

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

SAINT LUCIA

SLUHCVP2018/0024

BETWEEN:

**[1] NETWORK CONSTRUCTION MAINTENANCE AND
REHABILITATION LIMITED**

[2] GREGORY LAUGHAN FEVRIER

Appellants

and

CABLE & WIRELESS (ST. LUCIA) LIMITED

Respondent

Before:

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Paul Webster

Justice of Appeal [Ag.]

The Hon. Mr. Gerard St. C. Farara, QC

Justice of Appeal [Ag.]

Appearances:

Mr. Dexter Theodore, QC with him, Ms. Sueanna Frederick for the Appellants

Mr. Deale Lee for the Respondent

2020: July 8;
September 18.

Civil appeal — Breach of contract — Civil Code of Saint Lucia — Prescription — Civil interruption of prescription — Legal effect of acknowledging a debt

In 2001, the respondent Cable & Wireless (St. Lucia) Limited (“Cable & Wireless”) began restructuring of its business operations in Saint Lucia. This involved making several employees redundant. Some of these employees, with the encouragement of Cable & Wireless, formed private companies to offer to Cable & Wireless, the services which were previously done by the employees which were made redundant. As such, the second named appellant Mr. Gregory Laughan Fevrier (“Mr. Fevrier”) formed the company Network Construction Maintenance and Rehabilitation Limited (“NCMR”). Mr. Fevrier has since deceased.

The parties held discussions on a draft contract proposed by Cable & Wireless but were unable to agree on the financial terms of the contract. Nonetheless, the parties agreed on the type of services to be performed by NCMR. Whilst NCMR did not agree to the rates as outlined in the “price list” which was attached in the draft contract, they agreed to commence providing services in August 2001, while the discussions continued.

NCMR did not provide any services during the month of December 2001 as a dispute arose between the parties about the billing procedure. NCMR resumed work in January 2002 and the disputes about the sums which should be paid to NCMR continued. The last invoice submitted by NCMR was in October 2003 at which point NCMR ceased providing services to Cable & Wireless.

On 25th September 2009, the appellants filed a suit against the respondent for breach of contract. They alleged that during their discussions with Cable & Wireless, a draft contract was presented which had a price list annexed, which they disagreed with. According to NCMR, although they disagreed with the rates in the price list, they agreed to commence providing the services to Cable & Wireless while discussions continued in relation to the terms of the contract. They also alleged that Cable & Wireless represented that it would provide a sufficient volume of work to NCMR to enable NCMR to receive revenue of approximately \$973,055.40; but Cable & Wireless did not. NCMR submitted that during further discussions in January of 2002, it was agreed that the rates would be increased by 10% but, in spite of, and in breach of, that agreement, Cable & Wireless altered the invoices and paid NCMR less than what was due, and also refused to pay for work done which was inadvertently omitted from the invoices for the period of August 2001 through June 2002.

The appellants claimed special damages in the sum of \$4,484,276.83, computed as follows: sums inadvertently omitted from invoices - \$76, 254.44, short payments on invoices - \$384,373.48; price adjustments - \$1,127,533.91, loss of profits for the period November 2003 to October 2006 - \$2,896,115.00; damages, interest and costs.

Cable & Wireless in their defence denied the allegations and contended that NCMR was paid in full for all services provided in accordance with the work orders and the price list. They agreed that they altered invoices but insisted that this was necessary since NCMR did not provide accurate invoices. Cable & Wireless also denied that they made any representations or warrants to NCMR that they would provide them with any specific volume of work. Further, Cable & Wireless argued that pursuant to the Civil Code of Saint Lucia ("the Civil Code"), NCMR's claims were prescribed.

The learned judge made the following findings relevant to this appeal: (i) the appellants failed to prove that the rates paid were not in conformity with the contract or were unreasonable; (ii) the rates paid were in line with rates paid to other contractors providing the same services for Cable & Wireless and were therefore reasonable; and (iii) the claims made for work done prior to 29th September 2003 were prescribed pursuant to section 2121 of the Civil Code.

