GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.12 OF 1995

BETWEEN:

ISSA NICHOLAS [GRENADA LIMITED]

Appellant

v

ELECTROTEC SERVICES LIMITED

Respondent

Before:

The Rt. Hon. Sir Vincent Floissac	Chief Justice
The Hon. Mr. C.M. Dennis Byron	Justice of Appeal
The Hon. Mr. Satrohan Singh	Justice of Appeal

Appearances:

Mr. K. Hudson Phillips, QC and Mr. Jayaram
instructed by Ernest John for the Appellant
Sir Harold St.John, QC & Mr. J. Bristol, instructed by Henry, Henry and Bristol for the Respondent

---

1996: February 27; 28; 29;
May 13.

JUDGMENT

BYRON J.A.

This is an appeal against the decision of St.Paul J. delivered on the 16th June 1995 in which he gave judgment for the respondent in the sum of $325,921.00 EC with interest at 6% per annum until payment and costs to be agreed or taxed.

The Narrowed Issue

In brief the respondent had sued on an alleged oral contract made between the 5th November 1985 and 11th July 1986 with the appellant to do electrical and plumbing work on its Ramada Renaissance Hotel. It alleged that the appellant engaged Project Control Associates [PCA] to act on its behalf with regard to the said works, and orally advised that

payment would be certified by the said PCA.

In its defence the appellant denied any contractual relationship with the respondent, and alleged a contract with PCA for the construction/renovation of the Hotel and a sub-contract between PCA and the respondent to perform the electrical and plumbing work.

The respondent did not join PCA as a party nor raise any issue of quantum meruit. An obvious result of this omission is that no order can be made to give effect to any finding of a contractual relationship between PCA and the respondent. Another, is that failure to prove the alleged contract is critical as the respondent would not be entitled to judgment for a reasonable sum, on proof of work done at the request of the appellant.

Contrary to the allegation of agency in the pleadings, counsel for the respondent agreed that their case would stand or fall on the issue of whether there was a direct contract between the appellant and the respondent. The proposition that the pleadings confine the court in this manner was expressed by Goff J. in **British Steel Corporation v Cleveland Bridge Co. Ltd.** [1984] 1 All E.R. 504 at p.509:

> "In most cases, where work is done pursuant to a request contained in a letter of intent, it will not matter whether a contract did or did not come into existence, because, if the party who has acted on the request is simply claiming payment, his claim will usually be based on a quantum meruit, and it will make no difference whether that claim is contractual or quasi-contractual. Of course, a quantum meruit claim [like the old actions for money had and received and for money paid] straddles the boundaries of what we now call contract and restitution, so the mere framing of a claim as a quantum meruit claim, or a claim for a reasonable sum, does not assist in classifying the claim as contractual or quasi contractual. But where, as here, one party is seeking to claim damages for breach of contract, the question whether any contract came into existence is of crucial importance."

The Appeal

The main issue raised by the appellant in the grounds of appeal was that there was no privy of contract between the appellant and respondent in relation to the said works, but rather that the respondent

was a sub-contractor of PCA.

The respondent relying on a line of cases which included **Bookers Stores v Mustapha Alley** [1972] 19 WIR 230; **Adolphus v Popper** [1986] 39 WIR 76; **Singh v Chase Manhatten** [1991] 45 WIR 220 submitted that the findings of the learned trial Judge should not be disturbed. These cases affirm the principle that an appellate court recognising the advantage of a trial Judge in determining the credibility of witnesses, having actually seen and heard them, would not normally substitute its judgment on this issue.

This proposition, however, is not applicable to this appeal as no evidence was adduced on behalf of the appellant and the findings of the learned trial Judge did not turn on his evaluation of the credibility of any witness. His decision was based on the inferences he drew from uncontradicted oral and documentary evidence.

An appellate court is in as good a position as a trial Judge to determine the proper inferences to be drawn from such evidence and should form its own independent opinion.

This principle was explained in **Benmax v Austin Motor Co.Ltd.** [1955] 1 A.E.R. 326 at 329, by Lord Reid thus:

> "But in cases where there is no question of the credibility or reliability of any witness, and in cases where the point in dispute is the proper inference to be drawn from proved facts, an appeal court is generally in as good a position to evaluate the evidence as the trial judge, and ought not to shrink from that task, though it ought, of course, to give weight to his opinion."

