



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2006: No. 201

BETWEEN:

EUSTACE FLOYD FORTH

Plaintiff

-and-

WAYNE FURBERT

Defendant

REASONS FOR ORDER

Dates of Hearing: 29 January, 30 January, 29 March, 12 June and 18 October 2007

Mr. Paul Harshaw, Lynda Milligan-Whyte & Associates for the Plaintiff

Mr. Edward Bailey, Edward P. Bailey & Associates for the Defendant

Introduction and Procedural History

1. These proceedings arise from a construction project undertaken by the plaintiff ("Mr. Forth") through the construction company operated by him at a property owned by the defendant ("Mr. Furbert") in Hamilton Parish. The works to be undertaken by Mr. Forth through his company at Mr. Furbert's property were reasonably substantial.
2. The amount originally claimed when the proceedings were issued in July 2006 was \$164,425, said to represent in part an amount unpaid in respect of the construction work undertaken by Mr. Forth and his employees at Mr. Furbert's property, and in part the sum of \$49,920, said to have been loaned by Mr. Forth to Mr. Furbert. There was originally a counterclaim based on allegedly negligent work, but this was withdrawn on 30 January 2007.
3. By the time the case first came on for hearing, witness statements had been filed, and in his witness statement, Mr. Forth had adjusted the amount claimed in

respect of the construction debt to \$80,623.77, which together with the loan of \$49,920 made a claim totalling \$130,543.77.

4. Difficulties arose on the first day of hearing when Mr. Bailey for Mr. Furbert sought to cross-examine Mr. Forth in respect of documents which were clearly discoverable, but which had never been disclosed during the discovery process. Since these were highly material, there was no alternative but to adjourn so that proper discovery could be given (on both sides). There were then further adjournments occasioned by the non-availability of both parties. One such occasion was 29 March 2007, when the Court reviewed the extent of compliance with the orders which had been made on 30 January 2007. At that time, Mr. Bailey indicated that there were three items in the spreadsheets produced on behalf of Mr. Forth which indicated that there had been double charging on the construction project. I should pause here to note that the pleaded cases on both sides fell far behind the assertions which had been made between counsel for the parties in correspondence and in submissions to the Court.
5. The matter then came back before the Court on 12 June 2007. At that time Mr. Harshaw for Mr. Forth indicated the amount claimed for construction had been reduced to \$77,573. There was argument between counsel in relation to a number of matters, during the course of which Mr. Bailey sought to persuade Mr. Harshaw that there was duplication between invoice number 4, dated 4 October 2005 in the sum of \$77,433.58, and the document styled Extras Summary, dated 14 November 2005 in the sum of \$149,685.90. Both, submitted Mr. Bailey, included the sum of \$63,256.08, which sum itself included the loan to Mr. Furbert of \$49,920. Mr. Harshaw accepted that these appeared to show duplication, and the Court thereupon gave directions for re-amended pleadings to be filed, and for witness statements to be prepared dealing only with the issues which then remained outstanding.
6. Although the Court's order of 12 June 2007 provided for delivery of the re-amended statement of claim in July, in the event this was dated 20 September 2007, and in relation to this delay Mr. Harshaw made application for an enlargement of time. Mr. Bailey indicated on the return date that the late service was of no consequence to the defendant, and that there was no need either for any further defence or for any new witness statements.
7. The re-amended statement of claim dated 20 September 2007 claimed the amount of \$77,573.90, and the loan figure of \$49,920, to give a total claim of \$127,493.90. One might have expected that this was a considered and final figure. However, when the matter resumed on 18 October 2007, Mr. Harshaw indicated that Mr. Forth accepted having received two cheques, one for \$45,000,

dated 22 January 2006, and one for \$5,300, dated 5 May 2006. This had the effect of reducing the claim by more than \$50,000, but Mr. Harshaw then indicated that his client claimed a further \$17,853, said to have been paid to a subcontractor, TCC Drywall Ltd. Although Mr. Harshaw gave a different figure to the Court, this led to a claim in respect of the unpaid construction work amounting to \$45,126. The amount in respect of the loan pleaded in paragraph 9 of the re-amended statement of claim was still being pursued, so that the total claim at that point was said to be \$95, 046.90.

