IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM NO. 514 OF 2021

BETWEEN:

MYRON MARIN Claimant

AND

LOPEZ EQUIPMENT COMPANY LIMITED Defendant

Appearances:

Mr. Rene Montero for the Claimant

Mr. William Lindo for the Defendant

2024: March 8
October 24

JUDGMENT

DAMAGES: Contract for dredging – Breach – Failure to obtain mining licence – Illegality – Whether claimant entitled to relief – Defendant's failure to lead evidence – Assessment of damages

[1] **Mansoor J**: The claimant has sued the defendant claiming damages in the sum of $228,731.46 for breach of contract. The contract dated 5 July 2019 was to dredge 55,911.30 cubic yards from the sea and fill his property – a private island – in consideration of a payment of $545,901.81. The claimant's case is that although full payment was made on 1 August 2019, the defendant abandoned dredging and filling of the claimant's property on or about 18 January 2020. The claimant also seeks general damages arising from the delay in developing his property resulting from the breach.

[2] Prior to the contract dated 5 July 2019 ("second contract"), the parties had another contract in August 2018 to dredge 20,000 cubic yards of sand for a consideration of $180,000.00 ("first contract"). The claimant makes no claim on the first contract. Cumulatively both contracts were executed to dredge 75,911.30 cubic yards of dredged material and place them on the claimant's property.

[3] The claimant pleads that he was unaware that the defendant had stopped dredging work. A subsequent topography survey had revealed that approximately 52,475.70 cubic yards of material was deposited on the claimant's property, leaving a balance of 23,435.60 cubic yards to be dredged and deposited. The defendant is also said to have failed to spread the material evenly on the property. The statement of claim pleads that the defendant's breach has caused a delay in the development of the property as a resort.

[4] By its amended defence, the defendant denies that it was in breach of contract and claims that the dredging contract is illegal and unenforceable as the claimant did not secure a quarry permit under the Mines and Minerals Act (Cap 226). In any event, the defendant says that it has performed the contract by providing 87,964.48 cubic yards of material and that this was 12,053.18 cubic yards more than the contracted amount. The defendant pleads that some of the material it provided had eroded due to improper containment of the island and that the claimant was informed of the erosion. The defendant also states that it commenced work in April 2019 although scheduled to start earlier as the claimant requested time to erect proper containment areas to retain the solid material produced during the dredging operation.

Trial

[5] Trial was initially fixed for 28 February 2024. On that day, counsel for the defendant sought an adjournment submitting that the parties are negotiating a settlement. The claimant opposed the adjournment. Trial was adjourned to 8 March 2024 to leave open the possibility of a settlement and the defendant was directed to pay the claimant's costs for the day. A settlement did not eventuate, and the case proceeded to trial. After trial was concluded, the claimant filed written submissions on 19 April. The defendant filed its submissions on 3 May and the claimant replied on 10 May 2024.

[6] By order dated 12 April 2022, each party was allowed to summon an expert witness: Mr. Ian Gillett for the claimant and Mr. Ronald Gordon for the defendant. On 7 October 2022, Farnese J ordered the parties to file and exchange witness statements by 9 December 2022. The claimant summoned five witnesses including himself: Ismael Burgos, Luigi Marin, Myron Marin the claimant and the surveyor, Ian

Gillet. The defendant, though intending to call four witnesses, did not file witness statements and, therefore, no evidence was led on its behalf.

Issues

[7] The claimant has raised two issues:

a. Whether the defendant is entitled to damages for breach of contract. If yes, what is the quantum of damages to be awarded to the claimant?

b. Alternatively, whether the defendant is entitled to the sum of $228,731.46 being monies had and received which has resulted in the unjust enrichment of the defendant.

[8] The defendant says it has not had the opportunity to respond to a claim based on unjust enrichment as the claimant raised the issue of unjust enrichment in its reply to the defendant's defence. The defendant submitted that by doing so it has been prevented from countering a new cause of action based on unjust enrichment.

