BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.20 OF 2000

BETWEEN:

MIRSAND TOWN PLANNING AND ARCHITECTS LIMITED

Appellant

and

SAMUEL S. CONDE ASSOCIADOS C. POR A.

Respondent

Before:

The Hon. Sir Dennis Byron — Chief Justice
The Hon. Mr. Ephraim Georges — Justice of Appeal [Ag.]
The Hon. Mr. Adrian Saunders — Justice of Appeal [Ag.]

Appearances:

Mr. Terrence Neale for the Appellant
Mr. Sydney Bennett with Ms. Michelle Matthew for the Respondent

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2003: January 28;
April 3.

JUDGMENT

[1] **BYRON, C.J.**: This is an appeal against the decision of d'Auvergne J. discharging a *Mareva* injunction restraining Conde from removing assets up to the value of US$300,000.00 from the British Virgin Islands. It was the second Mareva injunction which had been discharged in this case. When the first Mareva was discharged the action became subject to a stay imposed by order of Benjamin J on 6th June 2001 with the consent of the parties. It is Conde's position that the terms on which the stay had been granted settled the dispute between the parties and made it improper for a second Mareva injunction to exist.

The Background Facts

[2] On the 27th February 1998 the Government of the British Virgin Islands contracted Conde to design and construct the new Beef Island Bridge. By a subcontract dated 18th April 1998, Mirsand agreed to provide services in connection with the construction of the bridge and Conde agreed to pay:

[i] 13% of any sum paid on account of the adjusted contract sum resulting from the approved designed budget; and

[ii] 10% of any amount paid on account of the value of any variation or change under the contract.

The contract specifically provided that Conde's obligation to pay those percentages would arise only if and when it received payment from the Government on account of the above stated heads of liability.

The First Mareva

[3] On 5th May 2001, shortly before the completion of the bridge, Mirsand issued a writ of summons and made an application without notice to Conde for an injunction to prevent Conde from removing assets up to the value of US$176,054.26 from the British Virgin Islands. This was intended to secure the sum of US$54,853.66, the amount alleged in the action to be due and owing and the sum of US$121,260.00, which, it was alleged, would fall due if and when Conde received payment of US$1,212,200.00, from the Government. On the 16th of May 2001 that injunction was granted. On 18th May 2001 Conde wrote Mirsand confirming its intention to honour the terms of the sub-contract and restating its commitment to pay 10% of the specified sum if and when the Government paid the respective sums to Conde. A substantial part of the dispute is about the effect of the last paragraph which reads as follows:

> "We would be obliged if you would confirm by signing below that upon payment by Conde to Mirsand of the said sum of US$121,200.60 and US$9,300.87 the sub-contract made 18 April 1998 between our companies will come to an end and neither Conde nor Mirsand will thereafter have any further obligations to each other."

The letter was signed by both Conde and Mirsand and on the same day Conde paid over the sum of US$54,853.66 in full satisfaction of the amount claimed as having fallen due for payment. On 6th June the injunction was discharged by Benjamin J in chambers with the consent of the parties under terms which included a declaration that Mirsand would become entitled to the sum of US$121,200.60 if and when Conde received payment of the sum of US$1,212,000.60 from the Government of the Virgin Islands and an order that the action was stayed except for the purpose of carrying the Order into effect.

The Second Mareva

[4] The dispute resurfaced after an adjudication process between Conde and the Government resulted in an award to Conde in the sum of US$3.6 million and costs, which was compromised at US$3,000,000.00. On 4th April 2002, Mirsand applied for an injunction, without notice, to restrain Conde from removing assets up to the value of US$300,000.00 from the jurisdiction, to secure a claim for 10% of the amount awarded to Conde.

[5] On 8th April 2002, d'Auvergne J. granted the application but on 22nd May 2002, after hearing both parties, discharged the injunction and ordered that the stay of action mandated by the consent judgment of 6th June 2001 remain in place. Counsel informed us that Conde has since received payment from the Government and has paid over to Mirsand the sum of US$121,200.60 in accordance with the terms of the agreement of 18th May 2001.

