

Privy Council Appeal No. 37 of 1997

**Electrotec Services Limited** *Appellant*

v.

**Issa Nicholas (Grenada) Limited** *Respondent*

FROM

**THE COURT OF APPEAL OF GRENADA AND THE  
WEST INDIES ASSOCIATED STATES**

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 16th February 1998

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*Present at the hearing:-*

Lord Browne-Wilkinson

Lord Lloyd of Berwick

Lord Nolan

Lord Hoffmann

Mr. Justice Gault

*[Delivered by Lord Browne-Wilkinson]*

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1. In this action the plaintiff, **Electrotec Services** Limited ("Electrotec") claims against the defendant, Issa Nicholas (Grenada) Limited ("Nicholas Limited"), the sum of EC\$325,921.00 plus interest at 6% for work done by Electrotec in 1985 and 1986 at the Ramada Renaissance Hotel of which Nicholas Limited is the owner. There is no dispute that the work was done by Electrotec Limited. The question is whether Nicholas Limited, as building owner, is liable under a direct contract with Electrotec that Electrotec should do the work or whether the work was done by Electrotec as a sub-contractor of Project Control Associates ("PCA") under a main contract made between Nicholas Limited and PCA.

2. The detailed history of the matter is extremely confused. In outline it is as follows. On 7th August 1985 Nicholas Limited entered into a written contract with PCA as main contractor for the renovation of certain rooms at the hotel ("contract 1"). This contract was subsequently extended to cover further works at the hotel ("contract 2"). The written contract between Nicholas Limited and PCA incorporated common form general conditions which provided for nominated sub-contractors whom Nicholas Limited, as employer, could in certain circumstances pay direct. There is no doubt that in relation to the works covered by contracts 1 and 2 Electrotec carried out works as sub-contractor under contracts with PCA as main contractor.

3. Late in 1985, Electrotec undertook further works on the site. These further works are referred to in the documentation as contracts 3 and 4. There is no formal written document relating to these later contracts. Some of the work under contracts 3 and 4 consisted of additions and alterations to works done under contracts 1 and 2: the rest was new work. It appears that some of the work under contracts 3 and 4 had been done before 5th November 1985.

4. On 5th November 1985 a meeting took place between Mr. Gay, of Electrotec, and Mr. Nicholas, the moving light behind Nicholas Limited. According to Mr. Gay's evidence, at that meeting he was instructed directly by Mr. Nicholas to do the work comprised in contract 3. In a letter of 6th November 1985 from Mr. Gay to Mr.

Hosein of PCA the work comprised in contract 3 is referred to as being the subject matter of quotations given directly by Electrotec to Mr. Nicholas. A copy of that letter was sent to Mr. Nicholas. Mr. Gay's evidence was that he was later instructed directly by Mr. Nicholas to do the work comprised in contract 4. In a letter dated 2nd December 1985 from Mr. Hosein of PCA to Mr. Nicholas, Mr. Hosein refers to a valuation of the contract work and states, *inter alia*, that the figures include contract 4 and "incorporate the contracts agreed to by you with Electrotec for the Sewer Treatment Plant and for the External Drainage works". According to Mr. Gay's evidence, Mr. Nicholas promised to pay Electrotec directly for the work comprised in contracts 3 and 4. This is to an extent confirmed by a letter dated 4th December 1985 from Mr. Gay to PCA in which amounts totalling over \$157,000 are described as "amounts promised to be paid by I.N. Limited".

5. The work comprised in contracts 3 and 4 were carried out by Electrotec. On 14th November 1985 Electrotec put in a request for payment to PCA on a form which described PCA as "main contractor" and the request for payment covered, in addition to work included in contracts 1 and 2 works included in contracts 3 and 4. In the period from 30th November 1985 to 22nd May 1986, Electrotec continued to apply to PCA for payment for the works included in contracts 3 and 4 but, apparently, without success. Having failed to extract the money from PCA, Mr. Gay sought payment direct from Mr. Nicholas. There was a meeting between Mr. Gay and Mr. Nicholas in June 1986 at which Mr. Gay sought direct payment. Mr. Nicholas requested that Electrotec should separate the work done by Electrotec into two categories viz., first, the category for which Mr. Nicholas was primarily liable to PCA as the main contractor in relation to which Electrotec's claim was against PCA; second, the work for which Nicholas Limited was directly liable to Electrotec. According to Mr. Gay, Mr. Nicholas again promised to pay Electrotec the amount due under the second category.

6. On 18th June 1986 Mr. Gay wrote to PCA (with a copy to Mr. Nicholas). It reads as follows:-

"As per Mr. I. Nicholas request, we have separated the items of work which were directly requested by him from that for which you are responsible."

