[2026] JMCA Civ 41

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA
THE HON MR JUSTICE LAING JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00049

BETWEEN	**STONE PLUS LIMITED**	**1st APPELLANT**
AND	**KAYON CLINTON CAMPBELL**	**2nd APPELLANT**
AND	**NOTFOYA THOMPSON**	**3rd APPELLANT**
AND	**PHILLIP WALTERS (T/A L.A.B. Asphalt Spraying)**	**RESPONDENT**

Miss Deborah Martin, Ms Sharon Usim and Ms Kelly Hamilton instructed by Usim Williams & Co for the appellants

Curtis Daniel Cochrane for the respondent

3 February and 13 November 2026

Contract – Interpretation – Whether parol evidence rule applicable – Plea of *non est factum* – Assessment of credibility

F WILLIAMS JA

[1] I have read, in draft, the judgment of Laing JA. I agree with his reasoning and conclusion and have nothing to add.

FOSTER PUSEY JA

[2] I too have read the draft judgment of Laing JA and agree with his reasoning and conclusion.

LAING JA

[3] This is an appeal by Stone Plus Limited ('Stone Plus'), Kayon Clinton Campbell ('the 2nd appellant') and Notfoya Thompson (together referred to collectively as 'the appellants') against a judgment of Palmer Hamilton J ('the learned judge') delivered on 22 April 2021 ('the judgment'). The appellants seek the following orders:

> "i) That [the] Judgment of the Hono[u]rable Palmer Hamilton J be set aside.
>
> ii) The costs of the Appeal to the Appellants to be agreed or taxed."

The background

[4] The Government of Jamaica selected Stone Plus through a competitive tender to carry out works on certain key cane roads as part of the Cane Haul Roads Rehabilitation Project, between Long Pond in the parish of Trelawny and the Appleton factory in the parish of Saint Elizabeth ('the project'). Stone Plus invited several subcontractors to submit quotations to perform works in respect of the Project. These works involved spraying MC oil ('MCO') and Tar ('together referred to herein as 'the products').

[5] The respondent submitted an oral quotation to the appellants and was awarded the contract to carry out the works for the project as Stone Plus' subcontractor. The appellants assert that the respondent was selected because it submitted the lowest quotation.

[6] Stone Plus and the respondent entered into a series of seven written contracts in respect of the Project ('the contracts'). The first of these ('Exhibit 1A') was dated 13 November 2017, and includes the following provision:

> "To supply and Spray 5000 gallons of tar for the Cane Haul Projects- Package 1 and 2."

The value of the work was stated to be "One Million Three Hundred Thousand Dollars ($1,000,000.00)". Notably, the words and figures do not match. The payment schedule

stipulated that $500,000.00 was paid on Friday, 10 November 2017, and $500,000.00 was paid on Monday, 13 November 2017. Exhibit 1A did not explain the $500,000.00 payment on Friday, 10 November, before the contract was signed. The expected completion date was stated as 15 November 2017.

[7] The contracts dated 21 November 2017 ('Exhibit 1B'), 28 November 2017 (Exhibit 1C') and 1 December 2017 ('Exhibit 1D'), followed a similar structure, specifying what quantity of tar was to be supplied and sprayed and the value of the work. There is no reference to MCO in these contracts.

[8] The formats of the contracts dated 3 January 2018 ('Exhibit 1E), 26 February 2018 ('Exhibit 1F') and 6 April 2018 ('Exhibit 1G') were different. The 3 January 2018 contract Exhibit 1E, referred to 4500 gallons of tar supplied and sprayed by Mr Walters at $400 per gallon and indicated that "[a]n additional 5000 gallons of MCO will be needed to supply and spray by Mr. Walters at $400 a gallon which totals $2,000,000.00".

[9] The contracts dated 26 February 2018 (Exhibit 1F) and 6 April 2018 (Exhibit 1G) are in the form of an accounting of the material sprayed, payments made, and the "total now due". Both reflect the same total quantities of 11,000 gallons of tar and 4,300 gallons of MCO, and the total now due of $620,000.00. However, Exhibit 1G includes the following qualification:

> "Payment schedule: As of February 26, 2018, the total now due for payment is agreed by both parties to be $620,000.00.
>
> Mr. Walters received $200,000.00 cash on April 6, 2018 and Sagicor cheque number 6001759 amounting to $100,000.00. Balance of $320,000 remains as of April 6, 2018."

[10] Despite the respondent signing Exhibit 1G, the parties disagreed on the amount owed to the respondent under the contracts, which culminated in the respondent filing a claim against Stone Plus and its directors.

[11] By his claim form filed 21 June 2018, the respondent claimed:

> "jointly and severally the sum of $10,820,200.00 less $1,660,000.00 for spraying 6600 gallons of [MCO], 11,000 gallons of asphalt/tar at $400.00 per gallon in each case, totaling $7,040,000.00, $180,000.00 for spreading gravel and $3,600,200.00 for credit obtained from Chins Construction Limited for [MCO] and Asphalt/Tar purchased on behalf of the [appellants'] between November 14, 2017 and December 3, 2017."

