[2015] JMSC Civ 84

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2010 HCV 04621

BETWEEN THEOPHILUS TYRELL CLAIMANT

AND SUNSET BEACH RESORT & SPA HOTEL LIMITED DEFENDANT

Mr. Garland Waugh instructed by Green and Moodie for the claimant

Mr. Brian Moodie and Miss Danielle Chai instructed by Samuda and Johnson for the defendant

Heard: 25th and 26th February; 29th April and 8th May, 2015.

Contract - Pavement contract – Contract price discounted – Whether withdrawal of discount allowed by custom – Misrepresentation of the area paved – Whether project completed in a satisfactory manner – Award of interest – No claim made for interest - Law Reform (Miscellaneous Provisions) Act.

Evan Brown J

Introduction

[1] The claimant was a Works Supervisor employed to Surrey Paving & Aggregate Co. Ltd. (Surrey Paving). The company permitted him to contract in his own behalf for jobs not requiring the deployment of full resources. It appears that in the performance of those contracts he would use material supplied by his company. That material was supplied on the basis of credit extended to the claimant. It appears also that the defendant had an existing arrangement with Surrey Paving.

[2] In or around December, 2007 the claimant entered into an oral contract with the defendant, in his own name, to perform paving work on the defendant's property. The total area to be paved under the contract was 4966 square metres at the rate of $950.00 per square metres. The total cost was therefore $4,717,700.00. The claimant

duly completed the project in February 2008, supplying all the materials and labour as the contract required.

[3] Before and subsequent to the completion of the project, payments totalling $2,745,930.00 were made in liquidation of the contract price. A payment of $1,500,000.00 was made to the claimant as a deposit. Subsequently, a further $1,000,000.00 was paid under the contract in August, 2008. A further $245,930.00 was paid to the claimant in December, 2008. The claimant claimed $2,467,700.00 for work done and material supplied.

[4] The defendant counterclaimed in the sum of $2,625,871.50. The counterclaim arose in two ways. First, the defendant alleged an overpayment to the claimant as a result of the claimant's misrepresentation of the square metres of the paved area. Secondly, the defendant said that it will have to undertake remedial work in the paved areas because of defects in the work performed by the claimant.

[5] Having considered the evidence, I give judgment for the claimant on both the claim and counterclaim. My reasons for doing so appear below. Preceding the discussion of my findings is a brief statement of the respective cases for the parties followed by a statement of the issues for determination.

Case for the claimant

[6] This was how he said his claim came about. In December, 2007 he and Mr. Ian Kerr, Managing Director of the defendant, discussed the possibility of paving the parking lot, main and back road areas of the defendant's property. In due course he provided Mr. Kerr with an estimate to pave all three areas. However, they agreed that only the main and back areas would be paved. The reason Mr. Kerr gave him for that was the defendant's cash flow problems. Under cross-examination the claimant denied that he was advised at the outset of the defendant's cash flow problems.

[7] The claimant completed the work and submitted his invoice for payment. At the time of that submission he indicated an allowance of a 10% discount. Because of the length of time in making payments the claimant decided that the 10% discount would no

longer apply. Cross-examined about this, the claimant said the 10% discount came up when discussing the job, provided payment came within three months. This was the tradition. However, he did not put this condition on the estimate. Neither did he advise Mr. Kerr that the 10% discount was revocable.

The paved area

[8] The claimant was questioned about the area paved and the quality of the work carried out. He maintained that the area paved was 4,966 square metres. He acknowledged the importance of not having water settle where guests are supposed to walk. Accordingly, the claimant agreed that Mr. Kerr told him there should be no ponding when it rained. He insisted that he completed the job without ponding. He employed a state of the art paver equipped with a sensor which gave the level of the surface as it was paved. Consequently, there was no need to do anything more after using that machine, the claimant asserted.

[9] The claimant denied that Mr. Kerr expressed his dissatisfaction with the job upon completion. If Mr. Kerr had done so, it would have been nothing for the claimant to go and finish it up as at that point there was no dispute between them, the claimant said. The claimant said also that he never made any unfulfilled promises to Mr. Kerr to remedy any defects.

