The Court of Appeal for Bermuda

CIVIL APPEAL No. 17 of 2012

Between:

VERNON TROTT &

CLAUDE SLATER

Appellant

-v-

JAMES DOUGLAS &

JAKEISHA DOUGLAS

Respondent

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Mr. Vernon Trott, Appellant In Person
Mr. Craig Rothwell, Cox Hallett Wilkinson, for the Respondents

Date of Hearing & Decision: **16 June 2015**

Date of Reasons: **16 June 2015**

REASONS

Bernard, JA

1. This is an appeal from the judgment of the Learned Chief Justice awarding judgment in favour of the Respondents in the sum of $49,042.06 with costs to be taxed.

2. On 5th September, 2006 the Respondents entered into a contract with the Appellants to construct a one-bedroom apartment at the basement level of their

property situate at 10 Stone Lane, Devonshire, at a cost of $147,000, the said work to be commenced on 5th September, 2006 and to be completed on or before 1st December, 2006.

3. The Respondents in their Statement of Claim alleged that they had informed the first Appellant that they had arranged for the property to be rented from February 2007 upon completion, but at the hearing of the action this did not accord with the evidence led, and the Learned Chief Justice refused their claim for loss of rental due to the Appellants failure to complete the construction within the agreed time.

4. The Respondents alleged that the Appellants were in breach of the contract by failing to complete the construction within the agreed period of time despite being paid according to a stipulated payment schedule. By agreement the completion date had been extended due to renovations to the upstairs bedroom at additional cost, and which were completed in January 2007. The Respondents alleged that the Appellants failed to complete the work within a reasonable time thereafter which they expected to be around March 2007. They further alleged that the Appellants discontinued work on the premises, and repudiated the contract. As a result the Respondents were forced to engage another contractor at additional cost.

5. The Chief Justice identified two crucial facts which were not seriously disputed, these being that the contract could not be completed within the agreed contract price, and when the Appellants abandoned the project, no agreement had been reached on an uplift in the contract price.

6. After a frank assessment of the evidence the Chief Justice concluded that it was (at worst) a runaway project which the Appellants secured with an unrealistically low bid and which by mid-2007 had been brought to a point where it could not be completed without the Respondents providing extra funding.

7. Expert evidence was proffered by both the Appellants and the Respondents, and after due consideration the Chief Justice expressed the view that the Appellants had all but formally concluded that:

   (a) the additions to the contract were cancelled out by the deductions;
   (b) they 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, they had broken a fundamental term of the contract entitling the Respondents to treat the contract as being at an end.

8. Accordingly, he found the Appellants liable for damages for breach of contract. He, however, took into account contractual extras and deductions, work done by the Appellants, the contract price and payments received by the Appellants as well as extra work undertaken by another contractor Araujo Construction Co. Ltd.

9. Despite the Notice of Appeal filed by the Appellants, the first-named Appellant in submissions dated 8th July, 2014, indicated that "at no point in time is it my position to not pay the judgment or the taxation due to the respondents and their attorneys." He only asks this Court to consider the costs to be assessed as standard costs rather than indemnity costs.

10. There is therefore now no appeal against the judgment awarded by the learned Chief Justice. The amount of costs seems to be the only bone of contention, and even in this regard there is no objection to standard costs, only indemnity costs.

11. The Chief Justice at paragraph 37 of his judgment stated that it was difficult to identify any obvious basis on which the usual rule that costs should follow the event should not apply. His strong provisional view was that "the Defendants

had acted unreasonably in the way they had defended the present action". They had flouted procedural orders of the Court, and had made minimal attempts to identify the real issues in controversy.

12. Further they had rebuffed an encouragement from the Court to pursue a settlement and had conducted their case without any apparent attempt to save time and costs. They, however, succeeded in demonstrating that the amount claimed in the Respondents' expert report served upon them in February 2012 should be reduced by $5,000, and also secured the dismissal of the Respondents' unproven $18,000 loss of rent.

13. In the circumstances he awarded costs to be taxed on an indemnity basis if not agreed so that the Appellants will carry the burden at any taxation hearing of demonstrating that the sums claimed ought not to be allowed.

14. The Appellants' only ground was against the costs as stated earlier, and they have not been able to satisfy this Court that the learned Chief Justice's order for indemnity costs was wrong or misconstrued. In the circumstances, the Chief Justice's reasoning is upheld.

15. The appeal is hereby dismissed. Costs will follow the event.

Signed

Bernard, JA

I agree *Signed*

Baker, P

I agree *Signed*

Bell, JA