In The Supreme Court of Bermuda

CIVIL JURISDICTION

2009: No. 299

BETWEEN:

APTECH GRANITE & MARBLE LIMITED

Plaintiff

-v-

PEREIRA ENGINEERING LTD.

Defendant

JUDGMENT
(In Court)

Date of Trial: February 21, 2012
Date of Judgment: February 29, 2012

Mrs. Lauren Sadler-Best, Trott & Duncan, for the Plaintiff
Mr. Richard Horseman, Wakefield Quin, for the Defendant

Introductory

1. The Plaintiff's claim is for damages and interest for tiling services rendered to the Defendant and billed under three invoices pursuant to an oral contract made between the two principals of the corporate parties to the present action before the onset of the present economic downturn. The parties had an ongoing commercial relationship under which the Defendant operated as a general contractor and engaged the Plaintiff as a sub-contractor on various jobs from time to time. The perhaps unsurprising informal contractual arrangements were exacerbated by the even less formal billing and payment practices the

parties employed. And while it was obvious that the Plaintiff's Mr. Pearman and the Defendant's Mr. Pereira would not have been primarily responsible for monitoring their respective companies' accounts, neither party called the staff who actually handled such matters on a day to day basis.

2. Accordingly, while I found both witnesses to be credible in general terms, I am unable to attach much weight to their oral evidence on points of accounting detail in isolation from the contemporaneous documentary records which were in evidence.

The Plaintiff's claim

Invoice 680

3. The Plaintiff claimed $9,168.04 under the first invoice dated December 14, 2006, and interest at the rate of 7% from that date until payment. It was common ground that this invoice related to work done at a Valley Road property between in or about October 2006 and in or about February 2007. The Defendant's case was that this job had been paid for in full and the invoice had been manufactured after the event.

Invoice 742

4. The Plaintiff claimed $24,254.95 under the second invoice dated May 7, 2007, plus interest at the rate of 7% from that date until payment. It was common ground that this invoice related to work done by the Plaintiff for the Defendant at Lyme House (occasionally referred to in the Plaintiff's documents as 'Lima' House) between in or about October 2006 and in or about April 2007. However, the Defendant alleged that (a) the work the Plaintiff was engaged by the Defendant to do had a fixed price of $10,000; and (b) much of the work billed to the Defendant was carried out by the Plaintiff at the instance of the architect, not the general contractor; accordingly the Defendant has no contractual liability to the Plaintiff in respect of the sums claimed.

Invoice 881

5. The Plaintiff claims $17,763.47 under the third invoice dated May 1, 2008, and interest at the rate of 7% from that date until payment. It was common ground that this invoice related to work done at Jennings Road between in or about February 2008 and in or about July 2008. Although the Defendant initially agreed on December 5, 2008 that this sum was properly due, subject to its right to set-off $14,925 owed by the Plaintiff, for the purposes of these proceedings this claim was disputed in part because of alleged overbilling.

Findings: the terms of the relevant contract

6. It is common ground that the Defendant from time to time orally engaged the Plaintiff to do tiling work for which invoices were rendered and paid. The Defendant contends that the agreed rate for laying tile was $6.50 per hour and that the Plaintiff was never hired to do other work which the Defendant's own employees could have performed. The Plaintiff insists that he was entitled to vary the hourly rate based on the type of tile being laid and that although the rate charged was not spelt out on all of his company's invoices, the rate could by means of simple arithmetic be calculated in each case.

7. The only reliable way of determining what the terms of an oral contract of this nature entered into between companies the principals of which had an ongoing business relationship is to have regard to not simply the oral evidence of the two protagonists, but the course of dealing between the parties and the commercial context as well.

8. As indicated above, I am unable to attach much weight to the oral evidence of either of the two protagonists by itself, because the testimony of each made it clear that informality and fluidity were the hallmarks of the commercial relationship. Moreover, this was not a consumer contract were an ordinary householder would likely be extremely concerned about the precise terms upon which he was being billed. This was a sub-contracting relationship in which the dominant question likely was how much the Defendant's client would pay in global terms under the main construction contract. It was also a relationship forged in the midst of a construction boom when profit margins were broad enough to make attention to minutiae of marginal concern to the principals of companies which hired other individuals to prepare and process invoices and payments received. An illustration of this point is that although the Plaintiff's foreman apparently kept records of the time spent and material used on each job, the Defendant did not during the performance of the contract insist that such worksheets be supplied. Only in the course of the trial after Mr. Pearman had completed his evidence did Mr. Pereira examine these documents and complain that the invoices he received were inflated.