Payments to Surrey Paving and Aggregate Co. Ltd

[10] Under cross-examination, the claimant described his relationship with Surrey Paving. That relationship was not one that allowed the company to collect money on his behalf. That notwithstanding, he asked Mr. Kerr to pay $1,000,000.00 to Surrey Paving. However, he did not have any agreement with Mr. Kerr for him to make payments directly to Surrey Paving for materials to be used by the claimant. The claimant said he was neither aware that the defendant had a credit with Surrey Paving nor that that credit should have been applied to purchase of paving materials used by him.

[11] Mr. Marlon Symister, Quantity Surveyor employed to Surrey Paving, confirmed that he authorized the extension of credit to the claimant. The claimant told Mr. Symister that the defendant was being tardy in paying him and asked Mr. Symister to use his

best efforts to expedite payment. According to Mr. Symister, he was assisting the claimant to collect so that he [Surrey Paving] could collect.

[12] Mr. Symister made several contacts with the defendant's accounts department before eventually speaking with Mr. Kerr. He explained to Mr. Kerr Surrey Paving's involvement in the matter. In particular, Mr. Symister told Mr. Kerr that Surrey Paving had given the claimant material on credit and that the claimant was unable to pay because of the defendant's default.

[13] Not long after those representations the defendant made the payment of $1,000,000.00 to Surrey Paving. Subsequent to that Mr. Symister made several other unsuccessful contacts with the defendant's accounts department for payment. On one of those occasions he spoke with Mr. Kerr and a meeting was arranged. That meeting never took place. In none of the contacts between Mr. Symister and the defendant was the outstanding balance disputed; neither was there a complaint that the work was defective.

Case for the defendant

[14] According to Mr. Kerr, the defendant was refurbishing at the time the claimant was contracted. Reliance Consulting Group was hired as project manager. Mr. Ian McNally, a director of Reliance Consulting Group Ltd. was the supervisor of the project. Mr. Kerr confirmed that the agreement was to pave two of three areas although he described the areas paved as the parking lot and main area. However, the measurement is the same as the claimant's. After the claimant provided him with the estimate, they had further discussions and agreed that a 10% discount would apply. The contract price was therefore $4,245,980.00. The claimant was paid a deposit of $1,500,000.00.

[15] It was also a part of their oral agreement that the claimant would be supplied with paving material by Surrey Paving. Further, they agreed that the defendant would make payment directly to Surrey Paving. To Mr. Kerr's certain knowledge Surrey Paving had a credit of $600,000.00 for the defendant from previous transactions. There was an

arrangement with Surrey Paving to use this sum to defray a part of the cost of material used by the claimant. Of this arrangement the claimant was well aware.

[16] Before the commencement of the work he instructed the claimant to complete the job without any ponding in the areas where guests were expected to walk. That was important as the guests could slip and fall, creating a major insurance risk. He received from the claimant an assurance that the job would be completed as instructed.

[17] Assurance notwithstanding, in February, 2008 Mr. Ian McNally advised Mr. Kerr that his inspection of the paving work being done by the claimant revealed a number of depressions. Those depressions created unsightly and dangerous ponding. Mr. Kerr's subsequent inspection confirmed Mr. McNally's report. In addition, Mr. Kerr noticed that a section of the area contracted to be paved was undone. Under cross-examination Mr. Kerr said he observed the ponding days after the completion of the work.

[18] Mr. Kerr brought these matters to the attention of the claimant who acknowledged them and promised to remedy the defects and complete the work. The work was then about 90% completed. Although the concerns were brought to the claimant's attention, Mr. Kerr had occasion to speak to the claimant several times about them.

[19] In spite of those outstanding matters, Mr. Kerr caused a cheque in the amount of $245,930.00 to be paid to the claimant in December, 2008 upon the claimant's request for payment. Mr. Kerr, however, reminded the claimant of the unfinished and defective work. That reminder evinced a faithful promise from the claimant to make good on the outstanding matters. The payment was therefore made on the strength of that promise.

