SAINT LUCIA:

Comment [a1]: Final copy. Issued to Parties on 7.6.2001.

IN THE HIGH COURT OF JUSTICE
(Civil)

Suit No. 479 of 1994
BETWEEN

JOSEPH PROSPERE

Plaintiff

and

JOSEPH OCHILIEN

Defendant

Appearances:

Mr. K. Monplaisir QC with Ms Gail Philips for the Plaintiff
Ms T Gibson and Mr. M. Maragh for the Defendant

2001: May 7,9,15 and 24

---

[1] Barrow J (Ag.) In 1991 the Defendant built a house for the Plaintiff. It turned out that the house was built across the boundary line of the Plaintiff's land and therefore partly on an adjoining parcel of land. The lawyer for the neighbour wrote the Plaintiff in July 1992 making a claim for compensation. In March of 1994 the lawyer for the neighbour issued a writ. The Plaintiff ended up paying $18,505.30 to the neighbour. The recoupment of this sum is the single largest claim of the Plaintiff's three claims against the Defendant. From the pleading and conduct of the Plaintiff's case I got a sense that the other two claims were simply tacked on to the principal claim. This may be the reason for certain features in the Plaintiff's case.

[2] The Plaintiff commenced his action against the Defendant by writ issued on the 5th July, 1994. From the documents placed before the Court, which do not constitute a complete record, it appears that the lawyers for the plaintiff had written a letter before action to the Defendant in March, 1994. That is the same month in which the writ was issued against the Plaintiff for building partly on his neighbour's land. When the Plaintiff, in turn, sued the Defendant it was firstly, to recover the compensation of $18,505.30 paid to the neighbour, secondly, to claim $15,500.00 that the Plaintiff said it cost him to complete the building that he said the Defendant had failed to complete and, thirdly, to claim $3,200.00 being the value of some tools that the Plaintiff said the Defendant had converted.

[3] It was accepted by the Plaintiff in cross-examination that when he first took the Defendant to the Plaintiff's property on which the defendant was to build the house, the land was not clear. The Plaintiff testified that on the second occasion when he took the Defendant there, he had had the land cleared. The Plaintiff testified that he showed the Defendant his boundary pegs. The Defendant testified to the same effect and said that he worked

according to what the Plaintiff showed him. Said the Defendant, "I set my line according to the boundary" that the Plaintiff showed. According also to the Defendant's son, who did much of the actual work for his father, the Plaintiff showed him and his father the boundary and the Plaintiff was there when the son did the setting out of the perimeter for the structure. The son said "I put my line where he showed me his boundary".

[4] In the face of the clear acceptance by the Plaintiff that he showed the Defendant on which land to build and within which boundary, I am at a loss as to why the Plaintiff proceeded to trial with this claim. In his closing speech counsel for the Plaintiff seemed to be saying that it was the duty of the defendant, who had a plan of the land, to have built, in reliance on that plan, within the boundaries that the plan showed. That argument imports the proposition that it was the duty of the Defendant to have disregarded the instruction of the Plaintiff for no reason whatsoever and to have divined that the Plaintiff was mistaken in his identification of where the boundaries of his land lay. It is an argument that is completely devoid of merit. This claim of the Plaintiff fails.

[5] The second claim of the Plaintiff is to recover $15,500.00 that the Plaintiff said he had to pay to a third person to complete the work because the Defendant failed to complete the work. The Defence asserts that the work was 98% completed and that the Defendant stopped working because the Plaintiff told him to stop. In his Defence To Counterclaim the Plaintiff says that the works were stopped because the Defendant carried out the works in an unworkmanlike and unacceptable manner and contrary to the terms of the contract, express or implied. The Plaintiff, in his Reply To Defence To Counterclaim, repeated that he stopped working solely because of the Plaintiff's request.

[6] It seems clear from the Plaintiff's pleading that the Plaintiff stopped the work. He gives his reason in his pleading for so doing: poor workmanship. But not a shred of evidence was offered in support of this allegation. In fact, it was never mentioned by any witness or by counsel. In the list of issues that the plaintiff identified for trial, it was also not mentioned. So complete is the Plaintiff's about face from this allegation that in the Plaintiff's skeleton arguments the version that is given is that after the Defendant had gotten all the agreed funds, identified as $160,000.00, the Defendant sought more money and it was because he was not given more money that the Defendant ceased working on the house and thereby breached the contract.

[7] This version first surfaces in the witness statement of Morris Gustave, the agent of the Plaintiff in attending to the construction during the Plaintiff's absence abroad. The Defendant and his son, in their witness statements, both agreed that they stopped working on the house because they had run out of money as a result of doing extra works that had been requested of them. The Defendant said that he was owed, when he stopped working, $35,000.00. The skeleton arguments of the Defendant accept that the Defendant stopped working on the building because of not being paid and asserts that had the Defendant been paid he would have completed.

