COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

Common Law & Equity Division
2015/CLE/GEN/01840

B E T W E E N

SINGLE PHASE INVESTMENTS LTD
(t/a Bain's Electric Company)

Claimant

AND

ADLER CONSTRUCTION CO. LIMITED

Defendant

Before:	**The Honourable Senior Justice Deborah E. Fraser**
Appearances:	**Ms. Roberta Quant and Ms. Leslie Brown for the Claimant**
	Mr. Samuel E. Campbell for the Defendant
Hearing Date:	**30 November; 01 December 2023**

Breach of Contract – Construction and Interpretation of Building Contract - Waiver of Pre-Conditions – Ambiguity in a Contract - Contra Proferentem Rule – Damages – Measure of Damages

JUDGMENT

FRASER, SNR. J:

[1.] This is the trial of an action commenced by Single Phase Investments Ltd (t/a Bain's Electric Company ("**the Claimant**") against Adler Construction Company Limited ("**the Defendant**" and collectively, "**the Parties**") for an alleged breach of contract due to the Defendant's failure to pay the Claimant funds owed for service rendered under the terms of a contract entered into by the parties on 13 February 2009.

Background

[2.] The Claimant is and was at all material times a limited company having its registered office in the city of Nassau, New Providence, The Bahamas carrying on business as an electric company trading as 'Bain's Electric Company'.

[3.] The Defendant is and was at all material times a limited company with its registered office located in the city of Nassau, New Providence, The Bahamas, carrying on business as a General Contractor.

[4.] On 13 February 2009 the Parties entered a contract ("**the Contract**") whereby the Defendant agreed to pay the Claimant BSD1,065,097.00 to provide electrical works and services as a sub-contractor for the Defendant on its construction project for the Government of The Bahamas' Magistrate's Court Complex on South and Nassau Streets, New Providence, The Bahamas ("**the Project**").

[5.] It is alleged that eleven change orders were approved during the duration of the Project which resulted in an increased scope of works for the Claimant totaling BSD935, 109.87.

[6.] The Claimant also alleges that the gross contract value (inclusive of the change orders) totaled BSD2 000,207.67.

[7.] It is further alleged that the Claimant provided works and services for the Defendant on the Project in accordance with the Contract and billed the Defendant for accordingly. It is alleged that the Defendant only made a partial payment (in the amount of BSD1,786,059.00) toward the indebtedness to the Claimant, but has failed to satisfy the outstanding balance of $173,935.11. The Claimant also states that it is purportedly owed BSD5,167.53 for completed additional work requested by the Defendant, all of which has been invoiced and sent to the Defendant.

[8.] It is further alleged that, to date, despite assurances from the Defendant to the Claimant that it would pay the outstanding balance, the Defendant has failed and/or refused to do so.

[9.] On 16 November 2015, the Claimant filed a Specially indorsed Writ of Summons ("**the Writ**") alleging breach of contract due to the Defendant's failure to pay the outstanding balance owed to the Claimant for services rendered on the Project and in accordance

with the Contract. The Claimant also filed an Amended Statement of Claim on 05 December 2018 ("**the Amended SOC**").

[10.] According to the Amended SOC, the Claimant seeks the following relief:

"1 $219,315.70;

2 Damages;

3 Interest;

4 Costs; and

5 Such further or other relief as the Court may deem just."

[11.] On 04 December 2015, the Defendant filed its Defence, denying the allegations contained in the Writ. It avers that it paid the Claimant its portion of the final account determined by the Ministry of Works for the Project. It further avers that the Defendant did assure the Claimant that it would use its best efforts to obtain an adjusted final payment from the Ministry of Works and if successful would pay an additional amount to the Claimant. To date, the Ministry of Works has not agreed to satisfy the Defendants' demands.

[12.] The Defendant further contends that the Claimant was fully paid for the Contract sum, but that the Claimant is claiming additional funds in the amount of B$219,315.70 for additional work performed by change orders directed by a third party, which were not part of the Contract sum.

Issues

[13.] I have reviewed and considered the Parties' respective Facts and Issues. In my view, the issues for determination can be framed as follows:

(a) Whether the Contract permitted Change Orders and if so, were such changes agreed to by the Parties?
(b) Whether the Defendant breached the terms of the Contract, thereby owing the Claimant further sums for work rendered on the Project?