NCMR appealed arguing that: (i) the claims for sums invoiced prior to 29th September 2003 were not prescribed as they were acknowledged by the respondent; (ii) there was no uncertainty in the terms of the agreement which prevented the parties from having an enforceable agreement; (iii) Cable & Wireless wrongfully altered the volume of work done by NCMR and therefore did not make full payment to NCMR; and (iv) there was no evidence on which the learned judge could have made the finding of facts which he did. **Held:** dismissing the appeal and awarding costs to the respondent being two thirds of the costs in the court below; that:

1. In order to interrupt prescription of contracts under article 2121 of the Civil Code by acknowledgement of a debt, the acknowledgement must be unambiguous and unequivocal. Furthermore, such acknowledgement must also be made while the prescription period is still running to be effective, as the contract is prescribed after the expiration of the time within which the Civil Code states an action may be instituted to enforce it. Therefore, the appellants claim for \$82, 197.50 as contractual sums due to them prior to September 29, 2003 is prescribed and the purported acknowledgment, at paragraph 29 in the defence of the respondent, did not interrupt the prescription period as it was not unequivocal and as it came after the prescription period of six years had expired.

Civil Code of Saint Lucia, Cap. 4.01, Revised Laws of Saint Lucia 2013 applied; **Bradford & Bingley Plc v Rashid** [2006] 1 WLR 2066 considered; **Dungate v Dungate** [1965] 1 WLR 1477 considered; **Surrendra Overseas Ltd. v Government of Sri Lanka** [1977] 2 All ER 481 considered; **William de Montmollin Marler: The Law of Real Property: Quebec** (Burroughs and Company [Eastern] Limited 1932) considered; **Deschamps v Bank of Nova Scotia** [1989] RDJ 456 applied.

2. NCMR's contention that the learned judge erred in finding that there was no agreement as to the rates and therefore no contract is misconceived. When the judgment is read as a whole, it is clear that the learned judge made a finding of fact that the parties agreed the rates to be rates in the "price list". The learned judge, however, found on a balance of probabilities, that the appellants failed to prove that the sums paid in accordance with the rates were either not in conformity with the contract or unreasonable.
3. While the learned judge did not specifically address the issue of whether Cable & Wireless altered the volume of work done by NCMR and did not pay NCMR for work done in breach of the contract, a judge is not required to address in a judgment each and every issue raised by a party in his statement of claim and on which evidence was led and submissions made by counsel, particularly where that issue is not determinative of the dispute between the parties. In view of the learned judge's finding that all claims prior to September 2003 were prescribed, the only remaining question to be determined was whether the volume of work for which payment was sought by NCMR in its 30th October 2003 invoice was altered by Cable & Wireless. NCMR was required to lead specific evidence showing that the volume of work that was altered by Cable & Wireless and also showing that Cable & Wireless were in breach of the contract in so doing and they failed to do either. The learned judge was therefore correct in finding that there was no breach of contract.
4. The appellants contention that the learned judge erred in finding, at paragraph 6 of the judgment, that the internal document was produced in response to a disagreement over a price list is misconceived. The learned judge was not making any findings in paragraph 6, rather he was merely outlining NCMR's case. Since the learned judge did not make a finding of

fact as alleged by NCMR, there is no basis to disturb his ruling on this ground.

JUDGMENT

- [1] **THOM JA:** This is an appeal against the decision of the learned judge in which he dismissed the appellants' claim for damages for breach of contract.

Background

- [2] In 2001, the respondent Cable & Wireless (St. Lucia) Limited ("Cable & Wireless") embarked on a process of restructuring of its business operations in Saint Lucia. This process included outsourcing the maintenance of its external line plant. Consequently, several of its employees were made redundant.
- [3] Cable & Wireless determined that the workers who were made redundant should be given the opportunity to provide the services to Cable & Wireless on a contractual basis. Several meetings were held between Cable & Wireless and the workers. As a result of these meetings, some employees formed private companies to provide services to Cable & Wireless. One such employee was the second named appellant Mr. Gregory Laughan Fevrier ("Mr. Fevrier") who formed the company Network Construction Maintenance and Rehabilitation Limited ("NCMR"), which is the first named appellant. Mr. Fevrier has since deceased, and his estate has decided not to participate in this appeal.
- [4] The parties held discussions on a draft contract proposed by Cable & Wireless but were unable to agree the terms of the contract and therefore no contract was signed by them. Nonetheless, the parties agreed on the type of services to be performed by NCMR. Whilst NCMR did not agree with the rates as outlined in the "price list" which was attached in the draft contract, they agreed to commence providing services in August 2001, while the discussions continued. Invoices submitted by NCMR to Cable & Wireless for the period August 2001 through November 2001 were paid using the rates on the price list. NCMR did not provide any services during the month of December 2001 as a dispute arose between the parties about the billing procedure. NCMR resumed work in January 2002 and the disputes about the sums which should be paid to NCMR

