

JERSEY / JUDGMENT

Murray v Camerons Limited [2021]

JRC 234 (21 September 2021)

[2021] JRC 234

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judgment

the bailiff:

Introduction

1. On 8 th September 2020, this Court handed down a Judgment in the above captioned proceedings (see Murray v Camerons Limited [2020] JRC 179) (the Judgment) in which the Court set out the basis upon which a contract existed between Sir Bob Murray CBE ("the Plaintiff") and Camerons Limited ("the Defendant") concerning the property known amongst other things as Les Lumieres West in the parish of St Brelade (the Property). 2. In the Judgment the Court set out the basis upon which the claim by the Defendant for payment from the Plaintiff should be calculated and although the Court expressed the hope that that exercise could be conducted by agreement that did not prove to be the case. Accordingly the parties are now before the Court for a decision as to the quantum of the claim between the Plaintiff and the Defendant. 3. It is not necessary to set out the details of the genesis and progress of the relationship between the Plaintiff and the Defendant. This is fully referred to in the

Judgment.

However, the Judgment contains certain guidance as to the way the question of quantum should be approached and it is appropriate therefore, to set out the relevant parts of the Judgment which are as follows:- ".....217. In our view, notwithstanding any subjective belief on the part of the Plaintiff there was a contract between the Plaintiff and the Defendant on the terms of the JCT Standard Form. The price had in effect originally been agreed in November 2014 and was based upon the RNJ Cost Report and the documentation underpinning that. Once those specifications had changed the price referred to in November 2014 as the cap or otherwise became irrelevant. It was and must have been understood by both parties that the price would change. The programme had been agreed as had the completion date. The works were to be conducted in accordance with JCT Standard Contract and the Defendant had made it entirely clear at every point that this was not to be a fixed price contract and they would not be providing any discount.

Whatever the Letter of Intent may have been intended to achieve when it was initially created in our judgment the contractual arrangement had significantly mutated to the JCT Standard Contract and the Plaintiff and the Defendant had conducted themselves, and were content to do so, in the manner provided for by that JCT Standard Contract. This to us is demonstrated by the parties' acceptance of and adoption of retentions, pay less provisions, architect's instructions, OHP and interim valuations and certificates. Although a final price had not been agreed a mechanism for establishing cost, through CCR's, AIs, certifications (including 6.5% OHP) had been established and the reasonable observer would have concluded that this was the agreed method of proceeding and agreed as applying to the work that the Defendant was doing. 219. In our judgment, the Defendant is entitled to the 6.5% OHP. In our judgment however, there should be no up lift for CDP as the Plaintiff had always refused this. There should be no uplift for potential claims from sub-contractors, unless the Defendant can show that bills have been submitted by those sub-contractors. Furthermore, there should be no up lift in the contract sum for legal costs. That in our view is how the price falls to be calculated. We see no basis to revisit sums already paid before certified. 227. Accordingly in our judgment the Defendant is entitled to be paid for its work on an agreed value basis, with OHP, and to the extent that that work is covered by AIs then on that basis. 228. We do not think that there was to be an uplift for CDP as this appears to be an aspect that the Plaintiff had always refused to accept and similarly there was not to be an uplift for potential claims from sub-contractors unless the Defendant can show that bills have been submitted by those sub-contractors. There was to be no uplift in the contract sum for legal costs. 229. For the avoidance of doubt, however, we do not find on the evidence before us that there is any basis to revisit the Intermediate Contract and the sums paid for the Enabling Works nor, as we have indicated above, do we find the allegations made by the Plaintiff against the Defendant established". 4. Prior to the hearing before us, it became apparent that there was a difference in approach between the experts appointed for the Plaintiff and the Defendant and the parties sought further directions from the Court. In a brief ex tempore judgment of the 4 th February 2021 (the February Judgment) the Court (Le Cocq, Bailiff, sitting alone) gave the following guidance: "1. It seems to me that the basis of valuation must be, as far as it is possible, to follow the guidance given in the in the Judgment of the Royal Court. That was after hearing all of the evidence and, without suggesting that this is a problem in this case, it does not appear to be possible at this stage to raise issues of fact which could and should have been pleaded before the Court when the matter was heard and which gave rise to that Judgment. Therefore, there cannot be in my view be any suggestion that the works done were not done to a sufficient standard or that the factual material agreed within the interim valuations were agreed on some wrong basis. 2. The starting point should, in my view be the interim valuations which is the starting point anticipated in the

Judgment.

