IN THE COURT OF APPEAL OF BELIZE AD 2017

CIVIL APPEAL NO 14 OF 2016

BELLA VISTA DEVELOPMENT COMPANY LIMITED
LOPEZ EQUIPMENT COMPANY LIMITED Appellants

v

IMER HERNANDEZ DEVELOPMENT COMPANY LIMITED Respondent

_____

BEFORE

The Hon Mr Justice Sir Manuel Sosa	President
The Hon Madam Justice Minnet Hafiz-Bertram	Justice of Appeal
The Hon Mr Justice Christopher Blackman	Justice of Appeal

_____

N Barrow for the appellants.
R Williams SC along with S Duncan for the respondent.

3 November 2016 and 24 March 2017.

SIR MANUEL SOSA P

[1] I concur in the reasons for judgment contained, and the orders proposed, in the judgment of Hafiz Bertram JA, which judgment I have read in draft.

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SIR MANUEL SOSA P

HAFIZ-BERTRAM JA

Introduction

[2] This is an appeal against the decision of Abel J delivered on 18 February 2016, in which the learned judge ordered Bella Vista Development Company Limited and Lopez Equipment Company Limited ("the appellants") to pay Imer Hernandez Development Company Limited (" the respondents"), damages for breach of contract in the sum of (a) BZ $721,297.00 for the value of work done under a subcontract; (b) BZ $1,000.00 as nominal damages for repudiation of the contract and (c) interest and cost. This Court heard the appeal on 3 November 2016 and reserved its judgment.

Factual Background

[3] The appellants and the respondent are Companies incorporated under the laws of Belize and are general contractors in the field of construction. The appellant had a contract dated July 2011 with the Government of Belize (GOB) for the construction of a road and related works and services under the AMS 2008 Sugar Belt Road Rehabilitation Project (main contract). This project was funded by the European Union (EU). The appellants subcontracted with the respondents for the building of the road by a contract dated 27 September 2013. The appellant's main contract was terminated by GOB in March 2015. At that time, the relationship between the appellants and the respondent had also broken down.

[4] The respondent agreed by virtue of the subcontract dated 27 September 2013 to provide to the appellants works and services for the construction of the road and related works and services such as the supply of labour, materials, plant and machinery, under the AMS 2008 Sugar Belt Road Rehabilitation Project, for a contract sum of $3,000.000.00.

The claim

[5] The respondent claimed that it was a fundamental term and stipulation of the subcontract that the appellants "*shall be responsible for finding pits that can produce suitable material that is accepted by the Supervision (team) for the use in the contract*."

[6] By letter dated 25 November 2014, the attorneys for the appellants wrote to the respondent informing them that their access to the Beto Carlos Pit where they extracted material for the works was terminated. They were further informed that the termination of access to the said pit did not relieve the respondent of their obligations under the subcontract.

[7] The respondent claimed that the conduct of the appellants to terminate it's access to the Beto Carlos Pit showed an intention to "*no longer be bound by the subcontract and have therefore repudiated same."*

[8] By a letter dated 1 December 2014, the respondent's attorney-at-law wrote to the appellants attorney-at-law stating that the provision of a pit constitutes a condition precedent for due performance by the respondent. Further, that the respondent accepts the repudiation of the subcontract and the same is at an end and all obligations under the same have been discharged.

[9] At paragraph 8 of the statement of claim, the respondent stated that prior to the repudiation of the subcontract, it performed substantial works and services under the subcontract for which it was not paid and has therefore suffered loss and damage. The respondent claimed that by its letter of acceptance of repudiation, it made a demand for the sum of $721,297.01 being the balance due to it after all payments and advances have been deducted. Further, the appellants refused to pay and the sum remains owing to date.

[10] In the statement claim at paragraph 9, the respondents claimed that they had lost the benefit of the agreement as a result of the repudiation of the contract and lost the profit it would otherwise have received and have suffered loss and damage. The specific loss was particularized as follows:

Particulars of Special Loss and Damage

Description Amount

1. *Sums owed work and services rendered in Performance of the subcontract from*

November 30th 2014 until repudiation of the $1,358,159.68 subcontract

2. *Sums owed for quarrying and stockpiling approximately 350 loads of aggregate from November 25th 2014 until Repudiation of the subcontract* *$ 78,750.00*

Less

3. *Payment received by the Claimant from the Defendants for works and services* *$50,000.00*
4. *Payment received by the Claimant from the Defendants for works and services* *$117,212.67*
5. *The Advance under the subcontract* *$500,000.00*
6. *The estimated cost for …. fuel* *$ 48,400.00*

TOTAL *$721,297.01*

[11] In summary the total claimed was $1,436,909.68 less $715,612.67 which amounted to a total balance of $721,297.01. This included work and services and also materials that were stock piled. In the last paragraph, the respondent stated that it was entitled to claim:

1. The sum of seven hundred and twenty one thousand two hundred and ninety seven dollars and one cent (721,297.01);
2. Damages for repudiation of the subcontract; (3) Interest and Cost.