for the services provided continued. The last invoice submitted by NCMR was in October 2003, following which NCMR ceased providing services to Cable & Wireless.

The court below

- [5] On 25th September 2009, the appellants instituted proceedings for breach of contract by filing a claim against the respondent. In their claim, they alleged that during their discussions with Cable & Wireless, a draft contract was presented which had a price list annexed. They also alleged that Cable & Wireless represented that it would provide a sufficient volume of work to NCMR to enable NCMR to receive revenue of approximately \$973,055.40 as outlined in an internal document of Cable & Wireless which was shown to NCMR. NCMR further alleged that they disagreed with the rates in the price list, but nonetheless, agreed to commence providing the services as outlined in "Works Orders" prepared by Cable & Wireless while discussions continued in relation to the terms of the contract. The appellant submitted that during further discussions in January of 2002, it was agreed that the rates would be increased by 10% but, in spite of that agreement, Cable & Wireless consistently and arbitrarily and in breach of the agreement, altered the invoices both in relation to the prices and the volume of the work completed and consequently paid NCMR less than what was due. The appellants also contended that Cable & Wireless refused to pay for work done which was inadvertently omitted from the invoices for the period of August 2001 through June 2002 and, reduced both the type and volume of services which were to be provided by NCMR.
- [6] The appellants claimed special damages in the sum of \$4,484,276.83, computed as follows: sums inadvertently omitted from invoices - \$76, 254.44, short payments on invoices - \$384,373.48; price adjustments - \$1,127,533.91, loss of profits for the period November 2003 to October 2006 - \$2,896,115.00; damages, interest and costs.
- [7] Cable & Wireless in their defence denied the claims and contended that NCMR was paid in full for all services provided in accordance with the work orders and the price list. They agreed that they altered invoices but insisted that this was

necessary since NCMR consistently did not provide accurate invoices. Instead, according to Cable & Wireless, NCMR applied their own rates instead of the agreed rates on the price list, and often broke down an item on the “Works Order” into several components and billed Cable & Wireless for each component at rates which they unilaterally set. Cable & Wireless also denied that they made any representations or warrants to NCMR that they would provide them with any specific volume of work.

- [8] Further, Cable & Wireless argued that pursuant to the **Civil Code of Saint Lucia**,¹ (“the Civil Code”) NCMR’s claims were prescribed. They also contended that there was no agreement with Mr. Fevrier for provision of services, and he provided no evidence of same in support of his claim, and therefore could not maintain a claim for breach of contract.
- [9] The learned judge having heard the evidence and submissions of counsel, dismissed the claim and awarded Cable & Wireless costs. In dismissing the claim, the learned judge made the following findings:
- (i) Mr. Fevrier could not maintain a claim for breach of contract against Cable & Wireless since there was no contract between him and Cable & Wireless.
 - (ii) The appellants failed to prove that the rates paid were not in conformity with the contract or were unreasonable.
 - (iii) The rates paid were in line with rates paid to other contractors providing the same services for Cable & Wireless. The rates were therefore reasonable.
 - (iv) Claims made for work done prior to 29th September 2003 were prescribed pursuant to section 2121 of the Civil Code.

¹ Cap. 4.01, Revised Laws of Saint Lucia 2013.

The Appeal

[10] The appellants being dissatisfied with the decision of the learned judge outlined five grounds in their notice of appeal. It is common ground that no appeal was made in relation to the learned judge's finding in relation to Mr. Fevrier. Also, as stated earlier Mr. Fevrier has since died. His estate did not seek to participate in this appeal. The appeal therefore proceeded with NCMR being the sole appellant.