9. I find that the Defendant engaged the Plaintiff to do tiling work at various locations from time to time, that these jobs overlapped in time and that (as suggested by Ms. Sadler-Best) the Defendant maintained a running account against which payments received from the Defendant were applied. While there may well have been at some point an oral understanding that the rate for tiling would be $6.50 per hour, the parties fundamentally agreed that the Plaintiff would submit invoices for payment from time to time. These invoices did in fact set out the basis on which the work done had been charged and the amounts claimed.

10. However, the way in which some of the Plaintiff's invoices were presented made it impossible for the Court to be clear precisely what invoices were sent to the Defendant at what point in time. The first invoice, for instance, was a document containing both billing information which may have been included in the original invoice set out on the invoice date and subsequent billing and payment information. The second page of the second invoice was a similar document. Only the third invoice was clearly admitted prior to the commencement of the present proceedings.

11. Mr. Horseman submitted that all relief should be refused because, as Mr. Pereira explained in his evidence based on job work sheets which were not put to Mr. Pearman in cross-examination (apparently because they were only produced by him on the day of the trial), the charges billed were in many cases greater than the amounts suggested by the work sheets. I decline to accept this submission; the Plaintiff's claim is a common law claim, not a claim for discretionary equitable relief. This complaint nevertheless falls to be taken into account in assessing whether or not the specific sums claimed are properly due.

Findings: Invoice 680

12. The Plaintiff has not satisfied me that the monies shown as due in the reconstructed version of Invoice 680 and dated December 14, 2006 is truly due. The Defendant contends that this account was paid for in full. In the face of this dispute, the Plaintiff at a minimum was required to produce credible evidence that invoices for all of the work done over a three month period were sent to the Defendant.

13. The date on the invoice relied upon suggests that a first invoice was sent (or generated) before the job was completed (by the Plaintiff's own account) and that subsequent invoices must have been sent. It is unclear on the basis of what billing information the monies paid by the Defendant in substantial settlement of this account were paid. There is no credible contemporaneous documentation to support the Plaintiff's claim. The facts of this case were far removed from the ordinary case were monies are claimed for services rendered where copies of the actual invoices sent are produced in evidence.

14. This head of claim is dismissed.

Findings: Invoice 742

15. The second invoice was challenged on two grounds. Firstly, it was suggested that the job was a fixed price contract and the $10,000 agreed had been paid. Secondly it was contended that a portion of this invoice related to work contracted directly by the customer through the architect.

16. On balance, I find that the parties did initially agree a $10,000 fixed fee for the Lyme House tiling job. This is supported by the fact that a flat amount of $10,000 was in fact both paid by the Defendant and credited by the Plaintiff itself to this invoice. It is also supported by Mr. Pearman's own email dated June 3, 2008 which is consistent with Mr. Pereira's assertion that the $10,000 was agreed and turned out to be insufficient to cover the Defendant's actual costs. The Plaintiff's claim for further payment in respect of tiling work on this invoice fails.

17. Less clear-cut is the question of the Plaintiff's claim in relation to the same job for $7,680.75 for preparatory work done pursuant to instructions from the architect, which instructions were notified to the Defendant's project manager at the time. This was extra work which had to be done but which was not taken into account when the contract was initially concluded. Mr. Pereira suggested that this work fell entirely outside the Plaintiff's sub-contract with the Defendant; the Plaintiff should look to the architect or the Defendant's customer who approved this work. He suggested that his company had not been paid for this work because he had not billed for it.

18. The documentary record in the form of an email chain dated February 21, 2007 shows that the Plaintiff offered to the architect to do the extra work preparatory ("*self-levelling*") for the tiling for "*$4.75 per sqft. based on 1500 sqft*". The architect asked the client to "*please approve this budget price which will be invoiced based on the actual square footage repaired*". The client promptly approved the budget item; the architect then forwarded the email chain to the Defendant's project manager under the following subject heading: "…*Tile Installation at Lyme House*". The Plaintiff invited the Court to construe this as evidence that the preparatory work in question formed part of the tiling sub-contract entered into by the Plaintiff and the Defendant.

19. On balance, I find that the more reasonable inference to draw from the documentary record is that the extra work was intended to form part of the tiling work that the Plaintiff was sub-contracted by the Defendant to do. It seems inconceivable that if the parties to the February 21, 2007 email correspondence had all intended that the Plaintiff should bill the architect directly for this extra work, they would not have made this explicit. It is difficult to see why, if this was the common intention, Mr. Pearman would not have

actually billed the architect in the first place rather than waste time pursuing collection from Defendant whom he considered to be a slow payer and with whose principal he had fallen out by May 2008. If the Defendant's project manager had, when the extra work was assigned to the Plaintiff, objected to the item being part of the existing tiling sub-contract, he could easily have responded to the email from the architect asserting that the Defendant would not be responsible for paying the Plaintiff for the work in question. The project manager's silence, in all the circumstances, implies the Defendant's assent to the Plaintiff undertaking the extra work by way of modification to the original contract.

