IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2005 HCV 01925

BETWEEN	**STARDUST INCORPORATED LIMITED**	**CLAIMANT**
AND	**MINISTRY OF EDUCATION YOUTH AND CULTURE**	**1ST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2ND DEFENDANT**

Building Contract – Liquidated Damages Clause – whether delay in payment is to be calculated with reference to the date the money ought to have been paid or with reference to the date of actual payment.

Heard: 11th, 12th March, 2013 and 31st May, 2013

Leslie Campbell instructed by Campbell & Campbell for the Claimant

Althea Jarrett instructed by the Director of State Proceedings for 1st and 2nd Defendants.

CORAM: JUSTICE DAVID BATTS QC

[1] The Claimant in this action seeks to recover $17,530,152,436,009.20 along with the costs of pursuing the action. This amount is said to represent interest due pursuant to Clause 60 (7) of a building contract consequent on a late payment. The detailed computation of the interest claimed is to be found at paragraph 8 of the particulars of claim.

[2] By a further Amended Defence of 23rd March 2012 the Defendants respond to the claim by alleging that:

a. The Defendant did not make good maintenance defects [as per Clause 48 of the contract] until 26 July 1996.

b. The certificate of completion maintenance and defects was signed off on December 9th 1996 and sent to the Claimant by letter dated December 10, 1996.

c. The Claimant gave certain directions as to payment and that it should be directed to Ronham and Associates Ltd. and this contributed to the delay in making payment [see letter dated December 18th 2000].

d. That Ronham Associates Ltd. gave an irrevocable commitment not to bring any legal action against the 1st Defendant and this commitment was binding on the Claimant.

e. That the claim is barred by statute of limitation.

[3] The Claimant's witness was Mr. Vincent Lachman who was extensively cross examined. The Defendant's sole witness was Keith Atkinson who was also cross examined. An agreed Bundle of documents [Exhibit 1] completed the evidence. At the end of the day however and having reviewed the evidence the most material facts were not in dispute nor indeed were the terms of the contract. The issue centers on the interpretation to be given to certain terms of this construction contract as well as how certain conduct and circumstances impacted the application of the terms of the contract.

[4] The contract is found at Tab. 33 of Exhibit 1. It is for the construction of block and steel buildings together with the installation of all electrical plumbing, joinery finishes, supporting infrastructures, external facilities and sanitary conveniences and the refurbishing of existing buildings, repairs to roofs, doors, windows, floors and sanitary conveniences. The engineer for the project, and this is common ground between the parties, was the National Housing Development Corporation.

[5] The clause which falls for consideration is Clause 60 (7).

"60 (7) FINAL ACCOUNT

a. Not later than 3 months after the date of issue of the Maintenance Certificate the Contractor shall submit a draft statement of Final Account and supporting documentation to the engineer showing in detail the value of the work done in accordance with the contact together with all further sums which the Contractor considered to be due to him under the contract up to the date of the Maintenance Certificate (hereinafter called 'Contractors Draft Final Account")

b. Within 3 months after receipt of the contractors draft final account and of all information reasonably required for its verification the Engineer shall determine the value of all matters to which the contractor is entitled under the contract. The Engineer shall then issue to the Employer and the contractor a statement (hereinafter called the "Engineers Draft Final Account") showing the final amount to which the Contractor is entitled under the contract. The Employer and Contractor shall sign the Engineer's Draft Final Account as an acknowledgement of the full and final value of the work performed under the Contract and shall promptly submit a signed copy (hereinafter called "the Final Account") to the Engineer.

c. On receipt of the Final Account the Engineer shall promptly prepare and issue to the Employer and the Contractor a FINAL PAYMENT CERTIFICATE certifying any further monies due to the contract. In the event of nonpayment within 45 days of such certificates being delivered to the Employer interest shall accrue to the Contractor on a daily basis at a rate of 30 per cent compounded per day of delay."

[6] In this matter the evidence from both parties is that the "Maintenance Certificate" referred to in Clause 60(7) (a) is also called the "Certificate of Completion of Maintenance and Defects." This document is at Tab 29 of Exhibit 1. It was signed by the Project Manager on the 9th December 1996 and the Technical Director on the 9th December 1996. The document certifies that the works were completed and made good on the 26th July 1996. The document is issued by the National Housing Development Corporation. (NHDC)

[7] The Claimant's witness stated that he had prepared and issued the draft final accounts to Garron, the agents of the NHDC, in February 1996. When asked

why would he do so when the completion was not certified until December 1996, he responded

> "A: It is correct so we did not expect any defects. There were no defects so we feel we could prepare it.
>
> Q. But no certificate
>
> A: No, It can be drafted and submitted and client review it and upon defect certificate they could deduct it if defects not represented."