[11] The issues which arise from the grounds of appeal are whether:

(i) there was evidence on which the learned judge could have made the finding of facts outlined in paragraph 1(1) – (15) (Grounds 1&2);

(ii) the claims prior to 29th September 2003 were prescribed (Ground 3);

(iii) the parties agreed the rates paid for the services (Ground 4); and

(iv) Cable & Wireless wrongfully altered the volume of work done by NCMR and therefore did not make full payment to NCMR (Ground 5).

Prescription

[12] I will deal with the issue of prescription first since all of the invoices except the invoice for 30th October 2003 in the sum of \$33,336.99 were in relation to debts prior to September 2003.

[13] The relevant articles of the Civil Code which address the issues of prescription, arising from this appeal, are articles 2121(6), 2083, 2088 and 2129. They read as follows:

“2121. The following actions are prescribed by six years:

(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) Contract for hire of labour or for the price of manual, professional or intellectual work and materials furnished saving the exceptions contained in the following articles;”

The exceptions are not relevant to this appeal.

“2083. Prescription may be interrupted either naturally or civilly.”

“2088. Prescription is interrupted civilly by renouncing the benefit of a period elapsed, and by any acknowledgment which the possessor or the debtor makes of the right of the person against whom the prescription runs.”

“2129. In all the cases mentioned in articles 2111, 2121, 2123 and 2124, the debt is absolutely extinguished and no action can be maintained after the delay for prescription has expired except in the case of promissory notes and bills of exchange, where prescription is precluded by a writing signed by the person liable upon them.”

[14] NCMR does not dispute the effect of article 2121 of the Civil Code is that the claims for debts must be made within six years. Rather, NCMR contends that the learned judge erred in that he failed to consider the effect of articles 2083 and 2088. NCMR submits that pursuant to those articles, Cable & Wireless, in paragraph 29 of their defence to the claim, acknowledged a debt to NCMR of \$82,197.50. They submit that the learned judge therefore erred in finding that this sum was prescribed. They relied on the authorities of **Bradford & Bingley Plc v Rashid**,² **Dungate v Dungate**,³ and **William de Montmollin Marler: The Law of Real Property: Quebec**.⁴

[15] Cable & Wireless submits in response that paragraph 29 of the defence does not amount to an acknowledgment of the debt because, the first and second sentences are contradictory and therefore cannot be said to be an unequivocal acknowledgment of a debt to NCMR.

[16] In establishing that there was no unequivocal acknowledgment of the debt, they relied on the decision of the Quebec Court of Appeal in the case of **Deschamps v Bank of Nova Scotia**⁵ where the Court in considering Article 2227 of the Civil Code of Lower Canada stated:

“(9) It goes without saying that the acknowledgment of debt, for whatever purpose we wish to use it, including the interruption of the prescription, must be clear and unequivocal.”

² [2006] 1 WLR 2066.

³ [1965] 1 WLR 1477.

⁴ (Burroughs and Company [Eastern] Limited 1932) 405.

⁵ [1989] RDJ 456.

[17] While the authorities on which NCMR rely reiterate the applicable principles of prescription, in my view, the application of those principles do not assist NCMR's case.

[18] In **The Law of Real Property: Quebec**, civil interruption under the Quebec Civil Code, which is written in similar terms to the Saint Lucia Civil Code, is explained as follows:

“Civil Interruption: The Civil interruption results from a demand in proper form served upon the person whose prescription it is sought to hinder, or filed and served according to the rules of the Code of procedure when a personal service is not required. Seizures, interventions and oppositions are considered as judicial demands, C.C. 2224. It may also result from a renunciation of the benefit of a period elapsed or from any acknowledgment which the possessor makes of the right of the person against whom the prescription runs, C.C. 2227. Where the judicial demand is successful, the true owner recovers his land, the benefit of the period elapsed is lost, and the legal effects of the possession are determined in the settlement between him and the possessor... If the demand is unsuccessful, and the suit is dismissed, C.C. 2226, or if it is brought before a court of incompetent jurisdiction, C.C. 2225, prescription is not interrupted, nor would it be interrupted if the service or the procedure be null from informality, or if the plaintiff abandons his suit, or if he allows peremption of the suit to be obtained C.C. 2226. In such cases the prescription continues.”

