

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 227

|         |  |                          |
|---------|--|--------------------------|
| BETWEEN | ESTATE RUTH LAWRENCE<br>represented by Albert Binger | 1 <sup>ST</sup> CLAIMANT |
| AND     | ALBERT BINGER  | 2 <sup>ND</sup> CLAIMANT |
| AND     | ALCOA MINERALS OF JAMAICA                            | DEFENDANT                |

Ms. Maliaca Wong and Mr. Dale Palmer instructed by Myers Fletcher & Gordon for the Claimants

Mr. Kirk Anderson and Ms. Terri-Ann Lawson instructed by Dunn Cox for the Defendant

Heard: July 1, 2, 3, September 3, 4, November 25, December 1, 4, 5, 12, 2008 and August 18, 2009

**Lawrence-Beswick J**

Breach of Contract

1. This matter concerns the purported breach of a contract between the claimants, who are landowners, and the defendant, the mining company of Alcoa Minerals of Jamaica (Jamalco). The landowners Ruth Lawrence and her nephew Albert Binger allege that Jamalco has failed to honour the terms of their agreement, and seek relief by this action.

2. By written contract, the parties agreed, inter alia, that Jamalco would mine 18 acres of the claimants' land at Stewarton district in Clarendon and thereafter, Jamalco

would return the land to the claimants except for a portion required for a roadway. In return, the claimants would get from Jamalco 60 acres of land at Whitney district in Clarendon. Jamalco would fence the land at Whitney and would register it in the claimants' names. In addition, Jamalco would pay to Mrs. Lawrence the cost of establishing at Whitney, 14.5 acres of the leucenia plant to be used for forage. How densely the leucenia would be planted was to be recommended by the Forestry Department. The recommendation was not obtained and accepted until after this trial commenced.

3 Jamalco took possession of the land at Stewarton on February 12, 1996, and mined it. The complaint is that Jamalco has not provided a registered title to the land at Whitney nor at Stewarton, which was unregistered land. The claimants also plead that Jamalco has not paid to establish the forage thus depriving them of the benefit the forage would have brought. The claimants therefore seek the following reliefs:

- “(1) The costs of establishment of 14.5 acres of leucenia trees for forage at Whitney \$18,000,000.00 less \$375,000.00 (Counsel agree already paid) being \$17,625,000.00;
- (2) Damages for the period January 2000 to January 2005 for failing to establish the 14.5 acres of forage at Whitney or alternatively loss of revenue calculated at \$55,000,000.00;
- (3) Certificate of Title in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Claimants to the 60 acres of land at Whitney;
- (4) Certificate of Title in the name of the 1<sup>st</sup> Claimant to the 18 acres of land at Stewarton;
- (5) An order that the Registrar of the Supreme Court execute the application for certificates of title referred to at paragraphs 2 and 3 above (sic) in the event that the Defendant is unable or otherwise fails to execute the necessary application and documents to apply for and obtain the said certificates of title within seven (7) days of being requested to do so;

- (6) The cost of fencing the 60 acres of land at Whitney estimated at \$48,697.00;
- (7) Costs.
- (8) Liberty to apply.”

Mrs. Lawrence is now deceased and Dr. Binger continues her claim in the capacity as the personal representative of her estate, as well as his own claim.

4. **The Contract**

It is undisputed that the parties entered into a contract. The contract with its variations is found in several documents. The first dated July 5, 1994 was signed by Dr. Binger on behalf of his aunt, Mrs. Ruth Lawrence. The second dated August 11, 1995 was signed by Mrs. Ruth Lawrence and modified the first. The parties varied the agreement of August 1995 by way of a letter dated January 18, 1996 to Jamalco from the claimants' then attorneys-at-law pursuant to a meeting which the parties had.

The first question to be determined is whether Jamalco breached its contractual obligations to the claimants.

5. Mr. Anderson, Counsel for Jamalco, submits that there is no dispute as to whether Jamalco owes the claimants the cost of establishing 14.5 acres of leucenia for forage. The dispute is as to the actual cost of such establishment, as well as to the other remedies claimed.

