In The Supreme Court of Bermuda

CIVIL JURISDICTION

2010: No. 357

BETWEEN:

JAMES DOUGLAS (1)

JAKISHA DOUGLAS (2)

Plaintiffs

-v-

VERNON CLIFFORD TROTT (1)
-and-

CLAUDE WAYNE SLATER (2)
(trading as Tippet Construction)

Defendants

JUDGMENT

(in Court)

Date of hearing: September 24-26, 2012
Date of Judgment: October 5, 2012

Mr. Craig Rothwell, Cox Hallett Wilkinson Ltd., for the Plaintiffs

The Defendants appeared in person

Introductory

1. The Plaintiffs' initial claim was for damages in the amount of $131,566.73 for breach of a construction contract between themselves and Defendants dated September 5, 2006 ("the Contract"). It was centrally alleged that the Defendants failed to complete the services they agreed to provide for a fixed sum of $147,000 and the damages sought represented the additional sums paid by the Plaintiffs to another contractor to complete the project.

2. The Defendants elected to defend the action without legal representation and were fortunate not to be deprived of the right to defend the action at trial due to their failure to comply with various procedural orders.

3. The first trial was adjourned on the Defendants' application because, although they had not filed any witness statements or expert report, the 1st Defendant asserted that vital documents had been unavailable to them. To facilitate their defence, the Court made an ex parte Order directing the Butterfield Bank to disclose to the Defendants any documents in its possession relating to the project. The Plaintiffs were awarded the costs of the adjournment to be payable forthwith and other directions were given for the filing of evidence by the Defendants.

4. The Plaintiffs' Witness Statements and Expert Report dated February 3, 2012 from Mr. Bruce Perinchief were filed and served before the first trial was adjourned on February 13, 2012. The Plaintiff's Expert Report took into account the Defendants' pleaded case, the additional work they did (beyond the scope of the original contract) and the additional 'completion' work done by the second contractor (beyond the scope of the original contract) and concluded that the Plaintiffs were only entitled to recover the sum of $54,532.07, a reduction of some 41% of their claim.

5. All expert witnesses who are professional recite in their reports that they understand their primary duty is to the Court, not to the party who retained them. The conclusions reached by Mr. Perinchief were so at variance with the Plaintiff's pleaded case on the quantum of damages that his independence and the reliability of his Report were demonstrated in an unusually clear way.

6. On September 13, 2012, the Court heard the Plaintiffs' Summons for Judgment based on the Defendants' failure to comply with the February 13, 2012 unless order with respect to the costs thrown away by the adjournment of the trial. At that hearing, it was discovered that the Defendants had filed some Witness Statements (but no expert report) in May but simply not served the Plaintiffs' counsel with them. The question of the Defendants default was adjourned to trial but was sensibly not pursued by Mr. Rothwell in the event.

7. At the end of the September 13, 2012 hearing, I sought to encourage the Defendants to pursue a settlement with the Plaintiffs on commercial grounds on the basis that it was unlikely that either side would succeed outright and that the costs of a trial might be disproportionate to the sums in dispute. I explained, or attempted to explain, that if the Plaintiffs prevailed at trial the Defendants would be liable to pay not only whatever sums were found to be due but also the Plaintiffs' legal costs. Each of the Defendants vigorously rebuffed this entreaty, insisting that they felt their defence was valid and would succeed.

8. At the commencement of the trial the Plaintiffs' counsel formally conceded that notwithstanding the Plaintiffs' formally pleaded claim for over $130,000, the Plaintiffs were in substance relying upon their Expert Report and were seeking $54,532.07 plus $18,000 for lost rent. As the Defendants were litigants in person who seemed determined to have their day in Court without regard to the relevance of the evidence they adduced or challenged and the implications of the length of the hearing in terms of legal costs, I elected not to curtail the conduct of their case in the way that I would have done had they been legally represented.

9. In the event, the trial lasted for three days and at the conclusion each Defendant made a closing speech which resembled more a plea in mitigation than a defence to a civil breach of contract claim.

