[2013] SC (Bda) 37 Civ (3 May 2013)

# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

**2012: No. 306**

**BETWEEN:**

**ARRUDA CONSTRUCTION LTD.** **Plaintiff**

**-v-**

**CLEVIE WADE**

**Defendant**

## JUDGMENT

(in Court)

Date of trial: April 16, 2013

Date of Judgment: May 3, 2013

Ms. Kimberley D. Caines, MJM Ltd., for the Plaintiff

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

**Introductory**

1. By a Specially Endorsed Writ of Summons dated August 27, 2013, the Plaintiff construction company seeks $82, 027.73 which amount it claims is due either under a costs and charge contract or, alternatively, on a *quantum meruit* basis. The work was done at the home of the Defendant and his wife in Southampton.

2. There was no real dispute at trial that the Defendant received invoices for the outstanding amount claimed and that the relevant work had been performed. Instead, a somewhat technical defence was raised to the effect that the parties never entered into a binding contract in relation to the extra work done over and above the scope of work originally agreed and linked to an estimated contract price of $293,000.

3. I describe this defence as <u>somewhat</u> technical because, although it appeared to ignore the alternative *quantum meruit* claim altogether, the Defendant did assert for the first time in his Witness Statement dated February 14, 2013 that the Plaintiff had expressly agreed to do two significant items of extra work for no charge. Closing in a porch was promised for free; and certain work on a downstairs apartment was only necessary to remedy damage caused by the Plaintiff's negligence, the Defendant alleged.

4. At the beginning of the trial Ms. Caines for the Plaintiff objected to the Defendant raising allegations by way of evidence which had not been pleaded. I considered it impractical in a case of this modest size to require the Defendant to amend his Defence at trial, especially since the Plaintiff was not taken by surprise by the matters set out in a Witness Statement served weeks before the trial.

5. The Plaintiff's own Statement of Claim, in any event, pleaded the relevant contract in a way which was not really supported by the Plaintiff's evidence. Mr. Bailey for the Defendant sensibly took no point on these discrepancies which did not impact on the substance of his client's case and, equally, could have been cured by amendment at any time before Judgment.

**Findings: the scope of the contract**

**<u>The initial contract</u>**

6. The Plaintiff's primary case was that the disputed work formed part of the initial cost and charge contract which was estimated to cost $293,000 although the Defendant would also have to pay an estimated $75,000 for certain materials himself. In practical terms, it was alleged that the Defendant agreed to pay for the actual work done at the Plaintiff's standard hourly labour rates and for materials used on the renovation project. The Plaintiff's principals, Mr. and Mrs. Arruda, both testified that the

company's usual practice is to enter into fixed price contracts for new buildings but cost and charge contracts for renovation work the precise scope of which tends to be more unpredictable.

7. The Defendant and his wife in their evidence asserted that they considered the bargain struck was for a fixed price, $293,000, and relied in part on the fact that this figure was based on information supplied by the architect and that their first four payments were in the amount of 20% of $293,000 figure. However, their primary case was that the disputed work, in any event, fell outside of the scope of the original agreement and was based on modified plans. More fundamentally still, they denied ever agreeing to any of the additional work, which principally included enclosing a porch and renovating a downstairs apartment.

8. I find that the terms of the initial contract were partly in writing and partly oral. They were evidenced by the Plaintiff's March 18, 2010 letter to the Defendant as supplemented by the Plaintiff's April 26, 2010 letter and the subsequent invoices rendered to and mostly paid by the Defendant. The March 18, 2010 letter read so far as is material as follows:

> "*After careful review of plans drawn by CTX (dated April 2009) for the proposed renovations to 22 Camp Road, Warwick, we have estimated our firm's price for these works, on a cost and charge basis, to be BD$ 293,000.00….*
>
> *…Should you find this estimate agreeable, you would receive detailed invoices from us every two weeks (or weekly of you prefer) for payment within 15 days for the duration of the project…* "

9. Mrs. Arruda, the Plaintiff's Managing Director who handled billing, had a simple explanation for why the Defendant made four payments representing 20% of the contract's estimated price rather than making all payments based on invoices rendered. This arrangement was made to facilitate regular drawdowns from the Defendant's loan facility. So while the precise payment terms agreed by the parties are somewhat unclear, invoices were rendered which set out the Plaintiff's charges for both labour and materials. Such invoices were only necessary or relevant if the parties contracted on a costs and charge basis.

