In The Supreme Court of Bermuda

CIVIL JURISDICTION

2008 No: 125

BETWEEN:

TROY BURROWS

First Plaintiff

-and-

THE PARAGON TRUST

Second Plaintiff

-and-

BERMUDA SELF-STORAGE LIMITED

Third Plaintiff

-v-

ERWIN P. ADDERLEY & ASSOCIATES LIMITED

Defendant

JUDGMENT

(In Court)

Date of Trial: September 21-22, 2011
Date of Judgment: September 30, 2011

Mr. Rick Woolridge, Phoenix Law Chambers, for the Plaintiffs
Mr. Richard Horseman, Wakefield Quin, for the Defendant

Introductory

1. At trial, the present case played out as something of a grudge match between two men with contrasting dispositions and occupations. The First Plaintiff ("the Plaintiff"), the younger man, presented as a rather blunt risk-taking entrepreneur, determined to make his mark on the world in the face of hostile market conditions through erecting what he hoped would be Bermuda's first purpose-built storage facility. He engaged an architectural and planning consultancy, the Defendant, whose older principal presented as a comparatively dignified and sedate retired Director of Planning; a man who had likely spent most of his working in a Bermuda that moved at a less frenetic pace and conducted business in a rather more gentlemanly manner than is now universally the case. A student of human chemistry observing the present proceedings would not find it surprising that the contractual relationship between the two main protagonists ultimately came to a premature end.

2. Although the Defendant initially sued the First Plaintiff for some $20,000, the First Plaintiff asserted a counterclaim in excess of the jurisdiction of the Magistrates' Court (in those proceedings) and issued the Writ herein on or about June 3, 2008[1]. The Plaintiffs' case is that the Defendant's principal held himself out to be an architect and in breach contract failed to provide the agreed services and failed to complete the crucial plans within the requisite timeframe. He seeks approximately $150,000 in damages, comprised of interest charges payable due to the delay (just under $100,000), money paid to the Defendant (just under $45,000) and legal fees (just over $5000). The relevant agreement was evidenced in writing signed by the Plaintiff and dated January 19, 2007 ("the Contract").

3. The Defendant denies the breaches complained of, primarily averring that it declined to complete because it had outstanding bills which the Plaintiffs were required to pay. The Defendant counterclaims for unpaid fees of $20,252.

4. The main issues which fall for determination are essentially twofold: (1) did the Defendant fail to discharge his contractual obligations within a reasonable time entitling the Plaintiff to terminate the contract? Alternatively, (2) is the Defendant entitled to recover the balance outstanding on its account?

[1] Although it is unclear that the Writ was formally issued, no point was taken in this regard.

The parties' contract

5. The Contract was in fact the third similar agreement (in terms of standard conditions) entered into between the same parties. On June 30, 2006, the Plaintiff hired the Defendant to file an application for in principle planning approval for the building, apparently using plans drawn by an architectural firm. This application was filed on or about July 13, 2006 and refused on October 25, 2006. On November 10, 2006, the Plaintiff again engaged the Defendant in respect of an appeal against this refusal. The Minister, acting in accordance with the advice of technical officers, allowed the appeal on January 9, 2007.

6. The Contract which forms the subject of the present dispute was concluded against this background. It is evidenced by a two-page document headed 'CONTRACT & FEES AGREEMENT', in which the Defendant confirms the services to be provided for a total cost estimate of $60,000 to $65,000. The first item of work estimated to cost only $1500 to $2000 is described as follows:

> "*Revise, design & complete plan required to obtain final planning permission and file application, see through to a decision of the Board…*"

7. The bulk of the work (estimated at $58,500 to $63,000) entailed the following to items:

> "
>
> - *Undertake and complete all architectural drawings required to obtain Building Permit, coordinate and direct other professional disciplines in the production of all other design and drawing required to obtain building permit such as (structural, mechanical, plumbing, AC, fire suppression and electrical (LTC)).*
> - *Submit application for Building permit, consult with technical officers of planning and other design profession and amend submission as required to obtain building permit.*"

8. The Contract also provided for a retainer of $10,000 with the balance "*to be billed monthly as work proceeds*". It concluded by setting out the following "*Policies*" under the client's signature:

"

- *Approved documents/plans will not be released from our office without final payment of invoices.*
- *Should this matter have to be passed to our Attorneys or Collecting agents, you will be responsible for all legal and/or collection fees incurred.*"

9. There was no material dispute about what the Defendant was hired to do. The Plaintiff did suggest that it was inconsistent with market practice for the Defendant to expect to be paid in full before the relevant Building permit had been obtained. Be that as it may I find that the parties expressly agreed that the Defendant would render monthly invoices. The written agreement did not specify a time within which invoices had to be paid. To give business efficacy to the Contract, I would imply a term that invoices were to be paid in accordance with the Defendant's standard billing requirements unless otherwise agreed.