Evidence

Claimant's Evidence

James Bain ("Mr. Bain")

[14.] On 17 January 2020 the Claimant filed the Witness Statement of James Bain ("**the Bain WS**"), which stood as Mr. Bain's evidence-in-chief at trial. According to the Bain WS, Mr. Bain is the President and a Director of Bain's Electric Company, the Claimant Company. Mr. Bain also states that the Claimant Company entered into the Contract with the Defendant Company.

[15.] According to the Bain WS, the changes were requested and approved by the Defendant. On 28 March 2008, an estimate was prepared by the Claimant and sent to the Defendant which reflected an estimated amount of $1,108,442.00 for the electrical wiring for the new Magistrate's Complex with a provisional sum of $75,000.00 quoted for the security and CCTV surveillance system. After negotiations between the Parties, the Claimant discounted its price and agreed to a total sum of B$1,065,097.80 for all services rendered for the Project. The Claimant never agreed any further discount to the contracted price for services rendered. The Defendant provided the Claimant with a cheque No. 9449, dated 12 February 2009 in the amount of B$106,509.78 for mobilization.

[16.] The Bain WS further states that the Defendant requested the Claimant to install two (2) flood lights for containers, which was work outside the contract. After the installation was complete, the Claimant provided the Defendant with an invoice dated 26 May 2009 in the amount of $1,714.56. The Defendant has refused to pay this invoice.

[17.] The Defendant also requested the Claimant to provide and install additional temporary lights for the Project. The Claimant billed the Defendant on 15 June 2009 for this additional work in the amount of $3,279.80 which remains owing to date.

[18.] The Bain WS further stated that, at the request of the Defendant, the Claimant purchased and installed new dusk to dawn fixtures on the south east front side of the Magistrates Court Complex. This installation was outside the Contract terms. An invoice for this was prepared in the amount of $173.17, which remains owing.

[19.] During the tenure of the Contract, eleven (11) Change Orders of which nine (9) impacted the scope of works and cost of the Project for the Claimant. All work outlined in the Change Orders for the Claimant was approved by the Defendant and the Ministry of Works & Utilities. Furthermore, the Contract allowed for approved work where there was no corresponding Owner Change Order. As a result of the change orders and additional work, the Contract price increased by B$935,109.87, making the total cost for work rendered by the Claimant to be B$2,000,207.67

[20.] The Project was successfully completed in January of 2014, inclusive of the various changes to the scope of works for the Project, which increased the Claimant's contracted works. The Defendant paid the Claimant by a series of cheques during the Project, but failed/refused to pay the total amount owing. By January 2014, the Claimant received B$1,481,212.97 from the Defendant. On 07 January 2014, the Claimant wrote to the Defendant demanding payment of the balance of the funds owed under the Contract. To date, the amount of B$214,148.67 remains owing to the Claimant from the Defendant for all work rendered under the terms of the Contract.

Defendant's Evidence

Richard William Greene ("Mr. Greene")

[21.] On 30 April 2019, the Defendant filed the Witness Statement of Richard William Greene ("**the Greene WS**"), which stood as Mr. Greene's evidence-at-chief at the trial. According to the Greene WS, Mr. Greene was employed as a Project Engineer with the Defendant Company from about 2004 to 2018. He further states that he is aware of the Contract and that the Claimant completed all works and was fully paid for said work, in accordance with the Contract. He also states that he is unaware of any variations or change orders that were signed by both Parties to the contract.

Findings of Fact

[22.] Having reviewed and considered the testimony of the witnesses, I shall provide my summary of their viva voce evidence and provide my Findings of Fact based on such evidence along with the written evidence before me.

James Bain ("Mr. Bain")

[23.] During cross-examination, Mr. Bain confirmed that he executed the Contract and initialed all pages on behalf of the Claimant Company (as he is the President and a Director of the Claimant Company). Interestingly, he also admitted that he did not read the Contract in its entirety. At lines 14 to 26 on page 9 of the 30 November 2023 Court Transcript ("**the First Transcript**"), the following is provided:

> "Q …Did you read the contract?
>
> A I read – to be honest with you, Mr. Campbell, when I went to sign the contract, I was given a number of pages to initial. I wasn't given this contract to take away and read and come back. I was standing in Mr. Minus' office. Mr. Greene was present with me and they said, Mr. Bain, we require your intial at the bottom of each of these pages…
>
> Q So you never read it at the time that you signed it?
>
> A Not all of them. I read the figures to see if the figures were correct. But all of the pages themselves, no."