7. The letter then specified a sum of \$82,842 odd as being the sum due from PCA. On the following day, 19th June 1986, Mr. Gay wrote to Mr. Nicholas (with a copy to PCA). The letter reads as follows:-

"Further to our discussions, we have detailed the works requested by you on the attached sheets.

8. Details of the account are as follows:-

9. Contract 3 - External works .... \$312,612.00

Contract 4 - Additional works ... 54,459.00

Amount outstanding .... \$367,071.00

10. We look forward to your payment as promised, as these moneys are now outstanding for over four (4) months and is causing us some serious embarrassment with our Bankers and Suppliers."

11. Enclosed with the letter were two schedules setting out the detailed items: these schedules referred to PCA as being the "main contractor".

12. There was a further meeting between Mr. Gay and Mr. Nicholas on 11th July 1986. According to Mr. Gay's evidence, he and Mr. Nicholas then agreed that certain items in the schedules sent on 19th June were due but Mr. Nicholas queried certain other items. Mr. Nicholas said that he would pay the amounts which PCA certified as due. Mr. Gay's account of that meeting is confirmed by two letters dated 21st August 1986. The first was a letter from Mr. Gay to Mr. Nicholas which reads as follows:-

"As requested by you, we have requested Messrs. Project Control Associates to certify our final account on the above mentioned contract.

13. We have received the approval from PCA in the sum of \$325,931.00. We wish to confirm that we would accept this sum ... as full settlement for works performed on this contract.

14. We look forward to your settlement as agreed."

15. On the same day, 21st August 1986, Mr. Hosein of PCA and a Mr. Karamath wrote to Mr. Nicholas a letter headed "Grenada Beach Hotel Final Account - **Electrotec Services** Limited" which read as follows:-

"**Electrotec Services** Limited have requested us to review their final statement of account prior to submission to you.

16. Attached is a copy of their statement with adjustments made by us to the figures submitted.

17. A summary is given as follows:

Contracts 3 and 4 (original) \$159,721.00

18. Contracts 3 and 4 (extra works

agreed with you) \$166,200.00

\$325,921.00"

19. Sent with that letter was a schedule referring to "Work Under Query" which, according to Mr. Gay, refers to the work which Mr. Nicholas required to have certified by PCA: that schedule contained certain amendments to the original figures and was signed by Mr. Hosein on 21st July 1986.

20. There was no response to any of these letters by Mr. Nicholas or his company. Electrotec did not receive payment. Mr. Gay telephoned Mr. Nicholas in October 1986 asking for settlement. Mr. Nicholas declined to pay saying that certain of the items had not been approved. That prompted the only document in the case emanating from Nicholas Limited being a letter which is undated but received on 29th October 1986. For the first time that letter alleged that Nicholas Limited were

not liable and that Mr. Nicholas assumed that PCA had sub-contracted the work to Electrotec.

21. In these confused circumstances, Electrotec brought these proceedings. In the amended statement of claim Electrotec alleged that "between the months of November 1985 and July 1986, the Defendant contracted with the Plaintiff for the Plaintiff to effect certain electrical and plumbing works at the Defendant's said premises". It then alleged that PCA had been engaged to certify the work to be done by the plaintiff, that PCA had certified the sum of \$325,921.00, the certificate for which had been sent to the defendant, and claimed the sum of \$325,921.00. The defence denied that there was any contract between Electrotec and Nicholas Limited.

22. The case came on for trial before St. Paul J. It is a singular feature of this case that, despite the documentary confusion and the lack of any communications from Nicholas Limited in the correspondence, no evidence was called on behalf of Nicholas Limited at the trial. The only oral evidence was that of Mr. Gay of Electrotec and Mr. Hosein of PCA. They gave evidence to the effect summarised above. In addition Mr. Hosein gave evidence which is of critical importance. He said:-

"There were works relating to external works which started before the end of 1985. We supervised their works. That was requested by Mr. Nicholas verbally. This was separate from the original works. We were not the contractor for any of that work."

23. In re-examination he said that he received no order under the contract for additional works and that he did not recall signing a contract for the central facilities of the hotel (contract 3). The judge apparently accepted the evidence of Mr. Gay and Mr. Hosein and held the evidence of a direct agreement by Mr. Nicholas with Electrotec to do the works comprised in contracts 3 and 4 to be consistent with the conduct of the parties and the correspondence. He expressed his conclusion as follows:-

"I conclude that the defendant did contract with the plaintiff for the plaintiff to effect certain electrical and plumbing works at the defendant's premises and the defendant engaged [PCA] to act on its behalf with regard to the said works and the defendant promised to make payment to the plaintiff provided [PCA] certified the said works. The works were certified by [PCA]. I therefore give judgment for the plaintiff ..."