The defence

[12] The appellants admitted they expelled the respondent from the pit but stated it was done for just cause as shown by the letter dated 25 November 2014. The appellants stated that the respondent instigated trouble with the pits's owner and used the material for personal use which was not related to the subcontract and for which the appellants had to pay.

[13] The appellants stated that by the letter dated 8 December 2014 to the respondent, they rejected the assertion of repudiation but accepted that the contract was at an end which resulted from the respondent's failure to act in a manner consistent with the continuance of the contract.

[14] The appellants admitted that the respondent demanded payment of $721,297.01 but responded by letter dated 14 January 2015, reminding the respondent that the subcontract provided that payment would be made "*based on approved and paid quantities"* and payment would be made to the respondent no later than 7 days after each interim payment. The respondent was also informed that much of the material it provided was below the required standard and much of the work had to be redone. Further, that they were assessing the damage resulting from the inferior products and work done so as to ascertain whether any monies were owing to the respondent.

[15] The appellants further stated that the respondent was not entitled to the sum claimed as the respondent had been paid for every claim made except the invoice forwarded by its attorneys.

The decision of the trial judge

[16] The trial judge considered three issues: (1) Whether the appellants repudiated the subcontract by expelling the respondent from the pit it had provided; (2) Whether the respondent was entitled to damages for the alleged repudiation and/or breach of the subcontract and (3) If the respondent is entitled to damages, whether it proved the appellants are liable for the sum of $721,297.01.

[17] The finding of the judge on the first issue in relation to repudiation of the subcontract, as shown at paragraph 74 of the decision, was that there was a breach of the fundamental term of the subcontract and the respondent was entitled to elect to terminate the subcontract, which was done. As such, the appellants were obligated to compensate the respondent in respect of the works already completed.

[18] The finding on the second issue by the judge as shown at paragraph 75 was that damages would be for the loss of an opportunity to complete the contract, which would have been to put the respondent in the position they had been if the contract had been

performed. At paragraph 76, the trial judge held that it was his view, the evidence to substantiate this loss had not been made out, and found that the respondent was entitled to nominal damages which he fixed at $1,000.00.

[19] On the third issue, which the judge referred to as a further and alternative claim for damages for work done, the judge found at paragraph 78 of his judgment that "… *on a balance I prefer the testimony of the witnesses on behalf of the Claimant*, (respondent) *and I find myself satisfied on balance that they have established that they have proved the amount that they have claimed in the Statement of Claim which is $721,297.00."* At paragraph 84, the judge found that the respondent proved to the satisfaction of the court that they are entitled to the claim for $721.297.01. He also ordered interest at 6% pursuant to section 166 of the Supreme Court of Judicature Act and prescribed costs in favour of the respondent.

Grounds of appeal

[20] The appellant had three grounds of appeal and narrowed the grounds to two issues:

1. Whether termination of access to the Beto Carlos Pit amounted to repudiation of the contract;
2. Whether the appellants are indebted to the respondent in the amount of $721,297.01 for works and services the respondent provided to the appellants.

Relief sought

[21] The appellant sought two reliefs:

(1) That the appeal be allowed and for the claim be dismissed; and

(2) Costs to the appellants.

Alternative argument by respondent - Request for variation of order

[22] The respondent did not file a respondent's notice for a variation of the judge's order in relation to the nominal damages awarded for repudiation of the contract. However, in their written submissions to this Court, the respondent argued that if the

Court does not accept their argument that the claim for $721,297.01 had been made out and the judge erred in awarding that sum, there should be a variation of the order made by the trial judge in which he awarded $1000.00 as nominal damages. The respondent submitted that the nominal damages ought to be varied to $721,297.01 being value of works performed but not paid. In oral arguments, learned senior counsel Mr. Williams for the respondent urged the Court to send the matter back to the trial court for the assessment of damages.

