[2020] JMCC Comm 19

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2017CD00305

BETWEEN	**LLOYD MILLER**	**1ST CLAIMANT**
AND	**PHILLIP DUNCAN**	**2ND CLAIMANT**
AND	**LAURIE FERRON (t/a Pyramid Design Consultants)**	**2ND DEFENDANT**

Mr Glenroy Mellish, Attorney-at-Law for the Claimants

Mr Keith Bishop and Andrew Graham instructed by Bishop & Partners, Attorneys-at-Law for the Defendant

Heard: 6th, 7th, 8th and 17th July, 2020

Contract – Breach – Whether contractors completed work required by the contract

Civil Procedure – Disclosure - consequences of failure to disclose directly relevant documents - Whether adverse inference can be drawn against party who has failed to disclose directly relevant documents

Evidence – Whether pre-action admission in writing by counsel admissible

LAING J

The Claim

[1] The 1st Claimant (referred to sometimes simply as “Mr Miller”), is a Welder and Metal Fabricator. He is also a Businessman who provides goods and services required in the construction industry, including the rental of scaffolding equipment.

[2] The 2nd Claimant (sometimes referred to as Mr Duncan”), is an Engineer and the business partner of the 1st Claimant

[3] The Defendant is an Architect and Businessman who was the design-build Contractor of a warehouse construction project at Lot 4 Bogue Estates, Montego Bay St James (“the Project”)

[4] The Claimants by their Amended Claim Form and Particulars of Claim both filed on 15th June 2018 assert that they and the Defendant had an oral agreement for the Claimants to provide labour, equipment, tools and consumables to fabricate and erect structural steel members at the Project.

[5] The Claimants assert that the value of the work they provided was $18,487,577.40 for which the Defendant paid them $8,966,000.00 by cash and/or cheques directly and also paid $898,400.00 to third parties on the Claimant’s behalf. This leaves a balance of $8,623,177.40 unpaid for which they now claim.

[6] The Claimants also aver that they had an agreement with the Defendant for the Claimants to rent scaffolding equipment to the Defendant for use on the Project. They say that the scaffolding equipment was provided, pursuant to an agreement between 21st September 2016 and 16th March 2017 after the fabrication work had been done on the Project. An invoice in the sum of $1,482,825.00, covering the rental of the equipment, transportation, repairs and replacement cost of lost equipment was provided to the Defendant which remains unpaid.

[7] The Claimants now seek to recover the total sum of $10,106,002.40 which they say is owing under both agreements, plus interests and costs.

The Defence

[8] The Defendant denies having any contract with the 1st Claimant save and except for a small contract to assemble and install the structural steel columns for which he was fully paid.

[9] The Defendant asserts that he had an agreement with the 2nd Claimant for the Claimant to assist the Defendant with the preparation of the bill of quantities and the supervision of the structural steel component of the Project. He asserts the 2nd Claimant has been paid in full for his assistance with the bill of quantities and "*substantially paid or alternatively overpaid for his work to assist with the supervision of the structural steel component*".

[10] The Defendant also asserts that 2nd Claimant's obligations were to provide labour and supervise the welding together of the structural steel members fabricated by a third party. The Defendant's case is that some of the welders were provided by the Defendant.

[11] The Defendant further avers, that although the sum of $18,487,577.40 is the amount included in the bill of quantities for the fabrication and installation of the structural steel components, the Defendant's construction supervisor erected about 50% of the work that is to say the erection of joists and girders and the Defendants workmen did about 80% of the work on the steel deck. Accordingly, the Defendant asserts that he does not owe any money in respect of those services.

[12] As it relates to the agreement for the provision of scaffolding equipment, the Defendant says that his agreement was with the 2nd Claimant only. The Defendant admits having received an invoice in the amount of $1,482,825.00 on 17th March 2017 and said he attempted to make a payment of $500,000.00 in keeping with the Bill of Costs, but the cheque was returned with instructions to make the payment to the 1st Claimant. This he refused to do on the basis that he had no agreement with the 1st Claimant.

The Claim for rental of props and scaffolding

The evidence of Mr Lloyd Miller

[13] Mr Miller asserted that he personally spoke to the Defendant several times before the Project commenced but that these discussions did not involve the provision of props and scaffolding for the Project. It was during the construction phase that there were discussions about the provision of props and scaffolding. He explained that Props are the supports used to shore up concrete form work and the scaffolding is the structure used to support the workers doing the construction work.