10. Invoices were rendered on terms which included both a 'DUE DATE' of one calendar month after the invoice date and an assertion that payment was due "*upon receipt*". As these documents were drafted by the Defendant, I would resolve this ambiguity in favour of the Plaintiff and find that the parties agreed that invoices were payable within one calendar month of their issue date.

11. The Plaintiff's pleaded case is that he made time of the essence by orally telling the Defendant's principal that the Plaintiff was liable from the outset to make mortgage payments. This matter was admittedly neither memorialised in the Contract nor in any documentation contemporaneous with its execution. It falls to be determined with reference to the oral evidence adduced at trial.

12. It is also asserted as part of the Plaintiff's pleaded case that Mr. Adderley, the Defendant's principal, held himself out to be a registered architect. There is nothing in the Contract, the Invoices or the Defendant's letterhead ("*Planning Design Development Consultants*") to support this serious allegation. This issue also falls to be determined with reference to the oral evidence adduced at trial.

Approach to the oral evidence

13. Because of the zeal with which the Plaintiff sought to discredit the professional competence and integrity of Mr. Adderley, the Defendant's principal, I approach the evidence of each of the two protagonists with care and circumspection. Rather than basing my assessment of their evidence on my subjective impression of who was more credible, I have considered the extent to which the witnesses' various assertions are

supported by contemporaneous documentation and are consistent with their inherent probability having regard to the nature and context of their contractual relationship.

Findings: the Plaintiff's claim

Was time of the essence?

14. The Plaintiff's claim for delay is based on the premise that the Defendant caused him to pay $11,000 per month as interest on his loan for longer than would have been the case had the work been completed within a reasonable time. In the Second Troy Burrows Affidavit, he asserts that he told Erwin Adderley this as part of the pre-contractual negotiations when the Defendant offered to draw plans instead of the Plaintiff's original architectural firm. Adderley told him he could complete the plans in two months and Burrows accepted this as a reasonable timeframe.

15. The Defendant does not dispute being aware that the Plaintiff was incurring interest costs but challenges the suggestion that any complaint about delay ever arose before September 2007. I find that the Plaintiff did know that time was of the essence in a sense that would apply in most building projects of this nature.

16. However, having regard to the terms of the Contract itself, I find that all that Mr. Adderley promised to complete within two months was the plans for final planning approval. It would make no sense whatsoever for the Defendant (on the Plaintiffs' behalf) to incur the substantial costs of preparing the building permit application before final planning approval had even been obtained.

17. I find that it was simply an implied term of the Contract that the building permit would be applied (and hopefully obtained) within a reasonable time. What was reasonable involves an assessment of not just the role of the Defendant but also the roles to be played by other key professionals whom it is agreed were independently retained by the Plaintiff himself (whether on his own account or on behalf of the Second and/or the Third Plaintiff).

Did Erwin Adderley hold himself out to be a registered architect?

18. It is unclear why it is alleged that Mr. Adderley held himself out to be a registered architect as negligence forms no part of the Plaintiff's case. However, Mr. Burrows in his oral evidence asserted that the reason for the Defendant's delay was simply that Mr. Adderley was not competent to deliver the services he agreed to perform.