The point on repudiation of the subcontract

[23] Learned counsel, Ms. Barrow for the appellants contended that the trial judge misdirected himself and erred in law in failing to give any proper consideration or weight to the uncontested evidence that:

(a) The respondent's access to the pit found by the appellants had previously been barred and the respondent had on that previous occasion located and worked from another pit in excess of six (6) months;
(b) After the appellants terminated the respondent's access to the pit they had located, the appellant informed the respondent that it was expected to continue working from the pit the respondent had previously located and worked from.

[24] The appellants further contended that the judge misdirected himself and erred in law in finding that the appellants had failed to indicate an alternative pit from which the respondent could work to perform the contract.

The trail judge's approach to the evidence on repudiation

[25] The trial judge dealt with the issue of repudiation of the subcontract from paragraphs 63 to 74 of his judgment. He considered the evidence and the law and found that the letter terminating the access to the Beto Carlos Pit was of great importance. In the letter of 25 November 2014, the respondent was informed by the appellants that the reason for the termination was that the respondent was instigating trouble with the owner of the said pit and extracting materials for their personal use. The judge found that the appellants did not prove the allegation of instigating trouble since the evidence of Mr. Lopez, the only witness for the appellant, was hearsay. As a

result, the judge found at paragraph 70, that the basis for terminating access to the Beto Carlos pit, was wrong and unfair to the respondent, and a breach of contract by the appellants to provide access to a pit it had found. The judge also found that there was no evidence that the respondent was extracting material for its own use. At paragraph 72, the trial judge said that the effect of the above findings showed that the reasons given for stopping access to the pit were just an excuse for terminating the subcontract. The judge further found that the appellants had a responsibility to locate a suitable pit after the termination of access to the Beto Carlos Pit and since that was not done this demonstrated an intention to repudiate the essence of the contract.

[26] The judge found at paragraph 74 that:

> "*As a result of what I consider a breach of the fundamental term of the sub contract, the Claimant is entitled to elect to terminate the sub contract which it did. There arises an obligation on the part of the Defendants to compensate the Claimant in respect of works already done*."

Discussion

Relevant term of the subcontract – 'Materials'

[27] The subcontract under the heading of 'Materials' states:

> "***Materials***
>
> *All materials used for the execution of the works shall comply with the technical specifications stated in VOLUME 3 TECHNICAL SPECIFICATIONS of the Feeder Roads Rehabilitation Project Phase II Lot B, contract Documents.*
>
> ***The JV (appellants) shall be responsible for finding pits that can produce suitable material that is accepted by the Supervision (team) for use in the contract**. The extraction and/or supply of material for the works shall be the subcontractor's responsibility*." (emphasis added)

[28] This provision in the subcontract clearly shows that the appellants were responsible for finding the pits that can produce materials acceptable by the Supervision team and the respondent was responsible for extracting the materials. So firstly the pit

must be identified and the Supervision team has to give its approval since there must be compliance with the technical specifications of the contract documents (which is the main contract for the building of the roads). This provision without a doubt is a fundamental term of the subcontract and it is my view that the trial judge was correct in his finding. This provision is not a mere formality as argued by the appellants.

[29] The trial judge determined that the letter of 25 November 2014 showed that there was a breach of that fundamental term of the subcontract. The letter written by the appellant's attorney to the respondent states:

> "…
>
> *Our clients have provided us with a copy of contract dated 27th September, 2013 whereby you agreed to supply labour, material, plant equipment and other necessary tools and machinery for the construction and completion of works of AMS 2008 Sugar Belt Road Rehabilitation Project Phase 2 Lot-B. By the terms of the contract you were to provide, transport, place and compact fill material and all other earth works operations required for the construction as detailed on specific drawings.*
>
> *In order to facilitate your completion of the contracted works, our clients secured access to a sand pit located in the vicinity of the junction of the San Estevan Road and Progresso Road ("the Beto Carlos Pit") and allowed you to extract and process material required for the works.*
>
> *Our clients have become aware that you have been instigating trouble for them with the owner of the Beto Carlos Pit and processing and extracting material from this pit for your personal use at a cost to them and at the risk of our clients losing access to the pit. As at the 26th September, 2014 you had extracted 128 loads of material at a costs of $1,792.00 to them (which sum our client will set off from any future sums earned under the contract).*
>
> *Your access, and that of any and all of your agents, to this pit is hereby* ***terminated****.*

For the avoidance of doubt, we are to advise that the termination of access to the Beto Carlos pit does not relieve you of your obligations under the contract of 27th September, 2013.