[14] He denied that the props and scaffolding that he took to the Project were for the better performance of his duties. He admitted that they were used in a small way by his workmen but that they were mainly there for the masons and carpenters.

[15] He admitted that he did not agree on a rate with the Defendant before he took the props and scaffolding to the Project. He said that the agreement was that he would take the props and the scaffolding to the Project and the Defendant would pay at a later date. He asserted that there is a rate used in the construction industry for the rental of props and scaffolding and the Defendant agreed to that rate. He further explained that he charged a daily rate and once the props and scaffolding were installed up and around the building he charged for their use even if they were not actually utilised, for example on a public holiday. This is because the "*construction rules*" are that once they are there, then the Defendant has to pay the daily rate whether anyone is actually using it or not.

The evidence of Mr Duncan in respect of props and scaffolding

[16] As it relates to the props and scaffolding, Mr Duncan supported the evidence Mr Miller and explained that the agreement was that the Claimants would provide them for rental at a rate below that which the Defendant could have obtained in Montego Bay at Wards, which is a major supplier of construction equipment for

rental. He also explained that it is a well-established norm in the construction industry that props, scaffolding and small hand tools are paid for the period of time that they are kept in one's possession until returned with no exception for holidays and weekends, much like the rental of a motor car.

The Evidence of the Defendant in relation to props and scaffolding

[17] The Defendant denied that he rented props or scaffolding. He said that the discussion and agreement he had with the Claimants was that the scaffolding would be used for their work and the Claimants would "*work out something*" and he would "*give them something*" for it because it was being used for the work that they the Claimants were doing. He therefore did not consider it a formal rental.

[18] It is noteworthy that in paragraph 4 of his amended Defence, the Defendant admitted that he had attempted to make a payment of $500,000.00 in keeping with the Bill of Quantities prepared by the 2nd Claimant.

[19] The Defendant was confronted by Mr Mellish during cross examination, with a letter written by his Attorneys-at-Law, Bishop & Partners, dated 3rd April 2017, addressed to R. Lloyd Miller and copied to Mr Duncan ("the Letter"). Mr Bishop objected to the admission of the Letter on the basis that it could only have been admitted as a hearsay document and the appropriate formalities had not been complied with. The Letter commences by referencing the Captioned Subject – Warehouse Building – Lot 14 Bogue Estates, Montego Bay - and "*the many written communications between yourself and Mr Laurie Ferron, ending with yours dated 29th ultimo*". Bishop & Partners were therefore acting as legal representatives for and agents on behalf of the Defendant in respect of this response to the matters in dispute. It was an open letter which did not purport to be without prejudice and purported to represent the instructions of the Defendant. Furthermore, it amounted to a pre-litigation admission in writing which is admissible, (see **Sowerby v Charlton** [2005] EWHC 949 (QB)). On these bases, Mr Duncan having identified

the letter and confirmed having received a copy of the Letter, it was admitted into evidence despite the objection of Mr Bishop.

[20] The reason for the objection by Mr Bishop to the admission of the Letter becomes readily apparent on reading the second paragraph which states:

> *… We act for and on behalf of Mr Laurie Fearon who instructs that he entered into an agreement wherein which, he rented aluminium scaffoldings from you. Our instructions are that this agreement was never reduced to writing but however there was a mutual understanding that the payments would have been reasonably below the actual market value.*

When confronted with this paragraph, the Defendant insisted that he did not rent scaffolding and props but he did not say that he was misquoted when he was asked by Mr Mellish if he was. I find that the Letter accurately represents the position of the Defendant on this issue as at that date. The Letter is compelling evidence and I find that it serves to discredit the Defendant to the extent that he said in his oral evidence that he did not have a rental agreement in respect to the props and scaffolding. The contents of the Letter in his regard are consistent with the evidence of Mr Duncan which I accept on this issue of the agreement for a discounted price. I therefore accept the evidence of the Claimants on this issue as to there being an oral rental agreement with the Defendant.

[21] I appreciate that the arrangements between the parties in many respects were quite informal but an agreement for the Claimants to "*work out something*" without any price point of reference whatsoever between commercial men in the context of a professional undertaking, strains reason. The letter, by itself, is cogent and compelling evidence, but had I been required so to do, I would find the Claimant's version more probable than not, in the absence of the letter.