19. What amounts to holding oneself out as an architect must be viewed in light of what the Architects Registration Act 1969 itself provides:

> "***Unqualified persons; offences***
> *2. (1) Subject to this Act, a person shall not, in Bermuda—*
>
> *(a) practise or carry on business under any name, style or title containing the word "Architect"; or*
> *(b) take or use any name, title or description (whether by initials or otherwise)*
> *stating or implying that he is an architect, unless he is a registered architect:*
> *Provided that nothing in this section shall affect—*
> *the use of the designation "naval architect", "landscape architect" or*
> *(i) "golf course architect"; or*
> *(ii) the validity of any building contract in customary form.*
>
> *(2)A person, whether or not a registered architect, shall not in Bermuda take or use or affix to or use in connection with any premises occupied by him, any name, title or description (whether by initials or otherwise) reasonably calculated to suggest that he possesses any professional status or qualifications as an architect other than a professional status or qualification which he in fact possesses and which, in the case of a registered architect, is indicated by particulars entered in the Register in respect of him.*
>
> *(3)Any person who contravenes or fails to comply with any of the provisions of this section commits an offence against this Act:*
>
> *Punishment on summary conviction: a fine of $720, or imprisonment for six months, or both such fine and imprisonment.*"

20. The Architects Registration Act does not prohibit unregistered persons from doing architectural work in contrast with the approach adopted in relation to law and medicine[2]. It merely prohibits persons who are not registered architects from: (a) practising under a business name which contains the word "architect", (b) using titles or initials that imply that one is an architect, and (c) affixing to business premises certificates etc. implying registration as an architect.

21. There is no or no credible evidence that Mr. Adderley contravened the 1969 Act in any way. Mr. Adderley has a Bachelor of Architecture degree and Masters degree in Architecture from the University of Nebraska, together with a Masters Degree in

[2] See: Bermuda Bar Act 1974, sections 26, 28; Medical Practitioners Act 1950, section 2 (1) (b).

Planning from the University of British Columbia. He displays these certificates in his office. He worked as a planner for five years in Canada, was Director of Planning in Bermuda between 1972 and 1994, and has been working for his consultancy company for some 17 years.

22. Mr. Adderley denied holding himself out as a registered architect and the Plaintiff's evidence did not plausibly suggest that he did so. I also find it highly improbable that any professional man in Mr. Adderley's position in a small community like Bermuda would seek to hold themselves out as having qualifications which a simple internet search would reveal that they lacked. On the contrary, I found Mr Adderley's evidence that he encouraged the Plaintiff to retain his company in part because of architects' fees were far higher to be consistent with the Plaintiff's own evidence. In his Second Affidavit, the Plaintiff deposed that Mr. Adderley said to him in the course of discussing concerns about the plans drafted by the Plaintiff's registered architect "*that if I wished to save a little money he would design and draw this building for me*" (paragraph 8). It seems improbable that Mr. Adderley would at one and the same time be promoting himself based on his extensive experience and at the same time representing that he was a registered architect who charged significantly less than other registered architects did.

23. Finally, and most significantly, the Plaintiff's own contemporaneous correspondence does not support his pleaded case on "holding out". It is clear from the following passage in his email of October 29, 2007 when the conflict between the parties was reaching its climax, that (a) the Plaintiff was aware at this point of the fact that Mr. Adderley was not an architect, but (b) did not complain that he had misled the Plaintiff <u>in this respect</u>:

> "…*It is my opinion that this building is too much for you to handle and you do not possess the skill necessary to complete the work as you made me believe. You should not have taken on this project you are not an Architect and <u>you should not have made me believe that you can do this project and save me money</u>*..." [emphasis added]

24. I reject this aspect of the Plaintiff's case altogether.

<u>Did the Defendant breach the implied term in the Contract that he would complete the building permit application within a reasonable time?</u>

25. The Defendant applied for final Planning permission on March 29, 2007, approximately two months after the Contract was executed as had been verbally promised. This application was granted by letter dated June 13, 2007. A Building Permit Application

form dated July 2, 2007 was signed by the First Plaintiff on behalf of the Second Plaintiff and seemingly filed by the Defendant (as evidenced by the Planning Department receipt) on July 4, 2007. This application was for the demolition of the existing building. The Department of Health promptly advised by letter dated July 10, 2007 that a survey was required for asbestos before the application could be processed. The Planning Department also promptly indicated by letter dated July 18, 2007 that the application could not be approved without hoarding being provided at the site. By letter dated July 31, 2007, the Defendant replied to the Planning Department that Mr. Adderley would not be able to attend to this until his return to Bermuda in early September.