The Law

The legal principles which govern privity of contract in building contracts are not in dispute. The general principle is that no privity of contract, between a building owner and a contractor, can arise out of a sub-contract concluded between the building owner’s main contractor and that other contractor.

I adopt the statement in Hudson’s Building and Engineering Contracts 1 995 edition volume 2 paragraph 13-016:

> "It cannot be over-emphasised that no privity of contract between an owner and another contractor can arise out of a

> sub-contract concluded between the owner's main contractor and the other contractor. Where the sub-contractor has been selected by the owner, as in the case of a nominated sub-contractors, early attempted were made to argue that the main contractor on the A/E had on the facts contracted as an agent or trustee of the owner, and at one time this view appears to have prevailed in the courts, at least in relation to nominated or selected subcontractors. However, the later cases made it clear that in only in the most special and unusual facts, showing that the owner expressly or by some unusual conduct authorised the main contractor or the *AlE* so to contract, would justify such a finding, which is contrary to the purpose of the usual main contract and the practice and expectation when negotiating contracts informally between the various parties in the construction industry."

An employer may, however, become liable to a sub-contractor on an express promise to pay the sub-contractor where he gives him a direct order to carry out work. I also adopt the statement in Keating on Building Contracts fifth edition at page 285:

> "Orders by employer. If the employer gives a direct order to a sub-contractor to carry out work or deliver goods he may make himself liable to the sub-contractor on an express promise to pay the sub-contractor.
> A sub-contractor, suing the employer for work extra the original contract, must put in that contract if in writing, and also prove a separate and distinct contract with the employer to do the work sued for. Eccles v Southern [1861] 3F&F 142, NP."

The Background

Mr. lmtiaz Hosein, a civil engineer and a director of PCA, gave evidence for the respondent. He stated that the appellant and PCA of Trinidad had entered into a written contract on 7th August, 1985 [which was exhibited in evidence] to renovate 1 86 rooms for a the sum of US $3,361,270.00. PCA and the appellant also orally contracted on the same terms for construction of new central facilities at a price of US$3,000,000.00, and also for certain external works and variations in the area of US$2,000,000.00. He was apppointed by Hafeez Karamath Construction to act on behalf of PCA for the supply of equipment, labour and materials for the project and to make arrangements for all shipments and foreign purchases. He said that PCA subcontracted the respondent to do electrical and plumbing works as specialist electricians

and plumbers approved by Mr. Nicholas.

He added, that there were works relating to external works separate from the original works which PCA supervised, as requested by Mr. Nicholas verbally.

Mr. Lindsay Gay, the representative of the respondent acknowledged sending letters to Messrs Hafeez Karamath on 12th August 1985 quoting the price of $256,400.00, "exclusive of the Main Contractor's discount", for carrying out the electrical and plumbing works for the reinstatement of the 186 rooms, and on 18th September 1985 enclosing documents indicating that the total sum for its work on the Renovations Contract would be $256,400.00, on the New Central Facilities Contract $335,000.00 and for works additional to those contracts $85,860 for the external works contract $1,271,300.000 and for works additional to that contract $182,000.00, and referring to projected cash drawings on these contracts on dates which included 20th September, 4th & 18th October, 1st, 15th & 29th November.

The written or main contract between the appellant and PCA exhibited in evidence contained the following provisions:

Clause 59(1):

> "All specialists, merchants, tradesmen and others executing any work or supplying any goods, materials or services for which Provisional Sums are included in the Contract, who may have been or be nominated or selected or approved by the Employer or the Engineer, and all persons to whom by virtue of the provisions of the Contract the Contractor is required to sub-let any work shall, in the execution of such work or the supply of such goods, materials or services, be deemed to be subcontractors employed by the Contractor and are referred to in the Contact as "nominated Sub-Contractors".

Clause 59[5]:

> "..... the Employer shall be entitled to pay such nominated Sub-Contractor direct, upon the certificate of the Engineer, all payments, less retentions, provided for in the Sub-Contract, which the Contractor has failed to make to such nominated Sub-Contractor and to deduct by way of set-off the amount so paid by the employer from any sums due or which may become due from the employer to the Contractor."