That is not to say that it is the finishing point however, it must be reasonable for any degree of duplication in payments to be addressed if, for example, work has been carried out, already paid for out of the enabling works, or in some way the interim valuations of covered work which was not in fact done, but I do not see that that should be a great deal of difficulty for the experts to agree a common view on. 3. Other than it seems to me it is helpful and informative to look at the case of Imperial Chemical Industries Limited v Merit Merrell Technology Limited

[2018] EWHC1 577 (TCC) which has been referred to by both parties as guidance to the experts in this case, but ultimately the Court will sit to resolve this at the three-day hearing in April" 5. We have received reports and heard extensive oral evidence from the experts. We heard firstly from Mr Mark Hackett ("Mr Hackett") who is the Defendant's expert and then from Mr Duncan Hughes-Phillips ("Mr Hughes-Phillips") who is the Plaintiff's expert. We do not in this Judgment set out full details of their respective evidence but it is, however, important to identify the approach of each expert. Each expert expressed the view to us that their approach was consistent with the Judgment and with the February

Judgment.

The approach of the Defendant's expert 6. The approach of the Defendants' expert, Mr Hackett, was set out in the introductory paragraphs of his report dated 29 th October 2020. 7. In Paragraph 1.2.3 of his report he says: "My input remains directed to matters of quantum and I do not attempt to express any view on legal, liability and technical issues outside this remit. My instructions require me to provide an independent, professional opinion based on the Royal Court's findings as set out in its Judgment dated 8 September 2020 (JRC 179) and, in particular, taking into account the following (the paragraph references given below are to the Judgment): (a) The contractual position and correct approach to quantification is that Camerons is entitled to be paid for its work on the "Agreed Value Basis" (paragraphs 227 and 230). (b) Camerons is entitled to overhead and profit (paragraph 227). (c) To the extent that work is covered by AIs and Camerons is entitled to be paid for that work on the basis set out in the AI (paragraph 227). (d) There is no uplift for the Contractor's Designed Portion (paragraphs 219 of 228). (e) There is no uplift for potential claims from Sub Contractors unless Camerons can show that bills have been submitted by those Sub-Contractors (paragraphs 219 and 228). (f) There is no uplift in the contract sum for legal costs (paragraphs 219 and 228). (g) There is no basis to revisit sums paid for the Enabling Works (paragraph 229)." The approach of the Plaintiff's expert 8. The Plaintiff's expert, Mr Hughes-Phillips, sets out his methodology in a separate appendix (Appendix B) to his report dated 23 rd November 2020. That appendix comprises some 7½ sides explaining the overall steps taken and how the individual elements of those steps had been established. The overall methodology is set out at paragraph 2 of Appendix B of Mr Hughes-Phillips' report which states: "This methodology includes the following steps: (a) Establish the Contract Sum and scope of the Main Works; (b) Establish the changes that CL have claimed to the Contract Sum ("The Changes"). (c) Establish which of the changes are variations ("The Variations") or are items which should be