[22] The Defendant has not produced the Bill of Quantities pursuant to which he said he attempted to make the payment to the Claimants. However, having regard to the evidence of the Claimants and in particular that of Mr Duncan, that the prime consideration was that the rate would be lower than that which could be obtained at Wards, which evidence I accept on a balance of probabilities, whatever is

contained in the Bill of Quantities would be of no moment. The Defendant also said that he could have obtained a cheaper rate in Montego Bay, but rather than this bare assertion he gave no evidence as to what that rate was and from whom the equipment would have been obtained. I therefore reject his evidence in this regards.

[23] I find on a balance of probabilities that there existed as between the Claimants and the Defendant an agreement for rental of props and scaffolding and I also find that the Claimants have proved on a balance of probabilities that they are entitles to the sum claimed in the amount of $1,482,825.00.

The Claim for work done

[24] Mr Miller's evidence was that the contract with the Defendant was terminated in December 2016 and at that time about 95% of the works that he had been employed to do had been completed.

[25] Mr Miller's evidence was that he and Mr Duncan had different roles and therefore he was unable to prove an answer in relation to certain details of the project which he said would be addressed by Mr Duncan.

The evidence of Mr Duncan

[26] The evidence of Mr Duncan, assists in putting the claim in context. He denied that the Defendant made an arrangement with him to prepare the Bill of Quantities. He said it was prepared by Michael Allen on behalf of the ultimate client. He admitted that he assisted the Defendant in calculating the rates for the various structural steel related works at the initial stage of the Project. However, there were numerous redesigns as a consequence of items being supplied from Florida which had different specifications. He explained that as between the Claimants and Defendant, because they were working as friends, there were only informal discussions about the changes that had arisen and it was understood between

them that the Claimants would do what was necessary to adapt and they would be paid at the appropriate time.

[27] In any event, it is important to note that there is no dispute as to the scope of the works that were required to be done or their value. The pith and core of the Defence is that the Claimants did not do all the works which they claim they did and that are included in the final statement of account dated 16th February 2017 prepared by Mr Duncan.

[28] A number of suggestions were made to Mr Duncan, the common thrust of which was that the Claimants had not performed or had only partially performed specific items listed on the statement of account. Mr Duncan rejected all the suggestions in that regard and maintained that the Claimants had done all the works for which they had charged save for the items for which there was a "discount" (a term which I found to be misleading and should be more accurately described as a deduction). These deductions were for work which the Claimants admitted that they had not completed.

The calculation of the value of the work completed

[29] It was suggested to Mr Duncan by Mr Bishop that the figure of $20,592,831.00 in the final account did not represent the measured works as Mr Duncan said but it was the figure of $18,487,577.40 which was in the Bill of Quantities plus a figure for additional work. Mr Duncan disagreed and explained that the measured work he presented would have differed from the Bill of Quantities because of all the variations. He also explained that whereas he inserted rates for the work to be done he did not insert the figure of $18,487,577.40 in the Bill of Quantities.

[30] In his witness statement at paragraph 7 the Defendant stated as follows:

> *7. I am familiar with the amount of $18,487,577.40 in that this was a figure in the Bill of Quantities for the labour component associated with the fabrication and installation of the structural steel component. This figure includes sums to be paid to me. Further, my construction supervisor erected about 50% of the work, that is to say the erection of joists and*

> *girders. In addition, my workmen installed about 80% of the work on the steel deck and 100% of welding the sheeting to the steel members.*

The Defendant was asked if he had disclosed the Bill of Quantities and he admitted that he did not but that he had it, albeit not at Court. The Court was therefore unable to verify his assertion that this figure of $18,487,577.40 was indeed in the Bill of Quantities.

[31] Mr Mellish suggested to the Defendant that the figure of $18,487,577.40 was arrived at by starting with the amount of the measured works of $20,592,831.00 and deducting the work which had not been completed namely the sheeting at the mezzanine level in the amount of $1,099,058.00 as well as the sheeting at the roof level in the amount of $1,006,195.60. The Defendant did not accept this suggestion.

[32] As it relates to the Defendant's assertion that the figure of $18,487,577.40 included a sum to be paid to him, Mr Duncan rejected this. He explained that the Defendant made it clear that whatever the Claimants charged needed to be at such a level as to allow him to add a mark-up of 15% for profit and overhead because that was the maximum being allowed on his contract, it being a design-build contract.

[33] If the $18,487,577.40 was indeed in the Bill of Quantities and inserted therein by Mr Duncan on the understanding that it included the 15% mark-up to which the Defendant would have been entitled, then one would have expected that the Defendant would have stated this in his Defence or witness statement. His vague reference to indeterminate "*sums to be paid to me*" without specifically stating that it was 15% is quite odd in the circumstances and no explanation has been offered for this omission.