The respondent's claim is based on his position that he agreed with the 2nd appellant that the labour cost for spraying MCO and asphalt (tar) would be the same, that is $400.00 per gallon for each, and accordingly, the rate of $400.00 per gallon mentioned in the contract was solely for his labour. His case was that Stone Plus would be liable for the cost of the Products although he would be responsible for supplying them.

[12] The essence of the defence is that where the contracts refer to a rate of $400.00 per gallon, that is the rate at which the respondent was to supply and also spray the relevant product. The appellants relied on the terms of the contracts and maintained that the respondent was entitled only to the amount stated in the final contract dated 6 April 2018, as a balance of $320,000.00.

Judgment in the court below

[13] The learned judge was tasked with determining the scope of the agreement between the parties and concluded that the parol evidence rule did not preclude the respondent from adducing evidence to prove that the contracts were not a complete record of their agreement.

[14] The learned judge found the respondent credible and his evidence reliable, finding that the 2nd appellant agreed to pay for the Products. Ultimately, the learned judge determined that the claim succeeded and awarded judgment in the sum of $8,360,200.00 with interest at the rate of 6% per annum from 15 November 2017 to 22 April 2021.

The appeal

[15] Being dissatisfied with the judgment, the appellants, by notice of appeal dated 2 June 2021, filed the following grounds of appeal:

> "a) The Learned Judge erred in law whe[n] she found that the parole [sic] evidence would avail the Claimant.
>
> b) The Learned Judge erred in law in finding that the contracts [that] were signed were not intended by the parties to represent the final agreement.
>
> c) The Learned Judge erred in law in failing to give due consideration to the doctrine of non est factum in the circumstances of the case.
>
> d) The Learned Judge erred in law in awarding Judgment for the claimant in the sum of $8,360,200.00 with interest at a rate of 6% per annum from 15 November 2017 to 22 April 2021."

These grounds are referred to herein as grounds 1-4 respectively.

The role of the appellate court

[16] It is a well-established principle in this jurisdiction, reiterated in **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7, by Brooks JA (as he then was), at para. [7], that "[i]t has been stated by this court, in numerous cases, that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility". (see also **Watt (or Thomas) v Thomas** [1947] 1 All ER 582).

[17] In **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] 4 All ER 418, ('**Beacon Insurance**') an appeal from Trinidad and Tobago, the Privy Council noted that there may be circumstances in which the appellate court is entitled to interfere with the trial judge's findings of fact where the appellate court is satisfied that the judge at first instance has gone "plainly wrong". The court noted at para. 12 that this:

> "... directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he

> did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984] 2 MLJ 165 at 168–169 (Lord Roskill)." (Italics as in the original)

[18] In **Beacon Insurance** at para. 17 the Board refers to the following passage of Lord Bridge of Harwich in **Whitehouse v Jordan** [1981] 1 All ER 267 at 286, which acknowledges that the perceived advantage the learned judge may have had of seeing the parties and witnesses when deciding questions of credibility and making primary factual findings might vary from case to case. He stated the following:

> "[T]he importance of the part played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly ever interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."

[19] This is important to note because critical findings of law by the learned judge regarding the terms of the agreement were a consequence of the learned judge's findings of fact based on an assessment of the credibility of the parties.

[20] There is a considerable overlap in the submissions on grounds 1, and 2, and for this reason, I find it convenient to address them together.

Ground 1: The Learned Judge erred in law when she found that the parole [sic] evidence would avail the Claimant.

Ground 2: The Learned Judge erred in law in finding that the contracts that were signed were not intended by the parties to represent the final agreement.

The appellants' submissions

[21] Miss Deborah Martin, for the appellants, highlighted the gravamen of the defence, namely that the written contracts contained the negotiated agreement between the parties, which was honoured over approximately five months. It was asserted that the respondent was paid a total of $3,299,800.00 pursuant to those contracts and was owed $320,000.00 as of 6 April 2018, as reflected in the contract of that date, Exhibit 1G. Counsel argued that none of the contracts refers to any other sum payable to the respondent for a debt incurred by the respondent and in respect of which the respondent says is the subject of another agreement.

[22] Counsel took no issue with the relevance of the case law authorities referred to by the learned judge on the subject of parol evidence but submitted that the learned judge erred in her application of the law to the evidence before her.

[23] Miss Martin agreed that the learned judge considered the parol evidence rule and observed that, at para. [26] of her judgment, she identified the main issue for resolution as follows:

> "[26] The main issue that has to be resolved in this case can be stated as follows: is there evidence, including the possibility of parol evidence to find that the overall discussions formed a collateral contract to the written agreements. The answer to this question will determine whether the claimant is entitled to the orders sought."