[9] The defendant cited the decision in ***Wilfred Elrington v Progresso Heights Limited***[1] and submitted that the claimant was not entitled to relief based on unjust enrichment, having not pleaded that ground in its statement of claim. In *Elrington*, the Caribbean Court of Justice stated:

> "This court has criticised deviation from pleadings that places the other side at a disadvantage. In Todd v Price, this court commented unfavourably on allegations of fraud and gross negligence which were not pleaded and in respect of which the appellant was not given an opportunity to respond or defend herself".

[10] In ***D & G Cars Limited v Essex Police Authority***, the English Court of Appeal quoted the Supreme Court Practice in stating that nothing which is pleaded solely in reply can amount to a new claim. The relevant practice note states:

> "A reply must not contradict or be inconsistent with the claim; for example, it must not bring in a new claim. If the claimant wishes to depart from the case set out in their claim they should seek to amend that claim rather than serve a reply".[2]

[11] The claim form and the statement of claim seek damages for breach of contract. The second issue is based on monies had and received, resulting in unjust

[1] [2024] CCJ 4 (AJ) BZ (paragraph 70 refers to note 16.7.3 of vol.1 of the 2013 Supreme Court Practice, 498)
[2] [2013] EWCA Civ 514

enrichment, which the claimant has not pleaded in his statement of claim. The court accepts the submission that answering the issue based on unjust enrichment may result in prejudice to the defendant. This issue will not be considered. It will also not be necessary in view of the findings reached based on the breach of contract claim.

The evidence

The project

[12] The claimant's island is between Long Caye and Caye Chapel in the Belize district. The island is about 8 acres, nearly half of which is considered a reserve. In February 2018, the claimant retained Mr. Ian Gillett to conduct a cadastral and topographic survey of the property to determine the elevation of the island and to calculate the filling that was required. Before the completion of the first contract, the parties executed the second contract to dredge 55,911.30 cubic yards and to provide heavy duty equipment to evenly spread the dredged material. The defendant was paid $545,901 on 1 August 2019. The entire island was to be filled with dredged material to the height of the seawall, the fill was to be spread and a beach to be made on the eastern side of the property. The caretaker, Ismael Borgos, was tasked with overseeing the dredging work done by the defendant, and to send pictures and updates of the work in progress.

[13] The claimant said that he signed the second contract as the defendant had completed the first contract. In his discussions with the defendant, the claimant says he intimated that he required to fill the reserve of 66 feet around the property and to have a beach of 100 feet in extent to the east of the island. Before the second contract was made, the claimant requested Mr. Gillett to prepare another topographic survey to find out the amount of material required to fill the property to the height of the seawall and to fill and construct the beach. Mr. Gillett determined that a volume of 55,911.30 cubic yards was needed to fill the 66 feet reserve and the beach. The volume included 8,195.91 cubic yards of material to fill the proposed beach alone.

[14] However, the claimant says, the defendant abandoned the project on 18 January 2020. When he called Mr. Alex Lopez, the defendant's director, he was told the defendant would return in two weeks to continue dredging after attending to maintenance work of the defendant's equipment. Mr. Marin says he contacted Mr. Lopez several times on whatsapp. The messages are dated 25 February, 13, 17, 18 and 19 March 2020. In June 2020, he asked Mr. Gillett to conduct a third topographic survey. On 24 July 2020, Mr. Gillett reported that approximately 52,475.70 cubic yards was dredged while 23,435.60 remains to be dredged. Thereafter, by letter dated 21 December 2020, the claimant's attorney at law

demanded that the defendant complete the project by filling 23,435.60 cubic yards. In cross examination, the claimant denied that the defendant filled more than 87,000 cubic yards as claimed in the amended defence.

[15] The claimant's witness, Ismael Burgos, a watchman and caretaker at the claimant's premises since 2015, took pictures of the work and sent them through *whatsapp* to the claimant. He said the defendant started to dredge on 18 April 2019 and worked on the property for about a year and stopped work. In carrying out work, the defendant worked six days a week for about three weeks and would then take some time off before returning. In January, he saw the defendant's workers pack up and leave the island with the dredging machinery, generator and other belongings. A worker told him that they were moving to another dredging site. Mr. Burgos brought their departure to the claimant's attention.