The bills of quantities attached to the exhibited contract for the room renovations showed that provision was made for the cost of the electrical and plumbing works. In my view the evidence established that

the respondent was a nominated sub-contractor under Clause 59[1].

Mr. Hosein said that the role of PCA changed sometime before the end of 1 985 because Mr. Nicholas made payments directly to the subcontractors and to the suppliers of material on certificates issued by PCA.

The legal effect of that change of role is governed by the well established principle that where the contract between the building owner and the main contractor provides for direct payment by the employer to a sub-contractor, such payment does not create privity of contract. **A. Vigiers Sons & Co. Ltd v Swindell** [1939] 3 All E R 590. By the appellant's direct payment to the respondent, the appellant was merely exercising the contractual power, right or privilege granted to it under clause 59[51 of the main contract.

In my view, therefore, Mr. Hosein's evidence of this change of role did not establish that the appellant and the respondent entered into a direct contractual relationship.

The Direct Request

Mr. Gay's evidence about the two meetings in which the appellant gave the respondent the instructions which form the basis of this claim has to be considered, against this background.

The first meeting was on 5th November 1985 at Issa Nicholas office in Trinidad.

Mr. Gay said:

> "The discussion related to the work that needed to be done not related to our original scope of work. We went through each item of work with corresponding prices we prepared for doing this work. Some of these items of work were agreed by Mr. Nicholas and were instructed to proceed. Mr. Nicholas gave those instructions. In other items he needed more details and site measurements. These were subsequently submitted. After this discussion I recorded the discussions that took place.
>
> The record was circulated to all persons including Mr. Nicholas."

Mr. Gay described these instructions as contract #3. The second was at a site meeting, the date of which was not given. The appellant requested that the respondent carry out certain additional works. Mr. Gay described these works as contract #4. There was no written

record of this meeting.

The findings of the learned trial Judge were expressed in this manner:

> "I am of the view that the defendant by conduct, as the exhibits have shown, and also by direct request by Issa Nicholas authorised the plaintiff to carry out the work in question for the defendant.
> The evidence in this case seems to be on 'all-fours' with the case of Eccles Ltd v Southern [1 861] 3F & F142 where it was held that a sub-contractor suing the employer for extra work under the original contract, must put in that contract, if in writing, and also prove a separate and distinct contract with the employer to do the work sued for.
> In Wallis v Robinson [1 8621 3 F & F it was held that if the sub-contractor is ordered direct by the employer to do work, the employer must pay for it."

The learned trial Judge applied the wrong principle when he found that the appellant authorised the work. As explained in the extract from Hudson's earlier, authorisation is relevant in cases where the issue is whether the main contractor or architect contracted with the sub-contractor as agent or trustee of the building owner. This did not arise here as the evidence was that the appellant gave the respondent direct instructions to do the work. The proper test to be applied, as explained in the extract from Keating is whether the appellant became liable on an express promise to pay the subcontractor. The learned trial Judge did not find that it did, and rightly so, because there was no evidence of such an express promise.

The learned trial Judge was wrong to describe the case as being on all fours with **Eccles v Southern,** The respondent did not allege in its pleadings that it had a sub-contract and was suing for extra work under the original contract, nor did it prove the terms of its original sub-contract with PCA. The evidence that the appellant gave its nominated sub-contractor instructions to do the work is not by itself inconsistent with the main contract and is not proof of a separate and distinct contract.

Wallis v Robinson should also be distinguished. Keatings 5th edition at p.286 sets it out as follows:

> "Where, in the progress of building work done under a contract, some process more expensive that contracted for was ordered by the architect, with the knowledge of the employer, and the builder's sub-contractor was told it was to be paid extra for: Held there was evidence of a contract to

> pay him extra for it , and of authority in the architect to make such a contract with him. **Wallis v Robinson** (1862) 3 F & F 307,NP."

The principle is that a building owner may be liable on an express promise to pay the sub-contractor for work which was extra or more expensive than required by the sub-contract. The facts of this case do not fall within that principle. The respondent did not sue for extras, nor prove the terms of the original contract, nor show that the work ordered was extra or more expensive, nor was there evidence of a promise to pay separately for the extra work.

