

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV2007/0220

BETWEEN:

THOMAS GABRIEL

Claimant

And

ATTORNEY GENERAL

Defendant

Appearances:

Mr. Hugh Marshall Jr. and Mrs. Cherissa Thomas - Roberts for the **Claimant**
Mrs. Carla B. Harris for the **Defendant**

2010: March 03
2010: March 11

JUDGMENT

1. **Harris, J.:** This is an assessment of Damages matter arising out of a judgment by Thomas J. (Ag.) delivered on May 18, 2009. In the substantive matter, the claimant claimed against the Attorney General OF Antigua and Barbuda; Damages for breach of contract and for professional services rendered.
2. The Claimant was contracted in the year 2000 as a Special Tax Consultant within the tax compliance unit of the Ministry of Finance for a term of four (4) years with an emolument package which included a 6 ½% performance incentive to a maximum of \$50,000.00, of any under payment collected¹ from a specified class of tax payer as a result of any approved audit carried out by the claimant.
3. The Judgment order, at para 171(7) thereof provided; *“The non-payment of the payment incentive to the claimant based on the audits of withholding tax and corporation tax for the periods 1990 to 2003 and 1998 to 2003 respectively, constitute a*

¹ See para 3 of the statement of claim at pp10 of Vol. 1 of the substantive Trial Bundle filed Oct.17, 2008.

breach of contract as the performance incentive are [sic] to be calculated on the basis of total revenue collected, rather than on underpayments".

4. Further, the judgment order provided at sub-para. 8 thereof, for the damages for breach of contract to be assessed. The present assessment of Damages hearing is pursuant to the said order.
5. Preparatory to the assessment hearing, by a case management order dated 22nd day of December 2009, the Master, upon hearing counsel for the respective parties, ordered that there be standard disclosure between the parties on or before the 15th day of January 2010; Witness statements be filed by the 29th of January 2010; a listing questionnaire be filled by the 5th February and that the matter be set down for trial on the issue of the Quantum of damages, on the 22nd February 2010.
6. The witness statement of Thomas Gabriel for use at the assessment hearing was filled on the 12th of February, 2010. No issue has been taken by the defendant as to its date of filing. The defendant has not filed any witness statement in opposition to the witness statement of the claimant or at all. The Defendant, like the claimant, also relies on the Trial Bundles of the substantive trial in this assessment hearing.
7. The quantum and justification for the claimant's claim is set out in his witness statement of the 12th February 2010 and supported by para 7 and para 10 of his substantive statement of claim at pp 11 and 12, Volume 1, of the substantive Trial Bundle and further supported by documents/receipts from pp 173 of the substantive Trial Bundle, Volume 3, along with the whole of the Trial Bundles and the Judgment of May the 18th 2009. Briefly, the claimant claimed for a specified period, performance incentives in relation to Withholding Tax, Corporation Tax, and Consumption Tax, assessed against WIOC/Petro-Invest, in addition to a claim for fees with respect to the claimant's professional review and report on certain agreements between the Defendant and West Indies Oil Company ("WIOC"). The total claim against the Defendant in the statement of case was for the sum of \$1,181,036.70.² This is made up of \$1,113,114.20 in performance incentives and \$67,922.50 for the said review and report. The substantive Judgment dismissed the claim for performance incentives with respect to the Consumption Tax claim³ and the claim with respect to the review and report.⁴ Paragraph 10 of the statement of Claim at pp12 of the Trial Bundle vol. 1, sets out the claim under the headings; "TAX YEAR"; "AMOUNT PAID"; and "PERFORMANCE INCENTIVE". The claimant now claims damages in the sum of \$1,020,218.70 together with interest and Costs.

² See para 12 of the statement of claim at pp.13 of Vol. 1 of the said Trial Bundle.

³ The value of that claim amounts to approx. 25% of the final award below (see Costs implications). Much argument appears to have taken place at trial in support of this failed claim.

⁴ See para 171(9) of the Judgment of 18th may 2009. The value of this claim is approximately 7% of the final award below. The statement of case, witness statement and trial Bundles evidences time spent in proving this failed claim.