[16] Luigi Marin, the claimant's father, also confirmed that dredging was carried out from about April to January 2020. In his witness statement, Mr. Luigi Marin said that he and his brother used to go fishing four to five times a week between 2017 and June 2020 and used the claimant's island as a fishing base. In January 2020, on one of his visits to the island, a workman of the defendant told him that they were moving to another job site and would return in two weeks to finish the job. At the time he observed that various parts of the island were not filled to the level of the sea wall. He did not see a beach to the east of the island.

Expert testimony

[17] The expert witness, Mr. Gillett, said he carried out a topographic survey to assess the amount of the required fill. Before dredging operations began, he said, about 30% of the island was underwater. In 2018 he attempted to determine the exact amount of material necessary to fill the island. The preliminary topographic survey was done at a very high density at intervals of five meters to ensure reliability of the survey data. The expert said that calculations were done by considering the height of the seawall as the dredged material was to be filled up to the level of the seawall. His expert report states that he carried out three topographical surveys; the first was in March 2018, followed by surveys in June 2019 and 2020.

[18] The survey in June 2019 was after some dredging was done. On that occasion the survey included the 66 feet reserve around the island and a 100 feet reserve for a beach. The 2019 survey relied on the base data from the 2018 survey. According to the expert's 2018 report, the island is comprised of two parcels and is 5.44 acres in extent. The expert's 2019 report gives the island's extent as 8.92 acres inclusive of the reserve. The expert report outlines the methodology that was adopted in carrying

out the surveys. Mr. Gillett's evidence is that the island was not filled to the level of the seawall and no material was placed on the proposed beach.

[19] Mr. Gillett in his report has stated the amount of material to be dredged to fill the property to the height of the seawall, which was a meter above the mean sea level. The volume of material needed was calculated by the baseline from the topographic survey and the height to which the land was to be filled. He said he expected some degree of compaction or settlement to have taken place by the time he visited the island in June 2020, although he could not say by how much. This ratio expresses the subsidence or the settlement when a land is filled. However, the volume of soil needed to fill the island was calculated and set out in the expert's report without taking into consideration the effect of compaction. The evidence did not disclose either party to have commissioned a soil compaction test.

[20] The claimant sought to lead evidence of a data storage device (USB) containing a video of the island. The defendant objected saying that the document was not properly disclosed. The device was also not filed of record. The claimant submitted that the video is referred to in paragraph 4.1 of the witness statement and, therefore, no prejudice would be caused to the defendant by admitting the video as evidence. However, the video was not allowed to be admitted in evidence as it was not properly disclosed or made available for the defendant's inspection.

Containment material

[21] The amended defence states that the containment material around the island was inadequate to prevent dredged material from seeping out. This position was put to the claimant's witnesses in cross examination. The claimant was unable to say whether the geotextile material placed as a sea wall around the island was impermeable in preventing material from seeping to the sea. His estimate is that the cost of the geotextile material is about a third of material manufactured with vinyl.

[22] Mr. Burgos said that the geotextile material was at times cut by the defendant's workmen to release water; as a result, sea water around the island looked murky; the material was cut mostly on the western side of the island. His evidence is unsupported by any of the claimant's other witnesses. Mr. Luigi Marin said that the geotextile fabric did a good job of holding the fill material. He visited his son's island after hurricane Lisa passed on 2 November 2022 and observed that the seawall and the material on the island remained in place.

[23] When cross-examined, Mr. Gillett was of the view that sea waves near the island were not forceful and, therefore, did not cause an erosion of the filled material. Except in saying that an impermeable barrier would have been superior to the

geotextile material used to build the sea wall he did not comment on the suitability of the material used by the claimant. The suitability of the containment material used by the claimant is not entirely convincing. Although the defendant made the assertion, it did not present evidence to show that there was erosion of the filling due to the nature of the containment material.