10. Accordingly, the evidence supports only one possible finding on the nature of the contract entered into: it was a cost and charge contract with an estimated price of $293,000 and <u>not</u> a fixed price contract for $293,000. The Defendant initially agreed to pay the Plaintiff for the renovation work covered by the plans referred to in the March 18, 2010 letter based on invoices to be rendered by the Plaintiff.

**The additional works**

11. It is common ground that no estimate was ever given by the Plaintiff for the additional work which required a modification to the plans (which apparently was necessary to enclose a porch). This extra work also included, according to Mr. Arruda, the following work carried out at Mr. Wade's request:

    (a) the excavation for and installation of cesspits;
    (b) painting the interior of the upper level and the entire exterior of the house;
    (c) renovation and completion respectively of two bathrooms in a lower apartment;
    (d) renovation of kitchen plumbing in the lower apartment.

12. The Plaintiff's case is simply that this extra work was covered by the terms of the initial costs and charge contract. This is, in my view, what ordinarily would occur in a cost and charge contract when the initial contract scope was widened. However, the Defendant disputed agreeing to pay for any extra work at all. It was implicitly common ground that the parties did not enter into an express oral or written agreement that the extra work would be carried out either:

    (a) by way of modification of the initial contract on the same costs and charge basis; and/or

    (b) on the basis of a revised estimate identifying a specific likely increased total cost.

13. The Plaintiff's case was in essence that the extra work was expressly agreed on the implicit basis that the pre-existing financial terms applied. The evidence of Mr. and Mrs. Wade to the effect that they never explicitly agreed cost and charge terms for the extra work nor any modification of the original $293,000 estimate was not in conflict with this aspect of the Plaintiff's case.

14. The Plaintiff's contention that the Defendant by his conduct agreed to make the extra work subject to the initial contract's pricing terms is supported by the fact that invoices rendered and paid seemingly included (on at least one occasion) work done pursuant to both the initial contract and extras. The Defendant's case that the only price he expressly agreed to was one linked to the $293,000 estimate is supported by the fact that the Defendant's payments stopped in January 2011 at the level of roughly $4000 in excess of the said estimate.

15. It is simply impossible to believe that the Defendant did not at least tacitly assent to the extra work which I am satisfied he was in a position to see being carried out. Nor am I able to accept the Defendant's assertions to the effect that the Plaintiff agreed to enclose the porch for no extra charge and also to fix damage to the lower apartment caused by his own negligence in removing a roof. Not only were these important allegations omitted from the Defence filed on December 14, 2012. In a December 5, 2011 letter sent by Mr. and Mrs. Wade complaining about the Plaintiff abandoning the project in August 2011 leaving various faults still to be remedied, these allegations were not raised either. Rather, the Defendant challenged the Plaintiff's right to receive the total amounts claimed (the last invoice rendered was dated April 9, 2011). The December 5, 2011 letter from the Wades most importantly stated: "*We have not said that we are **not** going to pay you. However we feel that we should not have to pay you that amount.*"

16. It beggars belief that if the Defendant had genuine factual grounds for challenging the Plaintiff's right to payment of over $80,000, he would not have forcefully set out any such case in that letter. Instead, the only explicit complaints made relate to various cosmetic problems which reduce the total amount recoverable by the Plaintiff by a minimal amount. On the other hand there is a direct challenge to the amount claimed; the fact that the reasons for the challenge are not spelt out is consistent with the uncertainty the Wades admitted in their oral evidence as to precisely what their contractual obligations were.