8. Mrs. Harris for the Defendant submitted that on the claim of the claimant and the terms of the judgment, the claimant's entitlement at best is \$870,218.70⁵
9. Taking a look at the substantive judgment of May 18th 2009, the amount of performance incentives proved is limited to a maximum of that set out in para 10 of the statement of claim, less the consumption tax incentives. Suffice it to say, the judgment does not contemplate an award greater than that claimed.
10. This calculation from the statement of claim is clear enough and in my view cannot be disputed. The dispute is that which is set out in para 17 of the Claimant's witness statement of February 12, 2010. In this paragraph, the Claimant claims a further \$150,000.00 in performance incentives in relation to National Petroleum (N.P.). He claims that West Indies Oil Company Ltd (WIOC) paid their Withholding tax and Corporation tax for themselves and that for N.P. in one payment and received one receipt for both entities. Further, in essence he claimed that the incentive payments set out in para 7 and para 10 of his statement of claim - \$50,000.00 - for each of the three years 1998-2000 in relation to Withholding Tax and Corporation Tax, did not include the performance incentive for payment from N.P. and that this was essentially due to inadvertence. He now claims the \$150,000.00(\$50,000.00 p.a.) for the N.P. performance incentive.
11. The upshot of Mrs. Harris's contention on behalf of the Attorney General is that this sum was not claimed in the statement of case of claimant; that the defendant would not have been afforded the opportunity to meet and respond to this claim in its statement of case. She contends that this claim was at best, first raised in the witness statement of the claimant which was prepared for this assessment hearing.⁶ In the circumstances concludes Mrs. Harris, the substantive judgment does not and did not intend to cover the then unclaimed amount of \$150,000.00 in performance incentive payments in relation to N.P.
12. Mr. Marshall for the Claimant submits that para 3 and para 7 of the statement of claim do raise the issue of the claim for the performance incentive in relation to N.P. and that the learned trial Judge acknowledged and dealt with the issue of the consolidated receipt(see para 10 above) at pg 156 of his judgment. Further continued Mr. Marshall, the Defendant did not contest this aspect of the claim at the substantive trial nor did they, by submission of a witness statement, contest this aspect of the claim at this assessment of damages hearing. In my view the witness statement of the claimant filed at the substantive trial made only tangential reference to National Petroleum Ltd in paras 13 and 20. Further, in my view, neither reference seeks to establish a basis for the claim with respect to the NP performance incentive. The Judgment relied on by the claimant, at para 41 makes reference to the defendant's witness, one David Mathias,

⁵ This involves deducting the \$150,000.00 NP performance incentive from the claimant's final claim now before this court.

⁶ In fact, reference to NP was first made in paras. 12 and 13 of the claimant's substantive trial witness statement, albeit no performance incentive claim in relation to it was there or elsewhere claimed.

as making a reference to National Petroleum.⁷ Again, the reference to *National Petroleum* by David Mathias there, does not provide a basis for the performance incentive claim in relation to NP. As to the defendant not contesting this issue by submission of a witness statement; it appears to the Court that on the state of the pleadings and facts as they are, ultimately, the dispute on this narrow issue is one of law or in any event can be resolved on the existing facts.

13. I note that para 3 of the statement of claim refers to the claimant's audit of any "...large Tax payer..."⁸ and counsel for the claimant submits that NP is a large Tax payer and as a consequence this is sufficient to signal the claim in relation to NP. NP may or may not be a large tax payer; however, it appears to me that the claimant is not now claiming for every audit he carried out, but only those for which he was not paid. In any event, he must specify with some clarity, the target of his claim in his statement of case. He has not done so with respect to the claim in relation to NP by virtue of his para 3 of the statement of claim. He had not claimed in his statement of claim, non-payment in relation to NP. Paragraph 7 and para 10 of the statement of claim, also relied on by the claimant as signaling his claim in respect of NP, make no reference to NP whatsoever. They refer to "*WIOC/Petro invest receipt...*". If one peruses the receipts referred to in para 7 and 10, exhibited from pp 173, 175 and 177 of the Trial Bundle, Vol. 3, no reference to NP is made in any of them either. The omission to identify NP as a target of the claim is also carried over into the claimant's Reply to the Defence.
14. The substantive Judgment sets out the issues for determination in the matter at para 55. The three (3) issues identified there, do not in my view allow for the consideration of the claim in respect to NP. Indeed, the third issue specifically identifies WIOC and Petro Invest⁹ as the entities in relation to which the performance incentives were based and claimed. Counsel for the Claimant relied further, on para 156 of the said judgment as proof of the trial Court having recognized the claim for the performance incentives in relation to NP. This is simply not so. The said paragraph merely regurgitates the data set out in paras. 12-15 of the Claimant's witness statement at the substantive trial. Some of this data is also set out variously in para 7 and 10 of the statement of claim. An explanation of what is in effect, the hidden dual character of the receipts, is now being given at this assessment hearing.
15. Mr. Marshall acknowledged in the end, that if the Court were to now find that the claimant's pleadings did not raise this issue or give the defendant notice of this issue/Claim and that the Judgment of the learned trial Judge did not deal with it as an issue for determination or subsequent assessment of damages; then, the Claimant would not now be able to claim it. He however, maintains that the claimant's statement of case was sufficient to put the Defendant on notice of this claim for the "*further \$150,000.00 in performance incentives*" in relation to N.P., that the learned trial Judge

⁷ He did not refer to NP in his witness statement, but referred to it in his response in cross examination.

⁸ The subject contract between the parties provides for the audit of any "...large Tax payers...". The interpretation of this was dealt with at the substantive trial.

⁹ The two companies referred to in para 7 and 10 of the statement of claim.

dealt with the issue at the trial, and in any event, that the issue was raised without objection in the evidence at the substantive trial. In the Court's view, there is nothing contained in the Trial Bundles or the substantive judgment that suggests to this Court that the NP issue was dealt with at the trial at all.