Counsel acknowledged that the learned judge's framing of the issue is appropriate since ultimately the crux of the dispute between the parties is whether the agreement reached by them included the 1st appellant's liability for the cost of MCO and tar.

[24] Regarding the respondent's evidence that he was unable to read when he signed the contracts, counsel stated that he signed the statement of case and the contracts, and that the issue of his inability to read arose only when he executed his witness statement.

[25] Counsel conceded that at para. [32], the learned judge appreciated that the respondent did not plead the defence of *non est factum*, and accordingly the default position is that he should be bound by the terms of the contract. Counsel's complaint about the learned judge's treatment of the respondent's evidence that he could not read when he signed the contract is that, whereas the learned judge correctly held that his inability to read, in and of itself, did not permit him to disown the contract, *non est factum* not having been pleaded and relied on, the learned judge nevertheless used that fact as a basis for making other findings of fact in the respondent's favour.

[26] Many of the learned judge's findings identified by counsel as inappropriate are contained in para. [33] of the judgment which is reproduced hereunder to provide context to the submissions:

> "[33] I have to take into consideration the fact that the contract was prepared and presented to the [respondent] for his signature in the circumstances that he explained. Pertaining to the evidence as to those circumstances, I reject the evidence of the [2nd appellant] that he was unaware that the [respondent] could not read and I accept the [respondent] as a reliable witness of truth in this regard. The evidence of the [2nd appellant] that the [respondent] had a friend guide him in the signing of the contract was not put to the [respondent] in cross examination and the [respondent] did not have an opportunity to refute or confirm this aspect. I reject that aspect of the 2nd [appellant's] evidence as well. I have had regard to the demeanour of the [respondent]. He was not able to neither give intelligent thought to certain questions asked of him in cross examination nor appreciate certain words used by counsel. In my view, respectfully, he was not capable of constructing the contents of the contract without assistance. Even if I were to accept that the contents of the contract were read over to the [respondent], the terms of the contract are so vague that the [respondent] would not have been put on notice that the sums stated therein would not represent the value for the scope of work carried out by him."

[27] Counsel submitted that there was no evidence that the respondent did anything to put the other party on notice that he could not read, and the learned judge therefore

erred in rejecting the 2nd appellant's evidence that he was unaware the respondent could not read.

[28] Counsel submitted that although the respondent did not plead *non est factum* or seek to avoid the contracts, he relied on his inability to read. She argued that para. [33] shows that the evidence that the respondent could not read coloured the lens through which the learned judge assessed the evidence. Further, counsel argued that it appears from paras. [35] and [36] that the learned judge was influenced by the respondent's inability to read and concluded that the contracts were not fair to him. The learned judge then erred in permitting the respondent to adduce parol evidence to alter the clear terms of the written agreement to achieve a result that could be considered fair to the respondent.

[29] Counsel strenuously argued that the respondent's claim that the 2nd appellant agreed that Stone Plus would pay for the MCO and tar was not credible. She contended that this was not a single contract in which a party might argue that a term was omitted from the written document. In this case, the parties had a series of dealings spanning approximately five months, during which they regarded the contracts as binding. Furthermore, while the initial contracts were less detailed, counsel maintained that the later contracts included balances that the respondent did not dispute. Critically, counsel reiterated that Exhibit 1G, the final contract dated 6 April 2018, expressly states that a balance of $320,000.00 remained as of 6 April 2018, and that the respondent signed it and did not challenge it.

<u>The respondent's submissions</u>

[30] Mr Cochrane's submissions for the respondent were brief. The essence of his submissions was that the learned judge was correct to find that the signed contracts did not contain all the terms of the agreement between the parties. He submitted that, in arriving at that conclusion, the learned judge correctly considered all the surrounding circumstances.

Analysis

[31] Grounds 1 and 2 can be conveniently dealt with together, as it was the learned judge's conclusion that the contracts were not intended to represent the final agreement that provided her with the legal justification for finding that the parol evidence rule would not hinder the respondent in his claim.

[32] Counsel in their respective submissions correctly proceeded on the basis that the parol evidence rule is a legal principle that limits the use of extrinsic evidence to vary or interpret a written contract. The principle is expressed in Halsbury Laws of England 5th Edition, 555 Volume 22 para. 21 as follows:

> "Where the intention of the parties has in fact been reduced to writing, under the so-called 'parol evidence rule' it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show that intention, or to contradict, vary or add to the terms of the document, including implied terms. This rule is not confined to oral (parol) evidence, but also excludes earlier extrinsic written matter, such as earlier drafts, preliminary agreements and prior correspondence."

[33] The rule is subject to exceptions as explained in Chitty on Contracts, 34th Edition, Volume 1 at para. 15-024, as follows:

> "... [T]he parol evidence rule is and has long been subject to a number of exceptions. In particular, since the nineteenth century, the courts have been prepared to admit extrinsic evidence of terms additional to those contained in the written document if it is shown that the document was not intended to express the entire agreement between the parties. So, for example, if the parties intend their contract to be partly oral and partly in writing, extrinsic evidence is admissible to prove the oral part of the agreement.... It cannot therefore be asserted that the mere production of a written agreement, however complete it may look, will as a matter of law render inadmissible evidence of other terms not included expressly or by reference in the document: 'The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties'."