included in the Adjusted Contract Sum; (d) Calculate the Adjusted Contract Sum; (d) Establish to what extent the work included in the Adjusted Contract Sum was properly completed; (f) Calculate the NFA; (g) Calculate the payment due." 9. Thereafter in his methodology Mr Hughes-Phillips explains that he has implemented each of the above steps. NFA means "Notional Final Account" which, so Mr Hughes-Phillips states, is pursuant to the JCT form of contract which states: "..... the Contractor shall as reasonably practicable prepare and submit an account. The account shall set out the amounts referred to in Clauses 8.12.3 to 8.12.3.4 and, if applicable, 8.12.3.5 namely: · The total value of work properly executed at the date of termination of the Contractor's employment, ascertained in accordance with these Conditions as if the employment had not been terminated, together with any other amounts due to the Contractor under these Conditions; · Any sums ascertained in respect of direct loss and/or expense under Clause 4.23 (whether ascertained before or after the date of termination); · The reasonable cost of removal under Clause 8.12.2; · The cost of materials or goods (including site materials) properly ordered for the Works which the Contractor has paid or is legally bound to pay; Any direct loss and/or damage caused to the contractor by the termination." 10. We will not go into the full details of Mr Hughes-Phillips' approach but we note that in paragraphs 4 & 5 of Appendix B, in which after stating that the Enabling Works was in flux as to scope and that, items of work moved in and out of the main works as a result he says the following: "This causes an issue for my assessment because whilst the Court decided that: "In our view, notwithstanding any subjective belief on the part of the Plaintiff there was a contract between the Plaintiff and the Defendant on the terms of the JCT Standard Form. The price had in effect originally been agreed in November 2014, and was based upon the RNJ Cost Report and the documentation underpinning that." 6. I cannot use this as the starting point without further analysis. This is because if I use the Court starting point, the changes between the scope of the Main Works in November 2014 and in January 2015 would not be taken into account. This would potentially mean that: (a) Work that was subsequently instructed and paid within the Enabling Works would also be included in the main works, and thus paid twice; or (b) Work that was included in the enabling works and subsequently moved to the Main Works would not be paid at all." Some areas of contention 11. The approach of the Plaintiff's expert was dealt with at some length in the Plaintiff's written closing

submissions.

In contrasting the approach of the two experts at paragraph 55 of the closing submissions the Plaintiff states: "The key difference between Mr Hughes-Phillips and Mr Hackett is that Mr Hughes-Phillips has undertaken a detailed forensic analysis, starting with the interim valuation 14 ... to track through the various stages of the Project, including a review of the negotiations, agreements and payments made at various stages, how much was paid at each stage and for what (applying the "Agreed Values" approach), to establish what proposed changes were, or were not variations, pursuant to the JCT." 12. Mr Hughes-Phillips' approach is roundly criticised by the Defendant. An approach based on a Notional Final Account, so the Defendants argue was not in accordance with the terms of the Judgment. The Defendant refers to paragraph 114 of Appendix