Our clients have also instructed that we inform you that your continued failure to do as promised in your letter of August 2014 is affecting its perception of your ability to complete the works as stated in the Proposed Program of Works you had provided. .."

[30] By letter dated December 1, 2014, the respondent through its attorneys responded to the appellants' attorneys as follows:

"…your clients' summary expulsion of our client from the Beto Carlos Pit is a fundamental breach and or act of repudiation by the Joint Venture of their primary obligation under the subcontract dated 27th September, 2013 between Bella Vista Development Co. Ltd./Lopez Equipment Co. Ltd. and Imer Hernandez Development Co. Ltd.

The Subcontract plainly stipulates under the rubric 'Materials' that Bella Vista Development Co. Ltd. And Lopez Equipment Co. Ltd. "shall be responsible for finding pits that can produce suitable material that is accepted by the Supervision for the use in the contract."

It is undeniable that our client's ability to "supply labour, material, plant, equipment and other necessary tools and machinery" and to generally perform its obligations under the Subcontract hinges on the provision by your client of a pit from which material can be extracted and processed. In fact the provision of a pit constitutes a condition precedent for due performance by our client.

In the premises ***our client does accept your clients' repudiation of the subcontract and the same is at an end as at the date hereof and further treats all obligations from thenceforth as having been absolutely discharged.***

For the avoidance of doubt, our client, its agents or workers will immediately cease all work under the Subcontract and remove all its machinery and equipment from the Beto Carlos Pit and any related worksite….

We hereby formally demand that payment of $721,297.01, being the total sum due by your clients to our client as at the date and the same is to be made within fourteen (14) days of the date hereof, failing which we are instructed to pursue all legal options available for recovery and will do so without any further notice. .."

(emphasis added)

[31] The above response shows that that the respondent viewed the termination to the Beto Carlos Pit as a repudiation of the subcontract and elected to accept the termination. The appellants in response to the letter of acceptance of termination by the respondent, rejected repudiation of the contract. The appellant however accepted that the contract was at an end but for a different reason. That letter of 8 January 2015 from the appellants attorneys to the respondent's attorney states:

"…Our client reject the assertion that the expulsion of your client from the Beto Carlos Pit amounts to a fundamental breach of the captioned contract and asserts that it is your client's disingenuous behavior that amounts to a breach of the contract.

The expulsion of your client from Beto Carlos Pit cannot and does not amount to a repudiation of the captioned contract as that contract never specified the pit from which your client would work. It was open to our clients to find another pit from which your client would work and it was also open to your client to continue working from Chuc's Pit, as it had done in the past when access to Beto Carlos Pit had previously been denied by the owners.

Our clients <u>accept that the contract is at an end</u> but says that it was terminated by your client's failure to act in a manner consistent with the continuance of the contract.

We are to request that the certificate referred to in your letter as substantiating the claim for $1,358,159.68 be provided as our clients dispute your client's entitlement to the sum claimed or any sums at all."

[32] In my view, the trial judge was correct in finding that the allegations against the respondent of instigating trouble and of extracting material for personal use had not been proven since the evidence of Mr. Lopez was hearsay. It was these allegations that were the basis of the termination to the Beto Carlos pit.

[33] It is my opinion that pursuant to the clause on 'Materials' in the subcontract, it was the appellants who had the responsibility to identify another pit that can produce suitable material acceptable by the Supervision team. As such, having terminated access to Beto Carlos pit, there must be identification of another pit. It was not sufficient for the appellants to merely inform the respondent in the letter that the termination to Beto Carlos pit did not relieve them of their obligations under the subcontract. The fact that Chuc's pit was used before the Beto Carlos pit is no excuse to relieve the appellants of their responsibility to identify a suitable pit. The materials for the building of the road is not a matter of suggestion for the use of Chuc's pit or any other pit as it is a fundamental term of the subcontract.

