[2016] JMCA App 14

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 128/2015

BEFORE: **THE HON MR JUSTICE BROOKS JA**
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**CONSTRUCTION DEVELOPERS ASSOCIATES LIMITED**	**APPLICANT**
AND	**URBAN DEVELOPMENT CORPORATION**	**RESPONDENT**

Patrick Foster QC and Miss Stephanie Forte instructed by Nunes Scholefield DeLeon and Co for the applicant

John Vassell QC and Mrs Juliann Mais-Cox instructed by DunnCox for the respondent

2 May and 3 June 2016

BROOKS JA

[1] This is an application by Construction Developers Associates Limited (CDA) to extend the time within which it may file a notice of appeal from a judgment of the Supreme Court. The respondent to the application, Urban Development Corporation (UDC), while not completely opposing the application, contended that the extension should only be granted on a limited basis. It argued that CDA should only be entitled to argue some of its proposed grounds of appeal. UDC also contended that at least two

issues raised by CDA's proposed grounds of appeal have no real prospect of success. UDC contended that CDA should, therefore, not be granted an extension of time in respect of those issues. UDC did not oppose the application in respect of the other aspects of the proposed appeal.

[2] The issues to be decided at this stage are, firstly, whether this court may issue conditions for, or qualify, any grant of extension of time within which to file a notice of appeal, and secondly whether UDC is correct in its assertion that the two areas included in the proposed grounds of appeal are unarguable and therefore not worthy to be included in an appeal to be placed before the court.

[3] The judgment in this case was handed down on 5 December 2014. The formal order was not served, however, until 2 March 2015. CDA should have filed its notice and grounds of appeal on or before 13 April 2015. It, however, did not do so. On 6 July 2015, it filed a document entitled Notice of Appeal but, as that document had been filed out of time, it had no effect. It will, therefore, be referred to, hereafter, as the proposed notice. CDA did not file the present application until 16 December 2015. No explanation was given for the lapse of some five months between filing the proposed notice and filing the present application.

[4] In light of UDC's stated position, it is unnecessary to undertake a specific assessment of the conditions that an applicant is usually required to satisfy, in order to be granted an extension of time within which to appeal. The first issue that will be assessed below is the authority to qualify a grant of such an extension. Thereafter, the

background facts will be set out and after that, the issue of whether the grant ought to be qualified.

Whether a grant of extension of time may be qualified

[5] In his written submissions in which he advocated for a qualified grant of an extension of time, Mr Vassell QC, on behalf of UDC, submitted that the court has the power to qualify the grant. He equated the power to that which is exercised when permission to appeal is granted. Learned Queen's Counsel said at paragraph 4 of his written submissions:

> "The Court has an express power when making an order giving permission to appeal to limit the issues to be heard on appeal. See paragraph 1.8(10) of the CAR:
>
> > 'An order giving permission to appeal may –
> > (a) ***limit the issues to be heard on the appeal***; and
> > (b) be made subject to conditions.'
>
> A request for extension of time to appeal is a request for the exercise of a discretionary power which a Court may in principle grant subject to conditions. **By parity of reasoning with the Court's power on an application for leave to appeal, the Court can in an appropriate case make an order for extension of time to appeal. Subject to a condition limiting the issues which may be pursued in the appeal.**" (Emphasis supplied)

Mr Vassell did not cite any authority for his proposition.

[6] Mr Foster QC, appearing on behalf of CDA, did not contest Mr Vassell's proposition. It seems, however, that Mr Vassell is correct in principle. The analysis of his proposition requires further references to the CAR. The time within which a notice of

appeal may be filed, is specified by 1.11(1)(c) of the Court of Appeal Rules (CAR). Rule 1.11(2) authorises this court to extend the time within which to file the notice of appeal. Rule 1.7(2)(b) allows the court to grant such an extension even if the application for the extension is made after the time had passed for filing the notice of appeal. Rule 1.7(3) specifies that when the court makes an order or gives a direction it may make the order subject to conditions. It does not, however, stipulate a power to limit the issues to be heard on appeal, as is done in rule 1.8(10).