10. There were two essential issues in dispute at the outset:

    (a) did the Defendants repudiate or commit a fundamental breach of the Contract by refusing to complete the agreed works within the agreed price?

    (b) if the Defendants did breach the Contract, what loss did the Plaintiffs suffer as a result in having to engage another contractor to complete the project and for which the Defendants can be held liable?

11. At the end of the day there were remarkably few serious factual disputes. I found all witnesses, including the parties, to be essentially credible and doing their best to give an honest account of the matter in question.

Findings: did the Plaintiffs breach the Contract?

12. Prior to the signing of the Contract, the Plaintiffs received three estimates. On March 29, 2005, B and B Construction provided a $185,000 estimate. On April 4, 2005, Melvin Douglas provided an estimate of $230,000. The Defendants' estimate dated

June 25, 2006 was the lowest at $140,800. The Contract's most important terms were the following:

(a) the total contract price was &147,000;

(b) payments were to include an initial payment of $15,700, monthly payments of $20,000 during the Contract's term and a retention of $15,700;

(c) the commencement date was September 7, 2006 and the completion date for the "general works" was December 1, 2006;

(d) the Plaintiffs were entitled in the event of delay to have a qualified person agreed between the parties determine whether the delay was due to the Defendants ' fault and, if so, terminate the Contract;

(e) the Plaintiffs were entitled to alter the scope of the work by adding or reducing tasks "*the contract sum being adjusted accordingly*" and the Defendants being required to seek more time when the change was "ordered" (clause 7);

(f) the Defendants were required to give written notice of any delay beyond the agreed completion date;

(g) the Defendants agreed to maintain in force throughout the Contract Contractors All Risk and Third Party Insurance to the value of $800,000.

13. The essence of the Plaintiffs' case on breach of contract was set out in the following paragraphs of their Specially Indorsed Writ:

"*14. The Plaintiffs had made the following payments to the Second Defendant in September: $15,000 on 8th September 2007, $6,824.00 on 21st September 2007 and $2,400 on 28th September 2007. Following this final payment the Plaintiffs refused to make any further payments to the Second Defendant as, by this time, they had paid to the Defendants the total sum of $141, 724.00. This was almost equivalent to the full contract price of $147,000.*

15. In response, the Second Defendant stated that he would not be returning to the work site if he did not receive further payment. The Second Defendant then left the site and did not return.

16. The Works were not completed. The Defendants left the Works unfinished in breach of the Contract. This repudiation of the Contract by the Defendants was accepted by the Plaintiffs."

14. Although the Defendants were at pains to show that they were not to blame for the delay, the Plaintiffs' claim for breach of contract is based on the core allegation that the Defendants left the job in circumstances where it was clear that the works could not be completed for the agreed price and, by necessary implication, no agreement had been reached that they were entitled to receive an uplift in the originally agreed price. I accept that the Plaintiffs agreed to extend time until possibly the end of April and that the delays were caused in part by the need to obtain an engineer's input and comparatively minor changes to the original plans. But the Plaintiffs have satisfied me that the Defendants repudiated the Contract by in late September 2007 by refusing to complete the works for the agreed price.

15. The following crucial facts were not or not seriously in dispute:

    (a) the Contract could not be completed within the agreed contract price;

    (b) when the Defendants abandoned the project, no agreement had been reached on an uplift in the contract price.

16. The 2nd Defendant was adamant that as work progressed in late 2006 and early 2007, he warned the Plaintiffs that the extras would come at a cost. However, both Defendants also agreed the scope of the work they were originally required to perform had been reduced by the Plaintiffs to save costs. The 1st Defendant was the eloquent "front man' who dealt with Plaintiffs on billing and in formal meetings but who displayed at trial little grasp of the details of how the project evolved. The 2nd Defendant was effectively the project manager, with a strong grasp of the work to be done but with seemingly no authority to negotiate on money matters with the Plaintiffs until the very end when the 1st Defendant had left the stage leaving his partner holding the wrong end of the proverbial stick. The 2nd Defendant gave very vivid evidence about his attempts to extract more money from the Plaintiffs in September, 2007. However, the Defendants ought to have known long before then that the Contract could not be completed within the agreed price and, if they were properly entitled to more money, ought to have made an itemized claim for an uplifted contract price.