A of Mr. Hughes-Phillips' report in which he says: "I am instructed to consider these issues and to prepare a Notional Final Account, presented in a manner which will enable the Court to consider these issues on an alternative basis to T & T's Interim Valuation 14". 13. This, so it is argued by the Defendant, is a clear departure from Interim Valuation No. 14 which is simply not authorised by the Judgment or the February Judgment. Such an approach had not previously been pleaded nor was it raised in the hearing which gave rise to the Judgment although that hearing was to have covered both quantum and liability. 14. Mr Hackett, at paragraphs 3.14 - 3.17 of his Reply dated 25th February 2021 comments on Mr Hughes-Phillips' Notional Final Account, and specifically, at 3.14 of that Reply Mr Hackett says: "Mr Hughes-Phillips states that he has been instructed to provide a Notional Final Account ("NFA") which he describes as something "pursuant to the termination of the employment of a contractual organisation". The belatedly introduced concept of an NFA is irrelevant for three reasons. First, the outgoing contractor (i.e. the Defendant) was not in default and the termination was instead for convenience. Secondly, the only final account which is relevant here, applying the agreed values basis set out in the Judgment of the Royal Court, is one that reflects the Defendant's proper entitlement taking into account the mechanisms by which values were agreed (and if not agreed by valuing the same in accordance with the JCT contract which was also found to apply) and the works which were performed and/or the rights which were accrued by the time of termination. Thirdly, this approach has not been pleaded, and even if it had been, Mr Hughes-Phillips has misapplied it." 15. We accept Mr Hackett's concerns in this regard. Mr Hackett criticises Mr Hughes-Phillips' report as offering opinions which first require a finding as to liability which, so Mr. Hackett says, is an issue not to be trespassed upon by a quantum expert. 16. Mr Hackett then at paragraphs 3.19 to 3.20 of his reply makes submissions as to the quantity of work performed. Mr Hughes-Phillips says he has identified that there were instances where certain works were not carried out. At paragraph 3.20, Mr Hackett then says: "Even if it is permissible for Mr. Hughes-Phillips to reject entitlement in respect of Works which he says were not performed, an even-handed approach would require similar emphasis upon those works which were performed but in respect of which no financial entitlement was recognised by Mr Hughes-Phillips." 17. Under the section relating to "claw-backs" from the Enabling Works, Mr Hackett repeats the statement in the Judgment to the effect that the Court did not find any basis to revisit the sums paid for the Enabling Works and points out that Mr Hughes Phillips in his analysis has sought to claw back the sum of £53,000 in respect of items paid for under the Enabling Works Contract. Mr Hackett at paragraph 3.23 goes on to say: "To overcome the embargo on removing sums of money from the enabling works contract, Mr Hughes-Phillips contrived a basis for saying that the monies in question should instead be deducted/credited from monies due under the Main Contract. Apart from undermining the Royal Court's finding in relation to the Enabling Works Contract, Mr Hughes-Phillips' argument also falls foul of the general position which is that the Defendant is at least entitled to be paid the gross amount certified." 18. Again, we agree with Mr Hackett's criticism of Mr Hughes-Phillips' approach. 19. As we have already indicated we have not gone into the full detail of the written evidence before us nor the oral evidence. To do so would have increased inordinately the length of this Judgment. 20. Mr Hughes-Phillips chose not to use the starting point specified in the Judgment and applied a different methodology to achieve a Notional Final Account. This is not in

accordance with the terms of the Judgement and so we discount his calculations. Mr Hughes-Phillips was also not entitled to claim claw backs by taking the Enabling Works into his account as this was not sanctioned by the Court. 21. In particular we reject Mr Hughes-Phillips' contention that a NFA should be calculated in accordance with the JCT contract. 22. As we have stated, the final contract price was never fixed and the various documents to which we have been taken illustrate a process by which the final contract price was being identified but was never in fact finalised. The tendered sum, faced with a changing specification, becomes less meaningful. It does not, therefore, surprise us that changes occurred in the various costings as to time and the specifications moved on and we do not think that it is realistic to apply those parts to the JCT form of contract which works on the assumption that there is a finalised contract sum or indeed finalised plans and drawings. Indeed, at one point, in the questioning between the Plaintiff's counsel and the Defendant's expert it was suggested that the tender price was fixed and no variation was possible. This is not, on our understanding, in accordance with the express wording of the JCT form of contract, but, in any event, in our judgment and as we have said, the price was evolving and was never fixed. 23. We noted with some surprise that the architect was not called to give evidence before us and indeed he had not given evidence before us at the trial that gave rise to the Judgment. In the context of the quantum argument, this seems to us to be particularly puzzling as it was the architect who was the certifier of the amounts due for payment under the Interim Certificates and was, of course, the author of the architect's instructions that were issued during the course of the development and which to a significant extent underpin the Interim Certificates. He would have been, we must assume, in a position to confirm how accurately he would have viewed the figure which is certified in the Interim Certificate and given valuable evidence as to the process that actually took place in this case and whether there was any question as to what reliance should be placed upon it. To the extent that there were questions about the inclusion of certain figures within the Interim Certificate or whether it was complete and to which date, he would presumably have been able to provide very useful comment. He was, however, not called for reasons that we do not fully understand. In the circumstances, however, we proceed on the basis that the Interim Certificate is an accurate assessment. The Defendant's Entitlement 24. The Gross Certified Amount, under the Interim Certificate No. 14 was £2,577,742. The defendant had valued the works up to and including 3rd February 2016 in the sum of £2,992,632. This was reduced by the Plaintiff's Quantity Surveyor (T & T) to the amount certified, a deduction of £414,890. It is clear that the Plaintiff made a very substantial deduction from Camerons' valuation of the works done and thus starting from the amount certified is likely to be favourable to the Plaintiff and detrimental to the Defendant. Nevertheless, the Defendant's expert has used this figure as his starting point in accordance with the Court's formula. We note that prior to the appointment of T & T all Camerons' valuations were accepted by the Plaintiff's quantity surveyor (RNJ). This changed shortly after T & T took over, from which point the architect (Godels) issued Pay-less Notices for every application from October 2015 and Camerons responded to these Pay-less Notices by stating that the reductions were grossly unfair. Camerons requested that T & T visit the site to review the Pay-less Notices. T & T did not respond nor did they visit the site. 25. The safest basis of assessment of amounts due in this case is to begin with the Interim Certificate No. 14 which is based on figures claimed by the Defendant, agreed by the