[20] In the wake of the filing of the claim, Mr. Kerr had the area paved by the claimant measured by a firm of surveyors in 2013. The surveyors found that the paved area measured 3,132.7 square metres, not the 4966 square metres for which the claimant was paid. That meant the claimant had been overpaid $667,471.550. The claimant was never notified that this survey was to be carried out. In addition to that, the cost of the remedial work was estimated at $1,958,400.00 by a construction firm.

[21] According to Mr. Kerr, “we did the base work for the area to be paved.”However, Mr. Ian McNally said it was the claimant’s responsibility to prepare the base. Mr. Ian McNally went on to say that the manner in which the surface is prepared would affect the paving job. Both the base and sub-base had to be properly compacted. It was also critical to establish the levels to which the final top coat is done. So that, where paving takes place on a sub-base which is not properly prepared, ultimately depressions will appear. In Mr. McNally’s assessment, the ponding was the result of the subsiding of the base and incorrect setting of the levels.

Issues for resolution

[22] There are four primary issues arising for my determination. The first is, was the contract price subject to a 10% discount? Flowing from that issue are the following collateral questions. If a 10% discount applied, was it revocable? That is to say, was the 10% discount extended on the condition that it would only apply if the bill was settled in a timely manner? Was there a custom in the paving sector to that effect?

[23] The second primary issue for resolution is, was it a part of the agreement between the parties that the paving material for use on the project would be obtained from Surrey Paving? Consequently, did the parties also agree that such funds as stood to the credit of the defendant at Surrey Paving would be applied in settlement of the claimant’s account at Surrey Paving? If there was such an agreement, was any money standing to the credit of the defendant at Surrey Paving in fact applied in settlement of the claimant’s account with Surrey Paving?

[24] Thirdly, did the claimant misrepresent the square metres paved in his invoice for payment? In other words, did the claimant pave less than the agreed square metres although he was paid for the entire area contracted to be paved, resulting in an overpayment? Did the claimant perpetrate a fraud upon the defendant?

[25] Fourthly, did the claimant fail to conclude the project in a manner that would ensure that the finished product would satisfy the purpose for which the claimant was engaged? Put another way, did the claimant perform the contract in such a manner that the paved areas developed depressions, that is, ponds, which accumulated water when

it rained? Did the claimant complete the project in a less than workmanlike manner, resulting in dangerous and unsightly ponding?

Findings and analysis

Issue #1: Was the contract price subject to a discount of 10%?

[26] Taking the issues sequentially, was the contract price of $4,717,700.00 subject to a discount of 10%? Was the discount of 10% a term of the contract? Since this was a simple oral contract, its terms are to be gleaned from the evidence of what the parties said. If a statement becomes a term of the contract it creates legal obligations: ***Cheshire, Fifoot and Furmston's Law of Contract*** 12th ed. p.127. The statement becomes a term of the contract if both parties intended it to become part of the contract: ***Bannerman v White*** (1861) 10 CBNS 844. If the statement is later reduced to writing this may be a profound indication that the parties intended it to become a part of the contract: ***Routledge v McKay*** [1954] 1 All ER 855.

[27] The evidence is that in their discussion of the work to be undertaken the matter of the discount of 10% was raised. There is no mention of the 10% discount in the estimate the claimant later submitted to the defendant before commencement of the work. However, the discount of 10% is accounted for in the claimant's invoice dated 11th February, 2008. Therefore, as I understood the claimant, he intended the discount of 10% to become part of their agreement. In that event, the intention that the discount of 10% should become a term of the contract was a shared one; that is, it was an agreement between the claimant and the defendant that the contract price should be subject to a discount of 10%. Since it was their common intention, I find that the discount of 10% was a term of the contract (see ***Bannerman v white***, *supra*).