The original agreement stated that:

“2. Fourteen point five (14.5) acres of land mentioned above is to be planted in leucenia seedlings by Jamalco or the Company, or Jamalco will pay to the vendor to establish the seedlings. **Plant population for forage to be recommended by Forest (sic) Department.**” (Emphasis supplied)

This was amended by the attorneys-at-law's letter thus:

“That Clause two (2) should state that the cost of establishing 14.5 acres of leucenia **will be paid to the vendor ....**” (Emphasis supplied)

This removed the original option for Jamalco to actually plant the seedlings.

6. Before Jamalco could pay the agreed amount, the Forestry Department would have to recommend the appropriate plant population. There was no clear recommendation from the Forestry Department.

The parties exchanged several letters seeking to resolve issues and to determine the population of the leucenia to be planted. All parties relied on several qualified and experienced experts. There was no meeting of the minds as to the appropriate population.

7. The agreements did not specify who bore the responsibility for obtaining the recommendation for the appropriate plant population from the Forestry Department nor what was to occur in the absence of obtaining the recommendation. The leucenia plants were not established, however, neither party appears to have treated the contract as having been repudiated. Correspondence reflects continuing discussions, albeit with intervening lengthy delays. In my view, the contract therefore remains partially unexecuted as the claimants have provided what was agreed and Jamalco is still capable of fulfilling its obligation if the quantity of leucenia to be established is determined.

8. **Plant Population**

There is evidence that the Forestry Department has now documented a recommendation and during the trial, Counsel all agreed to accept that recommendation that the appropriate plant population is 9,000 seedlings/plants per acre. The document was exhibited and is dated January 28, 2008.

Counsel for Jamalco argues that the cost referred to in the document should be adjusted downward to allow for the breach having occurred in 1997 and not in 2008 when the document was created.

It is my view that the 2008 figures are appropriate as they were created and agreed in 2008 and are the most recently available estimate of the costs to establish and maintain the plantation as of 2009, which is now the pertinent time.

Jamalco must now therefore pay the cost of 130,500 seedling/plants, i.e. 9,000 x 14.5, being the recommended population for 14.5 acres.

9. **Establishment of Seedlings/Plants**

The next issue therefore is to determine what costs are to be borne by Jamalco in establishing the seedlings. There are several costs associated with establishing the seedlings/plants, as, for example, clearing the land and transporting the plants.

10. Counsel have agreed with the estimate of the Forestry Department for establishment of the plants which is \$127,513.00 - \$145,729.00 per acre.

I use the median amount of \$137,000.00 per acre as being appropriate to establish the plants. This was calculated at a density of 2024 seedlings per acre. However, the agreed density is 9,000 seedlings per acre. The amount to establish one acre at 9,000 seedlings per acre is therefore -

$$\frac{\$137,000 \times 9000}{2024} \quad \text{which equals } \$609,189.72. \quad \text{For 14.5 acres this}$$

amounts to \$609,189.72 x 14.5, being \$8,833,250.94. It is agreed that this establishment cost includes the cost of the seedlings.

11. **Maintenance of Seedlings/Plants**

Counsel also now agrees with the estimate for maintenance of the plants as being \$65,434.00 - \$76,382.00 per acre per year at a density of 2,024 seedlings per acre.

I use the median figure of \$70,908.00 per acre per year as being the appropriate amount that Jamalco is liable to pay for maintenance of the plantation. This was calculated at a density of 2,024 seedlings per acre. At the agreed density of 9,000 seedlings per acre, the amount is

$$\frac{\$70,908.00 \times 9000}{2024} \text{ which equals } \$315,302.37 \text{ per year.}$$

For 14.5 acres, this amounts to  $\$315,302.37 \times 14.5$  which is equal to \$4,571,884.37 per year.

12. The next question is for how many years the plants must be maintained.

Counsel for the claimants argues that the maintenance should be for three years as that is the time when the plants would have matured sufficiently to be used for forage.

Counsel for Jamalco urges the Court to accept one year or 18 months as the appropriate time because Jamalco's expert witness had opined that certain types of seedlings could be established within 18 months.