The record of the meeting of 5th November 1985 which Mr. Gay circulated was put in evidence. It was a letter dated 6th November 1985 addressed to Mr. Hosein of PCA. Copies were sent to all persons who were present including the appellant's representative, Issa Nicholas.

This was more consistent with a report to the main contractor by a nominated sub-contractor, than with the commencement of a contractual relationship between the appellant and the respondent, as it was not addressed to the appellant.

Conduct of the Parties

The pay requests or bills were sent from the respondent to PCA. Pay request No.4 dated 14th November 1985 was entitled:

> "Electrotec Services Limited.
> Subject: GRENADA BEACH HOTEL LIMITED.
> Main Contractor: Project Control Assocs."
> It claimed
>
> | | |
> |---|---|
> | "Contract 1 | $254,597.00 |
> | Contract 2 | $310,403.00 |
> | Contract 3 | $133,300.00 |
> | Total | $698,300.00 |
> | Previously claimed | $407,747.00 |
> | Bill # 7806 | $290,553.00" |

The 6th January 1986 bill claimed that the total contract sum due was $928,827.00, the total paid was $435,412.74 and the total outstanding was $493,459.26.

The 28th February 1986 bill claimed that the total contract sum due was $981,351.00, the total paid $500,829.74 and the total outstanding was $480,522.00.

On 28th February 1986 the respondent sent PCA a statement detailing the additional works on contract 4 and showing a total due of $52,459.00 which was the bills of 6th January 1986 and the 28th February 1986.

On 22nd May 1986 it claimed that the total sum due on the contract was
$981,351 .00, the total paid was $533,417.57 balance outstanding was $447,933.43.

On 2nd December 1 985 PCA wrote to the appellant

> "I wish to submit as you had requested a summary valuation of works done as at 30th November 1985 together with a summary of all payments made to date. Please note that the valuation used for Contract (2) - Repairs and Renovations toe Rooms, and Contract (3) - New Facilities were as per our original agreements. Contracts (1) and (4) - Site Works and External Mechanical/Electrical were in accordance with the figures given to the World Bank Officials and would incorporate the contracts agreed to by you with Electrotec, for the Sewer Treatment Plant and for the External Drainage Works.
>
> Total Value of Works to date
> E.C. $6,408,500.00
>
> Total of payments received,
> payments made on our behalf,
> and payments authorised by us
> $5,551,491.34
>
> Balance $ 857,008.66"

The reference in this letter to contracts agreed by the appellant and the respondent for the Sewer Treatment Plant and the External Drainage Works confirms that the relevant sums were absorbed in the contract between the appellant and PCA and refutes the contention that they formed separate or distinct contracts.

This accords with the well established principle that a building owner is not liable under a sub-contract between its main contractor and the subcontractor even if the terms of the subcontract, were not settled by the main contractor but by the building owner or his

architect, once those terms fell within the sums provided in the main contract. **Hampton v Glamorgan** [1917] A.C. 13.

On 23rd January 1986 PCA issued a payment certificate signed by Mr. Hosein and addressed to the appellant, certifying the

Contract Sum	$8,500,000.00 US
Value of Works done	$8,255,270.00 US
Total Value of Works Certified	$8,255,270.00 US
Payments made	$8,255,270.00 US
Payments made directly for materials and equipment [Finishes, electrical, sewer, etc]	$1,323,118.00 US
Amount Due This Certificate	Nil".

Mr. Hosein's evidence did not explain away or even address the inference that the value of the works in this certificate included those works for which the respondent had sent in claims prior to 21st January 1986.

The conduct of the parties up to the end of May 1986 as revealed by the exhibits is, therefore, consistent only with the existence of a sub-contract between the respondent and PCA. The evidence was that changes in the conduct occurred after the end of May when the bills the respondent had sent to PCA had not been paid for over six months.

In June 1986 Mr. Gay visited the appellant's offices in Trinidad. As a result of Mr. Nicholas' request to separate the claims he was making against the appellant from those he was making against PCA, the respondent wrote PCA on 18th June 1986, claiming

"Total contracts 1 & 2	$616,260.00
Total paid to date 1986-05-22	$533,417.57
Balance Outstanding	$ 82,842.43 EC"

and on 19th June 1986 the respondent made its first written demand to the appellant for

"Contract 3 - External Works	$312,612.00
Contract 4 - Additional Works	$ 54,459.00
Amount Outstanding	$367,071.00"

On 14th July 1986 the respondent wrote the appellant confirming a meeting of 11th July 1986, in which:-

> Work agreed upon:" showed a total of $166,200.00, and the "Works under Query:" showed a total of $159,721.00."