The Grounds of Appeal

[6] There were many grounds of appeal but in my view the issues that emerged could be compressed as follows:

[1] Procedural.

[i] Whether Mirsand could have been granted an interlocutory injunction in the absence of a cause of action?

[ii] Whether there was a cause of action?

[iii] Whether the consent order of 6th June 2001 could be reopened?

[2] The effect of the letter of 18th May 2001.

[i] Whether it constituted a binding agreement which settled the matter?

[ii] Whether Mirsand's agreement had been induced by Conde's misrepresentation.

[iii] Whether Mirsand was prevented from presenting the claim for US$300,000.00 on the basis of the doctrine of promissory estoppel?

[3] The Merits.

[i] Whether Mirsand had any entitlement to the sums claimed as resulting from the approved design budget or any variation or change order under the contract.

[ii] Whether the term "variation or change order" included the sums awarded on the adjudication?

Whether the Injunction could have been granted in the absence of a cause of action

[7] Mirsand submitted that the learned trial Judge erred in law in holding that it did not have a present right to the payment of the US$300,000.00 as there was no existing cause of action and the right to hold or obtain an interlocutory injunction being merely ancillary and incidental to a pre-existing cause of action could not stand on its own.

[8] The facts show that the terms of the subcontract provided that Mirsand's right to payment of monies under the agreement arose when Conde had received money from the Government on account of the contract sum or of some variation or change order of the contract. Mirsand was in effect claiming a declaration to the future entitlement to payment for monies that Conde had not yet received. The

learned trial Judge ruled that this was not a sufficient interest or right to found an entitlement to an injunction.

[9] The case of **Carpenter v Ebblewhite and Others** (1937) 1 KB 347, is authority for the proposition that a claim for a declaration of a future or hypothetical liability is not a cause of action which could sustain proceedings. The claimant had sued a driver, the owner of the car and the car owner's insurers for injuries sustained in a collision alleged to caused by the negligence of the driver. The claim against the insurers for a declaration that they would be obliged to satisfy any judgment that was obtained against their insured was struck out. In the Court of Appeal Greer L.J. at 357 said that the making of such a claim is contrary to anything that has ever been decided in regard to actions for declarations. He opined that no dispute can arise between the plaintiffs and the insurance company until after the disposal of the action by the plaintiffs against the establishment of a right of indemnity by Ebblewhite against the insurance company. He concluded:

> "It would, I think, be wrong and entirely premature to determine in this action, or even in a separate action, at the present time a dispute which has never as yet arisen between the parties."

[10] This seems to be identical with the position that confronted the parties at the time of the consent order in the present action. There was no present liability, and it was possible that there might never be liability, because the liability to pay was contingent on the respondent receiving payment from the Government. It is unlikely that the court would have made a declaration based on a possibility of a contingent liability that might arise in the future.

[11] The well established principle that an interlocutory injunction is dependant on a pre-existing cause of action and could not be granted to support a claim for a future or possible liability was outlined by Lord Diplock in the *locus classicus* **The Siskena** (1977) 3 All ER 803 at 824:

> "…A right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependant on there being a pre-existing cause of action against the defendant arising out of an invasion, actual or

> threatened, by him of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the *status quo* pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction."

[12] Mirsand contended that this case was distinguishable from the **Siskena** because there could be no dispute that there was a cause of action if only for a declaration that the appellant was entitled be paid when the respondent received payment from the Government.

[13] This argument, however, has already been judicially rejected in **The Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co Ltd** (1986) 2 Lloyds LR 439 which is clear authority for the principle that a court has no jurisdiction to grant security for a cause of action which might arise in the future but had not yet come into being. In the Court of Appeal Sir John Donaldson M.R. said:

> "Justice and convenience in this context is not an abstract conception. It predicates that there is a cause of action in respect of which the court may make an order and the court will be unable to enforce its order unless there is security provided by a *Mareva* injunction. Therefore we asked Mr. Kealey what the cause of action was that we were being asked to support. The answer is that the only cause of action that they can conceivably have at the moment is a cause of action for a declaration that, in the event of the club having to honour its guarantee and in the further event of the shipowners being called upon to pay the club under their undertaking and perhaps in the further event of the ship owners not meeting their obligation, the ship owners will be liable to the club. It seems to me that no such declaratory relief needs a *Mareva* injunction to support it. What the club really wants is security for a future cause of action - a cause of action which will give rise to entitlement to monetary relief. I think that it will be contrary to a long line of authority which says that s. 37 is to be used in support of an existing legal or equitable right. I furthermore think that if we extended it to this case, even assuming we have jurisdiction to do so, it would be difficult to see what possible limits there could be to the *Mareva* jurisdiction since whenever it was apprehended that someone was likely in the future to commit a breach of contract, and it was further apprehended that if they did and if judgment were given against them they

might be unable to meet the judgment debt, it would follow that the fearful plaintiff was entitled to a *Mareva* injunction. That plainly is not the case."

[14] This principle was applied in the case of **Siporex Trade SA v Comdel Commodities Ltd.** (1986) 2 Lloyd LR 428. In that case Bingham J upon an application to discharge an injunction in similar circumstances said at p.436:

> "What, then on February 27 was Comdel's cause of action against Siporex? It was not a claim for moneys had and received because Siporex had had and received no moneys. It was not a claim for damages for repudiatory breach by Siporex because Siporex had manifested no intention to withhold from Comdel any sums recovered from the bank in excess of their own loss (no request for payment of such excess having ever been made) and the contract had already come to an end on Siporex's acceptance of Comdel's repudiation. So the only relief Comdel could then seek was a declaration of Siporex's duty, upon receiving payment from the bank, to pay over any excess to Comdel after compensating themselves for their own loss. That remains the position.
>
> I take it to be clear law, both on principle and authority, that a *Mareva* injunction will not be granted to an applicant who has no cause of action against the defendant at the time of application: see for example, **The Niedersachesen**, (1983) 2 Lloyd's Rep. 600 at pp. 602, 613. Siporex submit that a claim of entitlement to a declaration in the absence of any claim of entitlement to an immediate money judgment, does not ground a claim to *Mareva* relief. That submission is founded on a Court of Appeal decision, **The Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co. Ltd**, (1986) 2 Lloyd's Rep. 439… The ratio of that case is, as it seems to me, plainly applicable in the present case. Comdel had, when the injunction was granted, and still have, no existing legal or equitable right. That is an additional reason why I must discharge this injunction."

[15] That principle is clearly applicable to this case because at the time d'Auvergne J discharged the injunction on the 22nd May 2002, Conde had not received the funds from the Government. This meant that the appellant did not have any existing legal or equitable right to payment. Accordingly, this ground of the appeal must fail.

Whether the Consent Order of 6th June 2001 could be reopened

[16] Mirsand urged that the learned trial judge was wrong in holding that the consent order of 6th June cannot be reopened. The conclusion was based on her finding that Mirsand had not indicated to the court any significant change of circumstances which could not have been foreseen at the time of the order.

[17] Mirsand relied on certain dicta of Lord Denning in **Purcell v F C Trigell Ltd** (1971) 1 Q.B. 358 at 363 to argue that a party, can appeal from a consent order, at any rate in interlocutory matters, on the ground of his own mistake. Lord Denning had been commenting on the case of **Mullins v Howell** (1879) 11 Ch. D. 763, where Sir George Jessel M.R. said, at p. 766:

> "There is a larger discretion as to orders made on interlocutory applications than as to those which are final judgments."

When he examined the case before him however, he concluded that there was no ground for setting aside this consent order because it was deliberately made, with full knowledge, with the full agreement of the solicitors on both sides. (Just as the learned trial judge had found in the case between Conde and Mirsand.) He however, indicated that even though the order cannot be set aside, there is still a question whether it should be enforced. It is worthy of note that at 366 of Purcell's case Buckley L.J. found it necessary to comment on the dicta of Lord Denning relating to **Mullins v Howell**. He opined that it was quite clear, from the terms of Sir George Jessel M.R.'s observations in that case that he was not in any way disregarding the contractual effect of the arrangement arrived at between the parties. On the contrary, he was saying that there was an agreement but it was an agreement which in the circumstances of the case the court would not enforce against the defendants; that is to say, he was saying that on equitable grounds, although there was a contract, it was one which ought not to be enforced in its specific terms. He concluded:

> "In my judgment, nothing in that case conflicts in any way with the view that I have expressed, that a consent order must be given its full contractual effect even if it relates to an interlocutory step in an action."

