

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCMAP2022/0006

BETWEEN:

GEARING UP LIMITED

Appellant

and

FDL CONSULT INC.

Respondent

Before:

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

Appearances:

Mr. Leslie Haynes, KC with Ms. Melissa Modeste-Singh for the Appellant

Ms. Candace Fletcher with Mr. Mark D. Maragh for Respondent

2023: March 20;
September 19.

Commercial appeal – Appellate court review of trial judge’s findings of fact – Restraint by appellate court in interfering with trial judge’s findings of fact – Whether the learned judge erred in her analysis of the evidence in finding that there was no binding agreement between the respondent and the appellant for sharing of profits from the projects – Whether there was a sufficient evidential basis to support the learned judge’s finding that the appellant was a sub-contractor

In June 2016, the appellant, Gearing Up Limited (“GUL”), and the respondent, FDL Consult Inc. (“FDL”) executed a Memorandum of Understanding (“MOU”) in which they agreed to collaborate on projects related to engineering and construction services. GUL through the MOU partnered with FDL to make bids for three solar photovoltaic (pv) installation projects

in the Eastern Caribbean, which were funded by the World Bank (“the Projects”). FDL and GUL did not possess the required skills for a successful bid for the Projects and as such held discussions with High Peaks Solar LLC (“HPS”) a company registered in the United States of America that had the required technical skills. However, the terms of the invitation to tender only permitted bids by joint ventures, and such joint ventures had to be limited to two partners. As a result, FDL and HPS formed a joint venture and bid for the Projects. GUL was not named a party to the joint venture. The bids were successful, and contracts were entered into for each of the three Projects by the respective Governments and the joint venture. GUL was not a party to any of the contracts with the various Governments. The Projects were successfully completed, and the contract sums were paid in full to the joint venture. GUL performed some of the tasks in relation to the Projects and certain sums were paid to GUL. GUL contends that it was also entitled to a 25% share of the profits of each project, such sums to be paid by FDL.

GUL instituted proceedings pursuant to Part 41 of Civil Procedure Rules 2000 (“CPR 2000”) against FDL with whom there was the MOU, seeking orders for account inquiries or directions for the purpose of determining sums alleged to be due and owing to GUL as profits. GUL claimed that in March 2018, FDL, HPS and GUL formed a consortium partnership and that there was a consortium agreement (“Consortium Agreement”) to bid, execute, and share the net profits from these Projects. FDL in its defence contended there was no agreement with GUL for sharing the profits from the Projects. The Joint Venture Agreement (“JVA”) only provided for the sharing of the profits of the Projects between the two parties to the JVA, being FDL, and HPS. FDL contended further that GUL was a subcontractor and had been fully reimbursed for services rendered and therefore was not entitled to any of the reliefs sought in the claim. The parties agreed at case management that there were two preliminary issues to be determined by the judge. Firstly, whether there was an MOU and/or a consortium agreement between the GUL and FDL and what were the contractual obligations if any which arose from these agreements. Secondly, and alternatively was there a sub-contract between GUL and FDL and what were the terms. Both GUL and FDL relied on documentary evidence including emails and transcripts and the evidence of several witnesses including Mr. David Bristol, GUL’s director and sole shareholder and Mr. Gilbert Fontenard, FDL’s Director and Manager.

The learned judge having heard evidence from both sides dismissed the claim and held *inter alia*, that (i) the MOU between GUL and FDL was not legally binding in the absence of an addendum for each of the Projects, and on its own the MOU could not give rise to any contractual obligations in relation to the Projects; (ii) there was no finalized consortium agreement or duly executed consortium agreement between GUL and FDL or GUL, FDL and HPS; (iii) there was no written agreement for a sub-contract between FDL and GUL; (iv) that as GUL was not a party to the JVA it was not entitled to an account of the finances of the JVA; and (v) that GUL’s claim seeking orders for an account to be made or inquiries and directions be given for the purpose of determining profits should be dismissed and that costs be awarded to FDL.

GUL, being dissatisfied with the findings of the learned judge appealed on five grounds of appeal. At the hearing, the issues which arose for determination were (i) whether the learned judge erred in her analysis of the evidence in finding that there was no binding agreement between FDL and GUL for sharing of profits from the Projects, and (ii) whether there was a sufficient evidential basis to support the learned judge's finding that GUL was a sub-contractor.