[34] The learned judge considered the parol evidence rule and correctly identified the central issue at para. [26] of her judgment as whether the evidence established that the parties' discussions gave rise to a collateral contract in addition to the written agreements, since, ultimately, the crux of the dispute between the parties was whether they had agreed that Stone Plus would bear the cost of the MCO and tar.

[35] The learned judge reviewed the relevant law and several cases, including **Barrington Scott Clark v Kimesha Amelia Debbie-Ann Notice** [2021] JMSC Civ 12, **Communtel Broadband Limited and Starcom Cablevision Limited v Alfred McKay** [2012] JMSC Civil 10, and **Joshua Jaddoo v Sugar Industry Authority** [2021] JMCA Civ 9. Thereafter, she expressed her approach to determining the applicability of the parol evidence rule at para. [31], which is worth reproducing below.

> "[31] From the above-mentioned authorities, I garner that the parol evidence rule may only avail the [respondent] if he is able to show that the seven written contracts did not represent the whole bargain between himself and the [2nd appellant] and that they did not correspond with the oral agreements that they had. In determining whether there was in fact any conversation where promises were made by the [2nd appellant] to buy the MC Oil and tar, all the circumstances of the case must be looked at, as well as all the evidence presented before the court. It is a matter of credibility whether such conversations did in fact occur between the [respondent] and the [2nd appellant], especially in the light of the [2nd appellant] denial that these conversations took place. I had the opportunity of hearing viva voce evidence from the [respondent], the witnesses called on his behalf and from the [2nd appellant] and I assessed their demeanour."

[36] The learned judge found that the exceptions to the parol evidence principle permitted the respondent to advance parol evidence in support of his claim. A summary of the learned judge's reasoning is captured at para. [35] as follows:

> "[35] The [respondent's] conduct and discussions with the [2nd appellant], at the time of and shortly following the execution of the contracts do give rise to the reasonable conclusion that the contracts that were signed were not

> intended by the parties to represent a final agreement. The contracts were very vague and apart from those dated 26 February 2018 and 6 April 2018 they did not reflect the actual value of the works intended to be carried out by the [respondent]. I find that that [sic] those values paid according to the contracts do not adequately reflect the scope of the work carried out by the [respondent] but instead they were in fact given to the [respondent] for the purchase of the MC Oil and tar. This would reasonably explain the [respondent's] conduct of purchasing the MC Oil and tar on credit at the hardware. I find that this was done in furtherance of the promises and assurances made by the [2nd appellant]. A contrary analysis would result in the [appellants] obtaining an unfair advantage under the contract resulting in an unjust enrichment."

[37] The learned judge's analysis and conclusions can be interrogated by considering the following question.

A. *Was there evidence that the contracts were not a record of the complete agreement between the parties?*

[38] The traditional view is that contract interpretation aims to ascertain the parties' intention. In the present case, there is no dispute about the plain meaning of "to supply and spray", so the learned judge's task was not confined to interpreting those words. The learned judge was charged with determining whether the parties agreed or intended that the written contracts should constitute the full scope of the agreement. According to Chitty on Contracts, 34th Edition, Volume 1 (supra), at para. 15-025, this is a matter "to be decided by the court upon consideration of all the evidence relevant to this issue."

[39] Accordingly, the learned judge had to consider whether it was therefore permissible for the respondent to adduce extrinsic evidence to prove that the contracts were not a complete record of the bargain struck and agreed between them, and this turned on the credibility of the respondent and the 2nd appellant.

[40] Assessing credibility is a difficult element of judicial decision-making. It involves, basically, ascertaining whether a witness appears to be telling the truth. In this

assessment, a number of tests are employed, including weighing the evidence against what has been clearly shown to have occurred, the internal consistency of the witness's evidence, and the witness's demeanour.

[41] The respondent's evidence, as set out in para. 3 of the witness statement, is that, after discussions with the 2nd appellant, it was agreed that the 2nd appellant would be responsible for the price of the MCO and tar. The 2nd appellant also agreed to pay $480.00 per gallon to spray MCO and $470.00 per gallon to spray tar. This was revised at the 2nd appellant's suggestion, and they agreed to $450.00 per gallon for spraying each. They subsequently settled at $400.00. The respondent asserted that it was agreed that, in addition to the cost of spraying the Products, Stone Plus would be responsible for the cost of the Products.

[42] The crux of the appellants' defence is that the respondent agreed to supply and spray MCO and tar at $400.00 per gallon. That is, the $400.00 would include the provision of the Products and their spraying. Insofar as that was the agreed position, the consequence was that the respondent would absorb the cost of the Products, and Stone Plus would not be concerned with or affected by the price the respondent paid for the Products.