[18] The prevailing legal principle is that the order being made by consent has contractual force. Although such an order may be set aside in certain circumstances the case of **Channel Ltd. v FW Woolworth** is authority for the proposition that the court would not permit such an order to be reopened unless some significant change of circumstances could be shown, or unless the party applying to set it aside became aware of facts which they could not reasonably have known or found out at the time of the hearing.

[19] Mirsand alleged that the change of circumstances was that the settlement agreement had been reached between the government and Conde for the payment of the sum of US$3 million and that if that sum was in fact due then Mirsand would be entitled to 10% of that money. They also alleged that it was a circumstance that they could not have forseen so that the consent was entered into by a mistake of fact or belief.

[20] Conde's response to that was that at the time the consent order was arrived at the monies claimed in the suit had not fallen due. So there was no cause of action which Mirsand had which could support a claim for damages or for an injunction as has been shown above. Thus, there were good grounds on which to oppose the injunction and the suit itself. The courts have consistently been reticent to make declarations in respect of purely future or hypothetical issues.

[21] As a result of Conde's agreement, Mirsand obtained at an interlocutory stage of the proceedings made shortly after the commencement of his action, an uncontested Order for the payment of US$121,000.00. In exchange Mirsand consented to the discharge of the injunction granted on 16th May and to the staying of the action except for the purposes of carrying the order into effect. I agree with Conde that this is a textbook example of practical and concrete benefits obtained by one party in exchange for the relinquishment of a claim to future rights which might never have come into existence.

[22] I am not persuaded that the conclusion of the dispute between Conde and the Government in favour of Conde fits into the category of a new circumstance or could be described as supporting a contention that the consent was entered into on the basis of a mistake of fact or belief. Mirsand was aware of the existence of the dispute, and it must have been in contemplation that it may have been resolved in favour of Conde.

[23] In this case the action having been stayed by consent Mirsand has received the payments promised by Conde. The parties made a compromise and it was performed. The dispute between them was completely resolved on the basis of the arrangements that had been made at the time of the consent order. A stay in such circumstances should not be removed unless it could be shown that there were exceptional circumstances to justify it. In the case of **ROFA Sport Management AG v DHL International Ltd**. (1989) 2 All ER 743 at 749 Neil L.J. said:

> "there may well, of course, be cases, however, where the person who wishes to have a stay removed will face great difficulties. An action which has been stayed by consent following a compromise provides an obvious example."

[24] I would agree with the learned trial judge that there was no sufficient reason shown that would justify the court to reopen the order made by consent on 6th June 2001. I would dismiss this ground of the appeal.

Whether the action was settled by the agreement contained in the letter of 18th May 2001

[25] Mirsand contended that the learned trial Judge erred in concluding that it was bound by the terms of that letter because there was no consideration for any promise it made. All Conde did was to restate its obligations under the existing contract.

[26] I think that the legal principle is well settled. Whereas it is true that a promise will only be enforceable in law if there was consideration for it, the flaw in Mirsand's

reasoning is that the mere fact that consideration consists in part on the performance of existing contractual duties does not mean that it is not good consideration upon which an enforceable agreement may be based. If the promisee derives some real and factual benefit from an arrangement in which he has agreed to vary or to forego his previously existing contractual rights, this will be found to be good consideration for the new arrangement.

[27] In the case of **William v Roffey Bros and Nicholls [Contractors] Ltd** (1991) 1 QB 1 Russel, LJ concluded that a gratuitous promise, pure and simple, remains unenforceable unless given under seal. But where a party undertakes to make a payment because by doing so it will gain an advantage arising out of the continuing relationship with the promisee the new bargain will not fail for want of consideration. In that case there was a main contract for the refurbishment of a number of flats. The carpentry sub-contract was agreed at £20,000, but the sub-contractor had gotten into financial difficulties and the main contractor was persuaded that the agreed price was low. The main contractor was faced with the possibility of penalties for delay and agreed to pay the subcontrator and additional sum of £10,300 for which no additional obligations were promised. The court held that the promise to pay was supported by consideration in the shape of the "practical benefits" obtained by the sub-contractors performance of his contractual obligations and that accordingly the new promise to pay extra could not be avoided on the ground that there was no consideration for it.