Held: dismissing the appeal and ordering the appellant to pay the respondent's costs, being two-thirds of the costs awarded in the court below, that:

1. An appellate court should exercise restraint when asked to determine appeals against findings of facts and evaluation of facts and should not interfere with findings of fact by trial judges unless compelled to do so.

Ming Siu Hung and others v J F Ming Inc and another [2021] UKPC 1.

2. In this case, despite the large number of documentary evidence including several emails, there was no evidence which supported Mr. Bristol's testimony that the parties agreed on the terms of the Consortium Agreement. In the circumstances, it was open to the learned judge when faced with the testimony of Mr. Bristol that there was agreement and that of Mr. Fontenard that there was no agreement, to make the finding which she did having regard to the evidence which was before her. There was no profit-sharing mechanism in the Consortium Agreement. In relation to the JVA the learned judge was also entitled to find, as she did, that the JVA was executed only by FDL and HPS, and thus recognized only the two partners, FDL and HPS. It contained no reference to GUL. Mr. Bristol did not adduce any direct evidence or any evidence from which the inference could be drawn that although the JVA consisted of two partners, FDL and HPS, there was an arrangement between GUL and FDL for sharing of the profit. A careful analysis of the documentary evidence and the oral evidence does not show that the learned judge's reasons and decisions can be faulted. Further, once the learned judge found that GUL was not a partner to the JVA, and not entitled to share in the profits, the issue of whether GUL was a subcontractor became moot. There is therefore no basis for this Court to interfere with the findings of fact by the learned judge.
3. GUL having withdrawn its application for disclosure of the transcript of meeting on 23rd March 2018, cannot rely on the absence of the transcript to show that the learned judge should have found that in the absence of the transcript, there was insufficient evidence to base a finding that there was agreement on 23rd March 2018 for GUL to receive 25% of the profits of the Project. Further, exhibit GF 6, a transcript of a recording of a meeting between Mr. Bristol, Mr. Fontenard, and Mr. Bailey of HPS, and exhibit GF19 a transcript of the recording of a meeting between Mr. Fontenard and Mr. Bristol, relied on by GUL, do not assist its case as there was no mention of profit sharing in relation to GUL.
4. There were several emails between Mr. Bristol, Mr. Fontenard, Ms. Mathurin, and Mr. Bailey in which they discussed the bidding process, financial matters and

execution of the project. The emails show that Mr. Bristol on behalf of GUL, wrote extensively about the formation of a consortium of two and in some instances three entities GUL, FDL and HPS. However, when all of the exhibits are considered, there is no evidence to support the finding of agreement by FDL or HPS on the matters addressed by Mr. Bristol in the various emails and the Consortium Agreement. They are simply proposals made by Mr. Bristol. More specifically, the evidence that Ms. Mathurin agreed to prepare a Consortium Agreement at a later stage, is not a sufficient basis to find that the terms were agreed.

JUDGMENT

- [1] **THOM JA:** In 2017, the World Bank provided funding for three solar photovoltaic (pv) installation projects in the Eastern Caribbean being: (a) The St. Vincent and the Grenadines Community College project at a contract price of EC \$1,555,105.52 (the St. Vincent project); (b) The St. Lucia EU Owen King Hospital project at the contract price of \$1,366,705.80 (the St. Lucia project); (c) The Grenada T.A. Marryshow Community College project at the contract price of \$1,390,296.36 (the Grenada Project), collectively referred to as “the Projects”.

- [2] Gearing Up Limited (GUL) and FDL Consult INC (FDL) are private companies with registered offices in Saint Lucia. GUL specializes in, among other things, the construction of solar pv installations. Its director and sole shareholder is Mr. David Bristol. FDL is an engineering consulting firm. Its Director and Manager is Mr. Gilbert Fontenard.

- [3] On 20th June 2016, GUL and FDL executed a Memorandum of Understanding (“MOU”) in which they agreed to collaborate on projects related to engineering and construction services.

- [4] FDL and GUL were desirous to make bids for the Projects, but they did not possess the required skills for a successful bid for the Projects. Discussions were held with High Peaks Solar LLC (“HPS”) a company registered in the United States of America that had the required technical skills. HPS expressed their interest in the Projects.

The terms of the invitation to tender only permitted bids by joint ventures and such joint ventures had to be limited to two partners. FDL and HPS formed a joint venture and bid for the Projects. GUL was not named a party to the joint venture.