[28] Since the discount of 10% was a term of the contract, was that term subject to another, implied by custom in the paving sector, making the 10% discount revocable if it is was not paid in a timely manner? A term may be implied into a contract as a matter of custom. The following passage from the judgment of Parke B in ***Hutton v Warren*** (1836) 1 M&W 466, Exchequer makes the point:

> *"It has long been settled that, in commercial transactions, extrinsic evidence of custom and usages is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions of life, in which known usages have been established and parties did not mean to express in writing the whole of the contract by which they intended to be bound, but a contract with reference to those known usages."*

[29] Before a trade custom can be implied into a contract there must be evidence which shows that it is generally accepted by those doing business in the particular trade in the particular place, and be so generally known that an outsider making reasonable enquiries could not fail to discover it: ***Kum v Wah Tat Bank Ltd*** [1971] 1 Lloyd's Rep 439,444, PC. Further, per Lord Jenkins in ***London Export Corpn Ltd. v Jubilee Coffee Roasting Co***. [1958] 2 All ER 411,420:

> *"An alleged custom can be incorporated into a contract only if there is nothing in the express or necessary implied terms of the contract to prevent such inclusion and, further that a custom will only be imported into a contract where it can be so imported consistently with the tenor of the document as a whole."*

[30] It seems then, that there are two guiding principles to bear in mind. First, the practice being relied upon must be so ubiquitous in the place where the contract was to be performed to give it unquestioned notoriety. To put it bluntly, when the claimant said there was a tradition for the 10% discount to be made subject to payment being received within three months of becoming due, the evidence has to go beyond his assertion. There must be evidence demonstrating its general acceptance by persons in the paving sector, in the locale where the contract is to be performed. In addition, the evidence must also show that the parties relied upon the custom.

[31] The second principle to bear in mind is the concord of the custom with the contract. The custom will not be imported into the contract unless it is in harmony with the tenor of the contract. In other words, the custom must do no violence to the sovereign intention of the parties. If the parties have expressed themselves in a manner contrary to the custom, the custom cannot be used to subvert their expressed intentions: ***Les Affreteurs Reunis Societe Anonyme v Walford*** [1911] 1 AC 314.

[32] So, was there any evidence that there was a practice among those in the paving sector in St. Ann that when a discount is given, whatever the percentage, that the discount lapses if payment is not made within three months of becoming due? The short answer to that question is no. Aside from the claimant asserting its existence, the evidence went no further. This assertion made its appearance in cross-examination. That gave it the unmistakable complexion of creative thinking on one's feet. Neither was the point pursued with any of the other witnesses called by either side.

[33] I am therefore constrained to find that no such custom has been established by the evidence. And since no such custom was established, there cannot be any question of the parties having placed any reliance on it. From the tone of the claimant's evidence, I formed the view that he was driven to the purported revocation of the discount of 10% by the protracted process of recovering the contract price. However, the claimant cannot be allowed to equate his personal frustration to a frustration of a term of the contract.

[34] If the claimant were to be allowed to unilaterally alter the terms of the contract that would throw commerce into confusion. That is something the court cannot countenance. A reference to the fourth of the long-standing canons of construction of a contract, confirmed by Lord Bingham in ***Hombourg Houtimport BV v Agrosin Private Ltd(The Starsin)*** [2003] UKHL12, [2004] AC715 (paras 9-13), makes the point. Below is what Lord Bingham said:

> *"In all merchantile transactions the great object is certainty: and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other. Because speculators in trade then know what ground to go upon."*

[35] The conclusion is therefore inevitable that the contract price was made subject to the allowance of a discount of 10%. It was never communicated to the defendant that the discount was revocable. In addition, the claimant's attempt to invoke revocation by custom has failed. Therefore, the contract price of $4,717,700.00 was subject to a reduction of 10%, that is, $471,700.00. The discounted contract price was therefore $4,246,000.00.

Issue #2: Was there an agreement for Surrey Paving to supply paving material?

[36] I now turn my attention to the second primary issue. Was it a part of the agreement between the parties that the paving material for use on the project would be obtained from Surrey Paving? There was no dispute that the paving material was sourced from Surrey Paving. That the paving material was obtained from Surrey Paving seems only natural in the context of their arrangement with the claimant to do small contracts.

[37] It is highly unlikely that Surrey Paving would have had such an open arrangement with its employee and the material used came from elsewhere. From the rationale informing that arrangement, it is not unreasonable to assume that Surrey Paving attached some nuisance value to its arrangement with the claimant. That nuisance value resided in the supply of paving material.

[38] In circumstances where the defendant knew that the claimant was undertaking the work while he remained an employee of Surrey Paving, the defendant either knew, or ought to have known, that the paving material would have been sourced from Surrey Paving. So, there was absolutely no necessity for the parties to have made the source of the paving material a part of their agreement.

