

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV2009/0129

BETWEEN:

**A'M TRACK CONSTRUCTION LTD.
MICHAEL SAMUEL**

Claimants

and

TRUSTEES OF THE PUBLIC WORKERS UNION

Defendant

Appearances:

Ms. Celia Edwards, Q.C. and Ms. Rosalyn Wilkinson for the Claimants
Ms. Dia Forrester and Ms. Jamie Bristol for the Defendant

2009: July 7
August 28

JUDGMENT

[1] **MICHEL, J. (Ag.):** By Claim Form and Statement of Claim filed on 1st April 2009 the Claimants claimed against the Defendant the following relief:

1. The sum of \$1.2 million on a quantum meruit being the sum expended by them out of pocket on the Defendant's building;
2. Interest thereon at the commercial rate of 10.5% per annum until payment pursuant to section 27 of the West Indies Associated States Supreme Court Act, Cap. 336 of the 1990 Revised Laws of Grenada;
3. An order restraining the Defendant, whether by itself, servants or agents or howsoever otherwise from calling in a Performance Bond in its favour issued by the Surety RBTT Bank Grenada Limited at the instance of

Michael Samuel and A'M Track Construction Ltd., on the 14th day of November 2007;

4. Further or alternatively, damages;
5. Interest thereon pursuant to section 27 of the West Indies Associated States Supreme Court Act aforesaid;
6. Further or other relief; and
7. Costs.

[2] On the said 1st April the Claimants also filed an Application Without Notice supported by an affidavit of Michael Samuel - who is the Second Claimant and the Managing Director of the First Claimant - seeking an interim order restraining the Defendant, whether by itself, its servants or agents or howsoever otherwise from calling in a performance bond in its favour issued on 14th November 2007 by RBTT Bank Grenada Limited at the instance of the Claimants until further order or until the determination of the case.

[3] The Defendant filed an Acknowledgement of Service of the Claim Form and Statement of Claim on 17th April 2009 and on 30th April 2009 filed a Notice of Application seeking an order pursuant to Rule 26.3 (1) (b) of the CPR that the Claim Form and Statement of Claim be struck out as not disclosing any reasonable ground for bringing a claim and an order that the time for filing a defence be stayed pending the outcome of the application.

[4] Both applications were set down for hearing on 2nd June 2009, on which date an undertaking was given by Counsel on behalf of the Defendant that the Defendant would not proceed to call in the performance bond issued in its favour, whereupon the Court ordered that the filing of a defence in the matter is stayed pending the hearing of the applications. The hearing of the applications was adjourned to 23rd June 2009.

- [5] On 23rd June 2009 leave was granted to both parties to file and serve Written Submissions/Skeleton Arguments by 24th June 2009 and the hearing of the matter was further adjourned to 7th July 2009.
- [6] Skeleton Arguments and Amended Skeleton Arguments were filed on behalf of the Defendant on 16th June and 18th June 2009 respectively, while Written Submissions were filed on behalf of the Claimants on 23rd June 2009. On 2nd July 2009 a Reply was filed on behalf of the Defendant to the Claimants' submissions.
- [7] On 7th July 2009 the Court heard oral arguments by Counsel for both the Claimants and the Defendant, augmenting the written submissions/skeleton arguments previously filed. Counsel addressed the Court though only on the Defendant's application to strike out the claim and not also on the Claimant's application for an injunction, which was addressed in the Written Submissions/Skeleton Arguments.
- [8] The Defendant's submission in essence is that the First Claimant and the Defendant entered into a fixed term fixed price building contract and the First Claimant defaulted in the performance of the contract resulting in the Defendant calling in a performance bond issued on behalf of the Claimants, whereupon the Claimants instituted proceedings against them seeking the relief stated in paragraph [1] hereof. The Defendant contends that the Claimants' case discloses no reasonable ground for bringing the claim and that the Claim Form and Statement of Claim should therefore be struck out.
- [9] The Claimants' case is founded on an allegation by them that the contract between the First Claimant and the Defendant had become commercially impracticable of performance because, in the course of the contract, construction cost had escalated so astronomically as to have resulted in the contract being discharged by frustration.

- [10] The issue then to be determined at this stage is whether the contract between the First Claimant and the Defendant was capable of being discharged by frustration on the facts as alleged by the Claimants.
- [11] The Defendant says that it cannot be and cites the cases of **Davis Contractors Ltd. v Fareham Urban District Council**¹ and **Michael Wilson & Partners Limited v Temujin International Limited**² and texts from Halsbury's Laws of England Fourth Edition and Hudson's Building And Engineering Contracts in support.
- [12] The Claimants say that the contract was capable of being and was in fact frustrated on the facts as alleged by them and they cite the cases of **Head Wrightson Aluminum Limited v Aberdeen Harbour Commissioners**³, **Ian Francis et al v Renwick & Payne et al**⁴ and **Island Construction Corporation v Urban Development Corporation**⁵ in support.
- [13] Having reviewed the submissions – both written and oral – made on behalf of the parties hereto and having read all of the authorities cited, including some long ones sometimes of limited relevance, this Court has made the following determinations:
- (a) The authoritative statement on the doctrine of frustration in the law of contract proffered in the House of Lords by Lord Radcliffe in the case of **Davis Contractors Ltd. v Fareham Urban District Council**¹ that “frustration occurs whenever the law recognizes that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is being

¹ [1956] 2 All E.R. 145

² BVI Civil Suit No. 0307 of 2006

³ (1958) S.L.T. 12

⁴ Grenada Civil Appeal

⁵ [1998] E.C.L.R. 435

called for would render it a thing radically different from that which was undertaken by the contract” is accepted and adopted by this Court.

- (b) A contract such as the one in issue in this case is capable of being discharged by frustration resulting from the contract becoming, “without default of either party,” commercially impossible of performance or, to use the language of Lord Radcliffe “[the] contractual obligation has become incapable of being performed.”
- (c) An astronomical escalation of the cost of construction, as alleged by the Claimant at paragraph 8 of the Statement of Claim, resulting in price increases of approximately 100% in some of the principal building materials to be used in performing the contract, as gleaned from the averments made in paragraph 9 of the Statement of Claim, can mean that, in the language of Lord Radcliffe, “the circumstances in which performance is being called for would render it a thing radically different from that which was undertaken by the contract.”

[14] The submission by Counsel for the Defendant that a contract could not be frustrated by a rise or fall in prices is somewhat hyperbolic, because although it is oft stated that “the courts will not generally release parties from the consequences of poor bargains”, it has also been stated that “unforeseen increases in costs and price in the course of a construction contract will not give rise to frustration save where increases make the obligation radically different from those contemplated”. This is extracted from Volume II of Chitty on Contracts, Twenty Ninth Edition, Paragraph 37-217, referencing the English Court of Appeal case of **Wates Ltd. v Greater London Council**⁶. In our own jurisdiction, the High Court in Saint Lucia in the case of **Island Construction Corporation v Urban Development Corporation**⁷ on the issue of frustration concluded on page 444 paragraph G of the report, that: “A mere increase in expenditure would not ordinarily suffice to

⁶ (1983) 25 B.L.R. 1

⁷ [1998] E.C.L.R. 435

frustrate a contract. The authorities indicate, however, that a severe increase in costs may excuse a party from performing his contractual obligations."

[15] I am not ruling at this juncture that the contract in this case was discharged by frustration. The Claimant still has some hurdles to surmount before the Court can arrive at this conclusion. I believe though that the Court should hear the evidence on both sides, have it tested by cross examination and then arrive at a determination after a trial of the matter whether the contract entered into between the First Claimant and the Defendant was discharged by frustration because, through no fault of either of the parties, the contract became commercially impossible of performance on account of an astronomical escalation of the cost of construction beyond anything that the parties could have contemplated, thus rendering the contractual obligation radically different from that which was undertaken by the parties at the time of the making of the contract. This, in my view, is the task of the trial judge.

[16] The Defendant's application to strike out the Claim Form and Statement of Claim in this matter is therefore denied and, although Counsel did not address the issue of the injunction in their oral submissions, it was addressed in the Skeleton Arguments/Written Submissions previously filed by the parties and the injunction sought will be granted by the Court pending the final determination of this matter or pending further order of the Court. This is the only reasonable thing to do once it is determined that the case must go to trial.

[17] The Court therefore makes the following orders:

1. The application filed by the Defendant on 30th April 2009 to strike out the Claim Form and Statement of Claim is denied.
2. The application filed by the Claimants on 1st April 2009 for an interim injunction is granted and the Defendant, being the body of trustees of the Public Workers Union, is hereby restrained, whether by itself, its servants

or agents or howsoever otherwise, from calling in a Performance Bond in its favour issued on 14th November 2007 by RBTT Bank Grenada Limited at the instance of the Claimants, Michael Samuel and A'M Track Construction Ltd., until the final determination of this case or until further order of the Court.

3. The Defendant is to file and serve a Defence in this matter on or before the 30th day of September 2009, after which the matter will take its normal course.
4. The Defendant is to pay the Claimants costs arising from these applications in the sum of \$1,000.

Mario Michel
High Court Judge (Ag.)