13. The contract is silent on an important issue. It does not specify the time for which the leucenia plants/seedlings are to be maintained. I must therefore seek to determine how long the parties intended that the plants would be maintained.

14. The plants at Stewarton were mature plants and I accept as true, the evidence that the plants become mature at three years, and require attention to reach that stage.

15. Correspondence dated August 12, 1997 is exhibited from Dr. Binger to Jamalco in which he made recommendations to resolve what he regarded as an impasse concerning establishing the plant population. Included was the recommendation that Jamalco assign an agricultural consultant to determine "how many man days it would take to plant .....seedlings, and **maintain them for a period of three (3) years**, at which time they would be ready to undergo regular harvesting for forage production." [Emphasis supplied]

16. The responses from Jamalco indicate that they were awaiting reports from their consultants concerning the establishing of the leucenia plants. There is no evidence of any report having been forthcoming from the consultants which was accepted by the parties. Nor is there any reasoned challenge to Dr. Binger's recommendation that they be maintained for three years.

17. The purpose of the contract in my view was to provide Jamalco with the claimants' land which Jamalco was at liberty to mine, and to provide the claimants with other land not being mined, which would compensate them for the dislocation. I accept as true, the unchallenged evidence of Dr. Binger that Jamalco's agent had surveyed the land at Stewarton. I find on a balance of probabilities that Jamalco was aware of the fact that the claimants were goat rearers and that there were leucenia trees planted for forage at Stewarton. It is inconceivable that Jamalco, in contracting to compensate landowners for land, would not be aware of the purpose for which the land was being used. It is my view that at the time of entering into the contract, the parties intended that the claimants would be returned to their original position, that is owners of land with mature leucenia trees for forage, albeit this would be at a different location.

18. In view of the evidence concerning the time required for plants to mature, I determine that the plants must be maintained for a period of three (3) years, which amounts to the yearly maintenance of \$4,571,884.37x 3 being \$13,715,653.11, as maintenance costs.

The agreed exhibited document which forms the basis of these calculations is dated January 28, 2008 which is later than the time when the plantation should have been established. Since these figures are current, I make no additional award for interest on the amount for the cost of establishing and maintaining the plants.

19. **Loss**

The claimants seek damages from Jamalco for loss they allege they suffered because of Jamalco's failure to establish the forage, or alternatively for loss of revenue.

20. Dr. Binger claims that he has lost forage which would have yielded 15 tons per acre per year and that in turn would have fed 44 tons of mutton per year valued at \$250.00 per kilogram. His counsel argues that he has therefore lost the value of the goats which he could have reared using the leucenia as food.

However, Mr. Delroy McDonald, a Senior Research Director at the Ministry of Agriculture who was a witness for the claimants said that he would not be able to provide evidence of an expected yield from the farm unless he had received information concerning details of the circumstances of the planting. He did not have that information.

21. Mr. David Miller, the Chief Livestock Officer at the Ministry of Agriculture also gave evidence on behalf of the claimants that if the leucenia had been planted in the correct density it could have fed about 1,119 goats which would have yielded 8,930 kilograms of live weight per year. He indicated nonetheless that a variety of factors can

affect the yield in goat meat, and that the leucenia could be toxic to goats, if used as their only feed, and is not a complete feed.

22. Ms. Cordia Thompson, another of the claimants' expert witnesses, and a Consultant in Agriculture, was also unable to give precise evidence concerning the growth of goats, as she would have required information about several variables in order to do so, e.g. conditions in which the goats were kept, and this information was absent.

23. Dr. Dinsdale McLeod, a Ruminant Nutritionist testified on behalf of Jamalco that the claimants' estimate of obtaining a yield of 15 tons per acre appeared to be inflated because leucenia would not grow unless the soil had the right bacteria and would be expected to yield no more than 4 to 10 tons of dry matter per annum. Dr. McLeod testified that he has studied weight gain in animals and that leucenia was never the sole source of feed because of its toxicity.

Thus he says, estimates by the claimants based upon the presumed weight of the goats are either inflated or incorrect, since leucenia would have had to have been mixed with other material to provide food for the goats and it is almost impossible to relate feed produced from the plants to meat produced.