[39] Although there was no agreement for the paving material to be obtained from Surrey Paving, did the parties agree that funds standing to the credit of the defendant would be applied in settlement of the claimant's account at Surrey Paving? I do not accept that there was an agreement to that effect. If there was, I would have expected that to have been raised with Mr. Symister when he so diligently sought to assist in the settlement of the claimant's account. I accept that Mr. Symister explained to Mr. Kerr Surrey Paving's interest in the matter. Against that background, I would have expected Mr. Kerr to have at least once said to Mr. Symister, the amount by which your company was overpaid by the defendant is to be applied in partial settlement of the claimant's bill.

[40] That evidence is conspicuous by its absence. In fact, even though Mr. Symister knew about the overpayment he could not recall its amount. But neither could Mr. Kerr. Mr. Kerr's 'certain knowledge' of $600,000.00 turned out to be an overstatement of

almost $35,000.00. In the amplification of his witness statement Mr. Kerr said the correct figure was $565,447.37. In addition to this uncertainty, the balance being claimed on the claimant's behalf by Mr. Symister was never disputed. It is therefore clear that Mr. Symister's mind was never drawn to the existence of an arrangement to apply this overpayment to the claimant's account.

[41] So then, while it is plausible and I accept it, that Mr. Kerr instructed Surrey Paving to hold the amount overpaid and utilise it in the future, I do not accept that those instructions were later tailored to the agreement with the claimant. It is plain from the interactions between Mr. Kerr and Mr. Symister that the matter of the overpayment being so applied never entered their discussions. Although I accept the fact of this overpayment, it has not been established that the money was still being held at the time Mr. Symister sought to settle the claimant's account. In any event, there is no evidence that such funds as might have stood to the credit of the defendant, was ever applied in the settlement of the claimant's account with Surrey Paving.

Issue #3: Did the claimant misrepresent the area paved?

[42] That takes me to the third major issue. Did the claimant misrepresent the square metres of the area actually paved? The claimant contracted to pave 4966 square metres. On the other hand, the defendant contended that only 3,132.7 square metres was paved. That is to say, a total of 1,833.3 square metres was left unpaved.

[43] However did that many square metres escape the notice of Mr. Ian McNally in February, 2008? Mr. McNally's evidence was that he noticed a "small area" unpaved before the completion of the project. Could Mr. McNally have been describing 1,833.3 square metres as small in relation to 4,966 square metres? The common sense and reasonable answer is no.

[44] Aside from that, Mr. Kerr's conduct does not reflect that of the unsatisfied customer he painted himself to be. He said he observed that the work was unfinished and what was finished was improperly done, yet he continued to make payments under the contract. The first of those payments was made in August, 2008, approximately six

months after Mr. McNally's observations. The second payment was made four months after the first payment, and ten months after the Mr. McNally's observations.

[45] I do not accept that this shrewd and intelligent managing director was seduced into making these payments on the strength of a promise given by the claimant to make good the defects and complete the work. That shrewdness is the very antithesis of proceeding with the faith of Abraham and the patience of Job. In any event, I do not accept that any such promise was made.

[46] Furthermore, I give very little weight to this survey. The first reason for doing so is the distance in time the survey was conducted relative to the completion of the project. The survey was conducted in 2013, approximately five years after the event. The surveyor did not measure a recently paved surface whose boundaries could have been readily ascertained by the presence of the freshly paved area. This raises the cardinal question of how the boundaries of the paved area were ascertained.

[47] In the circumstances of this case a surveyor's report detailing how the boundaries of the paved areas were ascertained would have been very helpful. Naturally, the sketch provided by the surveyor was wholly unhelpful to resolve this question. Since the surveyor could not have been assisted by the recency of the paved area, someone must have pointed out to him the boundaries of the disputed areas. Undoubtedly that person was a servant or agent of the defendant, a person with an interest to serve.

[48] The other person with a vested interest in the survey was the claimant, and he was absent. This brings me to the second reason for giving little weight to the survey; that is the absence of the claimant. The claimant received no notice of this survey. Therefore, he was not afforded an opportunity to be present and participate in establishing the boundaries of the paved areas; at the very least to express his objections and have them noted. Fairness demanded no less.

