GRENADA

IN THE COURT OF APPEAL

HCVAP 2007/013

BETWEEN:

VOLKER STEVIN CONSTRUCTION EUROPE BV

Appellant

and

VOS LIMITED

Respondent

Before:

| | |
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| The Hon. Mr. Denys Barrow, SC | Justice of Appeal |
| The Hon. Mr. Hugh A. Rawlins | Justice of Appeal |
| The Hon. Mr. Errol Thomas | Justice of Appeal (Ag.) |

Appearances:

Mr. Karl Hudson-Phillips QC and Ms. Leslie-Ann Seon for the Appellant
Mr. James Bristol and Ms. Shireen Wilkinson for the Respondent

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2008: March 11;
June 2.

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*Contract Law – Formation of contract – whether contract existed*

The appellant company ("the appellant") was contracted to build a cruise ship terminal in Grenada. The respondent company ("the respondent") is alleged to have been incorporated for the purpose of providing the appellant with skilled and unskilled labour pursuant to an oral agreement made between three individuals ('the contractors"). The oral agreement allegedly provided for the provision of labour by the contractors/respondent for the duration of the appellant's contract to construct the new port. The respondent provided labour from 14th February to 4th March 2003 but its services were terminated by the appellant on 17th March, 2003. The respondent argued successfully in the court below that the appellant's termination was a wrongful repudiation of the agreement. The appellant's appealed on the ground that no contract existed between the parties.

Held, allowing the appeal and awarding costs to the appellant:

The agreement between the parties was the acceptance by the appellant of a standing offer made by the respondent to provide such numbers of workers as were required from time to time. This did not create an exclusive or absolute

obligation on the parties, or in other words, this was not an absolute contract. Each time a certain number of workers were required of the respondent, a separate contract would be created. There was a contract only to the extent of that requisition; otherwise there was no contract.

Burton v The Great Northern Railway Company (1854) 9 Ex. 507 applied.

JUDGMENT

[1] BARROW, J.A.: Both parties submitted to the judge that the sole issue he was required to decide was whether there was a contract between the parties to supply labour for eighteen months or whether there was a contract to supply labour for the completion of a specific building. Notwithstanding that the appellant had so conveyed to Benjamin J, the appellant contends on appeal that the judge should have found the contract between the parties was not of either such description but was a contract to supply labour as periodically requested.

The statements of case

[2] The judge found there was a contract to supply labour for eighteen months. He awarded damages of $2,402,244.08 to the respondent, who was the claimant below, for breach of contract. The claim made in the amended statement of claim was that in January 2003 an oral agreement was made between Bruce Hutton, Stuart Hutton and Jan Van Der Steen (together "the contractors") and the defendant (hereafter the appellant). The respondent alleged it was agreed that pursuant to a quotation faxed to the appellant on 21st January 2003 at 2:43 p.m. the contractors would provide the appellant with skilled and unskilled labour for the 18 months duration of the appellant's contract to build a cruise ship terminal in St. George's, Grenada.

[3] The respondent further alleged it was agreed between the parties that the contractors would incorporate the respondent company to perform the contract but in the interim the contractors would perform the contract. At all material times, the respondent said in their statement of case, the contractors were represented by Jan Van Der Steen (hereafter Steen). The quotation, it was said, included the

respondent's provision for profit on the said labour at 71%. The respondent stated it anticipated the cost of labour as EC$4,086,732.00 and the profit on that sum was EC$2,901,579.00.

[4] Pursuant to the agreement, the respondent stated, the contractors provided labour from 14th February 2003 to 4th March 2003, when the respondent company was incorporated. Thereafter, it was stated, the respondent and appellant agreed that the respondent would provide the said labour on the same terms and conditions as were agreed between the contractors and the appellant. Invoices were thereafter issued by the respondent and duly paid by the appellant.

[5] By letter dated 17th March 2003 the appellant terminated the agreement, wrongfully the respondent stated, before the appellant completed its contract to build the terminal. On that same date Steen terminated his relationship with the respondent. The respondent stated the appellant's termination was a wrongful repudiation, which it accepted, and claimed damages.

[6] In its amended defence the appellant denied the agreement or any agreement alleged by the respondent. The appellant stated "an offer was made" by the appellant "for the construction of a site office building for the Cruise Ship Terminal Project only." In or about the month of December 2002, the appellant stated, its project manager held discussions with Steen, and then at a later date with Bruce Hutton and Steen, about providing certain services for the construction of the terminal. These discussions included, among other things, the supply of labour to the appellant for the Project and the supply of labour for the erection of a building to be used as the appellant's site office.

[7] The amended defence stated the respondent sent various quotations to the appellant including a letter dated 21st January 2003 to supply labour for the construction of the office building and a second letter of even date showing a breakdown of the labour costs, which the appellant stated it had requested verbally. The appellant stated that its project manager indicated to the respondent

then that the cost was too high but directed that the respondent could start the work on the site office building, for which payment would be on an hourly basis. Save as stated, the appellant said, it denied the agreement asserted by the respondent. The defence admitted that the appellant "terminated the services" of the respondent and gave the reasons for doing so.

## Facts found by the judge

[8] Guided by the appellant's statement of the issue, with which the respondent agreed, which was whether there was a contract to supply labour for 18 months during the construction of the terminal or a contract to supply labour for the construction of a site office building only, the judge reviewed the evidence to determine which was the true version of the agreement. He concluded that "the evidence has established overwhelmingly that there was an oral contract between the parties for the Claimant to supply the labour for the entire duration of the contract and not, as pleaded and argued on behalf of the Defendant for only the erection of a site office building." [1]

[9] In a number of instances the judge considered the conflict in the testimony of witnesses for the appellant and the respondent and provided a reasoned basis for resolving the conflicts in favour of the respondent's witness. Mr. Hudson Phillips QC, counsel for the appellant, who did not appear in the court below, does not seek to challenge these determinations by the judge. This court is therefore not being asked to interfere with such findings of fact. The court is being asked to find, however, that the evidence, unchallenged though it is, failed to establish a number of core factual assertions.

[1] Vos Ltd. v Volker Stevin Construction Europe BV Grenada GDAHCV 2003/0479 (delivered 23 March, 2007); paragraph 36

No evidence of a contract

[10] Mr. Hudson-Phillips challenged the factual premise of the decision by first acknowledging that in closing arguments counsel on both sides "appeared to restrict themselves" to the question whether or not there was a contract for the construction of a site office building only or for the supply of labour for a period of eighteen months. But, he submitted, whether the arrangement was to provide labour for the limited purpose of the construction of the site office or for the entire period of the main contract, the Court first had to find that there was evidence that a contract had come into existence.

[11] Counsel submitted the respondent based its claim to an eighteen-month contract on "a quotation faxed to the Defendant on 21st January 2003 at 2.43 p.m."[2] However, counsel submitted, the evidence indicated that as late as 13th March 2003 negotiations were taking place on manpower requirements and rates of pay for workers.[3] This fact was the foundation slab for Mr. Hudson-Phillips' argument that no contract between the parties ever came into existence.

[12] In particular, counsel submitted, there was no evidence of the following:-

(i) Of the duration of the main contract to construct the Cruise Ship Terminal.
(ii) Any agreement on the rates of pay of skilled and unskilled workers to be employed.
(iii) Any requirement that the appellant, Volker Stevin Limited, undertook to employ labour exclusively from the respondent or at all. Rather at best the evidence showed that a contract, whether to erect the site office or for the entire contract, only came into existence on each occasion that Vos Limited was requested to supply labour and agreed so to do.
(iv) That there was any obligation on the part of Volker Stevin to request Vos Limited to supply labour. Nor was there any obligation, enforceable by Volker Stevin, on the part of Vos Limited to supply labour if requested.

[2] See paragraph [2], above
[3] Record of Appeal, bundle III, pp 440, 441 paras 41, 42 and 43

Evidence of a contract

[13] In response, the respondent noted that the judge was never asked to consider "the bare issue of the existence/non-existence of a contract", and so he never addressed or examined this issue in his judgment. However, the respondent submitted, proof of the existence of a contract was to be found both in the pleadings and the oral and documentary evidence. The respondent submitted that the existence of a contract may be a matter of express agreement but may also be implied from the conduct of the parties and, in fact, the contract may come into existence during its performance; Trentham Ltd. v Archital Luxfer.[4] In the instant case, the respondent argued, the pleadings and the evidence established the existence of a contract.

[14] In the pleadings the respondent pointed to statements by the appellant in the amended defence[5] that the appellant's project manager directed that "the Claimant could start the work"; the appellant's project manager asked the respondent for a breakdown of labour costs; workers supplied by the respondent commenced work on the site office; the appellant's project manager experienced problems with the respondent's representative; the project manager was dissatisfied with the rates charged by the respondent; and the appellant terminated the services of the respondent and paid all the respondent's invoices in full and final satisfaction of same. The respondent submitted that the appellant was bound by its pleadings and what the respondent argued was the admission therein that there was a contractual relationship. The dispute really is as to the extent of the contract, the respondent submitted.

[15] The evidence to which the respondent pointed[6] to support the existence of a contract was the evidence of Ruud Goosens, the appellant's project manager, Steen, Bruce Hutton and Stuart Hutton. The evidence of the last named witness is of no weight as he simply made the conclusionary statement that there was a

[4] [1993] 1 Lloyd's Rep 25 at 29
[5] In paragraphs 7, 8, 9 and 10.
[6] In paragraph 30 of the respondent's skeleton arguments

contract. In the evidence of Goosens the respondent pointed to statements that Goosens terminated the services of the respondent and paid all invoices which were submitted for payment; that the supply of labour for the construction of the site office and the fencing was not a real contract, only an invitation to start and see how it goes; that the appellant paid invoices for over $100,000.00 from 25th February to 20th March 2003; that the people on the work site worked for the respondent; and that the respondent supplied the labour to erect the fencing.

[16] The portions of Jan Van Der Steen's testimony on which the respondent relied were that the appellant terminated the services of the respondent by letter dated 17th March 2003; that the fencing around the site office was constructed by workers from the respondent; and that a payment Steen expected to receive from the respondent was for the period when the respondent was supplying labour to the appellant.

[17] Bruce Hutton's testimony was relied on for his statements that it was agreed the contractors would incorporate the respondent company to perform the contract from the date of incorporation and that Steen informed him that the contractors had been awarded the contract, which they were to perform until the new company started performing. His testimony also confirmed the other evidence and the pleadings that the respondent supplied labour to the appellant and was paid for doing so.

### The missing evidence

[18] The evidence on which the respondent relied to prove the existence of the contract, it is plain, is of limited scope. This is not surprising when one considers the nature of the only piece of evidence that was given as to the making of the oral agreement between the parties. That was the evidence of Bruce Hutton who stated[7] that:

> "Subsequent to faxing the letters of January 21, 2003, to the Defendant, Jan Van der Steen informed me that the Contractors had been awarded

[7] In his witness statement at paragraph 21

> the contract to provide skilled and unskilled labour ("the Contract") for the eighteen-month duration of the Defendant's contract to build the Terminal and that a new company to be registered at Grenada, Vos Limited (Vos Grenada), would perform the Contract but in the interim the Contractors would do so. The Contract was based on the said quotation faxed January 21st, 2003 at 2:43p.m."

[19] The judge disbelieved Steen's denial that he had so informed Bruce Hutton and, as earlier stated, there is no challenge to the judge's resolution of the conflict in the evidence. But Steen's denial meant there was no evidence that any term had been agreed beyond the terms that Bruce Hutton stated. For that reason, there was not even a hint of what words the appellant used in telling Steen the contractors had been awarded the labour supply contract. Bruce Hutton's evidence therefore established only that the following terms were agreed: (1) the contractors would provide labour, (2) the rates for categories of workers would be as stated in the letter of 21st January 2003, (3) the duration of the contract was the eighteen-month duration of the appellant's contract to build the terminal, (4) a new company would be formed that would perform the contract, and (5) in the interim the contractors would perform the contract.

Duration of the contract

[20] Mr. Hudson-Phillips submitted there was no evidence before the court as to the duration of the main contract to build the terminal. The testimony on this matter came from Bruce Hutton, in cross-examination, who stated he made an assumption that "the work would last eighteen months or thereabouts".[8] He did not say on what basis he made that assumption. There was no other evidence as to the duration of the main contract. The judge made no finding of fact as to the duration of the main contract, understandably in view of the framing of the issue he was asked to decide, but seems to have accepted that eighteen months was the duration of the main contract and that the duration of the contract between the instant parties was the same. The appellant contends the evidence shows there

[8] Record of Appeal, Bundle 1, p. 42 line 15

was no contract, in the legal sense. There was, instead, at best an arrangement that the respondent would be required from time to time to provide labour.

[21] It seems to me the 18 months duration that the judge accepted is highly questionable. Bruce Hutton's answer in cross-examination, that he assumed the main contract would last for 18 months, cannot be ignored. This answer makes it doubtful that Steen told Hutton the appellant had agreed to an 18 months period of supply. Had it been that Steen told Hutton that the appellant said the contract would last for eighteen months it is inconceivable that Hutton would have said it was an assumption he made.

[22] It is also questionable whether the judge was entitled to rely on the hearsay statement by Bruce Hutton that Steen told him the appellants had given the labour supply contract to the contractors. It is clear that at the time when Steen told this to Hutton, Steen was a representative of the contractors and not a representative of the appellants. The respondent itself established this.[9] I am unclear how what one contractor told another contractor could amount to admissible evidence against the appellant. Steen did not give this evidence in court. It was perfectly open to the judge to believe Hutton that Steen had told him so and to disbelieve Steen when he said he did not tell Hutton so. But that dispute is as to what was said out of court and relates to Steen's credibility. I do not see how it can constitute evidence of the fact that the appellant told Steen what Hutton said. In other words, no one testified that the appellant agreed to give the labour supply contract for 18 months to the respondent.

[23] The evidence, on which the respondent relied to argue the existence of a contract could be inferred, does not even faintly advert to duration. As I said, because of how the issue was framed, the judge made an assumption as to duration. He decided it was an eighteen months contract because, he found, the labour the respondent provided was for work other than a site office building. Had the judge considered whether there was evidence that the appellant had agreed to eighteen

[9] See paragraph [3], above

months duration as the period of labour supply I am satisfied he would have found there was no such evidence.

Rates of payment

[24] Given the statement of rates and categories of workers in the letter of 21st January 2003, it might have been thought that the parties had agreed on the rates the appellant would pay the respondent. That letter stated:

> "We take pleasure in submitting our daily/weekly rates for the supply of labour for the various categories of work on the Esplanade project. The rates are as follows:
>
> | | | | |
> |---|---|---|---|
> | Foreman | EC$ 1,000.00/week | | |
> | Carpenter | | Carpenter | |
> | A Class | EC$25.00/hr | B Class | EC$ 16.00/hr |
> | Electrician A | EC$ 25.00/hr | Electrician B | EC$ 16.50/hr |
> | Mason | EC$ 22.00/hr | | |
> | Plumber | EC$ 25.00/hr | | |
> | Labourer | EC$ 10.00/hr | | |
> | Building Maintenance | | | |
>
> In addition to the above we are in a position to offer any type of service that you may require and will supply rates at your request.
>
> We hope that the above meets with your approval and look forward to being of service of you on the project."[10]

[25] However, there is no gainsaying Mr. Hudson-Phillips' observation that in a list that accompanied its letter dated 13th March 2003 the respondent is seen providing information requested by the appellant as to the categories of workers that would be needed for a one year period, the number in each category, and the average yearly wage for each category. That list contained the following:

| "Quantity | Trade | Ave. Yearly Wage |
|---|---|---|
| 1 | Quality Control | $78,000.00 |
| 2 | Secretary | $45,500.00 |
| 1 | Surveyor | $84,500.00 |
| 1 | Surveyor Helper | $31,200.00 |
| 6 | Operator | $62,400.00 |

[10] Record of Appeal, Bundle II, p476

| | | |
|---|---|---|
| 1 | Banks Man | $31,200.00 |
| 7 | Foreman | $52,000.00 |
| 38 | Tradesman | $34,320.00 |
| 14 | Labourer | $15,600.00 |
| 4 | Cleaners | $13,000.00 |
| 1 | Stores Manager | $44,928.00 |
| 1 | Ass. Stores Man. | $19,500.00" |

The point is that up to the stage when this list was requested there was no agreement on those fundamentals.

[26] The termination letter came just four days after this list was presented. There is no evidence the parties agreed on this manpower supply or the rates of payment. There is no evidence that there was prior agreement on manpower requirements beyond what was stated in the letter of 21st January 2003. The January letter, compared to the March list, mentioned only some of the categories of workers (seven as against twelve) and did not specify the number of workers in each category. For example, the March list specified the provision of 38 tradesmen while the January letter did not mention tradesmen (although the description 'tradesmen', in the March list, may have subsumed specific categories of workers mentioned in the January letter). One imagines the January letter could hardly have been more specific since it was only a quotation and the contractors would not have known the manpower needs of the appellant at the time.

[27] It is the fact that there was no evidence as to the other terms that counsel for the appellant mentioned. There was no evidence that it was a term of the agreement that the appellant was obliged to employ labour from the respondent, either exclusively or at all. Similarly, there was no agreement that the respondent was obliged to supply labour as distinct from an agreement that the respondent would do so. It also appears not to have been agreed whether either party could terminate the arrangement upon giving reasonable notice or without notice.

Some basic principles

[28] Against the backdrop of what the evidence was incapable of proving Mr. Hudson Phillips submitted that some basic principles of law were ignored in reaching the conclusion that there was a contract to supply labour for 18 months. The starting proposition, counsel submitted, was that the judge should have realized that the letter of 21st January 2003 was a tender or an offer and should have considered the effect of its acceptance. In Cheshire, Fifoot and Furmston's Law of Contract[11] the effect of the acceptance of such an offer is considered. The authors use the example of a corporation that invites tenders for the supply of certain specified goods to be delivered over a given period. In the example, a trader puts in a tender indicating he is prepared to supply the goods at a certain price. When the corporation 'accepts' the tender, what is the legal result of the 'acceptance'?

[29] The answer to that question is discussed in the following passage.[12]

> "There is no doubt, of course, that the tender is an offer. The question, however, is whether its 'acceptance' by the corporation is an acceptance in the legal sense so as to produce a binding contract. This can be answered only by examining the language of the original invitation to tender. There are at least two possible cases.
> "First, the corporation may have stated that it will definitely require a specified quantity of goods, no more and no less, as, for instance, where it advertises for 1,000 tons of coal to be supplied during the period 1 January to 31 December. Here the 'acceptance' of the tender is an acceptance in the legal sense, and it creates an obligation. The trader is bound to deliver, the corporation is bound to accept, 1,000 tons, and the fact that delivery is to be by instalments as and when demanded does not disturb the existence of the obligation.
> "Secondly, if the corporation advertises that it *may* require articles of a specified description up to a maximum amount, as, for instance, where it invites tenders for the supply during the coming year of coal not exceeding 1,000 tons altogether, deliveries to be made *if and when* demanded, the effect of the so-called 'acceptance' of the tender is very different. The trader has made what is called a standing offer. Until revocation he stands ready and willing to deliver coal up to 1,000 tons at the agreed price when the corporation from time to time demands a precise quantity. The 'acceptance' of the tender, however, does not convert the offer into a binding contract, for a contract of sale implies that the buyer has agreed to

[11] 11th ed., London Butterworths 1986
[12] At p 45

> accept the goods. In the present case the corporation has not agreed to take 1,000 tons, or indeed any quantity of coal. It has merely stated that it may require supplies up to a maximum limit. [Fn: Another way of analysing the difficulties here is to say that the corporation has provided no consideration until it makes a promise to buy a definite quantity of goods. Cf Adams 94 LQR 73]"

[30] The authors comment that in the second case the standing offer may be revoked at any time provided that it has not been accepted in the legal sense; and acceptance in the legal sense occurs when a requisition for a definite quantity of goods is made.

> "Each requisition by the offeree is an individual act of acceptance which creates a separate contract. If the corporation in the case given telephones for 25 tons of coal, there is an acceptance of the offer and both parties are bound to that extent and to that extent only – the one to deliver, the other to accept 25 tons. If, however, the tradesman revokes his offer he cannot be made liable for further deliveries [Fn: Offord v Davis (1862) 12 CBNS 748], although he is bound by requisitions already made. [Fn: Great Northern Rly Co v Witham (1873) LR 9 cp 16]"

[31] In the instant case the absence of agreement by the parties on the basic terms already referred to means that the respondent cannot identify the specific contract that it says the appellant accepted. I note the respondent did not plead in its amended statement of claim that the agreement was that the respondent would supply <u>all</u> the labour the appellant might need. The respondent pleaded "it was agreed … that the Contractors would provide the Defendant with skilled and unskilled labour …"

[32] It strikes me that no obligation flowed from that agreement for the respondent to supply any particular number of workers far less to supply all workers the appellant might need. Equally, the agreement did not oblige the appellant to obtain all the workers it needed or even a minimum number of workers from the respondent. The agreement in the instant case is even more amorphous than the second example given in the textbook. In the instant case there was no specification of any quantity of workers that the appellant would require over the specified period, unlike the case in the example where a maximum amount is specified. It is difficult to see the agreement in the instant case as other than the 'acceptance' by the

appellant of a standing offer made by the respondent. When Steen told Bruce Hutton that the contractors had been awarded the contract, at that time there was no obligation on either party to require or supply, respectively, any number of workers. The agreement was no more than that the respondent would "provide labour" of such description and such quantity as -- it was left unsaid -- may be specified from time to time.

No absolute contract

[33] But even if there had been an agreement for the respondent to provide the appellant, and the appellant to obtain from the respondent, all workers needed, the case of Burton v The Great Northern Railway Company[13] shows that this still would not create an exclusive or absolute obligation.

[34] In that case it was provided by an agreement in writing that the plaintiff should provide all wagons, horses, drivers, tarpaulins and all other plant necessary for the cartage of merchandise between two locations and should convey all merchandise "that may be presented to him" for that purpose by the defendant. The consideration by way of the rate to be paid per ton of merchandise transported was agreed. The agreement was for the space of one year. About seven months into the year the defendants notified the plaintiff that from a certain day they would cease providing the plaintiff with merchandise to be conveyed. The plaintiff sued for damages for breach of contract.

[35] One of the arguments presented by the defendants, at first instance, was that the plaintiff wrongly alleged an absolute contract that the plaintiff should carry all merchandise for the defendants whereas the evidence proved a contract that the plaintiff should carry such merchandise *as should be presented to him* by the defendants. On the other hand, counsel for the plaintiff contended that on the true construction of the agreement, one party was bound to present and the other to carry, the merchandise for one year. The first instance judge thought the

[13] (1854) 9 Ex. 507

defendants had committed a breach of contract by entering into an arrangement with another company, which prevented them from having merchandise carried between the two locations. On appeal it was held there had been no breach of contract because the defendants had not refused to perform the contract but had merely intimated that from a certain day the defendants would cease to have any goods for the plaintiff to carry.

[36] From a reading of the exchanges between counsel and the bench[14], it emerges that the reason for the decision was that the contract was not an absolute contract. Parke B made the observation that the parties had omitted to provide for the contingency of the defendants ceasing to be carriers. Alderson B raised the question, "Suppose it had been inconvenient or a loss to the defendants to carry, could they not have discontinued it?"

[37] It seems to me that the contract in the instant case is even further away from being an absolute contract. To paraphrase Alderson B, why could not either party to the instant contract discontinue it?

[38] The only possible answer to that question that occurs to me is that it was a contract for 18 months. That answer is unsatisfactory for a number of reasons. First, as previously discussed, that duration was simply an assumption the respondent made. There is no evidence that the appellant knew of, far less agreed to be bound by that assumption, or led the respondent to believe the appellant had agreed to be bound. Secondly, even if eighteen months had been specified, there is nothing in the evidence to show that the appellant was not free to cease requiring labour supply from the respondent during that period. The parties simply did not provide for that contingency. Thirdly, the 'contract' was a standing offer, not to provide a certain number of workers or all the workers that might be required, but to provide such number of workers as were required from time to time. This comes back to the appellant's argument that, as a matter of legal principles, when there is a contract to provide such number and description of workers as may be

[14] At p 511

required from time to time, each time a certain number of workers is required of the supplier, a separate contract is created. But there is a contract only to the extent of that requisition; otherwise there is no contract.

## Fairness

[39] On the basis that the arrangement that existed between the parties was a standing offer and not a contract, in the legal sense, it seems to me the appeal must be allowed. In coming to that decision I have considered the fairness of the result given how the issue was presented to the judge. It is clear that counsel for the parties misdirected the judge. That misdirection, however, occurred at the end of the trial, after all the evidence had been taken. The evidence was presented in the context of the issues as defined by the statements of case. It is unquestionable that issue was joined on the pleadings whether any contract came into existence and there was specific evidence from the appellant denying the respondent's assertion that a contract had been awarded. Thus, the amended defence specifically denied the existence of any contract. It specifically stated "The defendant denies the agreement or any agreement as alleged …" Even in relation to the 'agreement' which the defence stated was reached, the defence asserted that the appellant rejected the price offered by the respondent to provide labour to construct the site office building and directed that the respondent could start work on that building but it would be paid on an hourly basis.

[40] On that pleading and the evidence given in support, neither side could have been misled as to the case the appellant was maintaining. The way in which the statement of the issue was framed was unfortunate and misdirected the judge. But it does not appear to have affected the respondent or resulted in any unfairness to the respondent. Commendably, the respondent made no allegation of prejudice or unfairness in this regard.

[41] Accordingly, I would allow the appeal with prescribed costs to the appellant both in this court and the court below. Prescribed costs on the award of $2,402,244.08 amount to $80,030.00. Prescribed costs in this court, being two thirds of that sum, amount to $53,353.33.

Denys Barrow, SC
Justice of Appeal

Hugh A. Rawlins
Justice of Appeal

Errol Thomas
Justice of Appeal [Ag.]