17. The Particulars pleaded in the Statement of Claim disclose the Defendant making payments largely consistent with the $293,000 original estimate up until January 24, 2011, with invoices being rendered up to April 9, 2011. The fact that payments stopped at this point is powerful evidence that the Wades did not believe at the time that the Defendant had entered into any binding agreement that the additional work would be performed on the previously arranged cost and charge basis.

**Were the additional works by necessary implication governed by the costs and charge payment terms of the initial agreement?**

18. In submitting that the Court should find no binding contract was entered into in relation to the additional works, Mr. Bailey relied heavily on the following dictum of Lord Denning (MR) in *Courtney-v- Tolaini* [1975] 1 All ER 716 at 719h:

> "*Now the price in a building contract is of fundamental importance. It is so essential a term that there is no contract unless the price is agreed or there is an agreed method of ascertaining it, not dependent on the negotiations of the two parties themselves. In a building contract both*

*parties must know at the outset, before the work is started, what the price is to be, or, at all events, what agreed estimates are. No builder and no employer would ever dream of entering into a building contract for over £200,000 without there being an estimate of the cost and an agreed means of ascertaining the price.*"

19. The present case is not as stark as the facts in *Courtney-v-Tolaini* because here the parties did agree an estimate of the cost of the project as initially defined by the March 18, 2010 letter and the plan referred to therein, together with a basis for calculating the actual price (cost and charge based on invoices to be rendered). The controversy arises because it is far from clear that the parties did actually agree on how the additional work would be funded, in circumstances where the additional work:

    (a) was significant enough to require a modification to the initial plans;

    (b) no revised estimate was supplied by the Plaintiff;

    (c) the Defendant was not a man of unlimited means and was known by the Plaintiff to be dependent upon Bank financing for funding the renovations; and

    (d) the final cost for the project was approximately $86, 000 over the initial estimate of $293,000 an increase of more than 30%.

20. At the end of Mrs. Arruda's evidence I asked her how it had been expected the extra work would be paid for by the Defendant whom she knew was obtaining bank financing if no estimate was given of the extra cost. She responded that no estimate was given (a) because her husband and the Defendant appeared to be getting on well together, and (b) banks were usually more flexible in providing top up funding to complete a project. Neither her evidence nor her husband's directly asserted that the Defendant had expressly agreed to seek funding for the extra cost, whatever it might be, on a cost and charge basis.

21. There are circumstances in which extra work would very easily be treated as subject to the payment terms of an initial contract. Such circumstances would ordinarily include cases where the extra work did not involve any change to the initial plans (where the scope of the initial project was defined with reference to plans) or where the extra work did not entail any significant departure from an initial estimate. In all the circumstances of the present case, the Plaintiff simply has simply failed to satisfy me that there was any express or implied agreement that the Plaintiff could carry out the extra work with no costs constraints whatsoever by way of extension to the initial contract for which a specific estimate had been given.

22. It is obvious that the Defendant consented to the extra work being carried out and realised that he would have to pay something for it. This realisation is reflected in the terms of the Defendant's December 5, 2011 letter to the Plaintiff which referenced Bank monies which were being held back at a stage when the original estimate had been exceeded and the sums claimed in the present action were already being sought. Is it possible that the Plaintiff encouraged the Defendant to believe the additional costs would be minimal? Without making any finding one way or the other on this issue, Mr. Arruda responded to the suggestion that he offered to enclose the porch for no extra cost in what appeared to me to be an unconvincing manner.

23. Be that as it may, what really casts doubt on the Plaintiff's primary case that the parties entered into a binding agreement for the extra work to be done without regard to the original estimate is the fact that their payments on invoices ceased more or less at the level of the original estimate. I believe that the Defendant and his wife, whose evidence on this issue was most persuasive, were genuinely confused about what their legal position was in relation to the extra costs having omitted to enter into an express agreement in relation to the payment for the extra work. And Mrs. Arruda testified that after the Defendant's payments stopped he explained that he was seeking to arrange financing with his Bank. This evidence, which I have no reason to doubt, supports the Plaintiff's case that the Defendant agreed to pay for work over and above the initial estimate. But it also supports the Defendant's case that the extra work was done without any clear agreement in place as to how much it would cost and how the Defendant would fund the additional expense.