- [5] All three of the bids were successful and contracts were entered into for each of the Projects by the respective Governments and the joint venture. GUL was not a party to any of the contracts with the various Governments. The Projects were successfully completed, and the contract sums were paid in full to the joint venture. GUL performed some of the tasks in relation to the Projects and certain sums were paid to GUL. GUL contends that it was also entitled to a 25% share of the profits of each project, such sums to be paid by FDL.
- [6] FDL having not paid GUL any of the profits of the Projects, GUL instituted proceedings pursuant to Part 41 of **Civil Procedure Rules 2000** ("CPR 2000") against FDL with whom there was the MOU. GUL sought orders for account inquiries or directions for the purpose of determining sums alleged to be due and owing to GUL as profits.
- [7] FDL in its defence to the claim contended there was no agreement with GUL for sharing of the profits from the Projects. The Joint Venture Agreement ("JVA") only provided for the sharing of the profits of the Projects between the two parties to the JVA, being FDL, and HPS. FDL contended further that GUL was a subcontractor and had been fully reimbursed for services rendered and therefore was not entitled to any of the reliefs sought in the claim.
- [8] The parties agreed at case management that there were two preliminary issues to be determined by the Judge. Firstly, whether there was an MOU and/or a consortium agreement between the GUL and FDL and what were the contractual obligations if any which arose from these agreements. Secondly, and alternatively, was there a sub-contract between GUL and FDL and if so, what were the terms.

[9] Mr. Bristol and several other witnesses testified on behalf of GUL. In addition to the oral testimony, GUL relied on several pieces of documentary evidence including a document headed MOU, a document dated 23rd March 2018 headed 'Proposal for consortium between FDL, GUL and HPS,' a chart, transcripts of meetings, several emails between Mr. Bristol and Mr. Fontenard, and several WhatsApp messages.

[10] The learned Judge having heard evidence from both sides, dismissed the claim and made the following orders:

“(a)The MOU between GUL and FDL was not legally binding in the absence of an addendum for each of the projects, and on its own the MOU could not give rise to any contractual obligations in relation to the Projects.

(b)There was no finalized consortium agreement or duly executed consortium agreement between GUL and FDL or GUL, FDL and HPS which had the effect of creating legal or contractual obligations between the parties.

(c)There was no written agreement for a sub-contract between FDL and GUL, and the relationship between them in relation to GUL's role on the projects derived its basis from a spread sheet containing defined roles and estimated fees for the respective roles, in which GUL provided Bid Preparation Services, System Design and Installation, in relation to the projects.

(d) As GUL was not a party to the JVA it is not entitled to an account of the finances of the JVA, which are protected by a confidentiality clause, as stipulated in clause 6 of the JVA.

(e) GUL's claim seeking orders for an account to be made or inquiries and directions be given for the purpose of determining profits, due to GUL under the respective projects is dismissed.

(f) Costs are awarded to FDL, which shall be assessed, if not agreed within 21 days.”

Appeal

[11] GUL, being dissatisfied with the findings of the learned judge appealed on five grounds of appeal. In their written submissions, counsel did not make any submission in relation to ground four which addressed a procedural issue. At the hearing, the issues which arose for determination were firstly, whether the learned judge erred in her analysis of the evidence in finding that there was no

binding agreement between FDL and GUL for sharing of profits from the Projects, and secondly, whether there was a sufficient evidential basis to support the judge's finding that GUL was a sub-contractor. This appeal is therefore an appeal against the learned judge's findings and evaluation of facts.

- [12] The approach to be taken by an appellate court in determining appeals against findings of facts and evaluation of facts has been demonstrated in a long line of cases including **Ming Siu Hung and others v J F Ming Inc and another**.¹ In **Ming Siu Hung and others v JF Ming Inc and another**, Lord Briggs in delivering his judgment stated:

"It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties' dispute is not rendered ineffective by undue appellate activism. The general reasons for appellate restraint are well summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, para 114, as follows:

"114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC 1; *Piglowskav Piglowski* [1999] 1 WLR 1360; *Datec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477. These are all decisions either of the House of Lords or of the Supreme Court..."