However, Dr. Binger maintains he suffered a loss. Jamalco's Counsel submitted that the claimants ought to have mitigated any loss by accepting Jamalco's offers and thereafter seeking further relief.

Dr. Binger's unchallenged evidence is that he met with senior officials of Jamalco, including the General Manager "on many, many occasions" to agree on a suitable amount to be paid for the leucenia. Counsel for Jamalco acknowledged that there was no evidence of Jamalco having made a firm offer to the claimants requiring

them to “sign off on an offer. The claimants had no other available resources. Dr. Binger’s evidence is that he was unable to limit the loss resulting from Jamalco’s failure to establish the plantation as that would have required him to obtain funding to establish the plantation and Jamalco had failed to give him a registered title for the property which therefore prevented him from using the property as security for funding. There was no other reasonable opportunity for mitigation of any loss.

24. **Damages for the Breach/Loss of Profits**

Ms. Wong, Counsel for the claimants, submits that if Jamalco had re-established the farm, the leucenia harvest would have been ready within three (3) years of the re-establishment and that therefore from 2000, the Bingers would have been profiting from that farm.

Counsel in seeking to quantify the loss, argued that the trees would have yielded dry matter which could support a quantifiable live weight of mutton per year which could be sold for profit by the claimants. The evidence to support this submission involved conversions and projections. It could accurately be said that in this regard there was a battle of the experts. They all were well qualified and very experienced but held widely diverging views, each of which was based on varied scientific experiments.

25. Ms. Terri-Ann Lawson, Counsel for Jamalco, submitted that the claimants did not establish an actual loss and were therefore only entitled to nominal damages as the submission that \$18 million of goat feed was lost was not substantiated by evidence. I agree with the submission that there was no such credible evidence.

In my view it borders on being impossible to assess the loss to the claimants from Jamalco’s failure to establish the plantation. The variables are many and include

condition of soil, condition of goats, state of dentition of the goats, rainfall, price of mutton at a particular time and many other factors. However, it is clear that the claimant must have suffered a loss and Ms. Wong on their behalf made an alternative submission, to compensate them.

Ms. Wong submitted that alternatively, the court could make an award of US\$70,000.00 which was the investment that Dr. Binger had made between 1984 and 1988 to establish the farm of leucenia trees at Stewarton of which Jamalco took possession in 1996. She asked for commercial interest to be added to that figure.

### **Unjust Enrichment**

26. In my view Jamalco did not breach the contract. Rather, the contract remained unexecuted because of the failure of a third party, the Forestry Department, to make a recommendation for over a decade, whilst Jamalco enjoyed the benefit of mining the land.

Lord Wright, in **Fibrosa v Fairbairn** [1943] AC 32 at 61 said:

*“It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining ... some benefit derived from another which it is against conscience that he should keep...”*

27. The learned authors of **Chitty on Contract** [27<sup>th</sup> edition 27-006] referred to **Beswick v Beswick** [1968] AC58 where specific performance was ordered of a promise to pay an annuity to a third party. They opined that the party in breach would be unjustly enriched (if damages were the sole remedy) by being allowed to retain the entire benefit of the promisee's performance, while rendering only a small part of his own.

Where a stipulation of a contract remains unfulfilled, each party is not free to resile from the contract if the stipulation can still be met. **Spectra International PLC v Tiscali UK Limited** [2002] EWHC 2084.

28. In discussing circumstances in which a contract shall not become binding until a further term has been agreed, Lloyd LJ in **Pagnan v Feed Products** [1987] 2 Lloyd's Law Report 601 at 619 said:

*"[T]he parties may intend to be bound forthwith even though there are further terms still to be agreed.... If [t]hey fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainties."*

While Jamalco enjoyed the benefit of mining all the lands, the claimants were deprived of the benefit of the trees, with the consequent forage which could have been produced.