The claim for breach of contract

[24] On 21 December 2020, the claimant, through his attorney at law, wrote to the defendant demanding that dredging be completed, and the property filled with the remaining 23,435.60 cubic yards of material. The claimant says that notwithstanding his demand, the defendant failed to dredge and fill the remaining property.

[25] In its statement of defence, the defendant says it supplied 87,964.48 cubic yards of material. The defendant pleaded that the material it had dredged and filled had been washed away. This was forcefully put to the claimant in cross examination. Mr. Marin's response was that he did not know. The defendant's counsel suggested that the dredging operation was completed and that the island's perimeter has not been properly contained resulting in some of the filled material getting washed away by the waves. Regretfully, the court does not have the benefit of the defendant's evidence in support of the quantum of material it says was dredged under the contract.

[26] In the absence of the defendant's witness statements, the court must evaluate the evidence on record and apply the usual standards in reaching its findings. The evidence before the court is that the defendant did not fully perform the contract after having accepted full consideration. The claimant's evidence that the defendant failed to perform its obligations has not been discredited. The court finds the defendant to have been in breach of its contractual obligations to dredge and fill the land.

[27] Notwithstanding the finding that the defendant is in breach of its contractual obligations to the claimant, there is a further matter to be considered. As the defendant has pleaded illegality of the contract, this question will have to be considered before turning to the matter of damages.

Illegality

[28] The defendant's position is that the onus is on the claimant to show that permits were secured under the Mines and Minerals Act, Chapter 226. Permit No.88 of 2019 permitted the claimant to dredge some 16,000 cubic yards of materials. In his evidence, the claimant said that he had verbal authorisation from one Edward Swift from the mining unit in Belmopan to dredge material under the second contract.

[29] The claimant, however, admitted that he did not make a levy to obtain a permit for dredging under the second contract. He agreed that it was his responsibility to comply with the conditions of the permit, and that the contractor was obliged to carry out work in terms of the permit. The claimant said Mr. Swift gave him permission to continue with work. Mr. Swift did not give evidence. After the claimant's case was concluded, the defendant sought the court's permission to summon Mr. Edward Swift or Ms. Michelle Alvarez as witnesses; permission was not allowed.

[30] The defendant relies on sections 82 (1) and 83 (1) of the Mines and Minerals Act and regulation 23 (1) of the Mines and Minerals (General) Regulations.

> Section 82.1 states:
> "When a person wishes to mine construction minerals from a site other than a Public Quarry, not being a site provided for in section 79 (2) (a) to (d) of this Act, he shall when applying for his quarry permit, also apply for the required site to be recorded as a "Registered Quarry", supplying plans for the intended site and such other information as may be prescribed".
>
> Section 83 (1) states:
> "The holder of a quarry permit shall have the right of access to any Public Quarry and to his Registered Quarry site, and shall have the right to mine, sell and dispose of construction minerals mined therefrom subject to the payment of any prescribed fee".
>
> Regulation 23 (1) of the Mines and Minerals (General) Regulations provides:
>
> "An application for a quarry permit and any renewal thereof shall be made in Form 3 of the First Schedule and shall be accompanied by the fee stipulated in the Second Schedule.
>
> The second schedule sets out the annual permit/ licence fee. The fee for a registered quarry of 5,000 – 10,000 cubic yards is $700.00 and $1,000.00 if it is 10,000 – 16,000 cubic yards.

[31] The claimant does not dispute that a licence is required to dredge material from the sea. By letter dated 12 November 2019, Michelle M Alvarez, the inspector of mines of the department of natural resources wrote to the claimant stating that conditions 5 and 6 under the registered quarry permit (RQP 88 of 2019) has been violated. The claimant was directed to cease operations until the following were addressed:

1. "The appropriate implementation of the sediment curtains, geotextiles and precautionary equipment around the extraction site.

2. The volumes of recorded material extracted as well as a tentative timeline as it pertains to the completion of the dredging operations are to be submitted for revision by the mining unit".

[32] The letter calls upon the claimant to contact the inspector's office no later than 20 November 2019 to address the issues and states that failure to address "the urgent matters will result in revocation of the permit". There is no evidence that any steps were taken to comply with the requirements of the Alvarez letter.

[33] In messages exchanged between the claimant and the defendant on 25 February 2020, the defendant is asking for the amount of quantities to be excavated, and the claimant agrees to send this information. The claimant indicates the information was already sent to the defendant, but he would request another assessment. The defendant said he would return in a week. In a previous message dated 13 November 2019, the defendant tells the claimant: "Good afternoon Myron, yes I spoke to the guys. They are saying that I only need to send in pictures and the quantity of material pumped". The claimant clarifies, "Ok so no big issue". The defendant says, "It doesn't seem so".

[34] The defendant submits that the first and second contracts amount to a statutory illegality as the Act authorises mining on being granted a registered quarry permit, and that the statute also stipulates the payment of a fee prescribed in the second schedule of the Act. The defendant submits that the claimant failed to satisfy both requirements.

[35] In ***Holman v Johnson*** Lord Mansfield laid down the maxim that "No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act".[3] Proceeding on this premise and in support of its contention, the defendant cited the decision of the Caribbean Court of Justice in ***Belize International Services Limited v The Attorney General of Belize***[4]. In that case, the CCJ observed that a contract that is not prohibited by law, but which is otherwise tainted by illegality, may, if the principle of proportionality allows, be enforced by the court. Referring to the decision in *St John Shipping Corporation v Joseph Rank Limited*, the apex court observed that if a contract is entered into with the object of committing an illegal act, the

[3] [1775] 1 Cowp 341, 343
[4] [2020] CCJ 9 (AJ) BZ S

contract would be unenforceable. The court referred to the following paragraph by Devlin J in St John Shipping Corporation v Joseph Rank Limited.

> "There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends on proof the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it…The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class ir does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two classes is this. In the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what acts the statute prohibits; but one is not concerned at all with the intent of the parties; if the parties enter into a prohibited contract, that contract is unenforceable".[5]

[36] In the *Belize International Services Limited*, the court considered the issue of contractual illegality and in doing so examined the development of the applicable common law principles. The case concerned a management services agreement made between the government of Belize and Belize International Services Limited ("BISL") in June 1993 to assist with the development and management of the government owned International Business Companies Registry ('IBCR') and the International Merchant Marine Registry of Belize ('IMMARBE'). At a certain point the parties amended the original agreement and extended its term to 11 June 2020. In 2013, the government took the position that the extension agreement was unlawful and that the management services agreement would expire on 10 June 2013. Thereafter, the government took possession of both IBCR and IMMARBE. When BISL sued, the government the took the defence of illegality.

[37] The Caribbean Court of Justice referred to four propositions that have developed under the common law on the issue of illegality in contracts. These are:

i. "A contract that is prohibited by law will not be enforced by the courts.

ii. A contract that is not prohibited by law, but which is nonetheless otherwise tainted with illegality, may be enforced by the courts if to refuse enforcement would be disproportionate to the degree of illegality involved.

[5] [1956] 3 All E.R 683 at 688

iii. The prohibition by law of a contract does not prevent the return of moneys or other property or benefit transferred under the contract if such restitutionary relief does not entail the enforcement of the contract.

iv. The return of moneys or other property or other benefit transferred under the contract will be denied, even where no enforcement of the contract is involved, if such restitutionary relief would lead to the stultification of the law prohibiting the contract".

[38] Section 2 (1) of the Mines and Minerals Act provides that property under territorial sea as determined by the maritime legislation in force is deemed to be vested in Belize. The statutory provisions are meant to apply in respect of minerals in property and under Belize's territorial sea. Section 2 (4) states that no person shall prospect or mine except in accordance with the rights granted under the Act. Section 2 (5) provides that any person who contravenes sub section (4) commits an offence and is liable on conviction, in the case of an individual to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding one year, or to both. In the case of a body corporate to a fine not exceeding five thousand dollars.

