EASTERN CARIBBEAN SUPREME COURT

HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV2007/0709

BETWEEN:

EVERETTE JONAS

Claimant

And

CARLTON LEWIS

Defendant

Appearances:

E. Deniscia Thomas for the Claimant

Stacey-Ann Saunders-Osborne for the Defendant

March 24, 2011

March 29, 2011

JUDGMENT

INTRODUCTION:

[1]. **FLOYD, J.:** This is a claim arising out of a contract between the Claimant and the Defendant entered into in or about November of 2004. The Defendant was to supply 1,000 metric tons of scrap metal to the Claimant for the purchase price of US$40.00 per ton.

THE PLEADINGS:

[2]. By way of a Claim Form and Statement of Claim filed on December 4, 2007, the Claimant claimed against the Defendant:

a) A declaration that the agreement between the parties made in or about the month of November 2004 is valid and enforceable.

b) Specific performance of the said agreement made in or about the month of November 2004 by delivery of the remaining 750 metric tons of scrap metal to the Claimant.

c) Further or alternatively, damages for breach of contract in the sum of EC$144,720.00 representing the loss of profit and other financial loss suffered by the Claimant as a result of the Defendant's breach of contract.

d) Costs.

e) Interest on such sum as may be found to be due to the Claimant.

[3]. By way of a Defence filed on February 14, 2008, the Defendant denied the claims of the Claimant and the relief sought, indicating that the terms of the contract had been fulfilled and his obligations thereunder had been discharged by his performance of the same. The Defendant asserted that the terms of the agreement were fully executed as they related to the supply and access to the scrap metal. The Defendant asserted that the Claimant received no less than 1,000 metric tons of scrap metal and denied that the Claimant was owed 750 metric tons of scrap metal.

[4]. By way of Reply to Defence filed on May 7, 2008, the Claimant denied removing 250 metric tons of scrap metal over and above the agreed upon 1000 metric tons of scrap metal. The Claimant also denied owing the Defendant US$5,000.00 in compensation therefore.

[5]. The trial of this matter took place on March 24 and 29, 2011, with both sides calling evidence. A Core Bundle of material had been filed on March 14, 2011.

[6]. By way of preliminary orders made on March 24, 2011, following submissions from Learned Counsel, the document entitled "Draft Survey Report" found at p. 13 of the Bundle of Documents Not Agreed, was excluded from evidence and the Claimant's Supplemental List of Documents was disallowed.

THE EVIDENCE:

[7]. The Claimant, Everette Jonas, provided a witness statement and testified. He stated that he was in the scrap metal recycling business, purchasing scrap metal in Antigua and Barbuda and shipping it overseas. His evidence was that the arrangement he had with the Defendant, Carlton Lewis, was for the purchase of 1000 metric tons of scrap metal at a cost of US$40.00 per ton. This is not in dispute. Additionally, it is not in dispute that the Claimant paid EC$108,000.00 to the Defendant, pursuant to this agreement.

[8]. No written contract was provided to the court. Instead, reference was made to a letter from the Defendant to the Claimant dated November 30, 2004, apparently confirming the arrangement.

[9]. The Claimant stated that he was responsible for cutting and piling the material found at the Old Sugar Factory grounds (the Defendant's premises). He employed truck drivers Watson Smith, Audley Hobson and Ricardo Wilshire to transport the scrap metal. The removal was interrupted by the Defendant on two occasions, resulting in the Claimant paying the Defendant a further EC$8,000.00 and later a further US$5,000.00. Transport resumed but the Claimant was only able to remove approximately 250 metric tons of material from the Sugar Factory. He had additional scrap metal from other locations, separate and apart from that purchased from the Defendant, which he added to that transported to the harbour for loading on to a ship in May 2006. The Claimant stated that he did not receive approximately 750 metric tons of scrap metal from the Defendant, despite paying the full purchase price.