quantity surveyor as to quantity, and signed off by the architect, after reducing the claim by Pay-less Notices. This amount may only be varied in accordance with the guidance given in the February Judgment. 26. We also observe that in the February Judgment we indicated that whilst the Interim Certificate was a starting point it was not the finishing point and it was clearly appropriate that the amount certified should be adjusted in accordance with costs incurred and work done. The defendant has calculated that it is entitled to a final payment of £337,333, excluding interest. The table that follows sets out this calculation with reference to the submissions made in respect of each item. We accept the Defendant's analysis of these items and refer to its closing submissions without repeating any of the detail. Analysis of figures 27. As the Plaintiff's expert, Mr Hughes-Phillips, has chosen to disregard the Court's instructions as to the approach to be taken in calculating a final account for the work done by the defendant in the construction of Les Lumieres West we have adopted the Defendant's analysis as this is based on the Court's instructions. 28. Accordingly, we find that the Plaintiff owes the Defendant £337,333 as detailed in the table below: 29. We are prepared to deal with matters arising on the paper. Authorities Murray v Camerons Limited

[2020] JRC 179 . £ £ Interim Certificate 14 2,577,742 Items credited in final account dated February 2017 (Hackett 29/10/20 page 22) 34,434 Credits conceded by the defendants ref to paragraphs in their closing submissions Drainage -para 71 1,159 Further adjustments in final account -para73 Roof 2,036 External Works Architect's Instructions 5,326 Preliminary fixed charges -para 74 18,422 Total deductions -62,360 Additions re defendants closing submissions Architect's Instructions - paras 138 to 142 35,954 Remeasures/Builders work in Connection -paras 143 to 151 23,802 Outstanding sub-contractor applications/bills Astons (Mechanical and Electrical)-paras 152 to 159 33,676 Granite Le Pelley (Natural Stone)- paras 160 to 165 40,236 AWS (windows and external doors) -paras 166 to 172 8,508 Additional preliminaries - paras 173 to 181 Target cost savings not achieved 20,000 Additional QS resource 108,618 Total Additions 270,794 sub-total 2,786,176 OHP @ 6.5% on net addition (£208434) 13,548 OHP on £26,800 paid to Astons by JP Mauger para 157 1,742 TOTAL DUE TO CAMERONS 2,801,466 Paid to Camerons 2,448,855 Retention paid to Astons by Plaintiff 15,278 Total paid to date 2,464,133 The Defendant's Entitlement (excluding interest) 337,333 Page Last Updated: 23 Sep 2021 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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