[24.] He did, however, confirm that he saw the total amount on page one of the Contract and confirmed that that was the negotiated figured agreed by the Parties (lines 27 to 30 on page 9 of First Transcript).

[25.] Mr. Bain also testified that under the heading "Additional Contractor Approved Work", he understood the excerpt in relation to the 10% total to mean that "over head and profit is value that is applied to this main contractor in addition to whatever price is submitted by the contractor." He did not understand the clause to mean that he would only be entitled to 10% of the total cost of the Contract for any additional work rendered.

[26.] He found the excerpt ambiguous and was not sure what to make of it. He was of the view that that portion of the clause did not apply to him or the work rendered by his company.

[27.] Mr. Bain's cross examination was brief. He, however, appeared to be a genuine and reliable witness. He did not provide any viva voce evidence which contradicted his witness statement. I will accordingly, rely on his evidence.

Mr. Richard Greene ("Mr. Greene")

[28.] Mr. Greene had a rigorous and extensive cross-examination. When asked if he considered himself Mr. Adler Minus' (one of the beneficial owners of the Defendant Company) "right hand" on the project, Mr. Greene stated that he: "played a prevailing role in the administration of the project on Adler Construction's behalf' (lines 19 to 23 on page 12 of First Transcript). He also confirmed that the Claimant Company was the principal electrician for the Project.

[29.] Mr. Greene further testified that he was substantially aware of the terms of Contract (lines 13 to 16 on page 13 of First Transcript). When asked if the 'Additional Contractor Approved Work' clause under the Contract included work outside the scope of the Contract, Mr. Greene stated that it can (lines 9 to 11 on page 14 of First Transcript). Mr. Greene also clarified that not all worked carried out by the Claimant Company was at the request of the Defendant Company. He stated that, at certain instances, it was at the request of the Ministry of Works (lines 12 to 19 on page 14 of First Transcript; lines 5 to 13 on page 15 of First Transcript). Mr. Greene also testified that the Claimant Company did not have a direct contract with the Ministry of Works.

[30.] Interestingly, Mr. Greene made mention of minutes of meetings which would evidence that there was work rendered by the Claimant Company at the request of the Ministry of Works (lines 21 to 28 on page 15 of First Transcript). Regrettably, no such minutes are in evidence before the Court. He also testified that proposals were tendered by the Claimant Company to the Defendant, subject to the Ministry of Work's assessment (lines 18 to 24 on page 16 of First Transcript). He later confirms that proposals submitted by the Claimant Company to the Defendant Company were approved by the Ministry of Works. Thus, change orders were issued. This is expressly stated at lines 17 to 24 on page 17 of the First Transcript, which reads:

> "Q Sorry. Before we deal with that, I just want to go back to a point that we were dealing with. You had indicated that the quotes from Bain's Electric was accepted by Adler Construction subject to Ministry of Works' acceptance. So it's fair to say that the Ministry of Works approved the proposal by Bain's Electric, and that is why the change orders were issued.
>
> A That's correct."

[31.] Mr. Greene also admitted that additional work by the Claimant Company was approved by the Ministry of Works. According to lines 13 to 27 on page 18 of the First Transcript:

> "Q But a representative from Adler Construction Company would have been the one liaising with the Ministry of Works?
>
> A That is correct, and I would have been one of those persons.
>
> Q And Adler would have received instructions on the scope of works from the Ministry of Works?
>
> A That is correct.
>
> **Q And Adler Construction therefore agreed to have that additional work completed?**
>
> **A With the approved change order form the Ministry of Works.**
>
> **Q So Adler would ensure that any additional work was completed by their subcontractors?**
>
> **A With the approved change orders**.
>
> [Emphasis added]"

[32.] Mr. Greene also confirmed and admitted under cross-examination that the Ministry of Works approved several Change Orders, which included work rendered by the Claimant Company. Lines 5 to 12 on page 20 of the First Transcript reads:

> **"Q And again it also states, 'for your necessary action.' So you would agree that Adler is to ensure that all of the work is completed on that change order?**
>
> **A Yes I do.**
>
> **Q And you would agree in all of these change orders, there was work for sub-contractors that had to be completed?**
>
> **A Yes, I did.**
>
> [Emphasis added]"

[33.] Mr. Greene also confirmed that several entries in various Change Orders corresponded with proposals submitted by the Claimant Company to the Defendant Company. This was confirmed and admitted on numerous occasions throughout the witness' testimony (eg: lines 13 to 28 on page 22 of First Transcript; lines 3 to 21 on page 23 of First Transcript; lines 6 to 19 on page 29 of First Transcript; lines 15 to 18 on page 30 of First Transcript; lines 16 to 20 on page 31 of First Transcript).

[34.] Mr. Greene also agreed with counsel that eleven (11) Change Orders were all approved by the Ministry of Works (lines 5 to 7 on page 4 of 01 December 2024 Court Transcript – "**the Second Transcript**"). Those lines read:

> "**Q And you would agree that the eleven Change Orders were all approved by the Ministry of Works?**
>
> **A As shown on the table, I would say, yes.**
>
> [Emphasis added]"

[35.] Mr. Greene also confirmed the total value for all of the Change Orders, specific to work rendered by the Claimant Company, amounted to $935,109.87. Lines 21 to 31 on page 4 of the Second Transcript provides:

> **"Q So, would you agree if at looking at the table on page 62 – and we're looking under the column that said "Bain's Electric". When you take into account the first column and the second column under Bain's Electric, the total value of work what was completed as a result of the eleven Change Orders by Bain's Electric amounted to $935, 109.87?**
>
> **A As shown on that spreadsheet, yes.**
>
> **Q And the spreadsheet was created by Adler Construction. Would you agree?**
>
> **A Yes.**
>
> [Emphasis added]"

[36.] Counsel then astutely asked the following question and extracted the following response from Mr. Greene at lines 7 to 16 on page 5 of the Second Transcript:

"**Q And you agreed that the $935,1-9.87 amounted to work that was completed by Bain's Electric…based on the Change Orders?**

A As shown on that spreadsheet that [we visited] on page 62.

Q So, it would be fair to say when you add up the $1,065,097.80 and the $935,109.87 Bain's Electric would have completed $2,000,207.67 worth of electrical work on this project?

A Yes, appearing on page 60 of 81 [of the Agreed Bundle of Documents].

[Emphasis added]"

[37.] In essence, Mr. Greene admits that the additional funds amount to what the Claimant Company has pleaded in its Amended Statement of Claim is owed and outstanding from the Defendant Company.

[38.] Despite being shown invoices which suggest that the Claimant Company provided additional work outside the scope of the Contract, Mr. Greene disagreed. He testified that the Claimant Company was paid for work rendered (lines 27 to 30 on page 10 of the Court Transcript). He remained steadfast in this position throughout his testimony until he is questioned on a letter from the Defendant Company to the Claimant Company dated 07 January 2014 (I will provide the full content of this letter later in my judgment). Once faced with this letter (which Mr. Greene admitted he drafted), he contradicted his own evidence. In fact, and most significantly, Mr. Greene made the following admissions at lines 1 to 18 on page 24 of the Second Transcript:

"**Q Let's stop right there. Wouldn't you agree that the statement "It is my hope that you will accept the attachment of $304,846.03 as a final payment for your company service rendered throughout the project." Indicates that funds are still being owed to Bain's Electric?**

A I'm incline[d] to say that – and perhaps you may not like the answer but funds were owed to the general contractor.

Q So, you're in agreement that funds was still owe[d] to Bain's Electric from Adler Construction?

A Funds were owed to both the general contractor and the principal sub-contractors.

Q Mr. Greene, due to the contract between Bain's Electric and Adler Construction, it's correct to say that Adler Construction was responsible for paying Bain's Electric?

A Yes.

[Emphasis added]"

[39.] Mr. Greene also provides the following material admissions during cross examination at lines 15 to 19 and 27 to 31 on page 26 of the Second Transcript:

"Q And I put it to you if Adler had paid all the funds owed to Bain's Electric, there would be no reason to say "I hope you accept this in final payment for your services

A That was implied…

That had there been what Adler Construction might have expected out of the project had fully materialized. Knowing then that he would have done – he would have had the funds to pay fully all debtors might have been owed.