[8] Neither side seemed to have been in the least bit embarrassed by this significant departure from the pleadings. The parties joined issue on the evidence. I must therefore treat this as part of the issue that I have to decide.

[9] What I have to decide is whether the Plaintiff should recover the $15,500.00 which he said he had to pay to have the building completed after the Defendant stopped working. Morris Gustave said that the Defendant achieved 90 per cent completion and he indicated what needed to be done. The Defendant said he had reached 98 percent completion and the son said it was about 95 percent completion. They identified what needed to be done. They also said that most of what the Plaintiff wanted done constituted extra work, costing more than what the contract called for. It is an unsatisfactory aspect of the Plaintiff's case that he produced no receipts to prove that he had to pay this sum of money and, more significantly, to prove for what he paid. I am prepared to assume in the Plaintiff's favour that he paid this sum. Given the direct conflict as to what needed to be done, I cannot assume what this money was paid for. It was the obligation of the Plaintiff to prove this aspect of his case. As counsel for the defendant submitted, he who asserts must prove. No explanation was offered as to why such proof was not forthcoming. I am unable to prefer the recollection of Mr. Gustave as to what needed to be done over that of the defendant and his son. More, I am unable to assume that the sum paid was paid to do strictly what the Defendant had left undone.

[10] The weight of the evidence is against the Plaintiff's claim as to what needed to be done. In his witness statement Morris Gustave stated that after he took over management of the construction and the Defendant came to him for money "to buy material to finish the house" Mr. Gustave told the Defendant that the Defendant had already received 90 percent of the construction money and the building was far from complete. Mr. Gustave stated that the building was not painted, the electrical and plumbing works were not completed, and the steps from the kitchen door and the railings to the front steps were also not completed. The testimony of the Defendant is that when he stopped working what remained to be done was only to build the railing on one side and to tile the floor with ceramic tiles instead of the agreed rubber tiles. The Defendant testified that the building was already painted and the electrical and plumbing works were completed. The Defendant further testified that to complete the building, including laying ceramic instead of the contracted rubber tiles and putting wooden instead of the contracted concrete banisters, it would have cost $8,000.00.

[11] What makes me believe the Defendant on this issue is the unreliability of the evidence for the Plaintiff. In cross-examination Morris Gustave said that when he took over the management of the construction the building was about 90 percent complete. This seems a far cry from his earlier assertion that the building was "far from complete". I am satisfied that the Defendant did more work on the building after Mr. Gustave took over the management. There are receipts produced by the Plaintiff showing payments by Mr. Gustave to the Defendant on 14th and 23rd August 1991 and a final receipt signed by the Defendant as late as 13th November 1991. I take these receipts as evidence that the Defendant was continuing to do work on the building as at the dates of their issue. These bear out the express testimony of the Defendant that when Mr. Gustave paid him moneys on behalf of the Plaintiff the Defendant was still working on the building. I would venture to think that the building must have progressed from 90 percent completion, at which it stood when Mr. Gustave took over management, in the three months period that the receipts cover. I am therefore inclined to believe the Defendant 's evidence as to what

remained to be done and what it would have cost to complete, including the extras that the Plaintiff required.

[12] In addition, I note the scheduling of the payments of the contract price. Payments were to be made according to stages of completion. At paragraph 14 of this judgment there is set out the schedule of amounts to be paid and stages of completion. According to that schedule at the point where the Defendant was to be paid the fourth of the six scheduled payments, which would take the percentage of the contract price that he had been paid from 70% to 85%, he would have had to complete the electrical and plumbing works. According to Mr. Gustave, the Defendant had already been paid more than 90% of the contract price when the Defendant came to Mr.Gustave for more money which Mr. Gustave refused to give him and which, in turn, led the Defendant to stop working. I would think that the Defendant was paid up to that percentage of the contract price because he had already done so much work as to have entitled him to it. This would tend to confirm my belief of the Defendant's evidence as to what remained to be done at the time the Defendant stopped working. I therefore reject the Plaintiff's second claim.

[13] The Plaintiff's third claim, for $3200.00, being the value of "several working tools" that the Plaintiff pleaded the Defendant "wrongfully used and converted to his own use … thereby depriving the Plaintiff of the same", was not pursued at the trial. It was not mentioned in either of the witness statements filed on behalf of the Plaintiff nor in the oral testimony for the Plaintiff. In cross-examination the Defendant 's son was asked about the tools and he said that the Plaintiff lent them to him to use and when he left the job he left them in the building. I accept this evidence and therefore dismiss this claim of the Plaintiff also.

[14] I turn now to the counterclaim of the Defendant for $35,000.00. The parties signed a contract dated 9th April 1991 for the Defendant to construct a building for the Plaintiff in accordance with plans and specifications which were stated to be attached to the contract. I have not seen any plan or specification. The price of $170,000.00 was to be paid in stages in accordance with the progress of the works. It may be useful to set them out:

$70,000.00 on commencement
$25,000.00 for completion of walls to ring beam
$25,000.00 for completion of roof, plastering and rendering
$25,000.00 for completion of fitting windows, doors, bathrooms, electrical and plumbing fittings.
$10,000.00 for completion of floor tiling, painting walls and delivery of the keys
$15,000.00 retention to be paid 3 months after completion.