[28] In this case, the court would have to look at the position of the parties at the date on which the agreement was made. Mirsand had obtained a *Mareva* injunction for sums that were admittedly due and for sums that admittedly were not yet due. Conde's reaction was to pay the sums that were due and unconditionally promise to pay the sums claimed that were not as yet due on condition that the contractual arrangements between the parties came to an end and they would have no further obligations to each other. At that time there was uncertainty as to whether there would be any liability for the sum that had not yet fallen due because there was a

dispute as to whether the sum claimed could be properly classified as a variation or change order.

[29] The reality of that dispute was established in subsequent events because it was one of the items in the dispute that was referred to the adjudication between Conde and the Government. The documents produced in this case included the judgment or order of the adjudicator which established that the adjudicator had found for the Government on that issue and payment of that variation or change order has never been made. In my view the agreement to forbear from contesting liability was a substantial benefit gained by Mirsand which constituted consideration. In addition Mirsand gained time, and saved expense and trouble. The order to pay was made by consent within a few weeks of the issue of proceedings without having to go through the process of litigation. This too, in my view, was a practical benefit which amounted to consideration.

[30] I am persuaded that the promise by Mirsand that the sub-contract will come to an end and neither Conde nor Mirsand will thereafter have any further obligations to each other, was supported by consideration from Conde. In my view the learned trial Judge was entitled to conclude as she did that the parties were bound by the terms of that agreement.

Whether the letter was induced by misrepresentation

[31] Mirsand contended that the agreement was induced by misrepresentation of Conde in deliberately allowing Mirsand to believe that the sum of US$1,212,006.00 represented the full extent of the Government's liability under the contract when they knew that was not the case. The evidence did not disclose that any such representation had been made. Counsel for Mirsand, when asked to identify the representation on which this submission was based, merely referred to the letter itself and commented that this was not his strongest ground.

[32] I do think it is necessary to develop this any further and would dismiss this ground of appeal because there was no evidence at all of any representation being made by Conde to that effect.

Whether the doctrine of promissory estoppel applies

[33] Mirsansd contended that the Judge erred in law in holding that by the letter of the 18th May 2001, because it had undertaken not to enforce any rights in excess of the sums stated therein and that Conde has altered its legal position, it would be estopped from presenting the claim for US$300,000.00 by that promise. The background to this ground was that although this was not the reason on which the judge had decided the case, she expressed the view that even if the promise was unenforceable for want of consideration Mirsand would be estopped from presenting the claim for US$300,000.00 on the basis of the equitable doctrine of promissory estoppel. In my view there was a sound basis for this obiter. It should be remembered that the appellant had sued for US$176,054.26, and had obtained satisfaction for that sum by way of payment in part and unconditional promise to pay the balance. Mirsand is claiming that it had agreed by the letter of 18th May 2001, to accept less than it was entitled and should not be bound by that promise.

[34] As I understand the case of **D & C Builders v Rees** (1966) 2 QB 617 cited in support of the learned trial Judge's comments on this point, it indicated that the courts will not allow a creditor who has agreed to accept less than was due to insist on the balance where it would be inequitable to do so. Lord Denning p 624 followed with approbation the broad principle stated by Lord Cairns in **Hughes v Metropolitan Railway Co.** 'It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms involving certain legal results, afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have

enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have taken place between the parties.' It is worth noticing that the principle may be applied, not only so as to suspend strict legal rights, but also so as to preclude the enforcement of them.