[10]. The Claimant confirmed that on one of the occasions transport trucks were stopped, he met

with and had conversation with a police officer at the Sugar Factory. He was told unauthorized material was being removed. He subsequently attended the harbour and saw "a couple of items" removed from the ship. Although he could not recall the name of the police officer, he stated that he only spoke to the officer at the Sugar Factory and no where else. All of the information he received at the harbour came from stevedores. There was no discussion with either police or the Defendant at the harbour that day and in particular no discussions regarding further payments to the Defendant that day. The police did not stop him at the harbour but rather stopped him loading at the Sugar Factory. The police did not order him to remove scrap from the ship. The EC$8,000.00 and the US$5,000.00 had been paid to the Defendant before the police attended that day and the latter amount was a form of sanction imposed by the Defendant.

[11]. The Claimant stated that he also shipped containers of scrap metal in early 2006, however, none of the material from the Defendant was involved. The Claimant admitted, however, that he had already removed scrap metal from the Sugar Factory by then.

[12]. With regard to the transport of the scrap metal from the Sugar Factory, the Claimant stated that Ricardo Wilshire made 2 trips in a 22 ton truck, Edison Baltimore did not transport anything and Troy Kellman was not retained to transport from the Sugar Factory. Watson Smith and Audley Hobson were the principal truckers. He confirmed that the trucking invoices submitted do not show a weight of scrap transported per load. Although he kept a list of the number of trips recorded in a binder, he conceded that he neither brought the binder to court nor provided it for disclosure.

[13]. The Claimant's son, Darron Jonas, provided a witness statement and testified that he operated a 10 ton truck, making 8 - 10 trips with scrap metal from the Sugar Factory to the Deep Water Harbour. The total weight of scrap he transported was unknown and he was unsure of the number of truck drivers involved in this process, other than himself.

[14]. Dwight Lewis (not related to the Defendant) provided a witness statement and testified. He

stated that he sold 392.11 metric tons of scrap metal to the Claimant and transported it for storage, where it was weighed. Although his Witness Statement indicated he sold the scrap to the Claimant in May 2006, he testified that this was an error and the date was actually May 2005.

[15]. The scrap metal was transported from McKinnon's, weighed and then stored before being later transported to the harbour. This witness was not, however, involved in the transporting to the harbour. He made certain observations of some trucks moving between the storage area and the harbour, but he also received information from the Claimant.

[16]. The Defendant, Carlton Lewis, provided a witness statement and testified. He stated that he owned a business known as Tyre Master, located at the Old Sugar Factory in St. John's, Antigua and Barbuda. He has been in the scrap metal business for approximately 45 years and by way of Cabinet decision, holds exclusive rights for the removal of scrap metal from the island of Antigua.

[17]. The Defendant confirmed there were oral and written communications between he and the Claimant, culminating in an agreement for the sale of 1000 metric tons of scrap metal to the Claimant for US$40.00 per ton. The negotiations occurred in 2004 and the transaction took place in 2005-06.

[18]. The Defendant stated that trucking services were provided to transport the scrap metal by Edison Baltimore, Watson Smith, Algie Atwood, Audley Hobson and Ricardo Wilshire. His foreman, Troy Kellman, was also engaged to transport scrap metal from the Sugar Factory to the harbour.

[19]. The Defendant stated that the Claimant received the agreed upon 1,000 metric tons of scrap metal, based on the size of the trucks used and the number of trips made. There was never any weighing of the material, it was all estimated. Truck drivers are paid per trip. It was therefore in the interests of the Claimant to fully load each truck.

[20]. The Defendant stated that the Claimant removed additional scrap metal without permission and this caused him to contact the police. Cpl. Olson Hector responded, met with the Defendant at his premises, and then attended the harbour, along with the Defendant. The Claimant was not at the Sugar Factory when police arrived. At the harbour, the Defendant showed the police officer the unauthorized scrap metal which was on board the ship. The Claimant was present. The parties agreed that the Claimant would pay a further US$5,000.00 for the additional 250 metric tons of scrap metal. Subsequently, the Claimant paid that amount and the outstanding balance of EC$8,000.00 to the Defendant.