[34] In the case of **Ampurius Nu Home Holdings Ltd v Telford Homes (Creekside) Ltd** [2013 EWCA Civ 577, Lewison LJ applied the principles in **Hong Kong Fir Shipping Co case** [1962] 1 All ER 474, in looking at whether the occurrence of an event discharged the parties to the contract from further performance of their obligations, where the contract itself is silent. The test as laid out by Diplock LJ as shown at paragraph 39 states:

"*The test whether an event has this effect or not has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those obligations?...*"

[35] The event in the case at bar is the expulsion from Beto Carlos pit. This breach goes to the root of the contract thus making it impossible to continue works on the road without the identification of a suitable pit by the appellants. The appellants actions after receiving the letter of acceptance of the breach from the respondent, did not seek to remedy the breach by informing the respondent that it can obtain material from Chuc's pit. Instead the appellants accepted the contract was at an end. The trial judge in arriving at his decision on repudiation had also considered the history of the bad relationship between the parties. In my view, the trial judge rightly determined that the appellants repudiated the subcontract by the letter of 25 November 2014, which terminated the respondent's access to the Beto Carlos pit. Accordingly, I am of the opinion that the trial judge had not erred in his finding that the respondent was "*entitled to elect to terminate the subcontract which it did."*

Damages awarded for repudiation of the contract by the trial judge

[36] The trial judge at paragraph 75 and 76 of his judgment said:

> "*In relation to this second issue, I can deal with this matter shortly and say that I concluded that the alleged damages for repudiation would, in my view, be damages for the loss of an opportunity of the contract, which would have been to put the Claimant in the position they had been if the contract had been performed.*
>
> *In my view the evidence to substantiate this loss has not been made out, and that the Claimant is only entitled to nominal damages which I will fix at $1,000.00.*

[37] I am in agreement with the trial judge that the respondent had not proved the loss of profit for the further performance of their contractual undertakings. Further, the nominal damages awarded was for the loss of opportunity to complete the contract and not as special damages for work and services performed under the contract.

<u>The points raised on the award of $721,297.01</u>

[38] The trial judge at paragraph 77 of his judgment referred to the claim for damages for work already done as an alternate claim. In fact, this was an error as there was no

alternative claim but, a claim for work the respondent alleged had been done at the time of repudiation and for materials that they had already acquired for further road works. The claim itself was not happily worded and hence the cause for confusion. In the statement of claim at paragraph 9, the respondent addressed loss of profit and special damages. The respondent claimed that it had lost the benefit of the agreement as a result of the repudiation of the contract and lost the profit it would otherwise have received and have suffered loss and damage. The claimant/respondent then particularized the special damages as shown at paragraph 10 above. It appeared as claimed that the loss of profit and special damages was one and the same thing because of the manner in which it was drafted.

[39] In oral submissions at the trial, counsel for the claimant/respondent sought to clear up the confusion for the trial judge. The loss of profit and the claim for special damages were two separate issues and this can be seen by the relief sought at paragraph 11 above. The special damages claimed was in relation to work already done and materials the respondent had acquired for the building of the road.

[40] Ms Barrow relied on grounds 2 (c), (d), (e) and (f) in relation to the payment of $721,297.01. The general ground being that the trial judge misdirected himself and erred in law in failing to give any proper consideration or weight to the uncontested evidence.

Measurement and approval of the works

[41] Ground 2 (c), (d) can be conveniently disposed of together since it calls for a construction of the Clause **"Measurement & Payment**". The two issues are:

> (c) *Whether payments to the respondent had to be made based on quantities that had been approved and for which the appellants had been paid under their contract with the GOB;*
>
> *(d) Whether the respondent was required to reconcile data with the appellants in respect of the quantities of work for which they claim $721,297.01;*

[42] The Subcontract between the appellants and the respondent dated 27 September 2013, under the heading of **"Measurement & Payment**" provides:

> "*Measurement and payment of each item of works shall be in accordance with the specification of the "Contract". Works shall be measured monthly in line with submission of documentation for Interim Payment Certificates. The unit of measurement shall be that specified in the Bill of Quantities approved and signed by both Imer Hernandez Development Co. Ltd. and JV and shall be paid based on approved and paid quantities. It shall be understood that payment will be made to the sub-contract no later than 7 days after payment [of] each interim payment is received by the JV.*"- (JV means Joint Venture as Bella Vista Development Co. Ltd and Lopez Equipment Ltd worked together).

[43] Counsel argued that it was clear from paragraph 81 of the written decision of the trial judge that he gave no consideration or weight to the significance of the uncontested documentary evidence that the subcontract between the appellants and the respondent provided that the respondent would be paid based on quantities that had been approved and for which the appellants had been paid under their contract with the Government of Belize (GOB).