The lack of documentary evidence supporting the defence

[34] The Defendant asserted that the Claimants did not complete all the tasks listed in the final account for they claimed compensation. The Defendant's assertion that his workmen were responsible for a portion of the work is comprised of two basic

components. Firstly, that his workmen did some of the work concurrently with the Claimants and secondly, that after the Defendants left the Project incomplete, his workmen finished the outstanding tasks.

[35] As to the first component, I would expect that a contractor in the position of the Defendant would have caused to be maintained, a record of the tasks completed by his workers at all stages of the construction. His evidence in his witness statement was that "..*my construction supervisor erected about 50% of the work, that is to say the erection of joists and girders.*" However, the Defendant's evidence was woefully lacking in this regard. He has not produced any cogent documentary evidence to support this assertion, whether through himself or his Construction Site Manager, Mr John Walker who was his sole witness.

[36] It is not inconceivable that workmen employed by the Defendant might have helped in minor tasks not requiring much skill such as holding a piece of metal in place while it is being welded, but for the significant involvement which the Defendant asserts, I would expect to see some documentary evidence supporting this. I do not accept on a balance of probabilities that the Defendant's workmen could have done the significant work he said they did, while the Claimants were on the project, without the Defendant having any documentation supporting this.

[37] As it relates to the second component, I would expect that on the event of the Claimants leaving the Project, especially in circumstances of a less than amicable separation, the first task of the Defendant would have been to carefully inspect and document the state in which the Project was left. The smartphone with a built in camera is a ubiquitous feature of modern life and it would be a simple task to take photographs of the unfinished work. I would also expect, that the next task would have been to have the value of the completed work and the incomplete work assessed by a competent professional. The purpose of this would have been for the Defendant to have an accurate "picture" of his financial position as it related to the structural steel component of his Project. An added benefit of this would have

been to place him in a positon to respond to any claim for payment made by the Claimants.

The non-disclosure by the Defendant

[38] It was disclosed to the Court during the cross examination of Mr Miller that there was a site Manager employed on the project who would inspect the work done and make a note in a book. The book had not been disclosed as part of the disclosure process and accordingly the Claimants had not seen it as a part of their preparation for the trial. The Court ordered its production to the Claimants for inspection and the books were accordingly produced namely, a site diary, two attendance diaries and an equipment diary.

[39] The Civil Procedure Rules ("CPR") Part 28.4 (1) provides that:

> *(1) Where a party is required by any direction of the court to give standard disclosure that party must disclose all documents which are directly relevant to the matters in question in the proceedings.*

CPR 28.1(4) provides that:

> *(4) for the purposes of this Part a document is "**directly relevant**" only if:*
>
> *(a) the party with control of the document intends to rely on it;*
>
> *(b) it tends to adversely affect that party's case; or*
>
> *(c) it tends to support another party's case.*

[40] The consequence of a party failing to give disclosure by the date ordered or to permit inspection, is that that party may not rely on or produce at trial, any document that was not so disclosed or made available for inspection. This is the sanction provided for by CPR 28.14(1). However, after the documents were disclosed to the Claimants they indicated that they wished to rely on the documents and were prepared to have the documents admitted into evidence by consent. It would be pointless to have an ongoing duty to disclose relevant documents if when documents are disclosed late to another party he cannot utilise those documents if they are in his favour and capable of assisting his case. It was on this basis that

the Court admitted into evidence, by consent, the site diary, the two attendance diaries and the equipment diary which were produced by the Defendant.

[41] Mr Mellish cross-examined the Defendant in respect of the attendance registers and the Defendant's assertions that he employed welders during the time the Claimants were working on the Project. The Defendant's response was that his construction manager who dealt with the day to day issues would be in a better position to address these issues.

[42] During the cross examination of the Defendant, Mr Mellish also confronted him with his list of documents which was filed on 12th May 2020 in compliance with the order for standard disclosure made by this Court on 7th November 2019 at the case management conference. The Claimants had filed their list of documents four months earlier on 31st January 2020.

[43] Schedule 1, Part 1 of the Defendant's list of document includes the following

> *5. Statement of Account*
>
> *6. Priced measurement for the labour portion of the structural steel fabrication that formed part of the Defendant's contract with the client.*
>
> *7. Assessment of the portion of work done by Phillip Duncan*
>
> *8. Site Diary*
>
> *9. Report from construction site manager in relation to the structural steel work erection that was done by Duncan/Miller. The portion was executed by Defendant's team.*

[44] The Defendant admitted that he declared in the list of documents that he had these documents. He initially said that 'document 9' would be dealt with but then admitted that there is no report before the Court from the site manager. He said that 'document 6' was the Claimant's final accounts which was before the Court and so too was 'document 8', the site diary. He admitted that 'document 5' the statement of account was not before the Court.