[21]. Edison Baltimore provided a witness statement and testified. He owns a heavy equipment and trucking company and has done work for both the Claimant and the Defendant. He stated that he was employed by the Claimant to transport scrap metal from the Sugar Factory. His company utilized several 20 ton trucks to transport approximately 500 tons of material. He was aware that the Claimant used other trucks and drivers also.

[22]. While Mr. Baltimore testified that he "thought" he had invoiced the Claimant for this work, he also said that he moved his business office and some documents were lost. Further, he was never paid for that work. No invoices were produced for this work at trial.

[23]. Troy Kellman provided a witness statement and testified. He has worked for the Defendant for approximately 17 years and is the foreman at Tyre Master, Old Sugar Factory. From 2005-06 he observed the Claimant and his workers cutting and transporting scrap metal from the Sugar Factory. He observed Edison Baltimore, Watson Smith, Algie Attwood, Audley Hobson and Ricardo Wilshire provide trucking service.

[24]. The Defendant's business was also engaged by the Claimant to transport scrap metal from the Sugar Factory to the harbour. It was Mr. Kellman who drove a 22 ton truck, making 13 trips, and transporting approximately 286 tons. Based on his observations of the transporting trucks, he estimated that the Claimant obtained approximately 1,300 tons of scrap metal

from the Defendant's site. There was no weighing of either the scrap metal or the trucks, it was all estimated.

[25]. It was Mr. Kellman who notified the Defendant in May 2006 that the Claimant's workers were removing scrap metal from unauthorized areas on the Defendant's premises. He stopped the Claimant's workers at that point. There were two different occasions when he stopped the loading of the Claimant's trucks. The Claimant and the Defendant had already made a decision on how much scrap was to be taken away. The material was therefore not weighed. It was an estimation "and maybe one party did better in the agreement", based on how many trucks removed material.

[26]. Ricardo Wilshire provided a witness statement and testified. He is the owner of a trucking business, renting heavy equipment. The Defendant contracted with his company, indicating that the Claimant required his services to transport scrap metal from the Old Sugar Factory. He therefore used his 22 ton truck to transport scrap metal from the Sugar Factory to the harbour and to Crabbs. He made 11 trips transporting approximately 220 metric tons.

[27]. Mr. Wilshire did not invoice the Claimant for the work and did not weigh the scrap transported. He did the work for the Claimant through the Defendant. It was the Defendant who paid him for the scrap deliveries.

[28]. Cpl. Olson Hector of the Royal Antigua and Barbuda Police Force provided a witness statement and testified. Cpl. Hector is an officer with approximately 17 years experience who knows both the Claimant and the Defendant. In May 2006 he responded to a call and attended the Old Sugar Factory. He observed a confrontation between workers with trucks being stopped. He met with the Defendant in order to investigate a reported larceny complaint. He did not see the Claimant nor speak to him at the Sugar Factory.

[29]. Cpl. Hector received certain information from the Defendant, implicating the Claimant in the unauthorized removal of scrap metal and its transport to a ship in the harbour. As a result of

that, Cpl. Hector, another officer and the Defendant then proceeded to the harbour.

[30]. Once on board the ship, the Defendant pointed out to Cpl. Hector the scrap metal in question in the ship's hold. Cpl. Hector spoke to the Claimant on the ship, advising him of the allegation. As it was unknown "what was what" in the ship's hold, Cpl. Hector indicated that all of the material was to be removed "in the interests of justice." Cpl. Hector then observed the Claimant and the Defendant walk away from the ship engaged in conversation. The Claimant and the Defendant later approached Cpl. Hector, and the Defendant advised that the matter had been resolved. Cpl. Hector then left the area.

[31]. A week or two prior to this investigation, there was a second incident at the Sugar Factory that Cpl. Hector was involved in. He was called to attend and observed a confrontation with trucks being prevented from loading. On that occasion, the matter was resolved with the Claimant and Defendant "sorting it out" between themselves.