24. Nicholas Limited appealed to the Court of Appeal (Sir Vincent Floissac C.J. and Byron and Singh J.J.A.) who unanimously allowed the appeal. On the appeal, counsel contended that the Court of Appeal should not disturb the findings of fact made by the trial judge in accordance with the ordinary principles. However in the judgment of the court given by Byron J.A. he said:-

"This proposition, however, is not applicable to this appeal as no evidence was adduced on behalf of the appellant and the findings of the learned trial Judge did not turn on his evaluation of the credibility of any witness. His decision was based on the inferences he drew from uncontradicted oral and documentary evidence."

25. He then considered the legal principles which he considered applicable. He set out the well known principle that, since there is no privity of contract between building owner and sub-contractor, in the ordinary case the building owner cannot be directly liable to the sub-contractor. He said that an employer might become directly liable to a sub-contractor on an "express" promise to pay the sub-contractor where he gives him a direct order to carry out work. In support of that proposition he relied upon Keating on *Building Contracts* 5th Edn. page 285. Given the fact that in relation to contracts 1 and 2 Electrotec was undoubtedly a sub-contractor, he held that the evidence given by Mr. Hosein that his role changed at the end of 1985, after which Nicholas Limited paid Electrotec and other sub-contractors directly, was not sufficient to show a direct obligation owed by Nicholas Limited to Electrotec. He further held that, in relation to the two occasions on which Mr. Nicholas entered into direct dealings with Mr. Gay leading to Electrotec doing the work, this was not sufficient to give rise to a separate contract because there was no "express" promise to pay the sub-contractor. He held that the conduct of the parties up to the end of May 1986 was consistent only with the existence of the sub-contract between Electrotec and PCA. As to the promises to pay, made by Mr. Nicholas in June, July and August 1986, the Court of Appeal did not treat them as creating a contractually binding promise changing the status of the parties.

26. Their Lordships are unable to agree with the approach taken by the Court of Appeal to the judge's findings of fact. True it is that there was no conflict of evidence since no evidence was called on behalf of Nicholas Limited. The learned judge accepted the evidence that Mr. Nicholas instructed Electrotec separately to do the works comprised in contracts 3 and 4 and did in June, July and August 1986 promise to pay Electrotec directly for such work provided that it was certified by PCA. The question is not what inference should be drawn from this evidence but whether it should be accepted at all given the undoubted position in relation to

contracts 1 and 2 that Electrotec was a sub-contractor, PCA being the main contractor.

27. In their Lordships' view the critical question in this case is whether the works comprised in contracts 3 and 4 were ever the subject of any contract between Nicholas Limited and PCA as main contractor. If there ever was such a contract, then the work under contracts 3 and 4 must have been done by Electrotec as sub-contractors. That being so, Electrotec would have no claim to direct payment from Nicholas Limited in the absence of a separate contract by Nicholas Limited to pay Electrotec direct even though Electrotec was a sub-contractor. Like the Court of Appeal their Lordships would have had considerable doubts whether such a separate agreement to pay Electrotec, as sub-contractor, directly could be spelt out of the evidence.

28. But in their Lordships' view that was not the question confronting the judge. Although the point is not noticed by the Court of Appeal, Mr. Hosein of PCA was quite clear in his evidence (which was not challenged in cross-examination) that Nicholas Limited never entered into any contract with PCA to do the works comprised in contracts 3 and 4. In those circumstances, this was not a case in which an undoubted sub-contractor was seeking to prove a separate obligation on the employer requiring him to pay the sub-contractor. The only question in this case was whether there was in fact a contract between Nicholas Limited and Electrotec there being no evidence of any contract between Nicholas Limited and PCA relating to the works comprised in contracts 3 and 4. Given that Electrotec did the work and that in 1986 Mr. Nicholas treated himself as liable to pay Electrotec for such work there was ample ground on which the judge could make his finding of fact that there was a direct contract between Nicholas Limited and Electrotec (there being no contract between Nicholas Limited and PCA) to do the work comprised in contracts 3 and 4 and therefore to pay for it.

29. In their Lordships' view, therefore, the Court of Appeal were not justified in upsetting the factual findings of the learned judge which were consistent with the evidence before him. Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the judgment of the Court of Appeal set aside and the judgment of St. Paul J. restored. The respondent must pay the appellant's costs in the Court of Appeal and before their Lordships' Board.