8. When the matter had come before the Court on 29 January 2007, the parties had been in agreement that the starting point could be taken as being 20 December 2005, when there was said to be a balance due of \$11,601. However, this agreement fell away in view of the changes in position which there had been subsequently. So on 18 October 2007 it seemed that the evidence would have to start from scratch. However, Mr. Bailey indicated that of the forty or so debit items appearing in the schedule of particulars, only six were disputed, although there were some further areas of dispute; the first of these was in relation to a payment in the sum of \$3,600, said to have been made by Mr. Furbert to Mr. Forth on 11 May 2006, and the second was a dispute in regard to the amount of discounts. Mr. Bailey also disputed the additional charge in respect of TCC Drywall in the sum of \$17,853, but said that all other items were agreed. Both counsel agreed that formal applications for amendment would be made when proper revised pleadings could be put before the Court, but at least at that point both counsel and the Court understood the issues between the parties.

Evidence on 18 October 2007

9. Against this complex background, Mr. Forth again gave evidence, and dealt firstly with the Extras Summary dated 14 November 2005, in the sum of \$149, 685.90. This document appeared in the bundle of documents at page 38. In relation to the items on this list, Mr. Bailey indicated that the first six payments to suppliers and subcontractors remained disputed, as did three subsequent payments to a company described as TipToe Engineering, which Mr. Forth later said was in fact TipToe Electrical.
10. Included as part of the item of \$149,685.90 were the three payments to Mr. Furbert totaling \$49,920, representing the loan in respect of which a separate claim was still being maintained. Mr. Forth confirmed that the figure of \$149,685.90 included the loan of \$49,920 and agreed that he could not claim this loan figure separately. Mr. Harshaw consequently sought leave to reduce the amount of his client's claim by the loan amount, which leave was granted, so that the total amount then being claimed was the figure of \$45,126.90, down from

11. Mr. Forth then dealt with the Extras Summary dated 20 December 2005, in the sum of \$9,000. This amount represented a charge for the use of equipment owned by Mr. Forth covering concrete mixer, jacks and staging. These charges, totalling \$9,000, appeared on a summary as at 20 December 2005, but Mr. Forth was unable to say whether there had ever been an invoice submitted to Mr. Furbert in respect of these charges.
12. Next was an amount claimed of \$6,615.75 in respect of a bill from Advanced Engineering, with a date listed in the summary as 15 January 2006. In fact, the invoice from Advanced Engineering was dated 13 January 2006. Mr. Forth first asserted that this was a payment which had been made by him to Advanced Engineering for plumbing work carried out on Mr. Furbert's project, but then had second thoughts and said that he was not sure whether the payment had been made by him, and that it might have been paid by Mr. Furbert. This proved to be the case, demonstrating both the unreliability of Mr. Forth's initial recollection and the claim made in the documents.
13. Mr. Forth was then taken to the underlying documentation for invoices number 26 and 27, both dated 26 April 2006, and claiming respectively \$4,104 and \$13,500. Invoice number 26 covered a charge made in respect of the supply of support jacks, and invoice number 27 covered a charge made in respect of staging. Both invoices were worded so as to cover the entirety of the project, and hence would seem on their face to represent duplication of the charges which had been made in the Extras Summary of 20 December 2005, which covered \$3,600 in respect of jacks, and \$1,200 in respect of staging, part of the claim of \$9,000 referred to above. Mr. Forth was not prepared to concede that there was any such duplication, but neither could he point to any invoice in respect of those charges which had been sent to Mr. Furbert.
14. Finally in terms of his evidence in chief, Mr. Forth gave evidence in relation to the disputed invoice number 4, the first item in time, but which was dealt with last because the relevant documents had not been in the witness bundle. This invoice covered the cost of labour for the previous week totalling \$12,577.50, and there then followed a charge for "total materials and expenses" in the sum of \$63,256.08. When asked to give a breakdown in respect of this item, Mr. Forth responded that there was a breakdown, but said that most of this was in the summary sheet on page 38 of the documents bundle, which of course was the Extras Summary dated 14 November 2005. Mr. Forth then revised this answer to say that some of the breakdown was in the document at page 38, and when asked

to explain what part of the \$63,256 appeared as part of the claim for \$149,685, responded that it was impossible for him to put his finger on that. Mr. Harshaw asked him in terms whether the \$149,685 included the \$63,256, and although the answer to this should have been obvious, Mr. Forth's response was that he really did not know how to answer that, explaining that the summary had been prepared by an accountant, not by him. So ended evidence in chief.