29. The contract failed to address the time within which the establishment of the seedlings should commence. This was a commercial transaction where the parties had access to legal advice. Jamalco took possession of the claimants' land on February 12, 1996 and I find on a balance of probabilities, that the intention of the parties was that the claimants would begin to enjoy the benefit of the agreement from the time that Jamalco took possession of the land.. However, since the Forestry Department was involved, and the parties had no control over the speed with which the Department would recommend, I hold that a period of three (3) months, i.e. up to May 12, 1996 is a reasonable time within which to expect that the Forestry Department could be diligently pursued/encouraged to

make a recommendation in order to allow the Bingers to start getting the benefit from the leucenia.

30. There is a settled principle of law which is expressed in **British Westinghouse Electric & Manufacturing Co. Ltd. v Underground Electric Railways Co. of London Ltd.** [1912 AC] 673 at 689. The principle “imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach....”

Here the unchallenged evidence of Dr. Binger is that he had earlier spent US\$70,000.00 to establish the leucenia farm at Stewarton and was unable to obtain more funding to mitigate his loss at the Whitney farm.

I accept the submission of Counsel for the claimants that an award of damages in that amount provides an alternative award in the face of an inability to properly assess the actual loss which they suffered because of the multitude of variables. However, the loss was suffered by both Mrs. Lawrence and Dr. Binger. Damages must be assessed, “as best they can upon the available evidence, such as it is.” **Tai Hing Cotton Mill Limited. V. Kamsing Knitting Factory** 1979 LR 91.

31. I find that payment to Mrs. Lawrence and Dr. Binger of the US\$70,000.00 which I accept that Dr. Binger invested, in Mrs. Lawrence’s farm at Stewarton which Jamalco mined, would properly compensate for the unjust enrichment which Jamalco enjoyed.

32. **Interest**

There was no evidence of the rate of commercial interest, but rather, Counsel for the claimants sought to present to the Court, documents from the Bank of Jamaica.

Mr. Anderson, for Jamalco, vigorously opposed such an approach and argued that evidence should be provided to the Court. Further, he argued, although on the claim form

there was a claim for commercial interest, it was not specified in the particulars of claim and therefore Jamalco was denied the opportunity to respond to a pleading in this regard. In his view it was not sufficient for Ms. Wong, the claimants' Counsel to simply provide the Court with documents, whilst in the process of making final submissions.

33 Ms. Wong, agreed and relied on **British Caribbean Insurance Co. Ltd. v Dalbert Perrier** 33 JLR 119 in asking the Court to award 25% interest in the absence of evidence. She argued that the commercial rate of interest should be applied to the award made to compensate the claimants for the US\$70, 000.00 spent by Dr. Binger on the farm.

34. It is clear that the court is empowered to award interest. Section 3 of the Law Reform (Miscellaneous Provisions) Act provides that:-

“the court may, if it thinks fit, order ... interest at such rate as it thinks fit...”

Rule 8.7(3) of the Civil Procedure Rules 2002 states:

“A claimant who is seeking interest must -

- (a) Say so in the claim form, and
- (b) include in the claim form or particulars of claim details of –
  - (i) the basis of entitlement;
  - (ii) the rate;
  - (iii) the date from which it is claimed;
  - (iv) the date to which it is claimed.”

35. In the **Perrier** case (supra) 33 JLR 119 Carey J A said:

*“I do not think it can be doubted that where a person has failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld.”*

The learned Judge of Appeal added that:

*“the rate at which a plaintiff can borrow money must be the rate to be set by the judge in his award ... the object ... is to restore the aggrieved party ... to the position he occupied before the wrong”*

36. He said further that it is desirable for the claim for interest to be included in the prayer as it would remind the parties that evidence could be added.

At p. 127 he continued that, “the judge,... should be provided with evidence to enable him to make that realistic award ... but I can see no objection to documentary material being properly placed before the judge to enable him to ascertain and assess an appropriate rate.”

37. In the instant case, apart from appearing on the claim form, the first reference to commercial interest was during the closing submissions by the claimants’ Counsel. Jamalco was therefore deprived of the opportunity to provide the evidence to form the basis of any argument against such an award for commercial interest. In these circumstances therefore, where there was no reference to commercial interest in the particulars of claim or the evidence, I make no award for commercial interest.