Suffice it to say that this draft account was not produced to the court. In any event if produced in February it would have been months before the maintenance certificate was issued and hence the Defendant, I hold, would have had no contractual obligation to have regard to it.

[8] In accordance with Clause 60(7)(a) the Claimant's obligation was to submit a draft statement of Final Accounts and "supporting documentation" to the engineer not later than three (3) months after the issue of the Maintenance Certificate.

[9] The Claimant, and this is also common ground, did submit a draft statement of Final Accounts within 3 months. However the NHDC had concerns, primarily because the draft accounts submitted by the Claimant was not properly supported by documentation. The Claimants witness Mr. Lachman admitted that in the period April 1997 to April 1998 there was disagreement between himself and the NHDC with respect to the supporting documentation. As he admitted in cross- examination he even suggested referral of the matter to arbitration. Several letters e.g. Tab 11 and 12 of Exhibit 1, evidence this fact. The Claimant admitted, and I so find, that he refused to sign the Draft Final Accounts when it was submitted by the NHDC because he considered that his claims were excluded. I find that the dispute between the Claimant and the NHDC was not resolved until March 2000. This is evidenced by the Final Statement of Account (Tab 31 Exhibit 1) which was signed by the Claimant on the 20th March 2000. It was not signed by the Defendant until the 7th September 2000.

[10] It is therefore apparent that the Engineers duty to prepare a Final Certificate pursuant to Clause 60(7) (c) only arose after September 2000 when the NHDC received the Final Account signed by both the Claimant and the Defendant. The engineer's duty was then to prepare "promptly" the final account.

[11] Interest according to Clause 60(7) (c) begins to run if the amount due as per the Final Payment Certificate is unpaid 45 days after it was delivered to the employer.

[12] The Final Payment Certificate is to be found at Tab 32 of Exhibit 1 and bears a date 11th December 2000. It was suggested to Mr. Lachman that the Defendant had no obligation to pay until the final payment Certificate was issued. This he denied. In his words,

> "Depends on what you call Final Certificate. The Final Certificate is the one I signed."

[13] I find that Mr. Lachman is in error in this regard. This may well explain his approach to the claim. The terms of the contract are clear. The obligation to pay arises after the Final Payment Certificate has been prepared by the engineers and submitted to the employer. Time under Clause 60(7) (c) runs from non - payment of the Final Payment Certificate not the Final Statement of Account.

[14]. This is not the end of the matter however as it is common ground that payment was not made within 45 days of the submission to the Defendant of the Final Payment Certificate. The Defendant excuses this delay by reference to what they say were contradictory instructions from the Claimant and the resultant need to get legal advice.

[15] At paragraph 52 of his witness statement Mr. Keith Atkinson stated,

> *"By letter dated December 18th 2000 the contractor authorized National Housing Development Corporation to pay directly to Ronham and Associates Fifteen Million Two Hundred and Fifty Two Thousand Nine Hundred and Thirty Dollars ($15,252,930.00). This arose out of an agreement with Ronham the Electrical subcontractor dated the 4th July 1994 in the sum of Three Million Five Hundred Thousand Dollars ($3,500,000) owing*

> *to Ronham with interest. This authorization was done. After Stardust had previously advised the Project Managers (by letter of August 15, 1997) that all "outstanding payments on the contract be made payable to CIBC Manor Park/Stardust Incorporated Ltd."*

[The letter of the 15th August 1997 is to be found at [Tab 4 of Exhibit 1, the Bundle of documents]. This was communicated to CIBC by letter dated 21 October 1997 [Tab 6 Exhibit 1].

[16] At paragraph 39 of his Witness statement Mr. Atkinson refers to a letter dated 19th March 2001, [Tab 23 Exhibit 1] from the Defendant to the Solicitor General seeking legal advice. That letter ended with the words,

> "Please advise whether the outstanding sums should be paid to the subcontractor who has agreed to indemnify National Housing Development Corporation (our agent) against any further liability for outstanding amounts not satisfied from the final accounts or CIBC Manor Park/Stardust Incorporated.
>
> I should be grateful for a very early response, so that payment may be effected in this fiscal year."

[17] The response from the office of the Solicitor General was received on the 30th March 2001 [Tab 24 Exhibit 1]. The Solicitor General's department in that letter advised that the payment could be made to Ronham & Associates and that,

> "Finally the sub-contractor must be required to indemnify the Ministry and its agent the National Housing Development Corporation from all legal actions."