24. In my judgment, having provided a very specific estimate for a very specific piece of work, the onus was on the Plaintiff to seek express agreement as to the payment terms for what was on any view an addition to the original contract involving a modification to the plans and (it seems) an increase in the initial estimate in excess of 30%. A simple letter further to the March and April 2010 letters confirming that the same payment terms applied and providing a revised estimate would have eliminated any room for doubt.

25. From the Plaintiff's perspective, no doubt, it seemed obvious that the Defendant was agreeable to have the extra work done on the pre-existing cost and charge basis. After all, they invoiced the initial contract and extra work together, without any apparent protest from the Defendant. No express reference was made in the course of the plaintiff's oral evidence to any invoice actually paid by the Defendant which covered extra work. However, from the Defendant's perspective, combining work done under the initial contract with extra work in composite invoices would only have confused the issue of whether the extra work was covered by the original estimate or not and, if not, whether he was legally bound to pay whatever the Plaintiff claimed was payable

in circumstances where the parties had not even estimated what the additional costs would be.

**Conclusion on scope of contract**

26. The Plaintiff's contractual claim is dismissed because the case that the parties agreed that the additional work would be paid for on a cost and charge basis has not been proved on a balance of probabilities.

27. There is no evidence of an express agreement to this effect. The evidence adduced at trial does not support a finding that, had the parties applied their minds to the issue, they would necessarily have agreed in the absence of a revised estimate that the Defendant should pay whatever amount the Plaintiff invoiced in respect of the additional work. This is the legal requirement for supplementing the express terms of a contract with implied terms.

**Findings: the Plaintiff's alternative quantum meruit claim**

28. Having rejected the Plaintiff's claim in contract, I am bound to accept in principle the alternative *quantum meruit* claim. The phrase *quantum meruit* literally means the amount that (the work) is worth. Ms. Caines rightly submitted in reliance upon *Keating on Construction Contracts* at paragraph 4-049 that: "*In order to make a person liable on a quantum meruit there has to be a necessary implication that the person liable is agreeing to pay.*" She also referred the Court to the following *dictum* of Singleton LJ in *Parkinson (Sir Lindsay) & Co-v- Commissioners of His Majesty's Works and Buildings* [1949] 2 KB 632 at 673:

> "*The additional work called for and executed later was something outside the contemplation of the parties in August, 1937. The contractors executed it at the request of the Commissioners, and they are entitled to be paid a reasonable profit or remuneration in respect of it.*"

29. Mr. Bailey did not contest this legal analysis and the suggestion that the Defendant did not implicitly agree to pay something for the additional work was simply not plausible in light of all the evidence.

30. The Plaintiff's case on the alternative claim was that it was entitled to recover in full the amount of its invoices which had never been positively challenged. However, the Plaintiff's counsel also referred the Court to the following passage which in *Keating*

*on Construction Contracts* (at paragraph 4-055) which accurately explains the difference between a contractual and restitutionary claim:

> "*For work outside the contract the contractor is entitled to a reasonable sum. The normal rule is that however great the amount of work outside the contract, the work within the contract is paid for at the contract rates and only work outside the contract is paid for at a reasonable rate.*"

31. The Plaintiff adduced no direct evidence that the amount sought in respect of the extra work was reasonable. The $82, 027.73 sought was simply based on outstanding invoice amounts relating to work that fell within and without what I have found to be the scope of the initial contract. The Court was invited to find that to the extent that this sum was not due under the initial contract it represented a reasonable amount.