17. Looking at the evidence very broadly, it is obvious that this was (at worst) a runaway project which the Defendants[1] secured with an unrealistically low bid and which (by mid-2007 when it was or to have been obvious that completion could not be achieved

[1] The 1st Defendant alone was clearly responsible for managing the project at the administrative level.

without extra funding) they hoped to take to the brink of completion leaving the Plaintiffs with little option but to uplift the original contract price. At best, this was a project which was managed by the Defendants in an undisciplined manner with no apparent regard to the level of administrative detail and financial controls which a fixed price contract requires. This was exemplified by their failure to renew the Contractor's All Risk Insurance policy when it expired at the end of 2006 even though the premium was seemingly less than $100.00. The Plaintiffs, like many homeowners, were too focussed on getting the work done to demand greater clarity on the financial status of the project until it was obvious that things were out of control. However, it seems clear that in deciding to relieve the Defendants of some tasks the Plaintiffs were doing their best to ensure that the Contract could be performed for the agreed price which formed the basis of their financing.

18. In the event, the progress was so slow and the distance to completion so far by the time that the contract price was almost fully paid, that the Plaintiffs decided it was worth their while to cut their losses and engage a new contractor. This was surely a last resort option for the Plaintiffs and a step which the Defendants might well have been surprised they had the fortitude to take at that stage.

19. To my mind the best general evidence that the Defendants did not themselves consider that they were legally entitled to renegotiate the contract price upwards, and likely believed at all material times that the additional items were (more or less) cancelled out by the reductions made to their original obligations, is that they admittedly made no attempt to renegotiate when the additional tasks were requested. It makes no commercial sense at all for contractors working under a fixed price contract to do extra work for which they are expressly entitled to demand extra payment and yet to fail to agree their extra payment entitlement before doing the extra work in question. By way of illustration, Peter Araujo, who completed the project, testified that he was paid essentially what he contracted to receive. He had to do some extras, but some tasks were taken away; he took the broad commercial view that the additions and the subtractions roughly cancelled each other out. Why he was subpoenaed by the Defendants is unclear.

20. However, even when one looks at the evidence in more detail, the inevitable conclusion also is that the Defendants were, by and large, legally obliged to complete the works for the originally agreed price. Mr. Perinchief itemizes in his Report a number of tasks which the Defendants agree they did not perform which were in their original estimate. Using the Defendants' own figures, these "omissions" amount to $43, 700 which the Defendants did not challenge at trial. Other items which the Defendants agreed they did not supply include the spiral staircase ($5000 +) and hard landscaping ($14,000+).

21. Accordingly, without even considering the completion costs attributable to incomplete work, and allowing for differences of opinion on the precise accuracy of the price estimates assigned by Bruce Perinchief to the staircase and hard landscaping, it was not disputed by the Defendants that the Contract deductions amounted to in excess of $50,000. The Defendants' own expert[2], surveyor Dalton Burgess Jr., estimated the total value of Contract extras at $45,344.10. So at the end of the trial, even if Mr. Burgess' evidence (which was disputed on the basis of the factual assumptions upon which his cost estimates were based rather than the estimates themselves) was accepted altogether, the Defendants had all but formally conceded that:

    (a) the additions to the Contract were cancelled out by the deductions; accordingly

    (b) the Defendants had no legal justification for demanding an increase in the original contract price; and

    (c) in refusing to complete the Contract for the agreed price in late September 2007, the Defendants broke a fundamental term of the Contract entitling the Plaintiffs to treat the Contract as being at an end.