[49] Therefore, the attempt to falsify the claimant's measurement failed. From his responses under cross-examination and his demeanour, I found him to be a witness of truth. His expression of incredulity teetered on the brink of indignation when he was

challenged on the point. Under cross-examination he was a much agitated man but a truthful one.

Issue #4: Did the claimant conclude the project in an unsatisfactory manner?

[50] It was accepted by both sides that the claimant would perform the contract in a workmanlike manner, with the result that no ponding would occur. In the opinion of Mr. Ian McNally two factors are responsible for ponding: a subsiding base and incorrect setting of the levels. It is convenient to consider the factors sequentially.

[51] If any depressions appeared in the paved area as a result of a subsiding base, that cannot be laid at the feet of the claimant. That is so because Mr. Kerr himself said "we", which I understood to be a reference to the defendant, "did the base work for the area to be paved." I cannot therefore, in the same breath, accept the evidence of Mr. McNally on the point. Mr. McNally laid the responsibility for compacting the base at the feet of the claimant.

[52] As it relates to the second factor, the claimant was not in any way discredited. The claimant relied on the proper functioning of what he described as state of the art equipment with the capacity to detect unevenness in the surface being paved. In the words of the claimant, the equipment had sensors which gave the levels as the paving was being done. The reliability of the equipment was not challenged directly.

[53] An oblique challenge came in the implication that the levels may not have been properly set. This suggests some human intervention in obtaining accuracy in the levels. Indeed, it was agreed that what the machine reacted to was the unevenness according to the levels set by its operator. The claimant was not the operator of the machine but he relied on staff he declared to be more competent than himself in the use of the machine. No evidence was led concerning the qualification and training of the operator of the machine.

[54] However, I do not consider it an abdication of my judicial responsibilities to accept the claimant's judgment on the point. The claimant was a man of considerable experience in the paving sector, and he asserted that the operator was more qualified than himself. From his evidence, I formed the view that one had to scrupulously

consider the person to be employed to operate that sophisticated bit of equipment. Given the breath of the claimant's experience, it is more likely than not that he would have and did exercise the requisite care in the employment of the operator.

[55] Be that as it may, I believed the claimant that he completed the job without ponding. I do not accept that Mr. McNally observed any depressions before the work was completed which he brought to the attention of Mr. Kerr. Mr. Kerr's subsequent conduct in disbursing $1,245,930.00 in two tranches to the claimant, over several months, belies their contention of early evidence of ponding. I find that the claimant completed the project in a workmanlike manner which did not result in any dangerous and unsightly ponding.

[56] I considered the written submissions filed on the 12th and 13th March, 2015 on behalf the defendant and claimant respectively. I was not persuaded by the submissions made on behalf the defendant. Counsel for the claimant invited the court to give judgment for the claimant for the full amount of the claim. However, the claim has not been proved in full. I hope this is self-evident from the figures provided in the succeeding paragraph.

[57] I set out below how I arrived at the final figure for judgment:

Contract Price $4,717,700.00

10% Discount.. ($471,700.00)

Discounted Contract Price $4,246,000.00

Deposit made to claimant.............................. ($1,500,000.00)

Payment to Surrey Paving August, 2008....... ($1,000,000.00)

Payment to claimant December, 2008..............($245,930.00)

Amount outstanding $1,500,070.00

To award or not to award interest

[58] The sum I found to be outstanding has been due to the claimant since the project was completed in February, 2008. In spite of that, there was neither a claim nor a

request for interest in either the statement of case or written submissions. To fill this breach the parties were invited to make submissions on this aspect of the case after their written submissions had been filed. This they did on the 29th April, 2015.

[59] Both sides agreed that interest can be awarded notwithstanding the failure of the claimant to include it in his statement of case. Counsel for the claimant cited ***RBTT Bank Jamaica Ltd v YP Seaton and others*** [2014] JMSC Civ. 139. In that case Sykes J accepted that as the position in passing, during his discussion of the position with the award of compound interest. Counsel for the defendant grounded her submissions in the authority of ***Freight Management Limited v Caribbean Cement Company Limited*** [2013] JMCC Comm.2.

