires damages to be proved. As is stated in Chitty, para 26-015, "[w]here it is clear that the claimant has suffered substantial loss, but the evidence does not enable it to be precisely quantified, the court will assess damages as best it can on the available evidence".*

[69] This is what the Court attempted to do in the Court of Appeal decision of **Caribbean Cement Company Limited v Freight Management Ltd** [2016] JMCA

Civ 2 where, though the Court found that CCCL terminated the contract and FML was entitled to claim damages on the reliance basis, FML failed to provide cogent evidence of the loss of income from the charter to make the vessel available to CCCL as alleged. At paragraph 56, Brooks JA opined that:

> *"[56] On the issue of the calculation of the damages, Mr. Robinson's submissions fail to take into account the principle that the denial of FML's claim of entitlement to damages, placed the onus on FML to prove its loss. The principle is that he who alleges must prove. CCCL was entitled to complain about the type of evidence produced by FML in proof of its loss. It is disappointing that a company, claiming loss of that magnitude, based on international transactions, only produced oral evidence of its loss, and in particular, only stated the amount of income lost without any accounting for the cost involved in earning that income."*

[70] The court addressed the usual measure of damages as follows:

> *[77] The usual measure of damages for breach of contract is for the loss of the bargain. A party is, however, entitled to claim, in the alternative, damages based on the profit that he expected to make, or the expense that he incurred in reliance on the performance of the contract. He may choose the method that is best likely to put him in the position he would have been in had the contract been performed or alternatively had never been made. FML was therefore entitled to claim damages on the reliance basis and the learned trial judge was entitled to apply that basis in her assessment of the damages."*

[71] In this case the Claimant has elected to claim damages based on the profit he expected to make. He was therefore required to prove on a balance of probabilities what the profit was that he expected to make. He has instead claimed the entire contract sum.

[72] Similarly, in the case of **BMS General Construction v The Attorney General CL** relied on by the Defendant, Walker J (as he then was) in calculating loss of profit set out what is required:

> *"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 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."*

[73] Walker J (as he then was) also found that:

> *"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."*

[74] The Claimant has not led a scintilla of evidence to show what is the sum of the profit he lost. King's Counsel has asked me to find that although the assessment is difficult and cannot be assessed with certainty, I should do the best that I can. In the **Jamalco v Lunette Dennie case**, the Court of Appeal recommended such an approach however, that case is distinguishable for the reason that there was some evidence upon which the Court could make an assessment. In the instant case King's Counsel has suggested that I could deduct the mobilization cost of ten percent (10%) in order to arrive at the profits however, I find this to be a flawed approach.

[75] Mobilization is simply the cost to set up the project. If only that sum is deducted, it would mean that there would be no deduction of the cost to the Claimant to actually execute the project. On the Claimant's own evidence, it was his expectation that the finished fence would be shipped to Jamaica. There is no indication of the cost

of shipping to Jamaica. The Claimant also mentioned "wharfage and clearance of finished fence". There is no indication of the cost associated with that. He mentioned layout and installation of fence as well as completion of installation and clean up. All of these items that would in the normal course of things attract some cost yet nothing was presented to the court, even if only by way of estimate to assist the court in carrying out an assessment.

[76] I would have to be satisfied of the cost or at least an estimate of the cost that the Claimant would have incurred in executing the contract. There is no evidence in this regard. In order to arrive at a figure, I would have to enter into the realm of speculation. There is really no evidence on which I can do the best that I can to make an assessment. The Claimant has a duty to prove his loss of profit. In simply throwing the entire sum out without more, he has failed to prove his loss.