38. **Cellular Tower**

Jamalco has contended that the claimants have been benefiting from a Cellular tower on the Whitney property but has not supported that with any evidence. I therefore do not take it into account in the award that I make.

39. **Certificate of Title in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Claimants to the 60 acres of land at Whitney**

This is the third relief sought by the claimants.

The agreement provided that: "The title for the land at Whitney shall be in the name of Ruth Lawrence and Albert Binger as Tenants in Common." The defence filed indicates that Jamalco has not itself been issued with the original title. However, there is no evidence confirming that assertion. In the absence of such evidence, Jamalco continues to bear the responsibility to which it agreed in the contract. The evidence is that there is no endorsement on any title showing the claimants as owning the land at Whitney. Jamalco is obliged to obtain and provide the Certificate of Title as agreed.

40. **Certificate of Title in the name of the 1<sup>st</sup> Claimant to the 18 acres of land at Stewarton**

This is the fourth relief sought.

The contract shows that the claimants were to have provided the Certificate of Title to Stewarton to Jamalco and the transfer or application to bring the land under the operation of the law was to be prepared by Jamalco's solicitors. [Par. (j) of Property Option dated 11<sup>th</sup> August 1995]. However, the contract included returning the 18 acres of land at Stewarton to the claimants, after mining and reclamation. (Letter dated January 18, 1996). The mined-out farm would not have remained in the possession of Jamalco. I am not satisfied on a balance of probabilities that the parties by **this** contract agreed that Jamalco would provide title to the land at Stewarton to Mrs. Lawrence. Further, I accept as true the unchallenged evidence of Mr. Michael Ferguson, the Lands Department Administrator at Jamalco, that when Jamalco mines and returns land, as with the Stewarton land, there is no passage of title between the parties. I therefore make no order for such a title to be delivered by Jamalco.

41. **An Order that the Registrar of the Supreme Court execute the Application for Certificates of Title**

In view of the findings above this fifth relief sought pertains only to the land at Whitney.

42. **The cost of fencing the 60 acres of land at Whitney**

The entitlement to this relief sought is supported by Dr. Binger's evidence that Jamalco initially provided the fencing in accordance with the agreement but that it was afterwards destroyed. It is his belief that the destruction was at the hands of Jamalco who was doing road works in the area at the time when it was destroyed. The cost of fencing the 60 acres, \$48,698.00, has not been contested by Jamalco. However, I am unable to make an award based on the "belief" of the claimant. He himself could not say who had damaged the fence but relied on the fact that Jamalco was doing road work at the time in the area. Any relief that there might be would depend on the cause of the act(s) or omission(s) which caused the damage to the constructed fence and not on a breach of this contract with which we are concerned. The unchallenged evidence is that the fence had been provided in accordance with the terms of the contract.

43. **The Orders**

The orders I make therefore are:

1. Judgment for the claimants.
2. Alcoa Minerals of Jamaica to pay to the estate of Ruth Lawrence and to Dr. Albert Binger:
  - (a) \$8,833,250.94 as establishment costs
  - (b) \$13,715,653.11 as maintenance costs

Less \$375,000.00 (agreed as having been paid previously)

3. Damages to estate of Ruth Lawrence and to Dr. Albert Binger in the amount of US\$70,000.00 with interest at the rate of 3% per annum from May 12, 1996 to June 22, 2006 and at 1½% per annum from June 23, 2006 to today.
4. Alcoa Minerals of Jamaica is to deliver to the estate of Ruth Lawrence and to Albert Binger, a Duplicate Certificate of Title in the names of Ruth Lawrence and Albert Binger as Tenants in Common of the 60 acres of land at Whitney.
5. The Registrar of the Supreme Court is empowered to execute the application for the Certificate of Title referred to in Order (4) above in the event that Alcoa Minerals of Jamaica is unable or otherwise fails to execute the necessary application and documents to apply for and obtain the said Certificate of Title within seven (7) days of being requested to do so by the claimants or their attorneys-at-law.
6. Costs to claimants to be agreed or taxed.