22. The Defendants are accordingly liable for damages to be assessed for breach of contract.

Findings: damages to which the Plaintiffs are entitled

Completion costs

23. The Plaintiffs are clearly entitled to recover from the Defendants damages measured by the reasonable costs of completing the works the Defendants contracted to do.

24. Their Expert Report was very credible and calculated what was due taking into account:

    (a) contractual extras;

    (b) contractual deductions;

[2] I omitted to formally admit the witness as an expert. He was qualified based on several years' experience doing quantity surveying work, though not a quantity surveyor, to give expert evidence. As it happened, his opinion evidence was not directly in dispute.

(c) extra work done by Araujo Construction Ltd. Beyond the scope of the Contract between the Plaintiffs and the Defendants;

(d) the work done by the Defendant; and

(e) the contract price and payments received by the Defendants.

25. Items (b) to (e) were not (or not seriously) in controversy. The main dispute centred on the precise scope of the Contract and what the extra items of work were. The Defendants' case, based primarily on their expert's evidence as to quantum, was that the following items were extras they performed:

(1) additional plaster to interior walls: $19, 550.12;

(2) additional works Engineers Report: $5876.60;

(3) new retaining wall: $10,976.81;

(4) additional excavation of floor: $5255.10;

(5) relocate retaining wall: $ 234.91.

26. I found that Mr. Perinchief's evidence was determinative on the following contractual scope issues:

(a) I accept his evidence based on an analysis of the plans and knowledge of building standards that the so-called additional plastering required to damp-proof the walls formed part of the original contract;

(b) I accept his evidence to the effect that the underpinning work formed part of the Contract and the allowance in his own Report of for the unexpected extra costs relating to the upper bathroom floor and related renovations;

(c) I accept his evidence that a new retaining wall by the entrance of the property formed part of the Contract, even though not clearly shown on the plans, as a necessary consequence of removing the pre-existing retaining wall adjacent to the roadway;

(d) I accept his evidence based on an analysis of the plans that the s"extra" block walls were included in the Contract and, to the extent that it

conflicted with the non-expert evidence of the draftsman of the plans, I found the expert testimony of the qualified civil engineer more persuasive.

27. Two items estimated by Mr. Burgess fall to be determined based on the evidence of the parties.

28. Firstly, Mr. Perinchief made no provision for extra-excavation of the floor which the Defendants claimed was carried out because the 1st Plaintiff, seeing a small portion of the floor dug deeper than the rest requested an extra high ceiling (1ft 6") throughout. He conceded he could offer no opinion on whether extra work was done. The 2nd Defendant was adamant that only a small portion of the floor was lower than the agreed level, and that some equipment was resting there. The 1st Plaintiff admitted somewhat reluctantly (it seemed to me) under re-examination and questioning by the Court that the entire floor was not dug down below the originally agreed level when he seized the opportunity to obtain a higher ceiling. He indicated that around 85% of the floor had been excavated to this level. I did not find his evidence on this issue to be impressive, but it is broadly consistent with his Witness Statement in which he stated:

> "*The height of the ceiling was also a non-issue. Tippet had already excavated more than was required by the plans. To stay with the original height, he would have had to raise the floor. So I told him, 'save yourself the trouble and just give me 9 foot ceilings-you are already there'*."

29. It is common ground that the 1st Plaintiff requested the higher ceiling after some portion of the floor had been excavated below the planned level. How much had been excavated is in dispute. I am unable to resolve that dispute although it seems probable that both sides have over-stated their respective positions to some extent. However, it is also common ground that the Plaintiffs received the benefit of the extra excavation work which was done by a combination of accident and design. The Plaintiffs could have insisted at the time that they only wanted the contractually agreed ceiling height and the Defendants would have had to bear the costs of any extra work done which the Plaintiffs neither contracted for nor received the benefit of. But since the 1st Plaintiff (acting on behalf of himself and the 2nd Plaintiff) elected to accept the benefit of the extra work, in my judgment the Defendants are entitled to be remunerated for it just as if they had purchased extra materials not contemplated by the Contract which the Plaintiffs elected to utilize.