[7] One of the tests which an applicant for an extension of time must satisfy, is to show that there is merit in the proposed appeal. The various tests are set out in **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (Motion No 12/1999 – judgment delivered 6 December 1999). Panton JA (as he then was) stated them at page 20 of the judgment in that case. He said:

> "The legal position may therefore be summarised thus:
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> (1) Rules of court providing a time-table for the conduct of litigation must, prima facie, be obeyed.
>
> (2) Where there has been a non-compliance with a timetable, the Court has a discretion to extend time.
>
> (3) In exercising its discretion, the Court will consider-
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> (i) the length of the delay;
>
> (ii) the reasons for the delay;
>
> (iii) **whether there is an arguable case for an appeal** and;

(iv) the degree of prejudice to the other parties if time is extended.

(4) Notwithstanding the absence of a good reason for delay, the Court is not bound to reject an application for an extension of time, as the overriding principle is that justice has to be done." (Emphasis supplied)

[8] Since the court may refuse an application for extension of time to appeal if it finds there is no arguable case for an appeal, then if it finds, in examining that application, that one or some of the proposed grounds of appeal, has no merit, it should, in its inherent power to control its own process, be able to refuse such an application which contains such grounds. Using another approach, it may be said that the court should, in exercising its authority granted by rule 1.7(3), be entitled to grant an extension of time within which to file a notice of appeal on condition that only certain grounds, that it approves, may be argued. If there are grounds which have no real prospect of success, it would be futile to grant an extension of time within which to argue such a ground.

[9] It may be noted that the Court of Appeal of England and Wales, which uses a more elaborate test for deciding whether to grant an extension of time, includes in that test the principle that a litigant should be allowed to appeal "provided that he can show that he has a real, and not a fanciful, prospect of success" (see paragraph 25 of **Sayers v Clarke-Walker (a firm)** [2002] EWCA Civ 645; [2002] 3 All ER 490).

The background facts

[10] Having considered that the court does have the power to limit the grounds on which an extension of time may be granted, the next step is to consider the present application. It is necessary, however, to put the application in context. In order to do so a brief outline of the factual background is required.

[11] The facts, in summary, are that UDC engaged CDA to do work on the Coronation Market, which is located in a volatile part of downtown Kingston. Their written contract was dated 26 May 1988 (the "C4 Contract"). Between 15 and 17 February 1992, which was some time after work on the project had started, vandals entered the work-site and stole hoarding, tools and building material. There was no insurance in place to cover that loss, as the relevant policy had previously been cancelled. CDA claimed compensation from UDC in respect of this loss. The architect for the project, Ms Nadine Isaacs, assessed the loss in the sum of $3,750,000.00.

[12] On 18 September 1992, representatives of the parties met with Ms Isaacs and the Quantity Surveyor, Mr Wright, and discussed CDA's claim. UDC's representative, Mr Karl Binger agreed to recommend to the UDC's Board that UDC reimburse CDA 50% of the assessed loss arising from the theft. On 1 October 1992, Ms Isaacs issued an interim payment certificate, designated no 39, in the sum of $4,385,500.00, which figure included the sum of $1,875,000.00. The latter figure represented 50% of the claim for the loss due to the theft.

[13] Mr Binger challenged the inclusion of the sum in the certificate. He asserted that there was no agreement to pay it. He said that he had only agreed to recommend its payment. Ms Isaacs recanted. She wrote a letter stating that that item in the certificate should be considered as only a recommendation for reimbursement. UDC did not include the sum in its payment of certificate no 39.

[14] A dispute arose between the parties as to whether the sum had eventually been paid. UDC asserted that it made the payment as part of its payment of interim certificate no 40, which was later issued by Ms Isaacs. CDA challenged the assertion.