[45] The Defendant's list of documents provides tacit acceptance of the kinds of documentary evidence which would have been helpful in supporting his case that some of the work for which the Claimant were claiming had been completed by his workers. Critical to a defence, would have been a contemporaneously prepared document or documents showing firstly, the tasks, which although included in the scope of work for which the Claimants were responsible, were performed by the Defendant's workers during the time the Claimants were still on the project. Similarly, helpful, would be a record of those tasks which the Claimants left unfinished which had to be completed by the Defendant's workers. The description in the Defendant's list of documents, of 'Document 9' in particular, suggests that if it had been produced to the Court it would have been helpful in assisting the Court to resolve the matters in dispute between the parties.

[46] In **Davey and another v Croxen and another - [2015] EWHC 2372 (Ch)**, Mr Robin Hollington QC sitting as a Deputy Judge of the Chancery Division in England had to consider the decision of a Judge refusing an application for disclosure in an administration action. He held that he did not need to order disclosure on this issue when he could alternatively leave it to the discretion of the trial judge to determine what adverse inferences may fairly be drawn from the failure of the Applicants to give disclosure on the issue being considered.

[47] This case is referred to simply for its acknowledgment of what in my view is sensible and settled law, that the Court can draw appropriate inferences from a party's failure to comply with its disclosure obligations, especially where no good reason has been provided for such failure.

[48] In this case the Defendant has asserted that he had in his possession a report from his construction site manager in relation to the structural steel work erection that was done by Duncan/Miller and the portion that was executed by Defendant's team. This report was not produced with no good reason being offered for its non-production. I infer from the non-production in these circumstances, that this report does not challenge the evidence of the Claimants or support the case advanced

by the Defendant. This inference is material in my conclusion, that, on a balance of probabilities, the Claimants have done the work which they have said they completed and which they itemised in detail in their final statement of account

[49] The evidence of Mr John Walker the construction site manager did not assist in bolstering the Defence. He stated that when the Claimants left the project there was outstanding metal fabrication work to be done, such as the metal sheeting at the roof level and mezzanine level and some of the members joints and girders were not totally welded together. The rails of the staircase were also not installed which he said was 10% of the staircase not 5% as suggested to him in cross examination.

[50] I note that the evidence as to the incomplete sheeting on the mezzanine and roof levels are admitted by the Claimants and a sum is deducted for that in the Claimant's statement of account. I accept the Claimant's evidence that that was the only work left incomplete.

[51] Mr Walker did not provide the level of detail which one would have expected if the assertions by the Defendant as to the extent of work which his workmen did is true. His evidence is incapable of supporting the assertion of the defendant that "..*my construction supervisor erected about 50% of the work, that is to say the erection of joists and girders.*" There was no detail provided of any work which the metal fabricators or welders employed by the Defendant did while the Claimants were working on the Project. Furthermore, the evidence of Mr Walker does not provide any detailed account of payments to metal fabricators/welders or detail of the work which they did, which materially contradicts the Claimant's account of the outstanding work for which they made a deduction.

Conclusion on the work completed by the Claimants

[52] I find on the evidence that the Claimants have proved on a balance of probabilities that they completed the work for which they have claimed. I find that the Claimants' final statement of account offers a detailed and accurate representation of the work

that they did and the pricing thereof. I was impressed with the *viva voce* evidence of both Claimants but in particular with that of Mr Duncan. His expertise in his field was clear by the manner in which he answered questions asked of him during cross examination. He was always eager to answer questions, in meticulous, sometimes excruciating detail, and often had to be reigned, in by the Court where his explanations went beyond what was reasonably necessary or helpful. His denials of suggestions put to him were forceful and he was always keen to be given an opportunity to further explain why those suggestions had no merit. I accepted at all times that he was a witness of truth being open and frank in an effort to have the Court understand the factual matrix which led to the Claim.

With whom was the contract made and what was the scope of the contract

[53] In addition to the assertion that the agreement was with the 2nd Claimant only, the Defendant averred in paragraph 1 of his Defence that the arrangement with the 2nd Claimant was to assist the Defendant to prepare the Bill of Quantities and "when the contract starts to "*assist the Defendant in supervising the structural steel component*". The Defendant explained to the Court that he was the contractor but that he needed the expertise of Mr Duncan.