[44] The trial judge at paragraph 81 said:

> "*I also accept that one can't help but to feel a certain amount of sympathy for the defendants (appellants), if in fact they had only received $424,215.44 as they claim (on the main contract); but I am not even clear on the evidence in the case that this is in fact so; so it is difficult to give any effect to any such sympathy based on the evidence, because it seems as if this is only the amount that they received during the period of the sub-contract. Also, and in any event, apparently it is unclear and unknown whether any monies is actually due to them (the Defendants) or have been obtained by them for the period outside of the sub-contract. I am not going to speculate, as speculation is what is involved, as there is no evidence to support it."*

[45] Ms Barrow argued that the trial judge had not considered the clause in relation to "Measurement & Payment" which showed that there were pre-conditions to be met before payment is made to the appellants by GOB. The pre-conditions being that items had to be measured monthly and the measurements had to have been approved under the main contract with GOB before payment is made. The appellants' contention was that they owed no monies to the respondent because GOB had not paid them under the main contract for the items of work for which the respondent claimed payment.

[46] Learned counsel for the respondent in written submissions in response submitted that the trial judge considered the clause in the subcontract on 'Measurement and Payment' as shown at paragraph 81 of his decision when he considered the evidence of Alex Lopez which shows that, "*during the period of the Subcontract, the Defendants received six (6) payments under the Contract totaling $424,215.44."*

[47] The respondent further submitted that though the term of the subcontract states that payment to the respondent would be based on approved and paid quantities, the subcontract did not stipulate that payment must come from specific interim payments, such as payments received during the life of the subcontract. Further, it would be unfair and inequitable for the respondent to have expended time, resources and money in executing the works under the subcontract and not recover payment for the works performed.

[48] The respondent submitted that the invoice dated 27 November 2014, was based on measured work though there was no formal reconciliation process and that the quantity of work done is displayed in the first column of the invoice. Further, the invoice coupled with the evidence of Omir Vega that invoices were prepared based on quantities of works measured on site persuaded the court below that the respondent did the works and was entitled to the payment of $721,297.01.

[49] The issues raised above call for a construction of the clause "*Measurement & Payment"* in the subcontract. The understanding of the parties as to how payment had to be done as shown by the history of payments already made, is also enlightening in making a determination of these issues.

[50] I agree with the appellants that the trial judge failed to address his mind to the clause in question. This clause shows the following:

1) Measurement and payment has to be done in accordance with the main contract with GOB;
2) Works shall be measured monthly and the unit of measurement shall be that specified in Bill of Quantities that had been approved by both the appellants and the respondent;
3) Interim Payment Certificates (IPC) has to be submitted to GOB along with documentation;
4) Payment shall be made to the respondent based on approved and paid quantities;
5) When the appellants (contractor) are paid by GOB, payment shall be made to the respondent no later than 7 days after the appellant receives interim payment from GOB.

[51] It is clear from the above that payment cannot be made to the respondent unless the works done by them had been measured in accordance with the bill of quantities and approved as specified under the main contract. This approval is done by an independent Supervision team for GOB. The definitions section of the subcontract shed some light on this aspect of the main contract. Under the heading of "*Definitions*" the word *"Supervision"* means team set forth by the Project Executing Unit to supervise and approve all works and materials for the contract. The Contract being the AMS 2008 Sugar Belt Road Rehabilitation Project – Phase 2 Lot B. One cannot lose sight of the fact that the appellants are the contractor (under the main contract with GOB) and had subcontracted to the respondent. The Supervision team therefore has to protect the interest of GOB who has to make payments based on the approval of all works and materials. The approval is obviously based on quantity and quality of the road works that had to be done. This verification had to be done between the appellant (principal contractor) and GOB. The respondent who was the subcontractor provided the invoice to the appellants with the supporting documents showing the works done.

[52] There was no evidence before the trial judge to show that there was reconciliation of data between the appellant and the respondent for works and materials valuing $721,297.01. Further, no Interim Payment Certificate had been issued by the appellant and approved by GOB as was done in previous approved payments. The respondent had submitted several invoices during the contract period, two of which had been paid after there was submission of the IPCs by the appellant to GOB. There is no dispute that at the conclusion of the contract, the final invoice was submitted without reconciliation of data between the appellants and the respondents. The obvious conclusion is that there was no measurement and approval by the Supervision team to verify the quantity and quality of the work done. This was necessary in order for the appellants to be paid by GOB and thereafter for them to pay the respondent. Since the appellants had not been paid for that particular invoice by GOB, no payment could have been made to the respondent within the 7 days period as stipulated by the subcontract.