[19] In **Bradford & Bingley v Rashid** the House of Lords in considering whether two letters by a debtor amounted to an acknowledgment within the meaning of section 29(5) and 30) of the UK Limitation Act, determined that acknowledgment has the effect of causing time to start afresh. Lord Walker pointed out that there is a public interest element in the rationale for the acknowledgment rule, firstly, there is a public interest in disputes being settled; and secondly a debtor who acknowledges his debt should not be able to benefit from the fact that a creditor relying on the acknowledgment does not take steps immediately to institute legal proceedings to recover the debt.

[20] There Lordships also endorsed the following view of Kerr J in **Surrendra Overseas Ltd. v Government of Sri Lanka**⁶ that the debtor can only be held to acknowledge the claim if he has in effect admitted his legal liability to pay that

⁶ [1977] 2 All ER 481.

which the plaintiff seeks to recover. But his acknowledgment need not identify the amount of the debt.

[21] Their Lordships also endorsed the decision of the Court of Appeal in **Dungate v Dungate**, where the Court found that an acknowledgement of a debt would be sufficient even if the amount of the debt was not identified, if the amount of the debt could be ascertained by extrinsic evidence.

[22] The principles which emanate from the above authorities are:

(a) A right or remedy is prescribed after the expiration of the time within which the Civil Code states an action may be instituted.

(b) The period within which the right must be enforced can be interrupted either civilly or naturally.

(c) An unequivocal acknowledgment of a debt will amount to a civil interruption and the period for instituting proceedings to enforce the right will begin to run afresh from the date of the acknowledgment.

Where the period has elapsed without any interruption the right is extinguished.

[23] It is not disputed by the parties that the relevant period for instituting the claim is six years. It is also not disputed that six years has elapsed in relation to all of the sums claimed save the claim for the sum due in the invoice submitted on the 30th October 2003. The contention of NCMR is that there was acknowledgment by Cable & Wireless within the meaning of article 2088 and, applying the principle in **Bradford & Bingley v Rashid**, time began to run afresh from the date of the acknowledgment.

[24] It must be noted that NCMR's contention of acknowledgment by Cable & Wireless only relates to \$82, 197.50 and is not in relation to all the invoices submitted prior to September 2003. The invoice in relation to the \$82,197.50 represents sums due for services provided between August 2001 and June

2002 which NCMR alleges was inadvertently not submitted in invoices for that period.

- [25] To amount to an acknowledgment, the debtor must have in effect admitted his legal liability to pay the sums owed. In determining whether there was an acknowledgment of the debt, the court must examine the document to see if there was a clear and unequivocal admission of liability to pay what is alleged to be owed. This requires an examination of what was pleaded both by NCMR and Cable & Wireless. Paragraph 29 of the defence which NCMR contends amounts to an acknowledgment by Cable & Wireless was a response to paragraph 29 of NCMR's statement of claim which reads:

"29. Accordingly, the First Claimant re-submitted invoices totally (sic) \$82,197.50 to Cable & Wireless (West Indies) Limited which Cable & wireless (West Indies) Limited has failed and refused to pay."

Paragraph 29 of Cable & Wireless' defence reads as follows:

"29. With regard to paragraph 1 (sic) of the Claimants' Statement of Claim the Defendant states that it does owe this money to the First Named Claimant. Sums for all "Works Orders" that were signed off on were paid. This is unilateral attempt by the First Named Claimant to seek payment for things that were not in the "Works Order" which the Claimants' know govern the works to be done. Save what is stated herein the Defendant denies paragraph 29 of the Claimants' Statement of Claim."

- [26] In my view the plain meaning of the words in paragraph 29 of the defence does not amount to an acknowledgment within the meaning of article 2088 of the Civil Code. While the first sentence does amount to an admission of owing money to NCMR, in the very next sentence Cable & Wireless categorically states that they paid for all works that were signed off and further contends that NCMR was seeking payment for services Cable & Wireless never approved since approved services were based on signed "Works Orders". In other words, Cable & Wireless was contending that there were no outstanding sums due to NCMR. This, in my view, does not amount to a clear and unequivocal acknowledgment. Further, in paragraph 42 of the defence, Cable & Wireless expressly states that there were no omissions from invoices for services provided. I also agree with the submissions of Mr. Lee that when paragraphs 29 and 42 of the defence are

read conjointly, it is clear that there is a typographical error in the first sentence with the omission of “not” before “owe” in paragraph 29 of the defence.