32. I am unable to make any positive finding as to exactly how much of that sum is attributable solely to the work done outside the contract and how much is recoverable on a cost and charge basis based on the essentially unchallenged bills. Based on the way the Plaintiff presented its case, I have little option but to treat the full amount as attributable to extra work. This approach is hardly unfair to either party as the Defendant paid only a small amount in excess of the Plaintiff's own estimate for the initial contract and advanced no positive case to suggest that any other figure should be regarded as attributable to extra work.

33. It remains to consider whether the Defendant has raised any valid basis for challenging the Plaintiff's assertion that the invoiced amount which is outstanding represents a fair amount for the work done. The initial estimate could be considered to be a fair one because it was based on an analysis carried out by an architect. The Plaintiff obtained no independent verification of the sort of cost which the extra work would entail. Yet over the considerable period of time since the sums claims have been in dispute, the Defendant never raised any specific challenge to any of the invoices. The only credible complaints made were those set out in his December 5, 2011 letter in relation to the following items:

    (1) the paint allegedly put on too soon after the plastering;

    (2) the electrical wires allegedly connected improperly so that the bill for the main house was sent to the tenant's apartment and vice versa;

    (3) the meter room was allegedly incomplete;

    (4) two bathroom sinks allegedly did not drain properly;

    (5) the water did not allegedly flow properly from a bathtub faucet;

(6) it was alleged that the doorbell ceased working within months.

34. The Defendant complained that money had to be spent to repair these defects. The Plaintiff responded by letter, positively disputing liability for the painting problems (and blaming the poor quality of the paint) and the doorbell (blaming the manufacturer). The Plaintiff also asked for documentary evidence of any remedial work carried out and offered to make appropriate reductions. No such evidence was produced in response to that invitation or at trial although the Defendant testified that family members assisted with remedial work.

35. On balance I find that it is more likely than not that the final stages of the Plaintiff's work were not completed to an appropriate standard because of the breakdown of the relationship between contractor and client. Having regard to the Defendant's evidence, I find that his failure to document any expenditure on remedial work is probably due to a combination of the fact that he may have not incurred additional labour charges and the fact that he was too angry to negotiate a reduction of charges with the Plaintiff. Added to this was uncertainty about his legal obligations to pay a substantial sum in excess of the only estimate he had ever been given. On the other hand, it is simply not credible that the defects complained of represented a significant proportion of the outstanding sum being claimed by the Plaintiff otherwise, angry or not, the Defendant or his wife would most likely have kept some documentary record of the costs of any materials purchased to remedy the defects complained of.

36. The Plaintiff bears the burden of proving that the sum of $82, 027.73 claimed represents a reasonable amount to charge for the additional work done. It has adduced no direct evidence on this issue (save for the fact that the work was done in accordance with his usual charges previously agreed to by the Defendant). The Plaintiff's failure to provide an estimate for the extra work flowing from the change to the plans (which I appreciate may not have encompassed all of the extra work) contributed to the breakdown in relationship which occurred between the parties. That breakdown must have impacted adversely on the quality of the final stages of the project which the Plaintiff all but admitted when offering to reduce its claim in January 2012.

37. In these circumstances the Defendant should receive the benefit of any doubt in assessing whether or not the sum claimed is a reasonable amount for the work done. The Court is left with no option but to do its best with limited evidence to form a rough and ready view of the appropriate deduction to be made from the amount claimed based on the Plaintiff's contractual charges.

38. I find that the Plaintiff's claim should be discounted by 10% so that the amount awarded in respect of the restitutionary claim is $73,824.96.

**Summary**

39. The Plaintiff's claim for $82,027.73 as monies due under a contract fails. The alternative *quantum meruit* claim succeeds and the Plaintiff is awarded 90% of the total amount claimed on a contractual basis or $73, 824.96 together with interest at the statutory rate until payment. Unless either party applies within 21 day by letter to the Registrar to be heard as to costs, the Plaintiff is awarded the costs of the action to be taxed if not agreed.

40. I will hear counsel if required on any other matters arising from the present Judgment and the terms of the final Order.

Dated this 3rd day of May, 2013 _____

IAN RC KAWALEY CJ