[77] The next question that arises is whether nominal damages can be awarded. Mr. Spencer in his earlier submissions before me had suggested that only nominal damages could be awarded. King's Counsel Mr. McBean also made reference to nominal damages in his submission although it was to suggest that the Court should award actual damages and not nominal. I do however find the authorities referred to, to be useful. Starting with the McGregor on Damages the following can be extracted from the text at para 8-001

> *"If the fact of damage is shown but no evidence is given as to its amount so that it is virtually impossible to assess damages, this will generally permit only an award of nominal damages."*

[78] This is the situation in this case. There has been loss but it is virtually impossible to assess it with the paucity of information available to the Court. McGregor on Damages goes on to say "*this situation is illustrated by* ***Dixon v Deveridge*** *(1825) 2 C. & P. 109; and* ***Twyman v Knowles*** *[1853] 13 C.B.222*". These cases were referred to in the **Jamalco v Lunette Dennie** case by Phillips JA at paragraph 55. In respect to **Twyman v Knowles** she pointed out *that "Since the plaintiff had failed*

to prove the extent of his interest in the land, he was only entitled to nominal damages". She went on to say, *"Similarly in* ***Dixon v Deveridge,*** *where the defendant accepted that he owed a debt, but the plaintiff gave no evidence of the amount, the court took the view that the plaintiff was only entitled to a nominal amount of damages*."

[79] Typically, nominal damages are awarded in cases of trespass where there is an actionable wrong, but no damage proved. This is because trespass is actionable per se unlike Negligence and Breach of Contract. However, the cases above demonstrate that an award of nominal damages is not confined to cases involving trespass and similar cases. The principles emanating from **Twyman v Knowles** and **Dixon v Deveridge** have been applied in cases from the region and although not binding, they do provide some guidance to the Court. In a case from the Supreme Court of Belize, **Cedric Flowers and Arture Vasquex v Kevin Castillo** BZ 2021 SC 30 the Court awarded nominal damages where:

> *"34. In making the assessment the Court is reminded that the Claimant ought to be put back in the position he would have been in had the negligence not 12 occurred. His damages should, therefore, be the sums incurred but for the negligence of the first Defendant. And there must be some evidential basis on which the assessment can be carried out. He who asserts must prove. Proof comes through the presentation of real evidence not through particulars, summaries, estimations or general conclusions.*
>
> *35. The Court is certain that the Claimant has incurred loss. As stated in the earlier judgment the first Defendant admitted making an inventory of the contents of the containers. That list was never in evidence. The Court is equally certain that had the Claimant acted with more diligence and less geniality, he may not have suffered as he has. But that is neither here nor there as the Court comes to assessing the damages. What is important and cannot be overlooked is the detrimental lack of evidence on which to make the assessment.*
>
> *45. The Claimant's loss is regrettable, particularly of those things that hold sentimental value personal to him and which are irreplaceable. But without the necessary evidence having been provided, this Court*

cannot conduct a proper assessment and can only award a nominal figure as has been submitted by the first Defendant."

[80] Similarly, in a case from the Eastern Caribbean Court of Appeal in **Grace Richardson v Herbert Richardson**, Magisterial Civil Appeal No. 5 of 1992, the court found there was negligence proven but no admissible evidence to justify an award for damages. The Court made reference to the passage from McGregor on Damages on nominal damages and the **Dixon v Deverdige** case and proceeded to set aside the award made and instead awarded nominal damages and commented that:

"We feel that the only legally permissible award of damages given the circumstances of this matter is one of nominal damages…." Nominal damages is a sum of money that may be spoken of but has no existence in point of quantity."

[81] I am prepared to make an award of nominal damages in the sum of Five Hundred Thousand Dollars ($500,000.00).

Costs

[82] Counsel Mr. Spencer on behalf of the Defendant asked to be heard on the issue of costs and the Court permitted further submissions on costs from both sides. Mr. Spencer articulated that the Claimant is not entitled to an award for costs as in essence, the Claimant is not the successful party. He highlighted that a Claimant who receives only nominal damages is not the successful party in a claim such as this, which is brought in the commercial court for loss of profit. He relied on a decision from the Royal Courts of Justice **Marathon Asset Management LLP, Marathon Asset Management (Services) Ltd v James Seddon, Luke Bridgeman et al** [2017] EWHC 479 (Comm) where Leggatt J considered the question of costs in a commercial case where nominal damages were awarded and redefined the definition of a successful party in these circumstances. He made these pronouncements:

2. "…But I also found that Marathon had not shown that the defendants' actions had caused Marathon any loss or the defendants any gain, with the result that Marathon is entitled only to nominal damages.