[43] In the absence of any provision in the written contract supporting the respondent's assertion that the $400.00 per-gallon rate in the contracts did not include both supplying and spraying, the learned judge was entitled to "look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties".

B. *The possible importance commercial viability to the issue of credibility*

[44] Where a contract admits two possible constructions, a court may prefer the construction that is more consistent with business common sense. For the avoidance of doubt, I reiterate that where the written terms of the contract are clear, "business

common sense" or "commercial common sense" cannot be used to modify the meaning of the written terms if they constitute the full scope of the agreement between the parties.

[45] Notwithstanding that limitation, commercial common sense can be used to assess the credibility of the respondent's evidence that there was an oral component to the agreement between him and Stone Plus. Commercial common sense supports the learned judge's conclusion that the "values paid according to the contracts do not adequately reflect the scope of the work carried out by the [respondent], but instead they were in fact given to the [respondent] for the purchase of the MC Oil and tar".

[46] When one analyses the task that the respondent had to perform as a subcontractor on the project and factor in the cost of MC Oil and tar, there was ample evidence on which the learned judge could have based that conclusion. Stone Plus was registered with the National Contracts Commission as a contractor and was engaged by the Ministry of Agriculture to perform the Project, which involved resurfacing specific roads. The 2nd appellant's evidence is that this involved preparing and compacting the base and sub-base, oiling it, and laying the tar and gravel.

[47] Stone Plus was awarded this contract through a public competitive tender, which required it to submit, as part of its bid, rates for spraying MCO and tar (asphalt) respectively. Notably, the 2nd appellant could not recall the rate Stone Plus submitted as part of its bid.

[48] The inability to provide these rates is important because they would have assisted the court by enabling a comparison between the rates Stone Plus agreed in the main contract and the $400.00 per gallon rate for supplying and spraying the Products that it asserts the respondent agreed. This comparison could help determine whether $400.00 for supplying and spraying fell within the range of a realistic price the respondent might reasonably have agreed to. The 2nd appellant asserted that he might agree a higher or lower price with a subcontractor than the price at which he bid and still make a profit by applying the mark-up to one area of the tender, for example, the base, which is marl.

However, in the absence of Stone Plus' bid price, the 2nd appellant provided no evidence to support why the respondent, as the subcontractor, would have agreed to $400.00 per gallon to supply and spray product.

[49] The 2nd Appellant also could not recall the market cost per gallon of MCO or tar in Jamaica in 2017/2018, or the market cost to spray either product during the applicable period. He was cross-examined regarding his statement in para. 4, that during this period, LAB Asphalt submitted a quotation and was awarded the contract to carry out works in relation to the project because it submitted the lowest quote. He confirmed that LAB Asphalt's quote was verbal. He stated, "To my recollection, I think it was $200.00 to supply and spray. It's either $200.00 or $400.00. I am not too sure". Such a wide variance in a rate appears to be unusual, and again, the 2nd Appellant could not recall a material fact, which would have assisted the court.

[50] Throughout his cross-examination, the 2nd appellant was confronted with what appeared to be errors in the contracts. Regarding Exhibit 1A, he was directed to the inconsistency between the $1,300,000 in words and the $1,000,000.00 figure in brackets. He said it seemed to be a typographical error. In re-examination, he confirmed that the correct amount in words should have been $1,000,000.00, as supported by the two payments of $500,000.00 made on 10 November and 13 November 2017. He was asked about the value of the work in Exhibit 1A, which was $1,000,000.00 for 5,000 gallons, implying a cost per gallon of $200.00. This price per gallon derived was an obvious arithmetic calculation. Nevertheless, his response was "I can't agree or disagree with your calculations but I can agree is what is in the contract were [sic]".

[51] The 2nd appellant was also cross-examined about the contract represented by Exhibit 1D and whether $999,900 for 4000 gallons of tar to be supplied and sprayed equated to $249.98 per gallon. His response was "I can't agree or dis-agree with your calculations, work it out or not I'm going to stick to the figure that is in the contract".

[52] In these examples, during cross-examination, when the 2nd appellant was confronted with what appeared to be patently clear inconsistencies in the contracts that were at odds with the appellants' case, he demonstrated an unyielding insistence that the contracts were accurate without explaining the inconsistencies. This is material on which the learned judge was entitled to conclude that he was not a credible witness and there was a demonstrable justification for the learned judge's conclusion at para. [37] as follows:

> "I found the [respondent] to be credible in his account to the court and his evidence reliable. I accept his evidence over that of [the 2nd appellant]. I believe he spoke the truth about these conversations he had with [the 2nd appellant] in relation to [the 2nd appellant's] promise to buy MC Oil and tar. [The 2nd appellant], on the other hand, was not forthright and at various intervals, could not recall important and basic details of the contract."