- [27] I am also of the view that any acknowledgment of debt after the prescribed period was of no legal effect. This is the effect of article 2129 of the Civil Code. The claim for sums which NCMR alleges were inadvertently not billed dated back to 2001 – 2002 and were therefore prescribed pursuant to Article 2121. The right and remedy having been extinguished, there could be no interruption of prescription. I agree with the submission of Mr. Lee that NCMR cannot resurrect an extinguished right. For interruption to be effective, the interruption must be made while the right is subsisting. Six years having elapsed without any interruption, NCMR could not maintain a claim for the sums they alleged were owed to them. I therefore find that the learned judge was correct in finding that the claim for sums due and owing prior to September 2003 were prescribed and NCMR could not maintain an action to recover those sums.

Rates of work (Ground 4)

- [28] NCMR, in its submissions, contended that the learned judge erred in ruling that there was no agreement as to the rates when he stated at paragraph 34: “... Firstly the scenario described in detail by the Claimant depicts a state of confusion in which there could have been no agreed intention of the parties other than that the Claimant would provide certain services for the Defendant.”
- [29] There is no merit in these submissions. It is necessary to outline the first sentence of paragraph 34 to get the context in which the learned judge made the statement on which NCMR relies. The learned judge stated: “I have determined that the Defendant is correct in these arguments.” The learned judge was there referring to the arguments made by Cable & Wireless in the preceding paragraphs 27 through 33. One of the arguments was that the agreed rate was the rates in the “price list” alternatively the rate was a reasonable rate. The learned judge then proceeded in the remainder of the paragraph to which NCMR refers, to explain why he did not agree with the submissions of NCMR. The learned judge continued his reasoning in paragraph 35 of the judgment which was referred to by Cable & Wireless where he stated:

“35. Having provided those services and having been paid, the Claimant had the burden of proof to show that the rates paid were either not in conformity with the contract or were unreasonable. The Claimant has failed to prove both of these claims on a balance of probabilities...”.

When the judgment is read as a whole, it is clear that the learned judge did make a finding of fact that the parties agreed the rates to be rates in the “price list”. There was evidence before the learned judge to support this finding.

Volume of work (Ground 5)

- [30] NCMR submits that the learned judge failed to make a finding in relation to its complaint that Cable & Wireless were in breach of contract when they adjusted the volume of work completed by NCMR and for which NCMR was entitled to be paid.
- [31] NCMR contended that this breach of the contract was pleaded in paragraphs 31 through 40 of the statement of claim and evidence in support of its pleading was adduced through its witness, Mr. Fevrier in paragraphs 41 through 43 of his witness statement and in his letter of 2nd November 2004 to Cable & Wireless. NCMR submits that the learned judge should have considered this evidence and determined that there was a breach of the contract.
- [32] Cable & Wireless in response submitted that the allegations of NCMR were denied and evidence to the contrary was led through its witnesses Mr. Aimable and Mr. Blaize. The evidence of both sides was before the learned judge who had the benefit of hearing the witnesses in examination in chief and cross-examination. The judge on more than one occasion stated that he believed the testimony of the witnesses for Cable & Wireless. This issue was subsumed under the issue whether Cable & Wireless had breached the contract and the learned judge found that there was no breach of contract.
- [33] I agree with NCMR that the learned judge did not specifically address the issue of whether Cable & Wireless altered the volume of work done by NCMR and did not pay NCMR for work done in breach of the contract. However, a judge is not required to address in a judgment each and every issue raised by a party in his statement of

claim and on which evidence was led and submissions made by counsel, particularly where that issue is not determinative of the dispute between the parties.