SUBMISSIONS:

[32]. Learned Counsel for the Claimant submits that there has been a breach of contract on the part of the Defendant in that significantly less than 1,000 metric tons of scrap metal were supplied, despite the Claimant paying the Defendant EC$108,000.00. The Defendant has failed to perform exactly his obligations pursuant to the contract, resulting in a breach and a loss suffered by the Claimant. Reference is made to "Chitty on Contracts" Volume 1, General Principles, paragraphs 22-001 and 27-054. The Claimant seeks specific performance and/or damages as a result.

[33]. In support of this position, Learned Counsel for the Claimant submits that the shipment of the transported scrap metal from the Sugar Factory by the Claimant took place on the vessel M/V O Un Chong Nyon Jo. This was the vessel the Claimant, Defendant and Cpl. Hector were on board and the SGS Survey document at p. 15 of the Bundle of Documents Not Agreed shows a weight of 949.030 metric tons of bulk scrap metal for that ship. The amount

is less than that contracted for and indeed it is submitted that a large portion of that material came from sources other than the Defendant's premises.

[34]. Learned Counsel also relies upon evidence that truck drivers Dwight Lewis and Darron Jonas transported scrap metal for the Claimant from locations other than the Sugar Factory to the harbour for loading on to the ship. Truck driver Ricardo Wilshire was actually paid by the Defendant, not the Claimant, to transport scrap metal, and therefore he was acting for the Defendant. The Defendant or his agents interfered with and stopped the Claimant and his agents from transporting scrap metal from the Sugar Factory on more than one occasion, thus resulting in the Claimant removing less than the amount of scrap metal agreed to. All of this, it is submitted, shows that the Claimant only received approximately 250 metric tons or less of scrap metal from the Defendant.

[35]. Learned Counsel for the Defendant submits that the terms of the contract were fully complied with in this case and that 1,000 metric tons or more of scrap metal were provided to the Claimant by the Defendant. The Defendant performed his obligation under the agreement, consistent with "Chitty on Contracts", Volume 1, General Principles, 29th edition, paragraph 21-001. That is, his actual performance satisfied the standards prescribed by the contractual obligation.

[36]. In support of this, reference is made to a number of different named truck drivers who were retained to transport scrap metal from the Sugar Factory to the harbour, including drivers employed by the Defendant. By noting the number of trips made by these drivers and the size of their trucks, it can be shown that the scrap metal tonnage agreed to, and more, was provided by the Defendant.

[37]. With regard to the transport of scrap metal from locations other than the Sugar Factory, Learned Counsel for the Defendant submits that much of that work was done in 2005 and that the weight or tonnage transported and number of trips made is unclear.

[38]. It is further submitted that the evidence that the Defendant contacted police when the Claimant removed unauthorized and extra scrap metal confirms the position that the full amount had been provided. Why else would the Defendant have called the police if the Claimant were not removing scrap metal over and above the amount agreed to?

[39]. Learned Counsel for the Defendant asks the court to consider carefully the SGS Survey document as there are actually 3 pages to it. Only one of the pages is in English, and it apparently relates to "intervention" in Columbia. It does not deal with the ship's status when it commenced its journey. It should not be taken, therefore, as confirming the amount of scrap metal obtained by the Claimant from the Defendant.

[40]. Both Learned Counsel referred the court to items in the Bundle of Documents Not Agreed at pages 2 - 12 and 14 - 16.

[41]. Learned Counsel for the Defendant submits that in the event the court finds there was a breach of contract by the Defendant, the Claimant is not entitled to the entire loss and damage claimed. Pursuant to "McGregor on Damages", 15th edition, paragraph 31, the Claimant would only be entitled to a refund of monies paid for 750 metric tons of scrap metal, being the market value of the property.

[42]. It is further submitted that the Claimant would not be entitled to a refund for the cost of cutting and compiling the scrap metal as being an expense incurred in preparation or part performance, pursuant to "McGregor on Damages", 15th edition, paragraph 45.

[43]. Further and following the case of Victoria Laundry v. Newman [1949] 2 K.B. 528 (CA) and "McGregor on Damages" 15th edition, paragraph 246, Learned Counsel for the Defendant submits that the claim for loss of profits should not be granted. The Defendant had no knowledge of the Claimant's contractual obligations with his purchasers and, therefore, no loss of profits was foreseeable.