In the Statement of Claim the plaintiff claimed that he had paid the Defendant the full contract price and this was the basis of his claim for the $15,500.00 that he said he had to pay a third party to complete the work that the Defendant left uncompleted. However, in his witness statement and in cross-examination the Plaintiff said he paid a total of $160,000.00 to the Defendant . This, therefore, leaves the Plaintiff owing a balance of $10,000.00 to the Defendant on the Plaintiff's own evidence.

[15] The matter goes further. The Plaintiff testified that the Defendant always gave him a receipt for the payments that the Defendant received. Morris Gustave similarly testified that he always got a receipt for money that he paid to the Defendant. After the close of the evidence I asked counsel to return to court and invited counsel to produce the receipts, which counsel for the Plaintiff told me they had in their possession but had omitted to disclose to the other side and were therefore precluded from producing. After hearing both sides the receipts were produced and the Defendant was given an opportunity to testify in relation to them. The receipts show that a total of $153,900.00 was paid to the Defendant. From this amount I subtracted $6,800.00 expressed to have been paid for building a retaining wall that formed no part of the contracted works. The receipts thus show that the total paid to the Defendant was $147,100.00. Both in his witness statement and in cross-examination the Defendant asserted that the total that he had been paid was $145,000.00. He did not have the benefit of the receipts; these were in the possession of the Plaintiff. The Defendant 's assertion that this was the amount that had been paid to him began with the filing of his counterclaim. The Defendant has been consistent throughout. More, if one takes his figure as an approximation, the receipts would seem to show that he has been correct. This is the sort of evidence which makes me tend to regard the Defendant as a reliable witness. When the amount paid to him, $147, 100.00, is subtracted from what was due to him under the written contract, $170,000.00, there is a balance owed to the Defendant of $23,000.00.

[16] The Defendant claims that there is a further amount of $10,000.00 owed to him by the Plaintiff. The Defendant says that after he had commenced construction of the building the Plaintiff requested him to increase the dimensions of the building from 40 feet in length to 44 feet and from 36 feet in width to 38 feet. The Defendant claims that he complied with the request for the change and subsequently told the Plaintiff that he would charge an additional $10,000.00 for the increased work. The Plaintiff's evidence on this point is equivocal. The Plaintiff said in his witness statement that the contract "was originally for $155,000.00 but due to modifications the contract prior (sic) was altered by $15,000.00 to $170,000.00". In cross-examination the Plaintiff stated that he did not ask the Defendant to make any alterations but rather it was the Defendant who told the Plaintiff that the Defendant would put the house higher so that the Plaintiff would be able to build below. When pressed on the point that he, the Plaintiff, altered the dimensions of the house the Plaintiff answered, "I did not ask the Defendant to alter, I took his advice, he is the builder". The Plaintiff continued: "He told me, I accept it. I told him yes, he could go ahead and alter the plans". A bit further on the Plaintiff testified that the Defendant did not tell him that it would cost an additional $10,000.00.

[17] I find it difficult to accept the Plaintiff's version. It would have been helpful if the Plaintiff had told the court what were the modifications that he made, apparently before the signing of the contract, which produced the increase in the contract price. Whatever these may have been, the Plaintiff did admit that the dimensions were altered. I did not get the impression from the Plaintiff's answers that the modifications were the same as the alterations that the Defendant advised and which the Plaintiff accepted. In his favour on this point, the Plaintiff pleaded in his Defence To Counterclaim that the dimensions of the building were increased before the contract price was agreed upon. But in that very passage in his pleading the Plaintiff also pleaded that "Plaintiff admits that he altered the

Plans of the building to increase its size … as alleged …". This stands in stark conflict with the Plaintiff's testimony that "I never altered the Plan", which are also the exact words that he used in his witness statement. On this aspect, also, I find the evidence of the Defendant to be more credible than that of the Plaintiff. I believe the Defendant that it was after the contract was signed and after he had commenced construction and had already been paid $70,000.00 that the Plaintiff altered the dimensions of the building. I believe that the Defendant subsequently told the Plaintiff that he would charge an additional $10,000.00 for the increased work. No basis has been suggested to me for disallowing this claim for increased remuneration and I therefore allow it.

[14] The judgment of the court is that the Plaintiff's claim is dismissed, with costs and the Defendant's claim is allowed in the sum of $33,000.00, with costs. The Defendant is entitled to interest at 6% per annum on that sum from 5th October 1994, the date of the counterclaim. Counsel very helpfully agreed that the sum of $5000.00 would be an appropriate award for costs. I fix costs to the Defendant in that amount.

Denys Barrow S.c.
High Court Judge (Ag.)