Submissions

- [13] Mr. Haynes KC who appeared for GUL submits that had the learned judge properly analysed the evidence she would not have ruled in the terms in which she did. Learned counsel referred to the MOU, the document headed 'Proposal

¹ [2021] UKPC 1.

for consortium between FDL, GUL, and HPS' ("Consortium Agreement" or "Proposed Consortium Agreement") and contended that an agreement had been reached for the sharing of profits of the project between FDL and GUL in the terms of the Proposed Consortium Agreement by the conduct of FDL, HPS, and GUL. This, learned counsel submits, is evident by the several emails, WhatsApp messages, transcripts, and a chart showing the roles to be played by FDL GUL and HPS in relation to the Projects.

[14] Mr. Haynes KC submits the following main points which he contends show that GUL was a partner and therefore entitled to share in the profits:

- (a) Neither Mr. Fontenard nor HPS were registered bidders. GUL was a registered bidder. The JVA bid would have failed to meet the bid requirements if GUL was not a registered bidder.
- (b) The email of 27th June 2018 by Ms. Mathurin of FDL specifically indicated that the JVA was being prepared and that the Proposed Consortium Agreement would be prepared subsequently.
- (c) FDL sent a copy of JVA to be perused by GUL, and further there was also a three-way discussion with FDL, HPS and GUL during which the parties agreed to share the profits of the Projects.
- (d) GUL performed its role as outlined on the Chart which formed a part of the Proposed Consortium Agreement.
- (e) FDL informed GUL of the outcome of the bid.
- (f) GUL acted on the assurance of Ms. Mathurin that the Consortium Agreement would be prepared and therefore focused on the successful completion of the work to be done on the projects within the scheduled time. Also, GUL fulfilled warranty obligations after completion of the Projects.

[15] Mr. Haynes KC contends that all of the above show that GUL was a partner and entitled to share in the profits and was not a sub-contractor as contended by FDL.

[16] This being an appeal against the findings of fact, it is necessary to examine the salient features of the evidence which were before the learned judge which GUL contends shows that there was agreement for GUL to share in the profits of the Projects.

MOU & Proposed Consortium Agreement

[17] At the hearing, Mr. Haynes KC agreed that the learned judge was correct in finding that the MOU did not create any legal rights or obligations. However, Mr. Haynes KC submits that the MOU provides relevant background to understanding the Consortium Agreement which GUL contends was formed and the members were FDL, HPS, and GUL.

[18] The Consortium Agreement on which GUL relied commences: "This proposal arises from the opportunity to tender for contracts where the bid requirements include specifications that cannot be met by an individual partner. These contracts are outlined in RFPs for World Bank-funded solar photovoltaic projects in Saint Lucia, Saint Vincent and the Grenadines and Grenada."

[19] The Consortium Agreement addresses several issues including the respective areas of expertise of each partner, the goal, measures of success, and a chart outlining the roles and responsibilities of each partner. Critically, there is no provision in the document for profit sharing and specifically no provision for profit sharing between FDL and GUL. Moreover, the document is not signed by any of the partners. Specifically, it is not signed by GUL or FDL.

[20] Mr. Haynes KC agrees that there is no written document showing the establishment of the consortium between GUL, FDL, and HPS ("the Consortium")

and the agreed terms. However, Mr. Haynes KC submits that the existence of the Consortium is confirmed by the tender document, and an examination of the evidence of Mr. Fontenard, in particular where he stated under cross-examination that: “The Consortium was jettisoned after the JVA came into effect.” Learned King’s Counsel argues that had the Consortium not existed then it could not have been jettisoned.

[21] Mr. Haynes KC also referred to the chart in the Consortium Agreement and submitted that GUL completed all the tasks assigned to GUL. GUL was involved in the Projects from the bidding process to the installation and the warranty phase. He contends further that based on the responsibilities of each entity as outlined in the Chart, FDL, HPS and GUL agreed the profits proportionally, being FDL-45%, HPS30%, and GUL-25%.

[22] Ms. Fletcher for FDL in her response agreed that there was a Consortium Agreement but stressed that it was prepared by Mr. Bristol. Learned counsel submits that there were several details missing from the proposal such as: (a) there were no identified rights and obligations of the parties; (2) no statement of duration of the agreement; (3) no apportionment of risks and liabilities and no profit-sharing mechanism. Further, neither FDL nor HPS acknowledged or agreed to the terms of the Consortium Agreement. There was no intention to create legal relations. Learned counsel referred to the emails from Mr. Bristol in support of her contention that the Consortium Agreement was not agreed by FDL and indeed, HPS.