Payment was made to Ronham Associates on the 31st March 2001, [see paragraph 23 Witness Statement of Keith Atkinson and Tab 25 Exhibit 1]. By letter dated 6th April 2001 [Tab 27 Exhibit 1] Ronham and Associates accepted the cheque and gave a commitment that they would not bring any further action against the Ministry of Education, It was not the indemnity that the Solicitor had advised be obtained.

[18] It is therefore against this background that at the end of the day, the Claimant's attorney's submission reflected a far more modest claim to interest than his

statement of case suggested. The submission made orally to me, as I understand it, is that the delay for which the Claimant is liable totals 63 days after the obligation to pay arose. He arrived at this figure in the following way:

a). The Final Certificate was prepared in March

b). The engineer's (NHDC) requisitions and concerns should have been completed by end of June.

c). The Final Certificate ought to have been issued in September but for the delay caused by the Defendant in July. Therefore and before 45 days from September 2000 means payment should have been in October 2000.

d. Ronham's claim and the Claimant's consequential direction only emerged in December 2000 and is therefore irrelevant.

e. The cumulative period of delay is therefore, 15+30+18 a total of 63.

[19] Counsel also submits that the court should not just have regard to the date when the Final account was dispatched, but rather to the date it ought to have been. In this regard he submits,

a). The engineer in January 2000 processed the Claimants draft final account within 3 months.

b). The Final Certificate was prepared in March 2000

c). All the engineers requirements were satisfied by June 2000.

d). The Final Account ought therefore to have been signed by Defendant by 5th July 2000.

e). At latest therefore the Final Certificate ought to have been issued by 1st September 2000.

f). Payment should therefore have been 45 days thereafter which is the middle of October.

[20] Claimants Counsel relied on the authority of **Henry Boot Construction Ltd. v. Alston Combined Cycles Ltd (No. 2) [2005] EWCA Civ 814**, in support of the submission that the right to payment arose when the engineer's certificate ought to have been issued and not when it was in fact issued. In that case the issue was when did time begin to run for the purpose of computing time under the Limitation of Actions Act, when interim certificates were issued or, whether it was the date of the Final certificate even if that certificate incorporated the interim certificates. Counsel for the employers submitted that the cause of action accrued upon the doing of the work. The engineers certificate was only evidence of the engineer's opinion of what is due to the contractor.

[21] Dyson J, stated his conclusion on that issue thus,

> [Para 50]
>
> > "In my judgment, there is nothing in the authorities which requires me to modify the conclusion that I expressed earlier that, upon the true construction of the contract, the right to payment arises when a certificate is not paid in accordance with CL 60(2) or (4) as the case maybe, or when a certificate to which Boot is entitled under Clause 60(2) or (4) is not issued in accordance with the contract."

[22] In relation to interim certificates Dyson J, decided that the cause of action with respect to an interim certificate was separate from the cause of action for a Final Certificate even if the same amount was included in both [see para 56 of his judgment]. In relation to the accrual of the cause of action for interest Dyson J stated,

> [Para 77]
>
> > "I would therefore hold that the right to claim interest on a sum which should have been certified becomes statute barred six years after that right accrued. If the arbitrator does not identify a date when £x should have certified, then £x is regarded as overdue for payment from the date of the certificate of substantial completion of the works: see clause 60(7)"

[23] That case therefore really has no direct bearing on the issue before me. Furthermore, and as Dyson J indicated, it really is a matter of construction of the contract.

[24] Counsel for the Attorney General submitted that the event which triggers the right to payment is the issue of the Final Payment Certificate. The Court is not entitled to look behind that. Therefore any delay prior to the event cannot give a right to interest. She submitted that insofar as the cases referred to when a certificate "ought to have been issued," they were considering situations when a Final Certificate was not issued. Further as no misfeasance had been alleged or proven in the conduct of the employer or the engineer there was no basis for the court to go behind the engineer's certificate.

[25] It is apparent that there were 5 periods of delay in this matter. In the first place there was in the period 1997 – 2000 a dispute between the Claimant and the engineer (NHDC) with respect to items in the Final Statement of account. [See letters dated 12th January 1998, 21st January 1998, 13th February 1998, 16th March 1998, 14th April 1998, 9th November 1998, 6 January 2000, [Tabs 7 to 15 Exhibit 1, bundle of documents].

[26] In the second place, there is the period 27 March 2000 to 5th July 2000. In its letter of 27th March 2000 [tab 15 Exhibit 1, bundle of documents] the engineer (NHDC) with reference to the Final Statement of account stated that, "it appears to be in order." The Defendant's witness Mr. Keith Atkinson said that was not a sufficiently definitive statement. He said, and I accept his evidence, that his efforts by telephone failed to get clarification. He thereafter requested clarification by letter dated 10th May 2000[Tab 16 Exhibit 1 bundle of documents]. It was not until the 5th July 2000 [Tab 17 Exhibit 1, bundle of documents] that the engineer revised its letter. I find nothing unreasonable about the position adopted by the Defendant which was entitled to demand unequivocal advice from the engineer.