[Emphasis added]"

[40.] The following evidence also came out during Mr. Greene's cross-examination at lines 23 to 29 on page 28 of the Second Transcript:

"Q And I put it to you that Adler Construction did not pay Bain's Electric $2,000,207.67 as reflected on page 60 of the document prepared by Adler Construction.

A To the best of my knowledge, Adler Construction paid what it was in [a] position of paying to Bain's Electric as well as other subcontractors.

[Emphasis added]"

[41.] On re-examination, Mr. Greene stated that only two of the nine Change Orders in evidence was signed by Adler Construction. He testified that, as he understood it, the Change Orders required both the Defendant Company's and the Ministry of Works' signatures. At lines 20 to 32 on page 32 of the Second Transcript, Mr. Greene provided the following testimony in relation to two of the nine Change Orders in evidence:

"Q Now, reference was made to ten and eleven Change Orders, I just want it for clarification. To your knowledge they were not on the list but to your knowledge they were also not signed by Adler Construction Company?

A My recollection of ten and eleven were Change Orders that [were] seemingly prepared towards the end of the contract which contained a considerable sum of money or the greater portion of those Change Orders in value were that of Bain's Electric. And the absence of Adler Construction's signature to those Change Orders would suggest that he was not a party to those Change Orders."

[42.] This testimony aligns with the evidence contained in the Greene WS at paragraph 4, which states:

"That I am not aware of any variations or change orders that were signed by both parties to the contract"

[43.] This position is further fortified by his testimony at lines 19 to 32 on page 36 and lines 1 to 3 on page 37 of the Second Transcript. Those lines provide:

"Proposals were throughout the contract, made by subcontractors as well as the general contractor. And when such proposals were made, Adler Construction was the vehicle to which those proposals were forwarded onto the Ministry of Works or the Ministry of Works to give due consideration to and if they were in concurrence with the proposals, they would – the Ministry of Works would then issue a Charge Order to which they then would refer back to Adler Construction for Adler Construction's approval.

And only when those Change Orders are fully authorized, any instructions emanating from those fully authorized Charge Orders could be put onto any party that was involved in the project, namely, the General Contractor who were referred to in certain parts as the Builder, or the principal sub-contractors being Bain's Electric and Professional Maintenance and so on."

[44.] Mr. Greene seems to suggest that there was a requirement that Change Orders must be signed by both Parties in order to be valid. I will explore this later in my judgment.

[45.] I found Mr. Greene to be a fairly reliable witness. At certain junctures during cross-examination, he was reluctant to provide responses. When he did provide direct answers to questions posed to him, his responses did appear truthful. I, however, note that he did contradict his own testimony when he initially suggested that the Claimant Company was fully pay, but then resiled from this position later and stated that funds were owed to both the Defendant Company and sub-contractors. In the round, I found most of his evidence trustworthy, and will thus give it the appropriate weight in my analysis.

[46.] Based on the foregoing and my review of the documentary evidence, I make the following findings of fact: (i) The Contract was executed by both Parties; (ii) eleven (11) Change Orders were approved by the Ministry of Works, which included work rendered by the Claimant Company as provided in proposals prepared by the Claimant Company and issued to the Defendant Company; (iii) additional work, outside the scope of the Contract, was requested by both the Defendant Company and the Ministry of Work and was done by the Claimant Company; (iv) The Claimant Company only rendered work at the bequest of the Defendant Company and/or the Ministry of Works; (v) all additional work was approved by the Ministry of Works; (vi) there were Change Orders that were not signed by the Defendant Company and (vii) the Defendant Company admitted to owing additional funds to the Claimant Company for work the Claimant Company rendered, which was approved by the Defendant Company and/or the Ministry of Works.

Law, Discussion and Analysis

[47.] Having read and considered the submissions of counsel along with the evidence, I now turn to the issues before me.

(i) Whether the Contract permitted Change Orders and if so, were such changes agreed to?

[48.] According to the "Additional Contractor Approved Work" Clause of the Contract:

> "Additional Contractor approved work may be required for which there is no corresponding Owner charge order (i.e., Contractor damage, damage by an unknown third party, lost or stolen materials, etc). Subcontractor agrees to perform such work at cost and shall not include any mark up for overhead and

profit. OH&P for all other change orders is limited to 10% total. All requests for change orders or proposals shall be itemized to show labor, man hours, unit prices for materials and taxes, overhead and profit."

[49.] From my understanding of this clause, change orders were indeed permitted under the Contract. There are, however certain criteria that must be satisfied for notice of change orders to receive approval: they must be itemized to show labor, man hours, unit prices for materials and taxes, overhead and profit. Accordingly, for any change order to be approved those pre-requisites must be satisfied.

[50.] Based on the evidence before me, the Claimant Company has provided several proposals to the Defendant Company evidencing the proposed work to be done. Additionally, the proposals are reflected in multiple entries in the Change Order produced by the Ministry of Works and issued to the Defendant Company. Though there was no strict compliance with the aforementioned clause of the Contract, there appears to be a waiver by both the Defendant Company and the Ministry of Works with respect to same. This can also be extracted from the testimony of Mr. Bain at line 31 and page 9 lines 1 to 3 of the First Transcript, where he stated that 'at no time did anyone question the manner in which it was presented. Nor did they ask for any further and better particulars".

[51.] Though merely persuasive, the Canadian decision of **Redheugh Constructio Ltd v Coyne Contracting Ltd 1996 CanLII** 3200 (BC CA) illustrates when waiver arises from the actions of a party under contract. At paragraph 20, Cumming J.A. made the following pronouncements:

"Goldsmith and Heitzman's Goldsmith on Canadian Bilding Contracts, 4th ed. At 4-17 states that a requirement for a written authorization for extra work may be waived by an owner (or presumably a contractor in the case where the other party is a sub-contractor), and that such a precondition may also be waived by the owner's conduct or acquiescence. At 4-17, the text states:

> "If the owner himself orders such extra work, the contractor is entitled to be paid for it even if the owner does not comply with the provisions of the contract as to written orders, as these provisions are included in the contract for the owner's protection and may be waived by him."

[52.] Cumming, J.A. at paragraph 22 of the decision further stated:

"The authority of Mr. Basnett to waive the preconditions is also supported in Advanced Mobile C. v Quartz Ventures Ltd (1991), 60 B.C.L.R. (2d) 235 (B.C.S.C.). In that case Mr. Justice Thackray at 242 held that a project manager for a construction project had "…general authority to enter into reasonable contracts on behalf of an agent for…" the company in questions. It would seem to follow that a project manager would also have general authority on behalf of a company to waive preconditions in a contract with a sub-contractor in reasonable circumstances."

[53.] The following was also noted in Hudson's Building Contracts 11th Edition, pg 918 at 7-063 (d) Order in writing a condition precedent:

"As cases illustrated supra, paragraphs 7-058 – 7-063 show, a contract may be worded that an order in writing, or written confirmation of an oral order, or written sanction of work done is made a condition of any right to additional payment for extra work.

'The law is too clearly established by numerous decisions to permit of any doubt that where orders in writing constitute a condition precedent to the right of payment for extras, such condition cannot be got over and as Earl C.J. with reference to such a provision in a contract for building of a ship said in Russell v Viscout Sa da Banderia 'It is a most salutary rule not to depart from plain rules of construction on account of any supposed hardship to either for the parties'.

It has already been submitted that no such provision, however explicitly worded will bar a claim if the owner personally, or in the case of a public or private corporation, its board or highest level of management with power to contract, expressly or impliedly authorize the work although it may well effectively do so if the person whose authority is relied on is an officer or representative at a lower level or an A/E who otherwise might have had ostensible power of contract…Later cases…clearly regard owner authorization, express or implied as avoiding the effect of condition precedent wording of the usual kind.".

[54.] Based on the evidence and the authorities referred to, it must be understood that the Defendant Company and the Ministry of Works waived the aforementioned pre-conditions. The Ministry of Works must have approved the Claimant Company's proposals as the work referred to in the proposals were reflected in numerous charge orders issued by the Ministry of Works and sent to the Defendant Company. Consequently, the Claimant Company was made to believe that all work proposed (with approval) and rendered complete would warrant compensation from the Defendant Company.

[55.] I note that there is testimony and documentary evidence from Mr. Greene noting that the Change Orders required signatures of both Parties. I, however, am unaware of nor have I seen any clause where such a requirement is expressly stated in the Contract. Thus, I rule that the Change Orders were valid and approved by both the Defendant Company and the Ministry of Works, as the Claimant Company's non-compliance with the terms of the relevant clause were effectively waived.

(ii) Whether the Defendant breached the terms of the Contract, thereby owing the Claimant further sums for work rendered on the Project?

[56.] It is trite law that, a breach of contract arises when a defaulting party fails to fulfill its obligations under the terms of a contract, which results in the innocent party suffering some form of loss (be it monetary or otherwise). As stated under my Findings of Fact, Mr. Greene admitted under oath during cross examination that: "***had there been what Adler Construction might have expected out of the project had fully materialized. Knowing then that he would have done – he would have had the funds to pay fully all debtors might have been owed.***" Furthermore, Mr. Greene made the following statements during his cross-examination:

> "Q So, you're in agreement that funds was still owe[d] to Bain's Electric from Adler Construction?
>
> A Funds were owed to both the general contractor and the principal sub-contractors."

[57.] These are clear admissions of the Defendant Company's failure to fulfill its obligations under the terms of the Contract.

[58.] Despite the Claimant Company fulfilling its obligations under the terms of the Contract and rendering regular proposals and invoice to the Defendant Company, the Defendant Company not only acknowledged that funds were owing but confessed that such funds were not paid to the Claimant. This unequivocal admission makes it abundantly clear that the Defendant Company is in breach of contract, thus resulting in the Claimant Company suffering loss – in this case, monetary losses.

[59.] The Defendant's counsel submits that the Claimant has to prove that the Claimant's OH&P does not exceed 10% of the total contract sum. I do not agree with this. The excerpt from that clause is ambiguous. It is unclear or uncertain what is meant by 10% of total. This can be interpreted to mean 10% of the total sum of the contract, or 10% of the total costs for the Overhead and Profit or 10% of the allowable additional work. What is patently clear is that it is uncertain what "10% of total" is referring to. On that basis, the principle of contractual interpretation known as contra proferentum would apply. According to this principle, where there is an ambiguity in a commercial contract, it is to be interpreted against that party who drafted or provided the contract.

[60.] I also rely on the analysis of relevant principles on ambiguity in contracts as discussed by Bain J in **Dodge et Al v Pate and Mc Cartney-Pedroche** - CLE/gen 1778 of 2009. There, the learned judge at paragraphs 24, 25, and 27 to 30 opined:

> "24 It is a long held principle that the proper mode of construction of a contract is to take the instrument as a whole to ascertain the meaning of words and phrases from their general context and to give effect to every part of it. (Anson's Law of Contract 20th Edition).
>
> 25 In considering the rules of interpretation of the contract counsel for the First defendant submits that the ***contra proferentem rule*** should apply. The ***contra proferentem rule*** provides that an ambiguous term will be construed against the party that imposed its inclusion in the contract - interpreted against the interest of the party who imposed it.
>
> 27 Commercial contracts should be construed in light of all the background which could reasonably have been expected to have been available to the parties in order to ascertain what would objectively have been understood to be their intention. Lord Hoffman in Monnai Investment Co. Ltd. v. Eagle Star

Assurance AC 749 in discussing interpretation of the commercial contracts stated –

"The fact that the words are capable of a literal application is no obstacle to evidence which demonstrates what a reasonable person with knowledge of the background would have understood the parties to mean, even if this compels one to say that they used the wrong words. In this area, we no longer confuse the meaning of words with the question of what meaning the use of the words was intended to convey."

28 In Prenn v. Simmonds [1971] 3 All ER 237 the court considered the construction of a contract by referring to the factual background known to the parties at or before the date of contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction per Lord Wilberforce. Further at pages 239 and 240 Lord Wilberforce stated –

"In order for the agreement of 6 July 1960 to be understood, it must be placed in its context. The time has long passed when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal tendencies, for Lord Blackburn's well-known judgment in River Wear Commissioners v. Anderson (1877) 2 App Cas 743 provide ample warrant for a literal approach. We must, as he said, inquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view. Moreover, at any rate since 1859 (McDonald v. Longbottom (1860) 1 E & E 977) it has been clear enough that evidence of mutually known facts may be admitted to identify the meaning of a descriptive term."

29 In Reardon Smith Line Ltd. v. Hansen-Tengen [1976] 3 All ER 570 Lord Wilberforce stated –

"No contracts are made in a vacuum; there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as "the surrounding circumstances" but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right

that the court should know the commercial purpose of the contract and this in turn pre-supposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

30 Further in Reardon Smith Line Ltd. v. Hansen-Tengen at page 574 Lord Wilberforce stated –

"When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties cannot themselves give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have if placed in the situation of the parties. Similarly, when one is speaking of aim, an object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties."

[61.] Based on Mr. Bain's uncontroverted evidence, the Contract was given to him by personnel from the Defendant Company for him to initial each page of. This must mean that the Contract was created by the Defendant or at the very least provided to the Claimant by the Defendant. Furthermore, several proposals were tendered to the Defendant Company and accepted by the Ministry of Works through its Charge Orders. I interpret this to mean that the Ministry of Works approved the additional work that the Claimant proposed and sanctioned payment for same. As the Contract is silent/unclear on what "10% of total" means, I can only infer that this clause cannot be interpreted in a manner against the Claimant. It must be interpreted to mean that the additional work is permitted, even beyond the 10% as the additional work was sanctioned by both the Defendant and the Ministry of Works.

[62.] Taking the evidence as a whole and interpreting the contract based on its terms, the surrounding factual matrix and the intention of the Parties, I am of the view that the Claimant was permitted to do additional work beyond the scope of the Contract and was permitted to be paid for such additional work. The numerous change orders authorized by the Ministry of Works strongly suggest this as they all have excerpts identical to proposed work proposed by the Claimant. Clearly, the Ministry of Works approved such works and agreed to pay such additional costs attributable to said work.

[63.] Accordingly, I rule that the Defendant Company is in breach of contract for failing to pay the Claimant for additional work rendered as approved and agreed by the Defendant as well as the Ministry of Works.

[64.] The Claimant asserts that it has been paid B$1,786,059.00 to date, but that $219,315.70 remaining extant and owing. The $219,315.70 is what is pleaded in the Amended Statement of Claim. Unfortunately, the difficulty that the Court is faced with at this juncture is that the Claimant did not particularize any special damages. It merely provided a global sum owed, but did not plead or evidence how this sum was arrived at. Even if one were to attempt to award general damages, this one was particularized in the Claimant's Amended SOC. Litigants are bound by their pleadings (***McHari Institute v The Department of Public Service*** - 2012/PUB/jrv/00033).

[65.] The purpose of damages is to put the aggrieved party in the position as if the breach never occurred. This was accepted and applied by Evans J (as he then was) in the case of Moss v Bahamas Reef Condominium Association. At paragraphs 76 and 79 of that decision, the learned judge had this to say:

[66.] "Parke B in Robinson v Harman supra stated what has become the general rule at common law that: ' where a party sustains loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same position with respect to damages as if the contract had been performed' and Alderson B opined: "where a person makes a contract and breaks it, he must pay the whole damage sustained"…

In Lodder & Anor v Slowley (1904) A.C. 442 on an action for recovery on a quantum meruit on a breach of building contract, the House of Lords, confirming the decision of the Court of Appeal stated that: 'The measure of damage in such an action is the actual value of work, labour, and materials and it is immaterial whether the contractor would have made a profit or a loss.'"

[67.] It is noted that the Claimant did plead damages. I, thus believe general damages ought to be awarded in the circumstances, based on the admissions made in cross examination by Mr. Greene. I shall, accordingly, make an order which reflects such.

Conclusion

[68.] In light of the foregoing principles and reasons provided, I rule that the Defendant is in breach of contract which has resulted in the Claimant suffering damages. Accordingly, I make the following order:

(a) The Defendant is liable for breach of contract for its failure to pay the Claimant funds owed in accordance with the terms of the Contract and for work rendered and approved by both the Defendant and the Ministry of Works.
(b) General Damages to be assessed by a registrar of the Supreme Court.
(c) The Defendant shall pay the reasonable costs of the Claimant, fit for two counsel, to be assessed if not agreed.

Dated this 21st day of November 2024

Deborah E. Fraser
Senior Justice