[34] In view of the learned judge's finding that all claims prior to September 2003 were prescribed, with which I agree, the only remaining question concerning the volume of work is whether the volume for which payment was sought by NCMR in its 30th October 2003 invoice was altered by Cable & Wireless. An examination of the evidence of Mr. Fevrier shows that there was no evidence of alteration of the volume of work in relation to the invoice of October 2003. The paragraphs in Mr. Fevrier's witness statement on which NCMR rely do not assist NCMR in this regard. Paragraph 41 of Mr. Fevrier's witness statement deals with Cable & Wireless adjusting rates in invoices. Paragraph 42 deals with claims prior to September 2003. In paragraph 43 Mr. Fevrier addresses the issue of alteration of volume of work as follows:

"43. To arrive at the reduced value of invoices, for settlement, C&W disregarded agreed procedure and facts and effected the following:

(a) C&W Supervisors agreed and approved, for payment, the "WORKS ORDERS" and "JOB REQUEST FORM" supporting the volume of work requested by C&W and completed/performed by NCMR Ltd and that ultimately "validate the invoice submission" to C&W.

(b) At the payment level, C&W paid no attention to the approved "WORKS ORDER" and approved "JOB REQUEST FORM" attached to NCMR Ltds' invoice and altered the approved/agreed volumes on the invoice to achieve a lower volumes and ultimately a lower value for settlement. Technically, C&W had no authority to alter the volume of the work done. Consequently, by so doing, Cable & Wireless had altered the agreed rates and this we say is a breach of contract.

(c) In our view, by rule of estoppels, C&W cannot subsequently alter approved/agreed job/work volumes to achieve a lower invoice value for ultimate settlement."

[35] Mr. Fevrier's letter of 2nd November 2004 was related to adjustment of rates by Cable & Wireless. The letter made no specific mention of alteration of volume of work. Critically, the letter made no mention of the October 2003 invoice.

[36] NCMR was required to lead specific evidence showing the work that was altered by Cable & Wireless and also showing that Cable & Wireless were in breach of a

contract in so doing. They adduced no such evidence. The learned judge in dismissing NCMR's claim in effect found that there was no breach of contract. In so doing he did not err.

Findings of fact (Grounds 1 & 2)

- [37] In the notice of appeal NCMR outlined at paragraph 1 (1) – (15) findings of fact which they contend were not supported by the evidence. However, in NCMR's submissions on these grounds which were very brief, and rightly so, NCMR contends that the learned judge erred in finding at paragraph 6 of the judgment that the internal document was produced in response to a disagreement over a price list. They argued that this finding was contrary to the evidence which was before the court. NCMR referred the court to the witness statement of Cable & Wireless witness, Mr. Aimable where he stated in paragraph 8 and 11 respectively:

Paragraph 8:

"... C & W provided NCMR an Internal Group Communication of 19th March 2001..."

Paragraph 11:

"NCMR Ltd began operation providing services to Cable & Wireless (WI) Ltd in early August 2001 **accepting and working under the terms of the agreement provided and the rate sheet** that was included therein."
(emphasis supplied by NCMR)

- [38] This submission is misconceived. It is necessary to outline paragraph 6 of the judgment. It reads:

"6. When Cable & Wireless presented its first written contract to the Second Claimant and or first Claimant for consideration; the attached price list became a major area of disagreement between the parties. Cable & Wireless responded by producing an internal document generated by Cable & Wireless dated 19th March, 2001. This document suggested that Cable & Wireless would be able to provide work for services worth \$973,055 per annum."

- [39] Paragraph 6 must be read in the context of the entire judgment. When read in context, the learned judge was not making any findings in paragraph 6, rather the judge was merely outlining NCMR's case. The learned judge did so from paragraphs 1 through 7. This was followed in paragraph 8 by the identification of the issues to be determined. Further in Mr. Fevrier's witness statement and the exhibits, on several occasions he referred to disagreement with the rates in the price

list. NCMR was of the view that the rates should be higher. Mr. Fevrier referred to several meetings held with Cable & Wireless to get the rates increased and on one occasion the rates were increased by ten percent. The learned judge having made no findings of fact as alleged by NCMR, these grounds of appeal fail.

Conclusion

[40] For the reasons stated above the appeal is dismissed. NCMR shall pay Cable & Wireless the costs of this appeal, being two thirds of the costs awarded in the court below.

I concur.

Paul Webster

Justice of Appeal [Ag.]

I concur.

Gerard Farara, QC

Justice of Appeal [Ag.]

By the Court

Chief Registrar