[53] It is a matter of reasonable deduction, requiring no particular expertise, that if the $400 per gallon stated in the contracts was for the respondent to supply and spray the Products, the contracts' commercial viability, from the respondent's perspective, would depend on the price of the products. The contract would only be commercially viable to the respondent if the cost of a gallon of MC Oil and a gallon of tar together totalled less than $400.00.

[54] Donette Johnson's evidence was that Chin's Construction Limited sold MCO and tar to the respondent. The invoices she prepared show that MCO and tar were each sold to the respondent at a cost of $400.00 per gallon.

[55] The expert Mr Kelvin Kerr's evidence also supports this as a reasonable market price. He stated that he used that price in preparing his report because it was the price he was given, but his independent research indicated that it was "far less than what the going rate at the time was for these similar items". He explained that he did not indicate in his report that those costs were below market rates because he was requested to

analyse the contracts and determine what was due to the respondent based on the information provided to him.

[56] The evidence that the respondent purchased MCO and tar for $400.00 per gallon respectively was not seriously challenged, and the appellants did not offer any evidence that the Products were available to the respondent at a lower price. Assuming that tar and MCO were each priced at $400.00 per gallon, if the contract required the respondent to supply and spray the products at that rate, the effect would be that the spraying of the Products would be done for free, his labour uncompensated, leaving no margin for profit. Such a contract would obviously lack commercial logic, and the appellants proffered no reason why the respondent, who was unquestionably an experienced and successful businessman, would have agreed to such unfavourable terms.

[57] Whereas a court should always recognise parties' freedom to contract and appreciate that parties may sometimes agree to terms that are not in their best interests, the terms of a written agreement, on its face, may be so commercially unreasonable, as they were in this case, that they may cast doubt on whether that was the full scope of the agreement reached by commercial men.

[58] The respondent's business acumen is demonstrated by his more than 20 years in business. It is reasonable to conclude that he would not have been able to do so and be successful if he disregarded elementary profit and loss concepts and entered into agreements under which he agreed to fund the cost of the material and supply it, when he was only being paid the price of his labour for spraying the material.

[59] In **John Thompson & Janet Thompson v Goblin Hill Hotel Limited** [2011] UKPC 8 the Privy Council reiterated that a party asserting commercial absurdity must prove that absurdity. Lord Dyson in delivering the decision of the Board at para. 24 stated the following:

> "24. …In the view of the Board, since it is the respondents who are seeking to displace the plain and ordinary meaning of article 91(1)

> on the grounds that that meaning produces a commercial absurdity, it is for them to demonstrate the absurdity. In some cases, commercial absurdity is patent and clear on the face of the instrument that has to be construed. But in other cases, the absurdity is less obvious and can only be demonstrated by an explanation of the relevant background facts. In such cases, it is for the party seeking to contend that the literal interpretation produces a commercial absurdity to prove the absurdity."

[60] In the instant case, the commercial absurdity is not obvious and the background facts and surrounding commercial realities must be examined in order to provide the support for the assertion of commercial absurdity. It is my view that the respondent provided sufficient evidence to prove the commercial absurdity of the contract, and the existence of an oral component.

[61] The fact that the terms of the contracts, as alleged by the appellants, were not commercially viable for the respondent was material, and the court could properly have used it to assess whether the respondent was truthful in saying the parties agreed that Stone Plus would pay the costs of the Products.

[62] The learned judge's observations at para. [34] of the judgment are apt and support her conclusion that the written contract did not embody the full agreement between the parties, as she stated:

> "[34] In my judgment, there is no contest that the written contracts were unilaterally prepared by [Stone Plus] company and then presented to the [respondent] for signing. The evidence from the [respondent] has established that the agreements did not contain what both parties had conclusively discussed, intended and finally agreed upon to be included in it. The fact that there were several errors and inconsistencies contained in the contracts presented to the [respondent] for his signature indicates that they were not perfect."

Conclusion in respect of grounds 1 and 2

[63] Having accepted the respondent's parol evidence, the learned judge had a proper basis to reject the appellants' reliance on the written contracts, as representing agreements for both the supplying and spraying of MCO and tar, respectively, at $400.00 per gallon. Accordingly, I find that there is no merit in these grounds of appeal.

Ground 3 The Learned Judge erred in law in failing to give due consideration to the doctrine of non est factum in the circumstances of the case.

The appellants' submissions

[64] Miss Martin highlighted aspects of the respondent's evidence that bore on the credibility of his assertion that he could not read when he signed the contracts. These included his operation of a multi-million-dollar business from 1990 to 1995, which required him to hold a bank account; his possession of a driver's licence for more than 20 years; and his failure to bring to anyone's attention that he could not read the contracts.

[65] Counsel relied on **Lux Locations Ltd (Appellant) v Yida Zhang (Respondent)** 2023 UKPC 3 ('**Lux Locations**'), in which the Privy Council reiterated that the doctrine of *non est factum* is a very limited exception to the common law rule that a person who signs a contractual document is bound by its terms, whether or not they have read or understood it.

[66] Counsel submitted that the respondent wittingly signed all the contracts and took no steps to guide his understanding, even though, at the time he executed the contracts, only he knew he was unable to read. Counsel in written submissions advanced the following:

> "Albeit that non est factum was not specifically pleaded and only arose on the evidence, it is submitted that the evidence did not rise to the level required for the LTJ to make a finding that arose in favour of the respondent."

The respondent's submissions

[67] Mr Cochrane submitted that the doctrine of *non est factum* was not a part of the respondent's case in the court below. He argued that even before the trial commenced the respondent embraced the contracts that he signed and accordingly the learned judge correctly concluded that the doctrine of *non est factum* was inapplicable.

Analysis

[68] A mistake in contract law may have several consequences. The authors of Chitty on Contracts, 34th Edition, Volume 1 (supra), explore the plea of *non est factum* at para. 5-049 *et seq*. In summary, the plea of *non est factum* (it is not my deed) refers to a limited category of mistake which avails a party if the mistake concerns the very nature of the transaction. The effect of a successful plea in respect of a contract that is signed by the party raising the plea, is that it is void because there was no genuine agreement.

[69] In **Lux Locations** at para. 80, the Board makes the following statement on the doctrine of *non est factum*:

> "80. … Under this doctrine, as established by the decision of the House of Lords in *Saunders v Anglia Building Society (sub nom Gallie v Lee)* [1971] 3 AC 1004, a person is not bound by his or her signature of a contractual document if (a) the person mistakenly signed the document, (b) the document was fundamentally different from what that person thought it to be, and (c) the person took "all reasonable precautions in the circumstances" to understand the nature of the document before signing it."

[70] The issue of the respondent's literacy was raised by his witness statement, namely at the certification by the witness Verley Shakes that: "The witness is not literate. The statement was read to him in my presence, and he appeared to understand it and signed the statement in my presence".

[71] During cross-examination, the respondent admitted that he had signed seven agreements but asserted, "[b]ack then I didn't understand because I couldn't read then,

but I can help myself now". He was questioned at length, with the obvious intention of testing that assertion. It was disclosed that the business was a multi-million-dollar business and that he was authorised to conduct business on its behalf at the bank. He also confirmed that he obtained a general driver's licence in 1989 after completing the written and practical components of the test. It was suggested that he would not have obtained his licence if he had not shown he could read and write. He disagreed. He explained that most of the answers were multiple-choice, that he guessed most of them and got most right, and that he could drive the truck he used to do the test.

[72] It was suggested to the respondent that he was not being truthful when he said that at the time he entered into the contract with the first respondent he was not able to read and write. He disagreed and maintained that he could not read he could just sign his name.

[73] Importantly for purposes of the plea of *non est factum* is the admission by the respondent when he signed exhibits 1A to 1G that "I know it was a contract I was signing that's why I signed my name to it and I signed many more contracts different from this". He admitted that when he signed the contracts referred to in exhibits 1A and 1G, he did not bring it to anybody's attention that he could not read what was written on the documents.

[74] In treating with the effect of the evidence of the respondent that he could not read at the time he signed the contracts, at para. [32] the learned judge explained her reasoning as follows:

> "[35] At first instance and in keeping with the law on written contracts, it would appear rational to hold that the [respondent] should be held bound by the contracts in the light of his signature and the absence of a formal plea of non est factum on his part. However, upon deeper analysis of the totality of the evidence, his signing of the contract, without more, cannot properly be held to be the end of the matter as the circumstances surrounding the execution of the contracts are of significant relevance. This is especially against the

> background of the evidence that the written contracts that were signed were to have had retrospective effect, following a course of dealings between the parties, which included the [respondent] having commenced work before there was any written contract in place."

[75] Therefore, the learned judge clearly did not consider that the plea of *non est factum* was applicable. She did not find that the contracts were void. However, the learned judge found that the contracts did not reflect the entire agreement between the parties. Whether the respondent could read was not only relevant to the plea of *non est factum*. It was a fact to be considered as part of the surrounding circumstances "in order to see what the bargain was that was struck between the parties".

[76] Therefore, the learned judge did not ignore the respondent's assertion that he could not read when he signed the contracts. The learned judge examined the evidence on this at para. [33], which, has been reproduced earlier at para. [26] herein, but is set out again below for ease of reference:

> "[33] I have to take into consideration the fact that the contract was prepared and presented to [the respondent] for his signature in the circumstances that he explained. Pertaining to the evidence as to those circumstances, I reject the evidence of [the 2nd appellant] that he was unaware that [the respondent] could not read and I accept the [respondent] as a reliable witness of truth in this regard. The evidence of [the 2nd appellant] that the [respondent] had a friend guide him in the signing of the contract was not put to the [respondent] in cross examination and the [respondent] did not have an opportunity to refute or confirm this aspect. I reject that aspect of [the 2nd appellant's] evidence as well. I have had regard to the demeanour of the [respondent]. He was not able to neither give intelligent thought to certain questions asked of him in cross examination nor appreciate certain words used by counsel. In my view, respectfully, he was not capable of constructing the contents of the contract without assistance. Even if I were to accept that the contents of the contract were read over to the [respondent], the terms of the contract are so vague that the [respondent] would not have been put on notice that the sums stated therein would

> not represent the value for the scope of work carried out by him."

[77] Notwithstanding the court's reluctance to interfere with the learned judge's findings of fact, there appears to be insufficient evidential basis to reject the 2nd appellant's evidence that he was unaware that the respondent could not read. The respondent was cross-examined as to whether he brought it to anyone's attention that he was not able to read what was written on the documents when he signed the contracts referred to in exhibits 1A and 1G, and he admitted that he did not. He was not asked a similar question regarding the other contracts, and so did not have an opportunity to respond, but he did not positively assert that he did so. The 2nd appellant's evidence in re-examination was that when he entered into the contracts with the respondent, he had no reason to think that the respondent was unable to read and write well. In such circumstances, that rejection of the 2nd appellant's evidence that he did not know that the respondent could not read, is flawed.

[78] However, I am of the view that this error did not materially affect the soundness of the learned judge's conclusions as to what the parties agreed. The learned judge clearly accepted the respondent's evidence that he could not read when he executed the contracts, and this was clearly open to the learned judge to do so. The important fact is that the learned judge did not use the doctrine of *non est factum* as a basis to assist the respondent in avoiding the contract.

[79] The learned judge's acceptance of the respondent's evidence that the 2nd appellant orally agreed that Stone Plus would also pay for the Products accords with business logic and is not inconsistent with the learned judge's finding that the respondent was unable to read when he executed the agreements. Nothing in his account was internally inconsistent with having operated a multi-million-dollar business despite such an impediment. Being unable to read and possessing good business sense and commercial judgment are not mutually exclusive.

<u>Conclusion in respect of ground 3</u>

[80] It is clear that the learned judge did not fail to give due consideration to the doctrine of *non est factum*. She considered the doctrine and correctly found that it was inapplicable. I am of the opinion that this ground of appeal has no merit.

Ground 4: The Learned Judge erred in law in awarding judgment for the claimant in the sum of $8,360,200.00 with interest at the rate of 6% per annum from 15 November 2017 to 22 April 2021.

The appellants' submissions

[81] It was submitted that an analysis of the evidence detailed in respect of grounds 1, 2, and 3 demonstrates errors in the learned judge's findings that led to the award of judgment with interest.

[82] It was further submitted that the learned judge erred in relying on the receipts from Chin's Construction Ltd because the appellants knew nothing of these receipts as they were never the subject of discussions or the record of dealings between the parties to the contracts.

[83] It was contended that the employee of Chin's Construction Limited who prepared the receipts had only prepared one of the relevant invoices and could not say which projects the oil was used for.

The respondent's submissions

[84] Mr Cochrane reiterated his position that the learned judge had adequately assessed the parties' evidence and awarded the respondent $8,360,200.00 with interest at 6% per annum from 15 November 2017 to 22 April 2021.

Analysis

[85] For the reasons set out above in respect of grounds 1, 2 and 3, the learned judge was correct to award judgment in favour of the respondent.

[86] Whereas the learned judge appears to have considered portions of the expert's report, it is clear that she did not do so in relation to the quantum of the award of

damages. The expert evidence on page 12 of his report stated that the total amount due for payment was $38,681,000.00, which is obviously erroneous, although during cross-examination he stated that he stood by his figure as the amount due to the respondent.

[87] Interestingly, although Miss Martin complained that the learned judge improperly utilised the receipts from Chin's Construction Limited, there was no submission as to what the correct amount owed to the respondent should be in the event that the court accepted the respondent's evidence that the contract was for supplying the Products at $400.00 per gallon and for spraying the Products at the same rate of $400.00 per gallon.

Conclusion in respect of ground 4

[88] Counsel for the appellants has not forcefully pursued this ground by dissecting the learned judge's calculation of the award. As framed and argued, this ground cannot be deemed to be a sufficient challenge to the quantum of the award and does not succeed.

Conclusion

[89] The learned judge arrived at the award of $8,360,200.00 although the figure claimed by the respondent is $9,797,225.20. When the interest of $527,025.20 and other costs and fees of $110,000 are deducted, the figure is $9,160,200.00.

[90] The appellants have not successfully challenged the quantum arrived at by the learned judge of $8,360,200.00 but instead have focused on the issue of liability and have not succeeded in that regard.

Disposition

[91] In the premises, I propose that the following orders be declared as the final order of the court:

(1) The appeal is dismissed.

(2) The appellants are to pay the respondent's costs of the appeal to be taxed if not agreed.

F WILLIAMS JA

ORDER

(1) The appeal is dismissed.

(2) The appellants are to pay the respondent's costs of the appeal to be taxed if not agreed.