16. The Law on the sufficiency and function of pleadings is now, I would think, legend. I do not believe that there is any dispute that a party must adequately¹⁰ plead its case and that issues between the parties are established by way of pleadings.¹¹ Barrow JA set out the law thus: *"The pleader makes allegations of facts in his pleadings. Those alleged facts are the case for the party... 'The pleadings should make clear the general nature of the case,' in Lord Woolf's words, which I again emphasize; To let the other side know the case it has to meet and, therefore, to prevent surprise at the trial the pleadings must contain particulars necessary to serve that purpose. But there is no longer a need for extensive pleadings, which I understand mean pleadings with an extensive amount of particulars because witness statements are intended to serve the requirements of providing details or particulars of the pleaders case."*¹²(emphasis mine)
17. In the **Boyea** case, Barrow J.A. at para 44, went on to make the point that; *"witness statements may now be used to supply details or particulars that under the former practice, were required to be contained in pleadings"*
18. It appears from the authorities however, that the evidence, documentary or oral, cannot enlarge the pleadings to the point of creating a cause of action that was not originally pleaded/ disclosed.
19. Blackstone's Civil Practice, 2003, at para 317 posits that a Claimant will not be permitted to pursue a case at trial, a secondary case if you will,'...*that is not fully reflected in the way that party's case was previously put in its statement of case. A judge is not permitted to give judgment on the basis of a Claim that is not included on the statements of case"*¹³(emphasis mine)
20. I am of the view that on the pleadings the Claimant did set out the *"general nature"* of the case the Defendant had to meet in relation to WIOC and Petro Invest. No new cause of action is now raised in the assessment of damages. However, clearly the allegations (and with it, the additional cause of action) with respect to outstanding performance incentive in relation to NP was not included in the statement of case of the claimant. The nature of this action is such that much turns on the details. The general nature of this case as put by the claimant is not sufficient to put the Defendant on notice of the aspect of the Damages claim he is now asked to defend. This is particularly so when specific entities are identified by the claimant's pleadings; none of which are stated as 'NP'. Looking at the statement of

¹⁰ See Lord Woolf in *Mc Philemy v Times Newspaper Ltd* [1999] 3 ALL ER 775.

¹¹ See *Three River District Council and other v Bank of England (No. 3)* [2001] 2 ALL ER 513.

¹² Barrow J.A. at para 43 *Eastern Caribbean Flour Mills Ltd. v Ormiston Ken Boyea*; *Eastern Caribbean Flour Mills Ltd. and Hudson Williams Civil Appeal No. 12* of 2006.

¹³ Part 2.4 of the CPR 2000 – Definitions – notably does not include witness statements as part of a statement of case.

case for the Defendant, one sees that they have not attempted to answer the case with respect to NP where one would ordinarily have expected an answer had the case for NP been pleaded by the claimant. **I dismiss the damages claim for the performance incentive in relation to NP in the sum of \$150,000.00.** This amounts to approximately 15% of the final Judgment order.

21. Save for the \$150,000.00 (N.P.) referred to and dealt with above; the claim by the claimant on the assessment of damages as set out in his earlier statement of case and the witness statements of the substantive trial along with the witness statement filed on the 12nd February 2010 for this assessment hearing, remains uncontested and for the most part proved. In Liverson Sandy v Antigua Public Utilities Authority¹⁴, Mitchell J. set out the guiding principles in proving special damages thus: *"The standard applicable to proof of special damages is the balance of probability. Where the Claimant by oral testimony in Court establishes the value of a claim for special damages and the value placed on the claim is not challenged, then unless the value claimed appears unreasonable, the only course of action properly open to the assertion is to accept the Claimant's claim in full"*. The award of Special Damages is in my view the appropriate damages award in the circumstances of the instant case.

22. Thomas Gabriel has by his affidavit filed the 12th February 2010, provided supplemental sworn testimony in support of his claim in damages. He has claimed in this assessment of damages hearing, the principal sum of \$1,020,218.70. Applying the ***Liverson Sandy*** case, and carrying out the calculations from para. 10 of the statement of case in the context of the Judgment and Order thereto and cross referencing it to the damages claim now before me; the said value claimed in the 12th February witness statement of the claimant does not appear unreasonable¹⁵. **Deducting the \$150,000.00 NP performance incentive from the principal sum claimed, results in a balance of \$870,218.70. This is what has been proved and reasonable in the circumstances.**

For the reasons provided above, **IT IS HEREBY ORDERED AS FOLLOWS:**

ORDER

23. That; the claimant is entitled to his proved damages in the sum of \$870,218.70; prescribed Cost pursuant to the CPR 2000 and discounted by 20%¹⁶, unless otherwise agreed between the parties; Interest pursuant to the Judgment Act, Interest pursuant to S.27 of the Eastern Caribbean Supreme Court Act at the rate of 3% per annum .

DAVID C HARRIS
JUDGE
ANTIGUA and BARBUDA

¹⁴ Antigua and Barbuda High Court Suit No. 156 of 1998.

¹⁵ \$1,020,218.70 less the \$150,000.00 'NP' performance incentive.

¹⁶ See fn. 3 and fn. 4 and para. 20 ante.