26. However, email correspondence and other documentation suggests that in August Mr. Adderley and his colleague (Ms. Delores Beraldo-Vazquez) were involved in reviewing a draft Asbestos Report prepared by Bermuda Water Consultants ("BWC") and that hoarding specifications were also provided to the Planning Department. The BWC Report in final form was forwarded by the Defendant to the Planning Department under cover of an August 31, 2007 letter. Mr. Adderley personally visited a similar building in Florida where he met with other consultants while he was abroad and continued to work on the plans, according to the September 4, 2007 invoice. Permission to demolish the building was notified to the Defendant by the Planning Department on September 12, 2007.

27. The contemporaneous documentation is wholly inconsistent with the Plaintiff's exaggerated complaint that "*Erwin Adderley held up my project for over* [a]*year*" (Second Affidavit, paragraph 19). Because even if the building permit plans had been completed and approved prior to the demolition of the building (but not conceivably before the demolition works themselves had been approved on September 12, 2007), the Plaintiff would still be incurring interest costs until such time as the building was completed and occupied. Building the new warehouse could not begin until the existing building had been demolished.

28. I make no finding as precisely when this occurred, but it seems improbable that the site could have been completely cleared before the end of September at the earliest; Mr Adderley suggested construction could not have possibly begun prior to November, 2007.

29. It is common ground that the Plaintiff started chasing the Defendant to complete the building permit process in September, 2007 and indicated that the delay was causing him expense. A letter from the Defendant to the Plaintiff dated October 1, 2007 stated as follows:

"*I refer to our telephone conversation of Saturday evening, September 30, 2007 where you once again stated that and I quote, 'You are costing me money', You continually make this comment when you believe that the project is not proceeding as fast as you would like it to proceed…*

Work on the Building permit phase did not commence until…less than 3 months ago. It is important to note that payment for every claim made for work done on this phase has been late in being received and at present there is an outstanding balance of approximately $7000.

While I do not agree with your assertion that the project is proceeding slower than normal, I am aware of ongoing delays due to communication breakdown which I believe are a result of the fact that you have assumed the role of coordination of the various design professionals….[reference was also made to the fact that the Defendant required stamped structural drawings which had not been delivered]…

In an effort to assist in speeding up the process and to keep your cost down we had volunteered to do the AC design and had commenced working on this part of the project. We now wish to inform you that we will do no further work in this regard and will concentrate on completing the architectural drawings as soon as possible…"

30. In an email exchange of October 10, 2007 between Mr. Burrows and Ms. Beraldo-Vazquez, the Plaintiff requested drawings he believed were available for collection and the Defendant explained that the final stamped Entech plans had not been delivered as promised. This prompted Mr. Adderley to write the Plaintiff on October 17, 2007 explaining:

"*To restate the obvious, we cannot submit a Building Permit Application unless and until we have received the required structural drawings. Therefore we cannot be held responsible for any cost that you have incurred as a result of this self-imposed time-limit. With regard to the amount of money that you have been billed by us, it is sufficient to say that we intend to complete the project within the terms and conditions of the contract.*

We await receipt of the requested structural drawings in order that we may complete the submission for a Building Permit."

31. The quoted and related correspondence suggests that the Plaintiff's anxiety about completing the project and his financial exposure clouded his appreciation of the complexities of the application process which he was personally involved in coordinating. It also demonstrates his ability, no doubt under extreme stress, to make completely unfounded accusations with great conviction. For example, on October 10, 2010 he emailed Ms. Beraldo- Vazquez asserting:

> "*It is my observation that Erwin Adderley is a compulsive liar and is taking advantage of my inexperience in Projects of this magnitude….he has lied to me for 10 months and delayed the progress of the building.*"

32. This accusation grossly distorted the true position of which the Plaintiff ought to have been well aware, had he been capable of stepping back and appraising the situation with a cool head. Moreover, if the Defendant was wrong in asserting that he was waiting for stamped final structural plans, as the Plaintiff suggested at the time, no evidence was adduced from Entech to support this contention. Although Mr. Adderley was under the impression that the Entech stamped drawings were never received by his office, it is conceivable that the stamped plans probably were delivered to the Defendant's office at some point between October 17 and 30, 2007. By email dated October 30, 2007, Mr. Burrows asked to collect the "*plans that Entech Stamped from you on Thursday morning*". The following day Mr. Adderley replied: "*The Entech drawings will be available for collection at my offices on Thursday morning as requested.*" I am unable to make a firm finding in this regard for two reasons. Firstly, because the tone of the communications makes it entirely plausible that there was a miscommunication on the status of the plans being discussed. Mr. Adderley in his oral evidence was quite clear that the only Entech drawings his company had were unstamped (he speculated that Entech too might well have been awaiting settlement of their outstanding bills). And, secondly, subsequent correspondence suggests that the structural drawings were never stamped.