15. Mr. Bailey began his cross-examination by referring Mr. Forth to the document at page 113 of the bundle, which appeared to be a different version of invoice number 4, the 4 October 1995 invoice. Mr. Forth conceded that it was a breakdown of invoice number 4, excluding the labour charge. The first 11 items were identical to the first 11 items of document 38, the Extras Summary of 11 November 2005, and included the entirety of the loan of \$49,920. Mr. Forth conceded that the numbers and descriptions at the top of the document at page 113 were identical to those at the top of the document at page 38, but maintained that that did not mean there had been a duplication of charges. Mr. Bailey then took Mr. Forth back to the particulars appearing under paragraph 9 of the re-amended statement of claim. Although the Extras Summary of 14 November 2005 was supported by document 38, and invoice number 4 by documents number 28.2 and 113, and notwithstanding that both set out \$63,256.08 worth of identical items, Mr. Forth refused to accept that they represented a duplication. He agreed that they represented identical amounts and descriptions, but would not agree that the fact that the items which appeared as the major part of invoice number 4 again appeared in the Extras Summary dated some six weeks later represented a duplication of his company's charges. That was an extraordinary position to maintain.

16. Mr. Bailey cross-examined Mr. Forth further on several of the smaller items, causing Mr. Forth to accept

- that the bill from Advanced Engineering in the sum of \$6,615.75 had indeed been paid by Mr. Furbert, and that this amount should be deducted from the claim;
- that a payment of \$3,600 had been paid by Mr. Furbert on 11 May 2006, and that his claim should be reduced in respect of that payment; and
- that Mr. Furbert had paid a cheque for \$1,500 to TipToe Electrical for which he should be given credit, so that there should be a deduction from the claim in that amount.

So those concessions lowered the claim by a further \$11,715.75.

17. Mr. Forth concluded by saying that he did not have receipts for the two rather more substantial payments to TipToe.

Mr. Bailey's Application

18. At this point, Mr. Bailey made an application for the claim to be dismissed. Mr. Bailey in fact asked for a dismissal on the basis of "no case to answer". He argued that if the Court accepted that there had been a duplication between the two amounts claimed as the 4 October 2005 invoice number 4, and the 14 November 2005 Extras Summary, then the amount duplicated (\$63,256.08) at that point substantial exceeded the amount of Mr. Forth's claim, so that the claim could not be maintained and should therefore be dismissed.

19. While the procedural basis for Mr. Bailey's application was not clear, the Court inferred that Mr. Harshaw did wish a determination on the merits in consequence of Mr. Bailey's application. Mr. Harshaw said in terms that if the Court took the view that there had been a duplication of the sum of \$63,256.08 in Mr. Forth's claim, then it was as well that the matter be disposed of sooner rather than later. The Court took the view that it was effectively being invited at this stage to make a determination on the merits, following conclusion of the Plaintiff's case.

20. On this basis, the Court's response was that it was quite clear that there had indeed been a duplication in Mr. Forth's claim, and accordingly dismissed Mr. Forth's claim, with costs to Mr. Furbert. This written ruling is provided in accordance with Mr. Harshaw's request that reasons for the dismissal should be given.

21. I should make one further comment. Mr. Forth at times in his evidence became exercised at the suggestion that his claim represented a duplication of charge. In fact, in respect of the loan figure, this was claimed three times in the re-amended statement of claim; first when identified as the loan itself, secondly as part of invoice number 4 of 4 October 2005, and thirdly as part of the Extras Summary of 14 November 2005. The balance of payments to subcontractors and suppliers in the sum of approximately \$13,000 was merely duplicated in the October invoice and the November Extras Summary. Matters were presented on Mr. Forth's behalf with a summary of some 42 charges and 12 payments, and a running balance which represented his claim. That Mr. Forth was unable to recognise the duplication in the re-amended statement of claim may be because the documents which particularised his claim in the re-amended statement of claim had been prepared by his accountants, and in truth he did not appear to have a good understanding of them. This much was demonstrated by his inability to answer

the simple question whether the 14 November 2005 Extras Summary of \$149,685.90 included the sum of \$63,256, which had already been claimed. Clearly it did, as was made clear in the alternative invoice number 4, (appearing at page 113 of the bundle) which set out 11 items totalling \$62,656.08, and added a charge of \$600 in respect of a concrete mixer to produce the figure of \$63,256.08. Those same 11 items were again charged for in the later Extras Summary. So the reality is that this figure of \$63,256.08 was part of invoice number 4 and was also part of the 14 November 2005 Extras Summary and hence was claimed twice against Mr. Furbert. This should have been clear to Mr. Forth, to his accountants, and to his legal advisor, particularly given that the very issue of the duplication of the amount of \$63,256.08 had been flagged by Mr. Bailey at a much earlier stage of the proceedings.

Dated the 29th day of October 2007.

Hon. Geoffrey R. Bell
Puisne Judge