[39] The provisions of the Mines and Minerals Act do not prohibit the making of a contract to dredge material from the sea. The statute imposes the requirement of a permit for operations involving minerals. The permit fee does not exceed $1,000.00. A contravention of the requirement will attract a penal sanction.

[40] If a contract is not prohibited by law, and yet tainted with illegality, it may be enforced if the principle of proportionality allows the courts to do so. This is clear from the authorities. If money has been paid or other property or benefit has passed under a contract prohibited by law, that prohibition would not necessarily prevent the recovery or restitution of property or benefit that has passed, without enforcing the contract. In other words such recovery or restitution will be possible if the claimant does not rely on the illegal contract. The defence of illegality will succeed, if the restitution would result in the stultification of the law. The contract read with the provisions of the statute does not lead to a suggestion of stultifying the law. The defendant also did not make submissions that contravention of the provisions requiring a permit would result in the stultification of the law.

[41] Statutory illegality is said to occur where the legislative intent is to prohibit the contract and not merely to prohibit the illegal way in which it was carried out. In St John Shipping Corporation v Joseph Rank Ltd, Devlin J stated that the court will not

enforce a contract which is expressly or impliedly prohibited by statute. Devlin J stated:

> "If a contract has as its whole object the doing of the very act which the statute prohibits, it can be argued that you can hardly make sense of a statute which forbids an act and yet permits to be made a contract to do it; that is a clear implication. But unless you get a clear implication of that sort, I think a court ought to be very slow to hold that a statute intends to interfere with the rights and remedies given by the ordinary law of contract. Caution in this respect, I think, especially necessary in these times when so much of commercial life is governed by regulations of one sort or another, which may easily be broken without wicked intent."[6]

[42] Where the defence relies on implied prohibition, the words of the legislative proposition must exhibit a clear implication or necessary inference. This was explained by the Court of Appeal of Singapore in ***Ochroid Trading Ltd v Chua Siok Lui***[7], cited with approval by the Caribbean Court of Justice.

> "Judicial reticence in this particular regard is warranted as statutory illegality generally takes no account of the parties' subjective intentions or relative culpability and could render contracts unenforceable even where the infraction was committed unwittingly. The restricted approach to implied prohibition is also justified given the proliferation of administrative and regulatory provisions in modern legislation (see Ting Siew May at [111]). At the same time, any concern that contracts involving statutory contraventions might go unpunished will be addressed by the common law principles on contractual illegality…"[8]

[43] In ***Saunders v Edwards*** the test of proportionality is explained in this way:

> "Where issues of illegality are raised, the courts have (as it seems to me) to steer a middle course between two unacceptable positions. On the one hand it is unacceptable that any court of law should aid or lend its authority to a party seeking to pursue or enforce an object or agreement which the law prohibits. On the other hand, it is unacceptable that the court should, on the first indication of unlawfulness affecting any aspect of a transaction, draw up its skirts and refuse all assistance to the plaintiff, no matter how serious his loss nor how disproportionate his loss to the unlawfulness of his conduct".[9]

[6] [1956] 3 All ER 683 at 690, [1957] 1 QB 267, 288
[7] [2018] SGCA 5
[8] Ibid 28
[9] [1987] 1 WLR 1116

[44] The words of Bernard JA in ***Ambrose v Boston*** are also relevant.