33. At this juncture, the Defendant was demanding payment of outstanding fees in accordance with the Contract before completing the assignment (pointing out that standard architectural fees would have been in excess of $500,000 for a project of this size). Meanwhile the Plaintiff was refusing to pay "*another penny until I have an approved set of plans in my possession*". This email correspondence was little more than an electronic shouting match. By the end of October, however, it seems clear that there were additional impediments to filing the application.

34. On October 19, 2007, the Defendant emailed Entech, Spectrum and the Plaintiff to advise that although it had been agreed to submit the plans as drawn and deal with possible relocation of a stairway later, Mr. Adderley now realised that the relocation "*has a*

significant impact on the fire suppression system, which need to be discussed". A meeting to discuss this issue was scheduled for October 22, 2007. This potentially significant practical impediment to the Building Permit application being filed was overlooked in the vituperative late October exchanges between Burrows and Adderley. Was this issue resolved by the end of October? If not, then the Defendant could not fairly be said to have been at fault for any delay.

35. If this issue was resolved prior to the termination of the Contract, it should have been straightforward for the Plaintiff to adduce evidence of this fact from documents belonging to one or more of the three Plaintiffs. He failed to adduce any such evidence. The Defendant, on the other hand, could point to two letters dating back to the period shortly after the Contract was terminated, which arguably supported the view that the structural plans and fire suppression issue had yet to be resolved. The Plaintiff, it must be remembered, testified in his Second Affidavit as follows:

> "*On November 4th 2007 I hired Conyers and Associates to take over the project and design the building for me. Their contract price for design was a total of $52,000.00. Please note that their contract price was $11,000 cheaper than Erwin Adderley and they produced the drawings in 5 weeks.*"

36. The first subsequent piece of correspondence, and most probative, is a letter before action written by Moniz George & Lavigne to the Plaintiff and dated November 28, 2007 demanding payment of the Defendant's outstanding fees. This letter asserts that "*our client was unable to complete the final matter because you failed to provide the requisite structural and mechanical plans (including fire suppression) which were to be prepared by others together with the application fee of $38,378.76*". If all documents had been produced by the service providers to the Defendant prior to termination, it seems highly improbable to me that instructions would be given to lawyers to justify non-completion on grounds which could easily be contradicted by production of the completed plans and/or by the independent professional experts themselves. What is more significant still, this fundamental central justification for the "delay" put forward on behalf of the Defendant nearly four years ago has not been directly contradicted by the Plaintiff ever since. His January 25, 2008 response to the Moniz George & Lavigne letter simply said that the Defendant "*has misinformed you as to why he did not make application for a building permit on my behalf*", an extremely tepid and non-specific response to a very clear and simple explanation which, if unfounded, should have been easy to explicitly contradict. The Plaintiff's Second Affidavit makes no mention of the structural engineering plans or fire suppression issue at all. Nor does the Plaintiff's Witness

Statement, replying to the Defendant's Witness Statement, directly assert that the Defendant had all supporting drawings from other experts required to complete and file the Building Permit application prior to November 5, 2007.

37. The second letter, and least probative in terms of indicating whether or not the other technical plans had been received in final form by late October 2010, is a letter dated February 26, 2008 accidentally sent by the Department of Planning to the Defendant. This letter was either sent in ignorance of the fact that another agent had filed an application on behalf of the Plaintiffs and formally replaced the Defendant, or because no other architectural firm or consultants had notified the Department that they were now acting in place of the Defendant. The latter seems more likely to be the case as the letter advised:

> "*We are currently unable to process the application because the issues stated below were not provided with the original submission.*
>
> 1. *Proposed elevators shall be applied for licensing purposes. Application forms are available at the Department of Planning Office.*
> 2. *Provide Fire Report Summary form the Bermuda Fire Service.*
> 3. *Provide Mechanical drawing with stamped engineering approval…*"