[15] The C4 Contract was mutually terminated in April 1993. The parties, however, agreed orally that CDA would provide security services for the worksite and UDC would reimburse it in that regard. They referred to that agreement as the security contract. The services were provided under the security contract from May 1993 to March 1995.

[16] Another dispute arose between the parties. This latter dispute was in respect of a claim for compensation under the security contract. There is no need to expand on that contract or on the dispute connected to it, as UDC has not opposed the inclusion of grounds in the proposed appeal in respect of those matters.

[17] Correspondence, including some penned by Mrs Vivalyn Downer Edwards on behalf of UDC, later passed between the parties in an effort to resolve their disputes. CDA asserted that at least one of Mrs Downer-Edwards' letters, written in or about the year 2000, suggested that UDC had not paid the $1,875,000.00 in respect of the C4

contract. At or about the time of that correspondence Ms Isaacs issued the final certificate under the C4 Contract.

[18] When the attempts by the parties to settle failed, CDA filed a claim in the Supreme Court in April 2000, seeking recovery of the sum of $1,875,000.00, as well as monies under the security contract. It claimed interest on both sums. The learned trial judge dismissed CDA's entire claim and awarded costs to UDC.

The proposed appeal

[19] CDA proposes to appeal from the learned trial judge's findings in respect of both contracts. Based on UDC's previously-stated position on the security contract, it is only necessary, for these purposes, to set out the proposed grounds concerning those aspects of the C4 Contract. They state:

> "a. The Learned Judge erred as a matter of fact and/or law in concluding that the Appellant's cause of action in respect of the sum certified on Interim Certificate 39 accrued on November 2, 1992 and that the Appellant's claim was statute-barred by virtue of the Limitation Act 1623 and the Limitation of Actions Act 1881 by failing to give due regard to:
>
> 1. the inclusion of this sum on subsequent Interim Certificates and the Final Accounts and Final Certificate issued on March 31, 2000;
>
> 2. the Respondent advising the Appellant in its letter to the Appellant dated January 21, 2000 that it would not be in a position to settle amounts due under Interim Certificate 39 until the Final Certificate was issued; and

3. the acknowledgment by the Respondent in its letter of January 21, 2000 that this sum had been certified but not paid.

b. The Learned Judge erred as a matter of fact and/or law in finding that the inclusion of the sum of $1,875,000.00 by the Architect in Interim Certificate was *ultra vires* the authority of the Architect by:

1. Failing to find that the Architect had correctly interpreted her powers under Clauses 11 and 30 of the C4 Contract and had acted within her powers by including the sum of $1,875,000.00 in Interim Certificate 39;

2. Interpreting Clause 11 of the C4 Contract too narrowly in finding that a claim for loss of materials by way of theft could not be made pursuant to the provision for "variation" under this Clause;

3. Interpreting Clause 30(1) of the C4 Contract too narrowly in finding that a claim for loss of materials by way of theft could not be made pursuant to this Clause as it fell outside the scope of "materials and goods" used in the "Works";

4. Interpreting the powers of the Architect under Clauses 11 and 30(1) of the C4 Contract too narrowly, particularly in light of the documentary evidence that the parties had agreed to a variation of the C4 Contract whereby the Respondent undertook the responsibility to insure the Works; and

5. Failing to find that the sum of $1,875,000.00 certified under Interim Certificate 39 was properly issued under the C4 Contract, and must be honoured by the Respondent.

c. The Learned Judge erred as a matter of fact and/or law in concluding that the risk of insuring the property resided with the Appellant by failing to give due

regard to the documentary evidence that the parties had varied Clause 20 of the C4 Contract and that variation made the Respondent responsible for the loss of materials by way of theft.

d. The Learned Judge erred as a matter of fact in finding that the Architect "withdrew" the sum of $1,875,000.00 from Interim Certificate 39, in failing to give due regard to the evidence that:

   1. the Architect did not formally or expressly withdraw the said sum under the Contract or in any correspondence with the parties;

   2. the Architect did not deduct this sum from subsequent Interim Certificates, which she was entitled to do at any time before the issuance of the Final Certificate;

   3. the Architect ultimately confirmed this sum in the Final Certificate; and

   4. the acknowledgement by the Defendant by its letter of January 21, 2000 that it[sic] this sum had been certified but not paid.

e. The Learned Judge erred as a matter of fact in finding that the sum of $1,875,000.00 certified under Interim Certificate 39 was paid by the Respondent to the Appellant, whether under Certificate 40, gratuitously, or otherwise, as there was insufficient evidence to support this conclusion.

f. The Learned Judge erred as a matter of fact and/or law by dismissing the evidence of the Respondent's authorised agent and legal representative, Mrs. Vivalyn Downer Edwards, and by failing to appreciate the legal implications of Mrs. Downer Edwards' representations to the Applicant in her letter of January 21, 2000."

CDA's application

[20] As was mentioned at the beginning of this judgment Mr Vassell sought to shorten the proceedings by indicating that UDC was not objecting to the application in its entirety. UDC's position at this stage, he informed the court, was that CDA has no real prospect of success in respect of the proposed grounds which concern the C4 Contract. Its objection to those grounds was broken down along two broad lines. It contended that:

a. CDA's claim under the C4 Contract is statute barred; and

b. Ms Isaacs' purported certification of the sum of $1,875,000.00 representing compensation for loss from theft was outside the scope of her authority and therefore void.

What appears below will, therefore, be restricted to those aspects of the application.

[21] Mr Foster QC submitted that both aspects of the proposed grounds of appeal, to which UDC objected, were arguable on appeal. He submitted that the relevant standard was no higher than that the grounds of appeal relied upon should not be completely unarguable. He cited **Calvin Green v Wynlee Trading Ltd** [2010] JMCA App 3 and **Sagicor Bank Jamaica Limited v YP Seaton, Earthcrane Haulage Limited, and YP Seaton & Associates Company Ltd** [2015] JMCA App 18 as authority for his submissions in this regard.

[22] On the limitation point, Mr Foster submitted that time only started to run when there was a denial of liability by UDC. He argued that, contrary to the learned trial judge's finding, there was no denial of liability by Mr Binger in 1992, when he wrote protesting the inclusion of the claim for $1,875,000.00, representing the loss, in certificate no 39.

[23] There was, as a related issue, the question of whether CDA had based its claim, in relation to the C4 Contract, on certificate no 39. UDC asserted that all the pleadings suggested that the claim was so based. On that premise, it contended that the claim was statute barred.

[24] CDA challenged that position. It stated that it also relied on the final certificate issued by Ms Isaacs.

[25] Mr Foster submitted that the pleadings and the evidence led at the trial, suggested that CDA was also relying on the final certificate issued by Ms Isaacs. The final certificate included the claim for the sum of $1,875,000.00. CDA argued that time would only run from the date of the final certificate and therefore the action was not statute barred.

[26] Learned Queen's Counsel submitted that a reference to the final certificate may be implied from the term, "final accounting of the C4 Contract", used in paragraph 8 of the statement of claim, and the term, "as certified by the Architect", used in the prayer for relief at the end of the statement of claim.

[27] In supporting CDA's position about the pleadings, Mr Foster also submitted that the court should not restrict itself to the strict pleadings in order to determine the nature of CDA's claim. He cited **Billard Graham v Jeremy Wright** [2015] JMSC Civ 69 and **Sealy v First Caribbean National Bank (Barbados) Ltd** [2010] 2 LRC 750, in support of his submissions in this regard.

[28] Additionally, CDA relied on the correspondence from Mrs Downer Edwards. It asserted that, through her, UDC had acknowledged the liability to pay the claim for the loss due to theft.

[29] On the point concerning Ms Isaacs' authority to certify the claim for the items lost by theft, Mr Foster relied on the provisions of the contract. He argued that the contract allowed the parties to vary its terms. He pointed to clause 11(2) of the contract, stating that it allowed the parties to agree on CDA being able to claim for the removal of "work material or goods" from the site. Learned Queen's Counsel argued that there was evidence that the parties had agreed to vary the contract to allow for UDC to be responsible for insuring the project against loss by risks such as theft. He submitted that there was no one document that recorded the agreement, but that the agreement to vary could be inferred from the exhibited correspondence. That variation, he submitted, would mean that CDA would be able to claim from UDC for recovery of the loss by theft. The claim was therefore an item that the architect could certify.

[30] Learned Queen's Counsel also argued that clause 30 of the C4 Contract "clearly contemplates the inclusion of a payment to replace goods brought on the site for use in the Works that were stolen" (paragraph 71 of his written submissions). He submitted that this provision also provided a proper basis for Ms Isaacs to have included the loss in certificate no 39.

[31] Mr Foster submitted that these were matters that were arguable on appeal and that CDA should be allowed to argue the grounds that were related to them.

The objection by UDC

[32] As has been mentioned above, UDC contended that the two aspects of the C4 Contract have no prospect of success on appeal. On the limitation point, Mr Vassell submitted that it was "clear upon paragraphs 4 to 7 of the Statement of Claim that the action is based upon non-payment of Interim Certificate No. 39...issued by the Architect on the 1st October 1992". UDC asserted at the trial that the claim, being based on interim certificate no 39, was statute barred, as time would begin to run in accordance with the provisions of the contract relating to interim certificates. The period stated in the contract for payment of the certificate was 14 days from the date of the certificate.

[33] The learned trial judge rejected UDC's approach. She found that time began to run from the date of UDC's refusal to pay the claim. She found that that refusal was contained in Mr Binger's letters contesting the inclusion of the sum in certificate no 39.

[34] Mr Vassell submitted that whichever date was chosen, using the permutations under the C4 Contract, "the action was hopelessly time barred when it was filed" in April 2000. There is no basis, he submitted, for asserting that time began to run from the date of the final certificate.

[35] His submissions were supported, he submitted, by an extract from Halsbury's Laws of England (5th edition, Volume 6 paragraph 328), which asserted that the interim certificate created an immediate cause of action, which was separate from the final certificate. He accepted, however, that the final certificate did create a cause of action as well, but contended that CDA had relied exclusively on the interim certificate. He also cited **Henry Boot Construction Ltd v Alstom Combined Cycles Ltd** [2005] 3 All ER 932 in support of his arguments on this point.

[36] Learned Queen's Counsel further argued that there was no acknowledgement by UDC, in any of the later correspondence, including that by Mrs Downer Edwards, which could have restarted time running for the purposes of the Limitation Act.

[37] He submitted that the learned trial judge dealt with the issues impeccably and there was no room for any reasonable argument to the contrary.

[38] On the point of Ms Isaacs' authority, Mr Vassell submitted that the inclusion of the claim for the loss due to theft was outside of the scope of the C4 Contract. The certification of the loss by her was therefore beyond her authority. He submitted that

she had no jurisdiction to place any legal obligation on UDC to pay or any legal right on CDA to receive any payment in respect of that loss.

[39] Learned Queen's Counsel supported his submission by arguing that if the C4 Contract allowed for such CDA to make such a claim, Ms Isaacs would have no basis to have discounted it by 50%, as was done. He asserted that the learned trial judge dealt with that aspect of the claim by demonstrating that the parties had attempted to resolve the issue by virtue of a gratuitous payment. He supported her reasoning that the interim certificate could not create a liability for which UDC was responsible.

[40] Mr Vassell submitted that the failure of the grounds on these points was a foregone conclusion and that no extension of time should be granted in respect of them.

