IN THE COURT OF APPEAL OF BELIZE, A.D. 2016

CIVIL APPEAL 9 of 2016

BETWEEN

A&N CONSTRUCTION (a firm) APPELLANT

v

HERITAGE BANK LIMITED RESPONDENT

BEFORE:

The Honourable Mr. Justice Sir Manuel Sosa -President
The Honourable Mr. Justice Christopher Blackman -Justice of Appeal
The Honourable Mr. Justice Murio Ducille -Justice of Appeal

Mr. Fred Lumor, SC, with Ms. Sheena Pitts for the Appellant
Mr. Andrew Marshalleck, SC, for the Respondent

March 15 and 24, 2017 and 22nd June, 2018

SIR MANUEL SOSA P

[1] This appeal should, in my opinion, be dismissed. I concur in the reasons for judgment given, and the orders proposed, in the judgment of my learned Brother, Blackman JA, which I have read in draft.

SIR MANUEL SOSA P

BLACKMAN JA

Introduction

[2] The issue for determination on this appeal is whether a document issued by the respondent Bank was a performance bond in favour of the appellant, a construction firm owned by Mr. Norman Reimer for payment in the sum of $228,202.36 in connection with a construction contract executed between A&N and Triple B Heavy Equipment Ltd. ('Triple B').

[3] The contention by the appellant both in this Court and the Court below was that the Bond provided for payment to the appellant by the respondent Bank of the amount claimed, for "works relating to the Road Paving and Painting portion of the project.". The Bank's response that the document sought to be relied upon by A&N did not create a performance bond and in fact gave rise to no legal liability for payment on the part of the Bank was upheld by **Griffith J** in her decision dated January 18, 2016.

[4] The following three grounds of appeal were filed on March 4, 2016

(1) The Learned Trial Judge erred in law and did not apply the statutory provisions of sections 5(b) and 6 of the Contract Act, Cap. 166 when she decided that "the performance bond ... unsupported by consideration, is required to be executed under seal in order to be enforceable." (para. 28)

(2) The Learned Trial Judge erred in law by deciding that what the Appellant desired can be viewed as a "guarantee of payment", and since it is a contract, the letter issued by the Respondent Bank lacked all the elements of a contract as it is not supported by consideration. (paras. 32 & 33)

(3) The Learned Trial Judge erred in law and misdirected herself when she decided that the letter issued by the Respondent Bank does not amount to a performance bond or guarantee of payment since -

(a) The letter created no contract; and

(b) The letter is not an independent obligation of the Respondent Bank which is irrevocable and payable on demand or "an irrevocable letter of credit". (paras. 34 & 35).

[5] During the course of the appeal, the appellant sought to add a fourth ground of appeal that the Learned Trial Judge erred in ruling or finding that the appellant abandoned the issue of estoppel at trial which had been raised by the appellant in its Reply to the defence of the respondent.

[6] The Court, by a majority refused the application to amend and stated that it will later give its reasons for that decision. Those reasons appear later in this judgment.

[7] Senior Counsel, Mr. Fred Lumor for the appellant invited the Court to consider his written submissions on the three grounds of appeal cited above. The gravamen of the submissions are that the trial judge erred in law in respect of each of the findings made on the construction of a letter dated 9th December, 2011 by the respondent Bank to the appellant firm for payment of monies due under a contract dated 12 December 2011 between Triple B and the appellant firm. The material part of the letter reads:

> **"*We advise that funding will be available for payment for works carried out under the above reference by A &N Construction on the basis of 50 per cent of value of works upon commencement of paving works at each stage. The balance of payments for such works will be made by Heritage Bank Ltd to A & N Construction no later than 45 days after the Payment certificate has been agreed by and received from the Project Execution Unit for works relating to the Road Paving and Painting portion of the project."***

[8] In my view, the trial judge gave careful consideration to the evidence adduced on behalf of the claimant and the submissions and authorities submitted on its behalf. A review of the Record of Appeal indicates that Mr. Norman Reimer the principal of the appellant claimant was the only witness for the claimant at trial. Under cross examination on the terms of the letter reproduced above, the learned trial judge felt obliged to say to Mr. Reimer, as recorded at page 210 of the Record of Appeal:

"*I think I feel compelled to say Mr. Reimer, when the Court assesses evidence which I have to do, I assess not only what you say but I assess exactly. I assess how you say it, your entire body language, your demeanor, everything. Mr. Marshalleck is doing a job, we are all doing jobs in here so where I might appreciate that there might be a certain sentiment that you may have in relation to the proceedings, everybody is doing a job and I am just letting you know that not only what you say, how you say it, how you respond is going to play a role in how I assess the truth of what you say, ok? All right."*

[9] Prior to the disposition of the matter, the trial judge had considered a number of authorities, particularly ***Edward Owen Engineering Ltd v. Barclays Bank International*** [1978] 1 All ER 976 and ***Gold Coast Ltd v. Caja de Ahorros del Mediterrraneo and others*** [2001] EWCA 1086 in concluding that no contract had been created between the parties or was a guarantee of payment. Moreover, at paragraph 35 of the decision dated January 18, 2016 the learned trial judge held that the Claimant had failed to prove that the letter issued by the Defendant Bank amounted to a performance bond or guarantee of payment on behalf of Triple B. The Court also noted that while an issue of estoppel had been raised in the Claimant's reply it was never pursued at trial, and consequently, there was no consideration of that issue by the Court.

[10] In relation to the finding by the trial judge that the Claimant had failed to prove that the letter issued by the Defendant Bank amounted to a performance bond or guarantee of payment on behalf of Triple B, this Court differently constituted, had occasion in the matter of ***Herrera and others v. Gomez and others*** Civil Appeal N0. 30 of 2014, and affirmed by the Caribbean Court of Justice on March 29, 2018 to reflect on an appellate's court ability to review findings of fact by a trial judge. In a judgment dated 24 March 2017 we observed at paragraphs 72 and 73 that:

"72. Over the last 70 years, a body of jurisprudence has developed in relation to an appellate's courts ability to review findings of fact by a trial judge. Lord

Thankerton stated the principles in ***Watt (or Thomas) v. Thomas [1947] 1 All ER*** **582 at page 587** "(i) "*Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion. (ii) The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. (iii) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."*

[73] That principle was re-stated by Lord Scarman in ***Maynard v. West Midlands Regional Health Authority [1985] 1 All ER 635 at 637*** *and more recently by the* ***Bahamas Court of Appeal in the matter of The Airport Authority v. Western Air Limited [2014] 2 BHS J. No. 36****. In light of the principles in the foregoing authorities and on a consideration of the matter, having regard to the findings of the trial judge, who had the opportunity to observe Ms. Gomez the Supervisor as a witness, I would agree with the learned trial judge that the Supervisor did not act in bad faith…"*

[11] In light of the express caution given by the trial judge noted at 6 above, and having regard to the principles of law adopted in ***Herrera*** I am unable to find any basis to disturb the conclusion reached by **Griffith J.** in relation to Mr. Reimer's evidence, and consequentially, to the disposition of the dispute.

[12] The final matter that needs to be addressed is that of our reasons by a majority, for refusal of the appellant's application to add a fourth ground of appeal in relation to the issue of estoppel. The majority were and are of the view that since the issue of estoppel was raised only in the claimant's pleadings by way of Reply and that neither the written submissions nor witness statements had addressed the issue, it would be unfair to the respondent to allow an amendment at that point of the appeal.

[13] In the result, I would dismiss the appeal with costs to the respondent, to be taxed in the absence of agreement. I would also affirm the orders of the trial judge. I would further order (a) that the above order as to costs be provisional in the first instance but become final after 14 days from the date of delivery of this judgment, unless either party shall file an application for a contrary order within the said period of 14 days and (b) that, in the event of the filing of such an application, the matter of costs shall be determined on the basis of written submissions to be filed and delivered in 14 days from the filing of the application.

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BLACKMAN JA

DUCILLE JA

[14] I have had the benefit of reading the judgment of Blackman, JA in the above-captioned matter and I am in full agreement with the reasoning and conclusions therein and cannot add anything further.

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DUCILLE JA