[44]. Lastly, Learned Counsel for the Defendant submits that specific performance is not an appropriate remedy, should a breach be found, due to the laches of the Claimant. Legal proceedings not being commenced until approximately one year later, reference is made to "Halsbury's Laws of England, Volume 44(1), 4th edition, paragraph 902 regarding delay in commencing enforcement of a party's rights possibly constituting laches and preventing specific performance.

ISSUES:

[45]. Did the Defendant breach the agreement with the Claimant for the supply of 1,000 metric tons of scrap metal?

[46]. If it is found that the Defendant breached the agreement, is the Claimant entitled to:

a) Specific performance (delivery of 750 metric tons of scrap metal);

b) Damages in the sum of $144,720.00 (for loss of profit and other expenses)?

DECISION:

[47]. There is no formal written contract in this case. The most written information regarding the terms of the agreement between the Claimant and the Defendant is found at p. 62 of the Core Bundle, in the form of a letter from the Defendant to the Claimant dated November 30, 2004. Although a price of US$40.00 per ton is quoted, the letter does not indicate an amount of scrap metal to be purchased. In fact, the Defendant writes that he "will not commit (himself) to any specific amount." The parties, however, have agreed, for the purposes of this case, that an amount of 1,000 metric tons was agreed to be provided.

[48]. The letter goes on to indicate that the scrap metal is to be accessible for the Claimant to "pick up and take to (his) destination" but is not specific as to how the material will be transported nor weighed.

[49]. Although the letter is dated November 30, 2004, it indicates that "we can start immediately to remove scrap to the dock" It is curious then that the matter does not come to a head until May 2006 when trouble apparently arises as the Claimant is attempting to arrange to load a vessel in the harbour.

[50]. What is clear, however, in the letter is the concluding comments from the Defendant that he "will not allow the boat to leave the Port until all monies are paid in full."

[51]. It is the general vague nature of this agreement that troubles the court. In the face of the apparently loose arrangement between the parties, the court is asked by the Claimant to construe and interpret the agreement and assess the factual evidence in order to determine whether or not its terms were fulfilled. One would have thought that seasoned businessmen in the field of scrap metal, as the parties hold themselves out to be, would have taken greater care to clearly formalize the terms of their business dealings.

[52]. That the Claimant paid the Defendant for the scrap metal is also not in issue. Although it is apparently admitted that the Claimant paid EC$108,000.00 to the Defendant, the only agreed upon written evidence of payment is found at p. 64 of the Core Bundle in the form of a receipt from the Defendant's company, Tyre Master, to the Claimant in the amount of EC$100,000.00. The Claimant, it is admitted, made a further payment of EC$8,000.00, however, the circumstances of such payment are not agreed upon. It is unclear whether the additional payment was made in satisfaction of the original agreed upon price or whether it was part of a payment sought by the Defendant from the Claimant for taking more than 1,000 metric tons of scrap or whether it was part of a further payment sought by the Defendant by way of a sanction or penalty.

[53]. During the course of the trial, it became apparent that scrap metal was transported from the Defendant's premises, the Old Sugar Factory, by the Claimant. However, there was a total lack of weighing of trucks and their cargo as they either left the Factory or arrived at the harbour or another destination. This is another curious fact in a business arrangement

between seasoned professionals that the court is asked to work out. In light of such a lack of quantified weighing, it would seem important for records to at least have been kept of the size of the trucks used and the number of trips made.

[54]. The evidence of Darron Jonas for the Claimant is not particularly helpful, other than to confirm that he transported an unknown quantity of scrap metal from the Old Sugar Factory to the harbour (8 - 10 trips in a 10 ton truck) and that he was aware of other drivers doing the same. The court noted that this witness had a connection to the Claimant, being the Claimant's son.