[35] I do not think that the criticism of the judge on this point is sustainable. Mirsand is unable to deny making the promise. Its contention that the promise is unenforceable for want of consideration has failed. Its contention that the promise was induced by misrepresentation has failed. I would also say that its contention that the court should not allow it to resile from its promise on the basis that it would be inequitable to do so should also fail. I do not agree that the learned trial Judge had misapplied the principles laid down in **D & C Builders v Rees**.

The Meaning Of The Terms Adjusted Contract Sum And Variation Order

[36] Mirsand challenged the learned trial Judge's conclusion that, in any event, it was not entitled to the sum US$300,000.00 because the money awarded to Conde on the adjudication did not form part of the adjusted contract sum nor was it the subject of a variation or change order.

[37] Mirsand was arguing that it was entitled to percentages of whatever monies Conde received from the Government. Now one just has to look at the contract and see the flaw in that argument. Mirsand was entitled to receive percentages of two types of payment only:

[1] 13% of the adjusted contract sum resulting from the approved design budget; and

[2] 10% of the value of any variation or change orders received by Conde.

[38] I think it would be useful to determine what is included in the "adjusted contract sum resulting from the approved design budget", although Mirsand is not making any claim under this clause of the contract.

[39] I have accepted that the adjusted contract sum in this context means the contract sum as adjusted between the pricing proposal contained in the initial tender and that finally approved by the Government as the contract price. The approved design budget is the amount allocated by the Government for the execution of the approved design. Once the contract price and scope of works are set out in the agreement Conde is bound to carry out the agreed works, and such other works as may be indispensably or contingently necessary to complete the project, for the price and in conformity with the drawings and specifications shown on the contract unless he is ordered to do otherwise by the Government.

[40] It would seem to follow that fluctuations in the amount payable to Conde by the Government on account of factors outside of the pre-contract design and budgetary process may be "adjustments in the contract sum". But such fluctuations or adjustments need not result from the approved design budget. Thus if the Government is compelled to pay more or Conde is compelled to accept less as a result of dispute resolution proceedings conducted between them, this adjustment to the contract sum would not have resulted from any design budget approved by the employer, but rather is an adjustment imposed on the parties through the dispute adjudication processes. Secondly, the calculation of Mirsand's remuneration is based on budgeted expenditure. Thus if for any reason Conde receives payment in excess of the budgeted amount Mirsand's entitlement would be limited to the stated percentage of the budgeted amount only. In this case Mirsand has not claimed any sum under that clause.

[41] What is a variation or change order? Mirsand relied on **Hudson Buildings and Engineering Contracts** for the definition that a variation or change order is "an alteration in the previously designed work and materials to be provided by the contractor [that is shown on the drawings and described in the specifications as indispensably or contingently necessary work included in the contractor's obligation to complete] such work being duly authorized by the owner or his

representative and the cost of which the owner will prima facie be responsible to pay the contractor." I accept this definition of variation or change order.

[42] It is clear that the term cannot not refer to every change in the contract price. If the contract price was increased with no variation or change in the work to be carried out this change would not be the subject of a variation or change order. In order to establish a claim under this head it would not be enough for Mirsand to show that there was a fluctuation in the amount made payable to Conde. It would have to show that the claim was in relation to an authorization by the Government to Conde to supply materials or to carry out the works in a manner at variance with that previously stipulated in the contract.

[43] But can Mirsand show that the US$3,000,000.00 was the subject of a variation or change order? The learned trial Judge found that these monies were a reimbursement of losses suffered by the respondent on account of breaches of contract by the Government and did not come within either category of monies to which the appellant is entitled to payment under the subcontract. It is therefore necessary to examine the nature of the award of adjudication. There were five heads of award.

[44] The first and largest part of the award was for losses suffered on account of the 15 month delay by the government in handing over the site to Conde between December 1998 and March 2000. During that period Conde was obliged to maintain a workforce and keep and maintain equipment. The losses included salaries and maintenance of nonproductive personnel and equipment, insurances and bonds, overhead costs and the foregoing of profits which could have been made had the personnel and equipment been utilized elsewhere. The adjudicator in making the award under this head for the sum of US$2,398,574.00 stated "I conclude that the respondent, with knowledge of the scale of costs involved, proceeded to deny the contractor access to the site until March 2000 and did not

elect to mitigate or terminate the contract." It is clear that none of this money resulted from either the approved design budget or any variation or change order.

[45] Mirsand alleged that Conde was being fraudulent in respect to an item under this heading allotted for agents fees in the sum of US$185,633.00, because it should be inferred that Conde had represented that those monies were paid out to Mirsand. Counsel was unable to point to any evidence to support such a finding. I have searched the adjudication order and can find nothing to support that proposition.

[46] The second head of damages related to compensation in respect to additional costs incurred and delays experienced by Conde on account of late instructions for design of approach roads and the wrongful failure of the Government to make timely payment of legitimate claims. The adjudicator found that "the financial burdens to the contractor brought about allegedly by the delays in granting a release of additional payments claimed, manifested themselves as increased costs, delays to the progress of works and difficulties in obtaining credit to continue its activities." The sum awarded under this head was US$4,636.00 per day for 146 days together with interest at 11% totaling US$723,596.00. No part of those monies could be classified as being part of the approved design budget neither as arising from a variation or change order.

[47] The third head related to the deletion from the contract of the task of demolishing the old Queen Elizabeth Bridge. The adjudicator stated as follows "I have decided that US$26,000.00 is reasonable compensation for the period of demobilization on the equipment hired for the demolition activities." Here again, this compensation for Conde could not be classified as resulting from the approved designed budget nor is a variation or change order.

[48] The fourth head was for the sum of US$60,000.00 wrongfully deducted by the Government as liquidated damages under the contract. Conde conceded that

since these monies were wrongfully deducted from the contract sum as resulted from the approved designed budget, 13% of the that sum would have been payable to the appellants under the subcontract and that figure totaled US$7,800.00.

[49] The fifth head of the award relates to casting beds reserved by Conde at its facilities in the Dominican Republic. The beds could not be utilized due to wrongful delays in design approval and the late introduction of design changes in the bridge superstructure thus changing the beam configuration. The amount of US$202,710.00 was awarded under this head. There is no question that any part of this element of the award could possibly have formed part of the subcontract.

[50] The final element of the award were costs of the Adjudication proceedings. Again no part of these monies could possibly be due to Mirsand under the terms of the subcontract.

[51] In my view the learned trial Judge was justified in concluding that the monies recovered by Conde under the adjudication proceedings could not be included under either category of adjusted contract sum or variation or change order except with possible exception of the sum of US$7,800.00. Therefore these grounds of the appeal have also fail. There was mention of equitable relief in various aspects of this case, but Mirsand was unable to show that it had suffered any part of the losses for which Conde had received compensation.

[52] There is another aspect. It is clear from this analysis that had Conde gone to trial Mirsand would not have been able to show that the sum of US$121,000.00 that it had received as a result of the consent order was due under the contract. It would seem that it would have been unable to establish a right to any more than US$7,800.00. It, indeed, benefited from the consent order to the extent of some US$113,200.00 more than it was entitled to. These grounds of appeal fail.

Costs

[53] On the question of costs, Mr. Neal submitted that in relation to the original claim the entire sum claimed was paid by Conde so that they were successful in the court below and an order should be made for those costs. In my view, in relation to the court below, the proceedings in which Mirsand obtained the award were settled by consent and there is no reason why it should be awarded costs in the the proceedings in which the injunction was discharged. I do not propose to vary the award of the trial judge with regard to costs.

[54] Mr. Bennett concedes that the prescribed costs would be US$31,000.00 based on the value of the claim being US$178,000.00, the difference between US$300,000.00 and US$121,000.00. He submits that this is a final disposition of the dispute between the parties and the full costs should be awarded. The matter was complex and we were assisted by a high standard of preparation and submissions. In addition Conde has had to suffer loss while waiting on the appeal as during that time its money was tied up pending the hearing of the appeal.

Order

[55] I would dismiss the appeal and affirm the order of the learned trial judge. I would order costs to Conde in the sum of US$31,000.00.

Sir Dennis Byron
Chief Justice

I concur. **Ephraim Georges**
Justice of Appeal [Ag.]

I concur. **Adrian Saunders**
Justice of Appeal [Ag.]