3. In a commercial case such as this a judgment for only nominal damages is a defeat. The position was trenchantly put by Jacob J in Hyde Park Residence Ltd v Yelland [1999] RPC 655 at 670, when he said:

> *"it seems to me that the whole question of nominal damages is at the end of this century far too legalistic. A plaintiff who recovers only nominal damages has in reality lost and in reality the defendant has established a complete defence."*

This is not a case where it can be said that money was not the object and that the claim was brought in order to establish or protect some legal right…"

4. I therefore approach the question of costs on the footing that the defendants are the successful parties.

[83] Mr. Spencer asked the Court to apply this novel statement redefining the issue of costs and find that the Claimant is not entitled to its costs. In the alternative, he submitted that if the Court is minded to order costs against the Defendant, the Court should apply the provisions of section 131(1)(a) of the Judicature (Parish Courts) Act and make an order that the Claimant should recover no more costs than he would have been entitled to had he brought his action or suit in the Parish Court. This takes into account the fact that the jurisdiction of the Parish Court extends to claims up to One Million Dollars ($1,000,000.00)

[84] King's Counsel Mr. McBean on behalf the Claimant, contended that the **Marathon Asset Management LLP** case is distinguishable from the instant case and so this principle regarding cost should not apply. He pointed out the dicta of Leggatt J in which he indicated that Marathon had not shown that the defendant's actions had caused them any loss. In the instant case he contended that loss has been proved

but that it was simply a question of the Court finding that there was a lack of evidence to support the actual sum of the loss of profit.

[85] In relation to the Section 131(1)(a) provision, Mr. McBean responded that it is subject to the discretion of the Court and that the Court can certify that there was sufficient reason for bringing the action in the Supreme Court. He pointed out that this case involved a contract which was valued at over Twenty-One Million Dollars ($21,000,000.00) and so the Claimant had every reason to bring the Claim in the Supreme Court.

[86] The case of **Marathon Asset Management LLP** raises an interesting point. There is some merit in the point that a Claimant who only succeeds in receiving nominal damages may not be viewed as having succeeded especially in a case involving a commercial dispute. However, I do find that the **Marathon** case is somewhat distinguishable from the instant case so I would be reluctant to apply the redefinition of the principle on costs to its full extent in the instant case. It is distinguishable for the reason that Leggatt J did find that Marathon had not shown that the Defendant's action caused Marathon any loss. *Au contraire*, in this case, I did find that the Claimant sustained some loss, and it was my finding that it was impossible to quantify the loss that resulted in an award for nominal damages. I therefore find the Claimant to be the successful party and so is entitled to its costs.

[87] On the issue of section 131(1)(a), there is also merit here. The provision makes it clear that the Claimant, having received an award for less than Eight Hundred and Fifty Thousand Dollars ($850,000.00), is only entitled to recover costs that he would have been entitled to recover in the Parish Court. This is the default position and can only be departed from if the Court certifies that there was sufficient reason on the part of the Claimant to bring the case in the Supreme Court. Having considered all the circumstances of this case, I am of the view that the Claimant should have carefully calculated what the loss of his profit was, before deciding in which forum to bring its action. It should have been obvious to the Claimant that

the loss of profit could not be the entire contract sum. Having not credibly pleaded what the actual loss of profit was, I cannot say that the Claimant has established to me on a balance of probabilities that it had sufficient reason not to bring the action in the Parish Court. The Claimant's cost should therefore be limited to what it would have been entitled to recover if the proceedings were brought in the Parish Court.

[88] My orders are as follows:

1. Judgment for the Claimant
2. Damages awarded in the sum of Five Hundred Thousand Dollars ($500,000.00).
3. Costs to the Claimant to be agreed or taxed. The Claimant shall recover no more costs than he would have been entitled to had he brought his action in the Parish Court.

…….
Stephane Jackson Haisley
Puisne Judge