Discussion

[23] It is not in contention that the Consortium Agreement was prepared by Mr. Bristol, but it was not executed by any of the parties and specifically not by FDL. The emails show that there was some discussion between GUL and FDL about the Consortium Agreement. By way of example, in the email of 26th March 2018, from Ms. Mathurin to Mr. Bristol, Ms. Mathurin made suggestions to

Mr. Bristol for adjustments to the Consortium Agreement. However, despite the large number of documentary evidence including several emails, there is no evidence which supports Mr. Bristol's testimony that the parties agreed on the terms of the Consortium. In the circumstances, it was open to the learned judge when faced with the testimony of Mr. Bristol that there was agreement and that of Mr. Fontenard that there was no agreement, to make the finding which she did having regard to the evidence which was before her. There is no basis for this Court to interfere with the findings of fact by the learned judge. Critically, there is no profit-sharing mechanism in the Consortium Agreement. The Consortium Agreement does not in any way assist GUL's case.

Transcripts

- [24] In relation to the transcripts, Mr. Haynes KC submits that based on the evidence, Mr. Fontenard had indicated that he had in his possession all of the recordings of the meetings between FDL and GUL and FDL, GUL and HPS. However, at the trial, Mr. Fontenard failed to produce the transcript or recording for the 23rd March 2018 meeting, and it was at that meeting the profit allocation to the three partners was discussed and agreed upon. Mr. Haynes contends that this failure to produce the transcripts should have led the learned judge to accept Mr. Bristol's testimony and find that there was agreement for profit sharing.
- [25] In response, Ms. Fletcher submits that all of the recordings/transcripts of meetings were disclosed to FDL. Learned counsel referred to the record of the proceedings in the lower court which showed that GUL made an application in the lower court for specific disclosure of the transcript of 23rd March 2018. Further, GUL subsequently withdrew its application. Therefore, GUL should not be permitted to pursue this argument to show that the learned judge erred in her findings.

Discussion

[26] I agree with the submission of Ms. Fletcher. Indeed, the record shows that an application for discovery of the transcript of 23rd March 2018 was made by GUL and the learned judge made an order in relation to the application on 8th July 2021 which was entered on 9th July 2021 (“the Order”). The paragraphs of the Order that are relevant are paragraphs 1 – 3. They read as follows:

- “(i) The applications are hereby discontinued and there is no order for costs.
- (ii) The defendant shall prepare, file and serve an official copy of the transcripts of the recordings referred to as exhibits GF6 and GF19 of supplemental affidavit of Gilbert Fontenard filed on 31st May 2021 by 16th July, 2021.
- (iii) The defendant is also at liberty to explore whether the recordings may be uploaded to the e-litigation portal.”

[27] Exhibits GF 6 is a transcript of a recording of a meeting between Mr. Bristol, Mr. Fontenard, and Mr. Bailey of HPS, while GF19 is a transcript of the recording of a meeting between Mr. Fontenard and Mr. Bristol. Both meetings were held on 22nd June 2018.

[28] The transcript of the GF 6 meeting shows that the three parties agreed to proceed with the project. Their discussion focused mainly on the execution of the project and the financing of the project. In relation to financing the following exchange took place:

“Mr. Gilbert Fontenard: Ummm, in terms of paperwork, ummm Kristal, is the paperwork in in in in place when it comes to...One of things we agreed was the profit for 30 for Kevin. Is that written? We need to just confirm these things so that we are clear on that. That was written, you have you and Kevin, did you all send that out?

And further:

Mr. Gilbert Fontenard: Okay, but David for me, significantly, is ummm when, it comes to the business side is for us to make sure that the scope, David scope, Kevin scope is clear.

David Bristel: Yes.

Gilbert Fontenard: and that we sign off on it so that there is no ummm misunderstanding. Not that there will be but, as they always say its ummm, let us just (inaudible) okay.

Kevin Bailey: Better to have it in writing that's what my mother always says."

[29] In relation to the GF 19 transcript, there was much discussion between Mr. Fontenard and Mr. Bristol about the World Bank procedures. Mr. Fontenard made it clear to Mr. Bristol that the costs relating to the projects were fixed in the bid documents and therefore there could be no changes to those sums. There was no demur by Mr. Bristol.