[55]. The other witness for the Claimant, besides the Claimant himself, was Dwight Lewis. This witness provided the only apparently quantified weight of scrap metal transported. He testified that he sold to and moved 392.11 metric tons of scrap for the Claimant. That scrap metal did not come from the Sugar Factory. The Claimant submitted that this scrap metal formed part of the amount transported to the ship in the harbour in May 2006. The court notes, however, that the actual weigh slips referred to by this witness were not produced. Reference was made to a condensed version of those documents found at pp. 3 - 5 of the Bundle of Documents Not Agreed, which was not prepared by this witness. Even if it is accepted that this witness sold such an amount of scrap to the Claimant, the date on which it was done changed. The court notes that in his testimony, this witness said that he made such a sale to the Claimant in May 2005 not May 2006, as his Witness Statement indicated.

[56]. It is also significant that this witness was not involved in the transport of this scrap metal to the harbour. He had earlier transported it for storage in 2005 and although he made some observations of trucks moving between the storage area and the harbour in May 2006, he also relied upon information told to him by the Claimant in relation to that transport and the reasons therefore.

[57]. The evidence of Dwight Lewis that he transported scrap metal for storage in 2005 is also significant when compared to the evidence of the Claimant. The Claimant testified that he

was involved in another shipment of scrap metal from the harbour in early 2006. Although he said none of the scrap metal from the Sugar Factory formed part of that shipment, he admitted that he had already removed scrap metal from the Sugar Factory by then, as well as from other locations, including that shipped and stored by Dwight Lewis. It is, therefore, entirely possible that some of the removed and stored scrap metal was shipped by the Claimant prior to the May 2006 shipment. The tonnage indicated in the SGS Survey found at p. 15 of the Bundle of Documents Not Agreed is, therefore, highly suspect as proof that an amount less than 1,000 metric tons was provided by the Defendant to the Claimant.

[58]. The SGS Survey document is also questionable for other reasons. The document is only one page of three, making up the SGS Survey (see pp. 14 - 16 of the Bundle of Documents Not Agreed). The other two pages are in Spanish and have not been interpreted for the court. The date on the English language document at p. 15 is July 28, 2006, however, the date on the Spanish language document at p. 16 is 28 **Junio** (my emphasis) de 2006 - a different month. The English language document, although naming the ship, does not confirm the port of embarkation nor whether there were any stops prior to the apparent unloading port of Santa Marta, Columbia. This is important as the document indicates that the total metric tonnage found at point of discharge represents "findings at moment and place of our intervention only." For all of these reasons and considering the difficulties with the evidence of Dwight Lewis referred to above, I am not satisfied that there is a clear indication of the amount of scrap metal tonnage placed into the ship in the harbour in May 2006.

[59]. As to the transporting of scrap metal from the Sugar Factory, the Claimant stated that Watson Smith, Audley Hobson and Ricardo Wilshire drove trucks for him, with Smith and Hobson being the principal drivers. The court did not hear from either Smith or Hobson. The Claimant denied that Edison Baltimore and Troy Kellman were hired to transport for him. The Defendant stated that all of these drivers and Algie Atwood were involved. In the absence of formal documentation confirming load weight and number of trips, the testimony of the drivers, therefore, became very important.

[60]. Edison Baltimore stated that he has done work for both the Claimant and the Defendant, and that in this case, he transported approximately 500 metric tons of scrap metal for the Claimant. Troy Kellman stated that, although he was the site foreman for the Defendant at the Sugar Factory, he personally transported 286 tons of scrap metal for the Claimant, as the Defendant's company was engaged by the Claimant to remove some of the scrap metal. Ricardo Wilshire stated he transported 220 metric tons of scrap metal for the Claimant, through the Defendant's company. While it appears somewhat unusual for truck drivers to have transported for the Claimant through the Defendant's company, I am satisfied that such work was indeed done and I am also satisfied that the removal of scrap metal by the Claimant from the Sugar Factory was not restricted to these three drivers only. Hence, an even greater amount of scrap was removed from the Old Sugar Factory than that testified to by these three drivers. I also note the evidence of the Defendant regarding the loading and transporting of trucks. He stated that truck drivers are paid per trip and it would therefore be in the Claimant's best interests to ensure each truck carried the maximum weight possible. A logical observation.

[61]. I also take careful note of the evidence of the Claimant in this regard. As the amount of scrap metal removed from the Sugar Factory was the very essence of the contract between the parties, one would have expected the Claimant to be careful to ensure the weight of the loaded trucks was recorded for each trip made. In the absence of that, one would have expected the Claimant to carefully record the size of the trucks utilized to transport the scrap metal and the number of trips made.

[62]. Indeed, in his testimony, the Claimant admitted that he kept a list of the number of trips made by the transport trucks from the Sugar Factory. The list was stored in a binder which the Claimant neither brought to court nor provided by way of disclosure of documents. The fact that such an important document was known to exist yet was never produced by the Claimant seriously impacts the credibility of the Claiamt in the eyes of the court. Surely, such a document would have gone a very long way towards settling the issues in question in this

case.

[63]. Another apparently significant aspect of this case is the police intervention at the Sugar Factory. Cpl. Hector confirmed that there were two occasions when he was called to attend and clearly, therefore, there were problems on site on those occasions. It is the second attendance of Cpl. Hector in May 2006 that is of particular importance, coming as it did during the loading of the ship in the harbour.

[64]. Cpl. Hector's evidence was given in a forthright and straightforward manner. He is an officer of some 17 years experience who knew both the Claimant and the Defendant at the time. As an independent, impartial witness, his evidence is important. The testimony of the Defendant accords with that of Cpl. Hector. The testimony of the Claimant does not. The Defendant stated that the Claimant removed scrap metal in excess of the agreed upon 1,000 metric tons and that it came from a different area at the Sugar Factory. Because of this, the Defendant called the police to attend at the Sugar Factory. The Claimant was not at the factory when the police arrived. The Defendant stated that the Claimant agreed to pay for the excess scrap metal when the two later met on board the ship. The Defendant further stated that Cpl. Hector was also present at the harbour and that the two spoke away from Cpl. Hector. They reached an agreement and the transaction continued. Much of that is confirmed by Cpl. Hector. The evidence of the Defendant is therefore supported, at least in part, by Cpl. Hector.

[65]. The Claimant also testified regarding the incident involving Cpl. Hector. He stated that he spoke to police at the Sugar Factory and nowhere else. When he eventually attended the harbour, he spoke to stevedores, not the police, and not the Defendant. Unfortunately, none of this accords with the evidence of Cpl. Hector. Cpl. Hector stated that he spoke to the Claimant on board the ship, not at the Sugar Factory. Cpl. Hector did not see the Claimant at the Sugar Factory. Cpl. Hector observed the Claimant and the Defendant walk away together, while conversing. The Claimant is, therefore, contradicted in large part by Cpl. Hector and his credibility is again significantly impacted as a result.

[66]. With such a lack of written material forming the basis of the contract or agreement in this case, the court must rely upon the witness statements and oral testimony, in particular, that of the Claimant and the Defendant themselves. For the reasons that I have indicated above, I do not accept the evidence of the Claimant. I prefer that of the Defendant. In the end, I am satisfied that truck drivers Wilshire, Baltimore and Kellman transported scrap metal for the Claimant, as they described, and as did other drivers. Bearing in mind the total amount of scrap metal transported by these and other drivers, I am satisfied that the Claimant did indeed receive at least the 1,000 metric tons of scrap metal he contracted and paid for. I find that the Defendant fulfilled his obligations under the agreement and that the Claimant has failed to prove, on a balance of probabilities, that the Defendant breached the agreement.

[67]. According to "Chitty on Contracts", Volume 1, General Principles, regarding performance, that both Learned Counsel referred me to, I am satisfied that both parties performed the obligations that they undertook, according to the contract. The Claimant has, therefore, failed to prove any breach of contract on the part of the Defendant. As a result, it is not necessary for me to deal with the issues concerning categories and quantum of damages.

ORDER:

[68]. For all of the reasons noted above, it is hereby ordered as follows:

i) The Claimant's claim is dismissed.

ii) Costs are awarded to the Defendant, pursuant to the prescribed costs regime of the Civil Procedure Rules 2000.

Richard G. Floyd
High Court Judge