[54] The Defendant also asserted in his defence, supported by his witness statement, that the full extent of his agreement with the 1st Claimant was that he was "*given a small contract to assemble and install the structural steel columns for which he was paid*". However, the Defendant has not produced any cogent evidence to support this separate "*small contract*". I do not accept the Defendant's assertion in this regard.

[55] I find that the Defendant's characterisation of the role of Mr Duncan as his assistant is not a matter of mere semantics. I accept the evidence of the Claimants that they were subcontracted to do the structural steel work as agreed, which included the welding/fabrication of some columns off-site in Kingston, which were then transported to the Project. Of course, I appreciate that as the main contractor the

Defendant would have ultimate supervisory control over the Project as a whole. However, the role of the Claimants as independent sub-contractors is supported by the evidence as to the Claimant's hiring of their own team of workers and the general independence in the performance of their duties within the parameters of the scope of works for which they were contracted. The evidence on a whole supports that finding, as opposed to a finding that Mr Duncan was "*assisting*" the Defendant which connotes something entirely different. I therefore find that the Defendant was not being sincere in his characterisation of Mr Duncan's role and of the nature of the agreement for the provision of services by the Claimant.

[56] My finding on this issue is largely based on my view of the credibility of the witnesses and I accept the evidence of the Claimants on a balance of probabilities that the Defendant engaged them jointly to complete the structural steel work on the Project.

Interest

[57] In the Court of Appeal decision of ***British Caribbean Insurance Company Limited v Delbert Perrier*** (1996) 33JLR 119 it was held that it is open to the Court to award interest to a successful claimant in matters of commerce. In the **Perrier** case, Carey JA expressed the view that the issue was not subject to debate and said at page 125 of the Judgment:

> *"I do not think it can be doubted that where a person has been found to have 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".*

Carey JA referred to the statement of Forbes J in ***Tate & Lyle Food Distribution Ltd. v Greater London Council & Anor*** [1981] 3 All ER 716 as to the basis for awarding interest at page 722 as follows:

> *Despite the way in which Lord Herschell LC in* ***London, Chatham and Dover Railway Co v. South Eastern Railway Co.*** *[1893] AC 429 at 437 stated the principle governing the award of interest on damages, I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the*

> *principle now recognised is that it is all part of the attempt to achieve restitution in integrum. One looks, therefore, not at the profit which the defendant wrongfully made out of the money he withheld (this would indeed involve a scrutiny of the defendant's financial position) but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates, the correct thing to do is to take the rate at which plaintiffs in general could borrow money."*

[58] In **Delbert Perrier** (supra) his Lordship Carey JA at page 127 C-D advised that is desirable that a claim for interest should be included in the prayer which would remind the parties that evidence can be adduced at the trial as to the rate at which money could be borrowed at the commercial rate in place of the money wrongfully withheld by the defendant. A claim for interest has been included in the prayer.

[59] At page 127B of **Delbert Perrier** (supra) Carey JA also stated that he could see no objection to documentary material being properly placed before the judge to enable him to ascertain and assess an appropriate rate of interest. Accordingly, the practice has developed in the Courts of litigants placing material before the Court usually the weighted loan rates applied by commercial banks as published by the Bank of Jamaica, without calling oral evidence.

[60] The Law Reform (Miscellaneous Provisions) Act section 3 also empowers the Court to make an award of interest at the rate it thinks fit between the date the cause of action arose and the date of judgment. In this case I note the letter of Mr Lloyd Miller to Pyramid Design Consultants dated 20th March 2017 in which it was indicated that the Claimants had not received any money since 29 December 2017. Helpfully, the parties have agreed that interest should be applied at the rate of 7% per annum from 1st May, 2017 to today's date, and thereafter the statutory rate should apply. Accordingly, the Court makes that award.

Conclusion and disposition

[61] For the aforementioned reasons I find that the Claimants have proved their case to the satisfaction of the Court on a balance of probabilities and I make the following orders:

1. Judgment is entered in favour of the Claimants against the Defendant in the sum of $10,106,002.40 plus interest at the rate of 7% per annum from 1st May, 2017 until 17 July, 2020 the date of judgment. This sum will attract statutory interest at the rate of 6% per annum from 17 July 2020 until the Judgement is satisfied.

2. Costs of the Claim to the Claimants to be taxed if not agreed.