Mr.Gay indicated in his evidence that about a month later he again met Mr.Nicholas who told him that if he can get PCA to certify the bill he would pay it. It was submitted that this was an undertaking which ought to bind the appellant.

The respondent relied on **Dixon v Hatfiled** as reported in Keating 5th ed. at 285 as follows:

> "A having undertaken to complete the carpenter's work in a house of defendant, and to find all materials, and being unable to procure timber for that purpose, it was supplied by B on the following undertaking being signed by defendant: AI agree to pay B for timber to a house situate, etc. out of the money that I have to pay A, provided A"s work is completed": Held this was not a collateral, but a direct undertaking by defendant to pay upon the completion of the work, and it was immaterial whether the work was done by A, or another person. **Dixon v Hatfield** (1825) 2 Bing 439:"

In this case there was no evidence of a direct undertaking as to payment given by the appellant to the respondent before the work was done, as was proven in **Dixon v Hatfield.** I could not regard the statement that the appellant would pay the bill if certified by PCA unaccompanied by any consideration moving from the respondent as a contractually binding promise which changed the status of the relationship of the parties. It seems to me to be an invitation to pursue the pre-existing contractual arrangements, between the appellant and PCA, and between PCA and the respondent.

On 21st August 1986 PCA addressed Mr. Issa Nicholas:

> "Dear Sir,
>
> GRENADA BEACH HOTEL
>
> FINAL ACCOUNT - ELECTROTEC SERVICES LIMITED
>
> Electrotec Services Limited have requested us to review their final statement of account prior to submission to you.
>
> Attached is a copy of their statement with adjustments made by us to the figures submitted.
>
> A summary is given as follows:

Contract 3 & 4 (original)	$159,721.00
Contract 3 & 4 (extra works agreed with you)	$166,200.00
	$325,921.00

Yours sincerely

Imtiaz Hosein

Hafeez Karamath

This document seems to indicate that the sum of $159,721.00 was due on the original contracts #3 and #4, and $166,200.00 for extra works agreed with the appellant on the same contract #3 and #4.

This certificate would therefore b governed by the basic principle that no privity of contract between a building owner and a contractor can arise out of a sub-contract between the building owner's main contractor and that other contractor.

By an undated letter which the respondents alleged they received on the 29th October 1986, the appellants replied denying liability. The main allegations in their brief letter were

> "...Since Ramada have definitely refused to accept the work which you have supposedly done, and is still incomplete and dangerously installed, they have called in specialists from the U.S.A. who have confirmed this to them.
> We have been instructed by International Finance Corporation of Washington that we should provide any remedial work and bill PCA. with the cost.
> We have been informing PCA on the situation since March, but nothing has been done to date. I suggest that you deal directly with PCA on the matter."

These allegations allege a dispute about PCA's liability for the respondent's unsatisfactory completion of its work, and emphasise the adverse effect of the omission to join PCA as a party to the case. No evidence was adduced on these matters.

On 27th November 1986 the respondent wrote the appellant setting out their position that they had a direct contract with the appellant, and refusing to accept an offer for EC$166,000.00 in full settlement and discharge of the claim. This could have no bearing on

the case as the offer was neutralised by its rejection.

The conduct of the parties is therefore consistent with the conclusion that PCA as the main contractor, sub-contracted the respondent to do the electrical and plumbing works, and when PCA failed to arrange for the payment of the claims the respondent had been making, the respondent tried to make the appellant directly liable for a portion of the outstanding bills.

In my judgment the evidence did not disclose that they entered into separate and distinct contracts for the sums they claimed from PCA and the sums they claimed from the appellant.

In the circumstances I conclude that there was no privity of contract between the appellant and the respondent. This resolves the narrow issue before us and I would therefore allow the appeal with costs.

DENNIS BYRON
Justice of Appeal

I Concur.

SIR VINCENT FLOISSAC
Chief Justice

I Concur.

SATROHAN SINGH
Justice of Appeal