20. I find that the Plaintiff is only entitled to recover for this extra levelling work at the rate of $4.75 per sq. ft. "*based on the actual square footage repaired*". The best available evidence of the work done is not the invoice, but the work order prepared by the Plaintiff's foreman by Mr. Pearman's own account. According to the relevant '*Job Work Order*', the actual area repaired was 1540 square feet. The Plaintiff is accordingly entitled to recover the sum of $7315 in respect of this head of its claim in relation to Invoice 742.

21. If the Defendant did not bill its client for this work as Mr. Pereira suggested, it has a clear basis for seeking reimbursement from the client concerned.

Findings: Invoice 881

22. The lack of clarity about precisely what invoices were sent to the Defendant before undisputed amounts were paid does not apply to this head of the Plaintiff's claim. In this case the Defendant in open correspondence dated December 5, 2008 admitted owing $17,763.47. The only question is that of the set-off asserted in the same letter in the amount of $14, 925, a claim which was never substantiated at trial.

23. I raised the question of whether there was documentary evidence in support of the set-off amount on more than one occasion during the trial. Mr. Horseman did not put any invoices supporting the Defendant's claim to the Plaintiff in cross-examination. Before Mr. Pereira left the witness box, I enquired whether he could show me where in the bundle the invoices referred to as an attachment to an email sent by the Defendant to the Plaintiff might be found. He was unable to do so.

24. At the end of Mr. Horseman's closing speech, I asked whether he could direct me to the document in the Bundle. He confirmed that the documents were not in evidence, but suggested, waving a document almost apologetically, that perhaps the documents could be put into evidence at that late stage. I refused leave to do so as the Defendant had been afforded every reasonable opportunity to put the relevant invoices into evidence before

the parties closed their respective cases. It seemed to me that the Defendant had effectively elected not to rely on the documentation in question.

25. There was no documentary support in the contemporaneous record for the specific amount claimed. On the contrary, the relevant email correspondence suggested that the Plaintiff on June 4, 2008 was only aware of a bill of "*approximately $650*"emanating from the Defendant. The only substantive response to this specific assertion was the Defendant's suggestion that the Plaintiff had been billed over three years in unspecified amounts which remained unpaid. It was also stated by the Defendant that although their accounts showed $37,763.47 owing in respect of the Jennings Land job, they were having their accountants review the records further. It is noteworthy that the letter of December 5, 2008 while asserting the right to set-off the sum of "*$14,925.00 for engineering services which date back to 2005*" did not according to its terms attach any documentary support for the Defendant's claim.

26. Should the Court take into account any discrepancies between work sheets and invoices as identified by the Defendant in the course of the Defendant's case? The Defendant knew or ought to have known prior to December 5, 2008 that it could either pay invoices on the basis of whatever items were billed, challenge the reasonableness of items billed and/or demand supporting documentation in respect of items in dispute. In my judgment having regard to the fact that the Defendant elected not to request sight of the work sheets in the course of its accounting analysis of what monies were properly due in respect of this invoice and admitting that a sum certain was in fact due, it is too late to re-open this question now.

27. Accordingly I find that the Plaintiff is entitled to recover the admitted sum of $ 17, 763.47 in respect of Invoice 881 reference Jennings Land.

Interest

28. The Lyme House invoice was dated May 7, 2007 after the work for which the Plaintiff is entitled to be paid was completed. Interest is claimed from this date. No submissions were advanced as to why interest should not be payable from this date; however the evidence suggests that there was some genuine confusion about what invoices had been received by the Defendant and that it was reasonable for the Defendant to have its accountants review the position.

29. This review was clearly completed by December 5, 2008 when the Defendant wrote the Plaintiff indicating the amount it admitted was due. Accordingly I find that the Plaintiff is

entitled to pre-judgment interest in respect Invoice 742 from December 5, 2008 on the $7315 awarded under this head of claim.

30. As far as invoice 881 is concerned, as the sum of $17,763.47 awarded has been found to have fallen due as a result of an admission made on December 5, 2008, so this is also the logical date for pre-judgment interest to run from in respect of this head of claim as well.

Conclusion

31. The Plaintiff's claim in respect of the first invoice fails, its claim in respect of the second invoice succeeds in part and the claim in respect of the third invoice is allowed. The Plaintiff is awarded the sums of $7315 + $17,763.47 = $25,078.47. The Plaintiff is also granted interest at the statutory rate of 7% from December 5, 2008 until judgment and thereafter on the judgment debt until payment.

32. I will hear counsel as to costs.

Dated this 29th day of February, 2012 _____

KAWALEY J