History of Interim Payment Certificates issued in the past

[53] The history of previous payments made to the appellants by GOB were before the trial judge as shown at paragraph 45 of the witness statement of Alex Lopez. Mr. Lopez at paragraph 45 said:

> "45. During the period of the subcontract, the defendants (appellants) received six(6) payments under the Contract totaling BZ$424,215.44. The first of those six (6) payments received was solely for preliminary and general works and amounted to $22,536.53. The last of the six (6) payments received during [for] the period September 2014 to October 2014 was solely for Drainage.

IPC No.	Transaction Date	Post Date	EURO	BZ Amount
10	10/04/2014	16/04/2014	…..	BZ$ 22,536.53
11	10/04/2014	16/04/2014	….	BZ$ 35,860.52
12	07/07/2014	11/07/2014	…..	BZ$ 141,355.01
13	07/08/2014	13/08/2014	….	BZ$ 90,700.17
14	14/11/2014	26/11/2014	….	BZ$ 112,811.91

15	04/02/2015	11/02/2015	….	BZ$ 20,951.30

BZ$ 424,215.44

[54] Mr. Lopez in cross-examination testified that there were a total of 7 IPCs submitted to the Project Execution Unit and six were paid. He further testified that IPC 16 had not been accepted by GOB.

[55] The evidence of Alex Lopez as demonstrated by exhibits AL 24 and AL 25 shows the procedure followed in the past before payment is made to the appellants and thereafter payment is made to the respondent. The invoice submitted by the respondent was supported by a certificate of the works done. This certificate shows an itemized description of the items of work, the unit of measurement, the number of the item in the bill of quantities, the rate of payment, quantities claimed previously and the quantities being claimed at the present time.

[56] The standard disclosure for the appellants as shown at pages 53 – 59 of the record shows the communication between the Team Leader for GOB and appellants in relation to payments made by GOB. The documents show the Interim Payment Certificates (IPCs) that were issued and those approved during the subcontract. Many IPCs were issued but not all approved. Number 43 of the disclosure show letter from Team Leader dated 6 March 2014 providing revised IPCs for No. 10 and No. 11. Number 47 of disclosure shows IPC No. 13 which was submitted on 14 April 2014. Number 48 of disclosure shows copy of a letter from the Team Leader dated 22 April 2014 providing signed copies of IPC No. 12. Number 49 of disclosure shows that IPC No. 12 was returned for lack of documentation and for price change. Number 54 of disclosure shows letter from Team Leader providing copies of signed IPC No. 12 which has been forwarded to National Authorizing Officer. Number 65 of disclosure shows copy of IPC No. 14 submitted on 14 July 2014. Number 77 shows a copy of a letter from the Team Leader to the Project Director dated 28 August 2014 providing IPC No. 14 for approval of $119,797.89. Number 100 shows copy of IPC No. 15 submitted on 4 December 2014.

[57] The above shows a pattern as to how payments were made by GOB to the appellants. It was not merely submitting an invoice given to appellant by the respondent. As shown above, IPCs which lacked proper documentation were not approved. The Supervision Team was tasked with the responsibility of approving the works done. The Chief Executive Officer of the Ministry of Works was the Chief Supervising Officer of the project and was part of the Supervision Team.

[58] In my view, the trial erred in his finding that there was proof that the respondent was entitled to the payment claimed. The respondent was required to firstly reconcile data with the appellants in respect of the quantities of work for which they claim payment. Thereafter, there had to be submission by the appellant of an IPC along with the supporting documentation to GOB. Payments to the respondent had to be made based on quantities that had been measured and approved by the Supervision team for GOB, and for which the appellants had been paid under the principal contract with GOB. These pre-conditions were not met.

Whether there was evidence that the respondent provided works and services to the appellants valued at $721,297.01 – Ground 11 (e)

[59] The special damages/financial loss had been pleaded by the respondent but not strictly proven as required in claims for financial loss of this nature. The judge at paragraph 78 of his decision arrived at his finding by applying the proof of a balance of probabilities. The judge said:

> *"I have heard all the evidence from the Claimant and the Defendant, witnesses for the Claimant and for the Defendant and I must say on balance I prefer the testimony of the witnesses on behalf of the Claimant, the evidence of the Claimant, and I find myself satisfied on balance that they have established that they have proved the amount that they have claimed in the Statement of Claim which is $721,297.00*."