The analysis

[41] It is understood, in conducting this analysis that this is not an appeal and that there need be no in-depth assessment of the points raised by the parties. The standard at this stage, in determining arguability, is that set out in **Leymon Strachan v Gleaner Company Ltd**, namely, whether there is an arguable case for an appeal.

a. The point concerning the limitation period

[42] The learned trial judge found that the claim in respect of the C4 Contract was statute-barred. She rejected CDA's assertions that the claim was based, in part, on the final certificate issued by Ms Isaacs. She found that the claim had been based on

interim certificate no 39 and that the limitation period had expired before CDA filed its claim.

[43] It is difficult to agree with Mr Foster that the pleadings could be interpreted to have included a claim based on the final certificate. There is no ambiguity in the specially-endorsed statement of claim which makes it clear that the claim for recovery of the sum representing the loss originated in interim certificate no 39. Paragraph 7 of the statement of claim accuses UDC, by its refusal to pay the full amount set out in interim certificate no 39, of breaching the C4 Contract. The particulars of breach were specified in that paragraph as follows:

> "(a) Clause 30(1) [of the C4 Contract] state [sic], inter alia, 'that the Architect's certificate of payment shall be honoured by the employer within the period stated in the Appendix from the presentation of the certificate'.
>
> (b) The said period stated in the appendix is fourteen (14) days.
>
> (c) The Defendant has failed to honour the certificate."

[44] CDA's amended reply to UDC's further amended defence reiterated that the claim for the value of the items stolen was based on interim certificate no 39. Paragraph 3 of the amended reply asserted that the "balance due and payable on Certificate #39 is $1,875,000.00". Nowhere in the pleadings does CDA mention the final certificate.

[45] The portions of the statement of claim to which Mr Foster refers, are too vague to overcome the specific references to the claim being based on certificate no 39.

[46] There is a difficulty, however. The learned trial judge rejected UDC's approach that the limitation period began to run at the expiry of 14 days from the date of certificate no 39. It then became, for her, a question of fact as to whether and when UDC had refused to pay certificate no 39. That raised the issue of interpretation of the correspondence on the point, including Mr Binger's letters concerning that certificate. An appeal in respect to that issue would include the interpretation of the relevant documents.

[47] An appeal in respect of the issue would also require a consideration of the fact that UDC asserted that it did pay the claimed sum. Such a position would be inconsistent with a refusal to pay. Those issues are beyond the scope of this exercise. It would seem, therefore, that the issue is arguable on appeal as to whether the claim was statute barred.

b. The point concerning the authority of the architect

[48] The learned trial judge stated at paragraph [54] of her judgment that Ms Isaacs' authority was "circumscribed by the C4 contract". She found that the "inclusion of the sum of $1,875,000.00 in the architect's interim certificate 39 was not authorized by the Contract or any subsequent agreement". Accordingly, she found, its inclusion was outside of Ms Isaacs' authority and, therefore, UDC was not obliged to pay that sum.

[49] The provisions of the contract do not support Mr Foster's submissions. Neither clause 11 nor clause 30 contemplates either the type of variation contended for by CDA,

or the type of loss that it suffered. Clause 11 only addresses variations in the work and deals with the authority of the architect to certify such variations. The relevant part of Clause 11 states:

> "(2) The term "variation" as used in these Conditions means the alteration or modification of the design, quality or quantity of the Works as shown upon the Contract Drawings and described by or referred to in the Contract Bills, and includes the addition, omission or substitution of any work, the alteration of the kind or standard of any of the materials or goods to be used in the Works, and the removal from the site of any work, materials or goods executed or brought thereon by the Contractor for the purposes of the Works other than work materials or goods which are not in accordance with this Contract."

This clause does not contemplate insurance by UDC. Nor does it include any work, materials or goods removed from the site by way of theft.