30. The Contract provided for the contract price to be adjusted based on additions and subtractions from the scope of work. I find that the Defendants were entitled to be paid for the extra excavation work done and accept Mr. Burgess' valuation of that

work at $5255.10. This amount must be deducted from the amount Mr. Perinchief found to be due.

31. The second item estimated by Mr. Burgess as costing $234.91 was relocating a retaining wall. The performance of this extra work was another event which the 1st Plaintiff admitted occurred and which the Plaintiff's expert could not opine on. I find that this amount also should be deducted from the amount the Plaintiff's expert found was due in respect of completion.

32. The Defendants' expert was not asked to opine on the extra work the Defendants' claimed they did in relation to the pit. This was something of a grey area. Mr. Perinchief did not consider the work to fall outside the scope of the Contract as the plans contemplated redesigning the original pit. However, he was understandably unable to estimate what the redesigning would have cost as what was contemplated was not specified. It was common ground that what was positively contemplated at an early stage was a "sump pump" being installed downstairs and connected to the existing pit. It also seems clear (without specific costing) that such a pump might have been cheaper in the short term but more expensive in the long term.

33. If any extra work was done, beyond what was contemplated by redesigning the existing pit and/or installing a sump pump, I am unable to attach a value to it because there is no reliable evidence as to what the difference between the two options would be.

Loss of rent claim

34. The Plaintiffs failed to satisfy me that the Defendants were aware when contracting that it was intended to rent part of the premises as required by law to make out this claim: *Knight-v-Warren* [2010] Bda LR 73 at paragraph 56. The 2nd Plaintiff honestly admitted under cross-examination that renting the property out had not formed part of her initial plans.

Conclusion

35. The Plaintiffs' claim for breach of contract succeeds. They are awarded by way of damages for additional costs incurred in completing the Contract the Defendants failed to fully perform the sum of: $54,532.07 - $5,490.01 ($5255.10 + $234.91 in respect of extra-work not assessed by the Plaintiffs' expert) = $49,042.06. However, their claim for loss of rent is refused on the grounds that the Defendants were not aware at the date of the Contract that the Plaintiffs intended to rent the premises in question.

36. My provisional views on interest are as follows. The Plaintiffs are entitled to pre-judgment interest, even though a trial was required to establish the precise amount due

to the Plaintiffs. In *Knight-v-Warren* [2010] Bda LR 73, the Court of Appeal awarded interest from a date shortly before the issue of the Writ. This was another case where the contractor left the site precipitously and the defendants (the homeowners) were successful in reducing the total amount claimed by the plaintiff. The Plaintiffs appear to me to be entitled to interest on the sum awarded from the date of the Writ, namely October 19, 2010 at the statutory rate of 7% and thereafter on the judgment debt until payment.

37. It is difficult to identify any obvious basis on which the usual rule that costs should follow the event should not apply. My strong provisional view is that the Defendants have acted unreasonably in the way they have defended the present action. The Defendants have flouted procedural Orders of the Court; they have made minimal attempts to identify the real issues in controversy; they have rebuffed encouragement from the Court to pursue settlement; and the Defendants have conducted their case at trial without any apparent attempts to save time and costs.

38. The Defendants have succeeded in demonstrating that the amount claimed in the Plaintiffs' Expert Report served upon them in February 2012 should be reduced by just over $5000 and have secured the dismissal of the obviously weak $18,000 loss of rent claim. The costs of the trial are likely to represent a substantial portion of the amount that they have ultimately fought over ($23,000) as I warned might be the case in the last pre-trial hearing. It would be surprising if the costs of the entire action are not greater than that sum.

39. My strong provisional view is that the Plaintiffs should be awarded the costs of the action to be taxed if not agreed on an indemnity basis so that the Defendants will carry the burden at any taxation hearing of demonstrating that sums claimed ought not to be allowed.

40. I will hear the parties on interest and costs.

Dated this 5th day of October, 2012 _____

IAN R.C. KAWALEY CJ