[60] The claim that was before the trial judge required strict proof. As discussed above, there were the pre-conditions that had to be met. These conditions were not met and as such the amount of $721,297.00 was not strictly proven.

[61] The evidence from the respondent's principal, Mr. Hernandez was that it had not provided any invoice as was previously done and that the claim for the $721,297.01 was made by way of the attorney's letter of 1 December 2014. It is clear from the evidence that the respondent understood the procedure for payment to be made since that had been done twice before.

[62] Mr. Hernandez under cross-examination testified that the respondent made only two claims when the subcontract was stopped. The first one was made in May 2014 for $240,433.07 and the second in June 2014 for $302,756.80 as shown at Annex C of his witness statement. The final invoice for $1,358,159.68 less monies received including down payment, was issued in November 2014, five months after the second invoice. He testified that he could not explain the third invoice but the Engineer would be able to do so. All he could say was that it was an assessment of everything the respondent had done up to the date when they stopped working. He admitted that the two previous invoices looked different. He testified that before the invoices were submitted, his engineer and the contractor valued the claim. He said that he was aware that GOB/EU had to be satisfied with the works they did under the subcontract for the appellant to be paid and thereafter for the appellant to pay him. He also understood that for the appellants to be paid by GOB, they had to meet the technical specifications. He further testified that he did not know whether the technical specifications were met but his Engineer would be able to testify to that aspect.

[63] Mr. Omir Vega who is a Civil Engineer was the respondent's project manager and engineer. He visited the site once or twice a week. Mr. Vega also understood the procedure for payment to be made to them. In relation to the last invoice, he testified that he received information from two site supervisors, Mr. Jose Hernandez and Mr. Teodoro Aleman who met with Mr. Rudolph Lamb to do the measurements.

[64] There was absolutely no evidence that GOB's Supervision team had measured and approved the works done as was done previously. In fact, the invoice issued by the respondent was for the entire works done until repudiation. There was no submission by the appellant of an IPC along with the supporting documentation to GOB for

verification of the works as was required by the contract. Mr. Imer Hernandez at paragraph 11 of his witness statement said:

> *"After the second invoice was submitted to the Defendants the Claimant continued to do work until the termination of the subcontract. A third invoice was therefore prepared factoring in the totals from the first two invoices and the total work done in the period from the second invoice up to the termination of the contract. The third invoice reflects the combined total of $1,358,159.68 for work done under the subcontract up to the time of termination. A true copy of this third invoice is now shown to me, hereto attached and marked 'D'. This last invoice was sent to the Defendants through the Claimant's Attorneys-at-law, Messrs. Barrow & Williams LLP under cover letter to the Attorneys-at-Law for the Defendants."*

[65] The said last invoice for the total of $1,358,159.68 was quite unusual as it included works which had been measured, approved and paid. That is, it included the first invoice for $240,433.07 and the second invoice for $302,756.80. A lump sum was claimed for the total work done less the amount paid. In summary the total claimed was $1,436,909.68 less $715,612.67 which amounted to a total balance of $721,297.01. There was no regard to the contractual provision as was done previously for Invoice 1 and Invoice 2 and for which payment had been approved and paid by GOB. The fact that there was bad relationship between the parties does not relieve them of the requirements under the subcontract. Further, Mr. Jose Hernandez and Mr. Aleman from whom Mr. Vega received the information for the last invoice, had not given evidence at trial to show how they arrived at the sum claimed. Most importantly, the pre-conditions for measurement and approval by GOB had not been met making the claim for $721,297.01 premature. Accordingly, it is my opinion, that the trial judge erred when he found that the respondent proved to the satisfaction of the court that it is entitled to the claim for $721,297.01.

Disposition

[66] The orders that I propose to make are:

(1) The appeal is partly allowed.

(2) The respondent succeeds on the issue of repudiation of the subcontract.

(3) The trial judge's order to award $721,297.01 is reversed and the claim for the said amount is dismissed.

(4) Each party will bear its own costs in this appeal and in the court below.

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HAFIZ-BERTRAM JA

BLACKMAN JA

[67] I have read the draft judgment of my learned sister, Hafiz Bertram JA and I concur in the reasons for judgment given, and the orders proposed in it.

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BLACKMAN JA