[60] In the latter case Sinclair-Haynes J discussed the authorities, first instance and appellate, dealing directly with the award of interest under the ***Law Reform (Miscellaneous Provisions) Act***. That review of the authorities demonstrates that this has been a much traversed area and the law is settled. The award of interest and at what rate under the ***Law Reform (Miscellaneous Provisions) Act*** is a matter of the court's discretion and as such, need not be pleaded.

[61] So, the court has the power to make an award of interest in this case. The question now is at what rate should interest be awarded and when should be its commencement date? Learned counsel for the claimant submitted that the rate should be 6% per annum to commence from the date of the filing of the claim form. On the other hand, learned counsel for the defendant submitted that the rate should be 3% per annum, the normal rate of judgments.

[62] Learned counsel for the defendant contended for interest at 3% per annum on two bases. If the claimant wished an award at the commercial rate he ought one, to have pleaded it and two, led evidence of the prevailing rate offered by the bank. Having not done so, there is no evidence to move the court to award a commercial rate of interest, counsel concluded.

[63] I am persuaded that the court has not been placed in a position to make an award of interest at the commercial rate. The law as declared in ***British Caribbean***

Insurance Co. Ltd. v Perrier (1996) 52 WIR 342, 354 provides sufficient justification. There Carey J.A. said this:

> *"In summary, the position stands thus:*
>
> *(i) Awards should include an order for the defendant to pay interest;*
>
> *(ii) The rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant; and*
>
> *(iii) The plaintiff is entitled to adduce evidence as to the rate at which such money could be borrowed."*

Unlike the situation in ***British Caribbean Insurance Co. Ltd. v Perrier***, *supra*, this claimant did not lead any evidence, such as the contents of Bank of Jamaica statistical digest, for me to consider.

[64] However, it is one thing to say a commercial rate of interest cannot be awarded but quite another to say it must then be 3% per annum. The ***Judicature (Supreme Court) (Rate of Interest on Judgment Debts) Order, 2006*** sets the rate of interest payable on judgment debts denominated in Jamaican dollars at 6% per annum. That Order was published in the Jamaica Gazette Supplement on the 22nd June, 2006. Learned counsel for the defendant invited me to award what was described as the usual rate on judgments.

[65] While defence counsel did not cite any authority for that proposition, I suspect that the guidelines laid down in ***Central Soya of Jamaica Limited v Junior Freeman*** (1985) 22 J.L.R. 152 were in the back of her mind. If that was the case, that would be a misunderstanding of what Rowe, P said. At page 167 of the judgment the learned President said this:

> *"Once the assessment has been made on the money of the day principle I do not think that the interest on general damages for pain and suffering and loss of amenities should exceed one half the rate applicable to judgment debts."*

The President was there dealing with the award of interest under the ***Law Reform (Miscellaneous Provisions) Act*** as it relates to claims for personal injury.

[66] Nowhere in his judgment did the learned President lay down similar strictures for the award of interest in any other claim. On the contrary, the discussion in the case makes it plain that the rate and its commencement date are matters to be left to the court's discretion. In the instant case the demand for payment of the outstanding balance has been protracted, spanning the passage of over five years. The recalcitrance of the defendant even necessitated the intervention of a third party. In my opinion, the justice of this case demands an order that interest of 6% per annum be paid on the sum awarded.

[67] I come now to the commencement date. Learned counsel for the claimant asked that the payment of interest commence from the date of filing of the claim form. No submission was made on the point by the defence. Notwithstanding the submission of the claimant, in my view the most appropriate date is one proximate to when the claim arose. The claim arose when the project was concluded on the 7th February, 2008. However, since it is unlikely that the request for payment was made on that date, I will allow for some lag between the completion of the project and the submission of the claimant's invoice.

Conclusion

[68] In fine, I give judgment for the claimant in the sum of $1,500,070.00. Interest is awarded on the outstanding sum at the rate of 6% per annum from the 1st March, 2008 to the 8th May, 2015. Further, I award costs to the claimant on both the claim and counterclaim, to be taxed if not agreed.