> "There can be no hard-and-fast rule in determining the degree of moral turpitude in infringing the provisions of a statute, and the facts of each case must be scrutinised before the court turns a blind eye to a contract tainted with illegality. A court must not be seen to be indirectly encouraging breaches of law enacted by Parliament for the protection of public at large in order to protect the narrow personal interests of individuals. One has to guard against sending the wrong signals. However, a court cannot be unmindful of the realities of the society in which it functions and ought not to be seen to be stultifying business transactions of individuals by adhering rigidly to statutes".[10]

[45] In this case what the claimant is asking is not the enforcement of the contract but the payment of damages for the failure to perform the contract. The question as to whether a contract is prohibited by statute must be determined by the principles of statutory interpretation. To quote the Privy Council in ***Goldfinger v Luxemberg***[11], to hold that the contract is illegal and so unenforceable would be stretching the statutory language and would produce a harsh result. Considering the purpose of the statute, its provisions on the taking of a permit and penalty for contravention the test of proportionality yields to the claimant's benefit.

Damages

[46] The claimant has established the defendant's failure to perform the contract after consideration had passed. The defendant was unsuccessful in showing that the contract was performed, although it was pleaded as such in the statement of defence. The defendant's claims are unsupported by evidence and the contention that the contract is illegal and unenforceable fails.

[47] Consequent to the finding of breach, the defendant is liable to pay damages to the claimant. In calculating damages, the court must decide the financial loss suffered by the defendant's breach. The claimant is entitled to damages based on the proportion of material that was not dredged and spread on the property. The extent of the material that was not dredged and placed on the property is based on the expert's evidence. The simple calculation is to consider the unit price of dredging and spreading the material based on the consideration and the quantity specified in the contract.

[48] The contract, however, gives no indication of a unit price for dredging. The consideration of $545,901.81 is to dredge 55,911.30 cubic yards and place it on the owner's island inclusive of the beach area and the provision of equipment to spread

[10] [1993] 55 WIR 184
[11] [2002] UKPC 60

the dredged material evenly. A separate charge is not specified for spreading of the material. The unit price of $9.76 stated in the statement of claim is by dividing the consideration by the amount of material to be dredged.

[49] The statement of claim gives particulars of the claimant's loss and damage based on the claim that the defendant did not fill 23,435.60 cubic yards. The loss of $228,731.46 is computed based on a price of $9.76 per cubic yard according to sums stated in the statement of claim.

[50] The evidence shows that although the claimant had a licence under the Mining and Minerals Act to perform the first contract, a licence was not obtained to dredge the property under the second contract. The defendant's case was based on the illegality of the contract based on the absence of a valid permit to conduct dredging operations. The evidence has it that the defendant stopped operations in January 2020. It is very likely that the claimant knew of the stoppage through his caretaker even if the defendant did not formally inform him. The messages tendered in evidence by the claimant shows that both parties were aware of concerns regarding the continuation of dredging operations. In February, the defendant says he would be back to continue operations. Both parties knew by then that the job was unfinished.

[51] Although illegality is not successful as a defence, the court is mindful of its consequences in the performance of the contract. The messages between the parties suggest that the stoppage of work resulted from certain inquiries by the authorities. The defendant has not given evidence on losses that might have been sustained resulting from a pause in work due to licensing concerns. The contract places the obligation of obtaining the necessary regulatory approvals on the claimant. There is also no denial that a licence was required. The evidence is that a licence was not obtained for the second contract. The letter dated 12 November 2019 by Michelle Alvarez confirms this and the claimant does not deny the fact.

[52] The assessment of damages is a pragmatic subject, in which the main issue is one of fact[12]. The general principle for the assessment of damages is to place the innocent party as far as money can do so in the same position as if the contract had been performed. The claimant has lost out on his bargain. He is entitled to be compensated. There must, however, be some allowance for the failure to obtain the requisite licence, which resulted in a stoppage of work. I am of the view that a reduction in the damages by a sum equivalent by approximately 15% of the amount assessed would give a fair reflection. The reduction is by no means precise and the

[12] Treitel's Law of Contract, 13th edition

court can only make an estimate of what might be a reasonable sum to be deducted. Based on this reasoning, the claimant is entitled to damages of $195,000.00.

ORDER

A. The claimant is awarded damages in the sum of $195,000.00

B. The defendant is to pay the claimant's costs.

M. Javed Mansoor
Judge