38. It seems improbable that architects or consultants would file an application which could not be processed; however this is of very minor concern. In paragraphs 12- 13 of his Witness Statement, the Plaintiff plausibly explains that the plans drawn by Conyers & Associates in five weeks were fresh plans, not copies of the Defendant's plans. Accordingly, fresh supporting materials were required. There is no basis for rejecting this explanation. However, what flows from this aspect of the evidence is that it clearly did not take Conyers five weeks to file a Building Permit application as the Defendant was contractually required to do. By February 26, 2008, almost four months after the Plaintiff says Conyers were hired, the Building Permit application in its final form had still to be filed. The Plaintiff, remarkably, did not produce any documentary evidence of when the application was actually finalized. He studiously avoided any mention of this date in his written evidence and dealt with the matter vaguely and unconvincingly in his oral evidence. Yet the essence of his claim was delay based in part on the implicit premise that he retained a registered architect who completed services the Defendant was unable to deliver within a shorter period of time.

39. I infer from all of these facts that the Building Permit application was not finalized in a materially shorter time than the time which elapsed between the notification of Planning approval on June 13, 2007 and the termination date of November 5, 2007. I find, based

on all the evidence, that the Plaintiff has failed to prove that the Defendant was at this juncture in breach of Contract by failing to deliver the services contracted for within a reasonable time.

Was the Defendant entitled to demand payment of arrears before completing the Contract?

40. On what was coincidentally Guy Fawkes Day, and although Mr. Adderley was neither an apprentice nor an employee, the Plaintiff sent the Defendant the following fiery electronic missile:

> "*This is to inform you that since you refuse to submit the drawings for the Bermuda Public Storage Building and furnish me with approved Plans according to our agreement and contract, Your services will no longer be required.*
>
> *YOU ARE FIRED from this job and I will be pursuing legal action against you….*"

41. It is common ground that past due balances existed on the Plaintiffs' account with the Defendant. The Plaintiff's main answer is that there was a complete failure of consideration on the Defendant's part so that the Plaintiffs are entitled to a refund of all monies due as well as damages for breach of contract in an amount far exceeding the arrears in any event. I have rejected the breach of contract claim so that all that remains is to consider whether the Defendant was entitled to refuse to extend further credit to the Plaintiffs in the days preceding the November 5, 2007 termination email.

42. It was clearly an express term of the Contract that invoices were to be paid on a monthly basis. The Defendant could, had the parties developed a better working relationship, perhaps have agreed to waive its strict contractual rights. It would be an unusual service-provider who, faced with a client who was not paying bills in full and at the same time questioning the service provider's professional competence in insulting terms, would elect continue working without being paid. I find that the Defendant was entitled to insist on arrears being paid before doing further work. There was no breach of contract on the Defendant's part which justified the Plaintiff in terminating the Contract.

The Defendant's Counterclaim

43. As a result of Mr. Woolridge's careful cross-examination, Mr. Adderley was forced to concede that one invoice might contain an element of over-charging. Although counsel in closing sought to rely upon this concession as proof of the general unreliability of his

testimony, I considered this to be a strong indicator of Mr. Adderley's general credibility as a witness.

44. The item in question was a $7700 item charge for 55 hours of Mr. Adderley's time at $140 per hour with the following description of work done: "*Complete work on building permit architectural drawings; review structural drawings and file permit application*".

45. Although in the course of the hearing I thought only one of these three items had clearly not been performed, on analysis it is clear that both the first and last items cannot have been performed. The drawings were admittedly not completed; the application was admittedly not filed. As the Defendant adduced no evidence to show how much time was actually spent on each limb of this composite billing item, the Court must do its best to estimate the appropriate reduction. I find that this $7700 item should be reduced to one third of the sum claimed or $2566.66.

46. The Defendant's Counterclaim is accordingly allowed in the amount of $20,252-$5133.32= $15,118.68.

Summary

47. The Plaintiff's claim is dismissed. The Defendant's Counterclaim for $20,252.00 is allowed in the reduced amount of $15,118.68.

48. I will hear counsel as to costs although there is no obvious reason why costs should not follow the event.

Dated this 30th day of September, 2011 _____
KAWALEY J