[50] Clause 30 only seeks to address the work done or to be done by CDA. It does not address the issue of items stolen from the site. The relevant part states:

> "30 (1) The Contractor shall be entitled to present at intervals named in the appendix requests for interim payment which shall include the total value of work properly executed on site and of materials and goods delivered upon the site for use in the Works excepting that the valuation shall only include such materials and goods as are reasonably and not prematurely brought upon the site and then only if adequately stored and protected. All requests for payment shall be accompanied by such detailed statements of quantities and unit costs as will enable the valuation to be properly verified.
>
> The Contractor's valuation shall, if in order, be approved by the Architect within 7 days and an interim certificate of payment issued by the Architect to the Employer stating the amount due. Such a certificate shall be calculated as the total amount of the approved valuation, less the percentage

> of Certified Value Retained as noted in the appendix to these Conditions, less the total of previous certificates issued by the Architect."

[51] Mr Vassell is correct in his submissions that the learned trial judge's findings, in respect of the authority of the architect, are unassailable. The learned trial judge relied on a number of authorities to support her finding that Ms Isaacs had no authority under the C4 contract to include the $1,875,000.00 claim in certificate no 39. She correctly came to that finding having relied on learning from Halsbury's Laws of England on the point. The learned trial judge spoke to the issue at paragraph [48] of her judgment:

> "The learned author of **Halsbury's Laws of England** (5th edition) Vol. 6 at paragraph 333 made it plain that:
>
> > '***Ultra vires certificates.*** *The certificates of architects and engineers are only conclusive as to matters entrusted to them, and if the certificate is ultra vires as to any matter it is to that extent not conclusive. Thus, it may be conclusive as to quantity and not as to liability, or vice versa.*
> >
> > *Again, if there is no power in the contract to vary the work to be done, a valid certificate cannot be given for work done at variance with the contract, even though the variation was made on the instructions of the architect, and is equivalent value to that which should have been done.'* "(Emphasis as in original)

[52] There is no basis for arguing that the contract allowed for the architect to have included in certificate no 39, the sum related to the loss by theft.

[53] It is also difficult to agree with Mr Foster that it is arguable that the parties had agreed for UDC to have assumed the responsibility for insuring the site and therefore

CDA could have claimed against it, by way of a collateral contract, to recover compensation for the loss by theft. Such a position would be quite inconsistent with the fact that the parties had had such extensive discussions about resolving the issue relating to the loss by theft. It would also be inconsistent with the fact that Ms Isaacs, on being challenged by Mr Binger about the inclusion of the sum in certificate no 39, retreated unconditionally, and dubbed the inclusion as merely a recommendation. It cannot therefore be said that there was a collateral agreement that allowed Ms Isaacs to include the sum in certificate no 39.

[54] On these bases, the proposed grounds of appeal in relation to this aspect of the case are not arguable and should not be allowed to be included in the notice of appeal, which should be allowed to be filed.

Conclusion

[55] As UDC did not object entirely to CDA's application for an extension of time within which to file its notice of appeal, the extension should be granted. It, however, should be granted with a qualification that certain proposed grounds should be removed from the proposed notice of appeal. The grounds that should be removed are those relating to the authority of Ms Isaacs to issue certificate no 39. Those grounds have no prospect of success on appeal.

F WILLIAMS JA

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

EDWARDS JA (AG)

[57] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

BROOKS JA

ORDER

1. The application for extension of time within which to file notice and grounds of appeal is granted, on the conditions set out below:
    a. There shall be no ground or complaint concerning the learned trial judge's findings in respect of any authority bestowed on the architect by the C4 Contract, or by way of any collateral agreement, to certify the loss resulting from the theft of items from the worksite between 15 and 17 February 1992.
    b. In particular, grounds b, c and d of the proposed grounds of appeal, filed on 6 June 2015, are precluded from being advanced as grounds of appeal.
    b. The notice and grounds of appeal shall be filed and served on or before 24 June 2016.
2. One half of the costs of the application shall be costs in the appeal.