[30] GUL having withdrawn its application for disclosure of the transcript of meeting on 23rd March 2018, GUL, therefore, cannot rely on the absence of the transcript to show that the learned judge should have found that in the absence of the transcript, there was insufficient evidence to base a finding that there was agreement on 23rd March 2018 for GUL to receive 25% of the profits of the Project.

[31] Neither the GF6 nor GF19 transcripts assist GUL's case. It is telling that while there was confirmation of 30% of the profits for HPS, and they insisted that it be put into writing, there was no mention of profit sharing in relation to GUL.

Emails

[32] There were several emails between Mr. Bristol, Mr. Fontenard, Ms. Mathurin, and Mr. Bailey in which they discussed the bidding process, financial matters, and execution of the project. Mr. Haynes relied on several of these emails which he contends when all of the evidence is considered shows that there was an agreement for GUL to have a 25% share of the profits.

[33] In the email dated 9th January 2018 from Mr. Bristol to Mr. Fontenard, Mr. Bristol stated;

- (i) GUL's interest in bidding for the Saint Lucia project and partnering with FDL to meet the financial requirements of US \$ 1 million.
- (ii) GUL's assessment of the key requirements for bidding and the timelines for bidding;
- (iii) Reference to the earlier project partnering and recommendation for it to be implemented for this project.

[34] The 27th March, 2018, email from Mr. Fontenard to Mr. Bristol indicates the need for provision of a Performance Bond to be addressed in the MOU. This bond was to be in the name of the joint venture. This email confirms that there was some discussion for a joint venture to be formed between FDL and GUL. Mr. Fontenard also indicated the need for percentage of certificates to be allocated. Ms. Mathurin in a later email on the said 28th March, clarified Mr. Fontenard's reference to the percentage of certificate, to mean that "the percentage of each certificate that will be paid to each party of the consortium must be agreed. These emails show that there was an intention to form a Consortium of which GUL was to be a party but the terms were not agreed.

[35] While the discussion between Mr. Bristol and Mr. Fontenard on the formation of a consortium was ongoing, there was a collateral discussion between Mr. Bristol on the one hand, and Mr. Bailey and Mr. Sturge, on the other hand, to form a consortium in relation to the Projects in which Mr. Bristol proposed that GUL and HPS were to be partners and FDL would be paid for services provided. This is evidenced by the emails of 20th March, 2018 and 29th March 2018. In the email of 20th March 2018 Mr. Bristol wrote:

"Dear Mike and Kevin,

As project sizes have increased we have partnered with a local engineering company to bid on projects but in this case they do not have the specific experience, but do have considerable experience with bid proposal, project management and do meet the financial criteria. The arrangements between our companies is governed by a general MOU

for solar projects. While it would be ideal for us to approach these bids as a three party consortium, there is a limit of 2 companies per consortium. So I suggest yourselves and Gearing Up Limited would form the consortium and any services provided by our local partner would be done on a fee per service/contractual basis.”

[36] The 29th March, 2018 email, does not assist GUL’s case. In this email, Mr. Bristol reported to FDL of discussions he held with Mr. Bailey and Mr. Sturge as follows:

“Dear Gilbert and Kristal’
Kevin Bailey, Mike Sturge and I completed the conference call this morning.

In summary;

1. HPS is pleased to be part of Consortium as the other party with FDL. Gul’s involvement is based on the GUL/FDL MOU – requires draft JV document,
2. Roles and responsibilities as outlined in draft organizational chart agreed, with final decisions based on bid.
3. Profit sharing – agreed principles based on
 - (a) Service provided by partner as percentage overall.
 - (b) Risk taken by partner as percentage overall.
 - (c) Need to make algorithm to address practical splitting on invoice/certificates/payments.”

[37] The email of 29th January 2020 also does not assist GUL’s case. In this email, Mr. Bailey of HPS was simply seeking to offer an amicable solution to the impasse between GUL and FDL by offering to give GUL 10% of its 30% profit.

[38] In essence, the emails show that Mr. Bristol on behalf of GUL, wrote extensively about the formation of a consortium of two and in some instances three entities GUL, FDL, and HPS. However, when all of the exhibits are considered, there is no evidence to support the finding of agreement by FDL or HPS on the matters addressed by Mr. Bristol in the various emails and the Consortium Agreement. They are simply proposals made by Mr. Bristol. More specifically, the evidence

that Ms. Mathurin agreed to prepare a Consortium Agreement at a later stage, is not a sufficient basis to find that the terms were agreed.