[27] The Defendant did not however sign the Final Statement of Account until the 7th September 2000 [Tab 31 Exhibit 1 Bundle of documents]. I find that the delay between the 5th July and 7th September 2000 (the third period of delay) has been explained adequately. Mr. Atkinson indicated that he did his own verification of the figures in that period.

[28] The fourth period of delay concerns the 7th September to 11th December 2000. On that latter date the Final Payment Certificate was issued. This delay is attributable to the engineer (NHDC). It has not been explained mainly because the engineers are not party to this suit, nor were they called to give evidence. It was not suggested that the Defendant is liable for the engineers delay.

[29] The fifth period of delay follows the issue of the Final Payment Certificate. Delay occurred because Final payment was not made until the 31st March 2001 more than 45 days after the Final Payment Certificate was issued. This delay is explained by the Defendant as being due to the uncertainty as to how that payment was to be made. The uncertainty arose because by letter dated 8th December 2000 attorneys at law writing on behalf of Ronham Associates made a claim on the Defendant with respect to the sums due to the Claimant [See letter dated December 8 2000 Tab 18 Exhibit 1]. That letter be it noted was copied to the Defendant. By letter dated 18th December 2000 the Claimant indicated agreement with Ronham & Associates claim. [Tab 19 exhibit 1 bundle of documents]. The Defendant did not seek the advice of the Solicitor General until the 19th March 2001 [Tab 23 Exhibit 1 bundle of documents]. That advice was promptly given on the 30th March, 2001 [Tab 24 Exhibit 1 bundle of documents]. As stated earlier (see paragraph 17 above) payment was made on the following day, 31st March 2001.

[30] In my judgment, this court is not entitled to look behind the Final Payment Certificate. The contract is clear that the interest accrues to the contractor in the event of non-payment within 45 days of the Final Payment Certificate being delivered to the employer. This claim is for interest pursuant to Clause 60(7) (c). It is not therefore for this court, as Claimant's counsel would have it do, to

assume, or extrapolate, or proclaim, a date when the Final Certificate "ought to have been issued". Certainly not in a context where a certificate has been issued. Such an approach would guarantee uncertainty and no end to claims. Courts, and arbitrators would forever be asked to determine the reasonableness or otherwise of prior conduct and the "assumed" date of issue. The regime established by the contract is clear and is obviously intended to avoid uncertainty.

[32] Any issues related to a prior breach or delay can be arbitrated or made part of the dialogue and exchange prior to agreement on the Engineers Draft Final Account. When that is signed by both parties it becomes the "Final Account" [Clause 60 (7) (b)]. It was suggested that the Defendant ought to have signed the engineer's draft Final account immediately. I reject that suggestion, because either party even at that late stage continued, after reconciling interim certificates and all the other aspects of the project to, have the right to raise a query with the engineer. If the employer delayed for an unreasonably long time to sign the Draft Final Account, then conceivably the contractor might allege breach of contract and damages. This however would not be a claim for interest under Clause 60(7) (c).

[33] In the result therefore I hold that the only relevant period of delay is the 7th December 2000 to 31st March 2001 time frame (the 5th period of delay described at paragraph 29 above). Clause 60 (7) (c) requires payment no later than 45 days after the employer receives the Final Payment Certificate. There is no exception made for "reasonable excuse." In other words the Claimant should have been paid on or about the 20th January 2001.

[34] The Defendant alleges that it is the claim by Ronham Associates Ltd. and the fact that it conflicted with the earlier instructions of the Claimant which led to this delay. However as we have seen the Claimant very promptly confirmed that the payment ought to be made to Ronham. Furthermore the Defendant took rather a long time to seek advice. This cannot be said to be a situation where the delay in payment was induced by the Claimant's conduct or was caused by it. In the

face of the uncertainty alleged the Defendant could have adopted the expedience of placing the money in escrow and/or of inviting all relevant parties to a meeting i.e. CIBC, Ronham and the Claimant. This could have been done within 45 days had the Defendant acted with alacrity. In the result they waited until March of 2001 to seek legal advice. I therefore hold that the Defendants are liable to interest on the amount of $14,801,821.54 calculated on a daily basis at a rate of 30 per cent compounded per day of delay for the period 20th January 2001 to 31st March 2001. .

[35] On my computation that amounts to $15,676,480.95. I will however hear submissions from the parties as the approach to the computation is not without difficulty for someone as handicapped in that regard as I. I will finalise the judgment after hearing the parties' further submission.

David Batts QC
Puisne Judge