Teleconference

- [39] In relation to the evidence of the teleconference, GUL relied on a teleconference between GUL, FDL and HPS on 23rd March 2018. Mr. Bristol's evidence was that during this teleconference the parties agreed the profit sharing of 30% HPS, Ms. Mathurin suggested 20% for GUL but his counteroffer of 25% was agreed. This evidence relates to the application to the court for the transcript which was later withdrawn. There is no transcript of this teleconference in evidence. There are however transcripts for the teleconference held on 22nd June, 2018, between GUL, FDL and HPS and between GUL and FDL. The transcript shows a discussion about the project and agreement on 30% profit for HPS. There is no mention of any profit sharing for GUL. Mr. Bristol does mention areas where costs could be cut to increase the profit of the Projects. This is mainly in relation to implementation issues.

JVA

- [40] The JVA is executed only by FDL and HPS and recognizes only the two partners FDL and HPS. It addresses the bids, the execution of the project, and the profit sharing between the two partners. It contains no reference to GUL.

Subcontract

- [41] In support of his contention that GUL was a partner and not a subcontractor, Mr. Haynes KC referred to the tender document that named Mr. Osman Freeman an employee of GUL as the Construction Supervisor for the Projects. This, King's Counsel submits shows that in keeping with the terms of the Consortium Agreement, GUL was a partner. Mr. Haynes buttressed this argument by referring to an area of the bid document submitted for the Projects that required any subcontractor to be named. This area he noted was left blank, but more importantly, GUL was not named as a subcontractor in the bid

document. This Mr. Haynes KC contends shows that GUL was a partner and not a sub-contractor.

[42] Mr. Haynes KC further contends that the JVA specifically prohibited a partner from subcontracting any services assigned to a partner. Also, Mr. Haynes KC submitted that there was no documentary evidence before the court which showed that GUL was a subcontractor. The only evidence of GUL being a subcontractor was from the testimony of Mr. Fontenard who made a bald statement that when the JVA came into effect, GUL became a subcontractor. All of the other evidence before the learned judge shows that GUL was a partner. There was therefore no basis for the learned judge to find that GUL was a subcontractor.

[43] In my view, the short answer is once the learned judge found that GUL was not a partner to the JVA the issue of whether GUL was a subcontractor became moot.

[44] It is not disputed that GUL performed some of the tasks of the project. GUL performed the tasks as discussed during the 22nd June, 2018 meetings. It is also not disputed that GUL was paid in accordance with the prices contained in the bid documents. Mr. Bristol testified that there was no agreement for GUL to be a subcontractor, while Mr. Fontenard testified that GUL became a subcontractor since the Joint Venture was limited to two partners.

[45] The learned judge had before her not only the conflicting oral testimony of Mr. Bristol and Mr. Fontenard, but the learned Judge also had before her a large volume of documentary evidence the vast majority of which was tendered by GUL.

[46] Adopting the approach outlined by the Privy Council in **Ming**, I find there is no basis to interfere with the findings of the learned judge. GUL placed much

reliance on the documentary evidence. A careful analysis of the documentary evidence and the oral evidence does not show that the learned judge's reasons and decision can be faulted. Mr. Bristol did not adduce into evidence any direct evidence or any evidence from which the inference could be drawn that although the JVA consisted of two partners, FDL and HPS, with profit sharing arrangement of 70% FDL and 30% HPS, there was an arrangement between GUL and FDL for sharing of the 70% profit between FDL and GUL, with 45% to FDL and 25% to GUL. The only evidence of the sharing of profit between GUL and FDL came from Mr. Bristol in his oral testimony. This agreement he contended for was reached at a teleconference. There was no transcript of this teleconference. The application to the court for the production by GUL was subsequently withdrawn by GUL.

- [47] The learned judge analysed very carefully all of the documentary and oral evidence that was before her in arriving at her decision that GUL was not entitled to any of the reliefs sought. I find no basis to interfere with her findings.

Conclusion

- [48] In view of the above, I am of the view that there is no merit in GUL's appeal.

Order

- (i) The appeal is dismissed.

- (ii) GUL shall pay the respondent FDL's costs, being two-thirds of the costs awarded in the court below.

I concur.

Margaret Price-Findlay
Justice of Appeal

I concur.

Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar