THE EASTERN CARIBBEAN SUPREME COURT

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. 360/1998

BETWEEN

TREVOR PETERS

Claimant

AND

PETER ST. BRICE trading as St. Brice Construction

Defendant

Appearances:

Mr. H. Deterville for the Claimant
Mr. R. Frederick for the Defendant

2002: June 12

2002: June 24

2002: July 03

2002: August 07

2002: December 17

JUDGMENT

PEMBERTON J.

[1] On the 21st April, 1998, the Claimant issued a Writ of Summons indorsed with a Statement of Claim against the Defendant claiming recission of the building contract entered into by the parties, Special Damages as intmised therein, General Damages, interest and costs.

There was a claim for an injunction against the Defendant, but that was heard and injunction granted prior to this hearing.

[2] The Claimant alleged that he employed the Defendant under the terms of a contract dated 27th day of January, 1997 for the purpose of constructing a concrete dwelling house on lands belonging to him, situate in Ciceron and to that end to perform certain works and to supply certain materials. The price stated in the contract was $306,720.00. The Claimant asserts that the following terms were implied in the contract between the parties, to wit:

- That the Defendant would complete the works as per the drawings supplied by Mr. Phil Leon and agreed upon by all the parties concerned to the reasonable satisfaction of the Claimant;
- That the said work and labour should be done well and efficiently and with care and skill and in a proper and workmanlike manner;
- That the said materials should be good and suitable and should properly and well and skillfully applied and used;
- That the said work and labour should be commenced on the 27th day of January, 1997 and be completed on or before 15th day of July, 1997.

The contract contained as well a schedule of payments, which need only be referred to for completeness, since none of the salient issues for consideration turned on this.

[3] The Claimant alleges that the Defendant breached the terms of the agreement in that:

- The work and labour was done badly and inefficiently and without skill and care and in an improper and unworkmanlike manner;
- The said materials were bad and unsuitable and were applied and used improperly, badly and unskillfully;
- The said works were not performed or supplied within the agreed completion date;
- The defendant failed to comply with written notices from the Claimant about defective work.

[4] The Defendant in his defence denied that all the works to be performed under the contract were contained in the drawings as alleged; that there was a variation of the contract so that the building of the storeroom cupboards and the supply of the light fixtures would be excluded from the works to be executed and the materials to be supplied respectively. The Defendant alleged that after 3 days into the works, he discovered that the foundation would have had to be five feet higher and this would have entailed an increase in the contract price. This he communicated to the Claimant, who then agreed to pay the increased price. The Defendant further stated that the Claimant called for a further variation of the contract, to wit the inclusion of the storeroom to the building works to be performed. This he referred to as 'extra' work. Further, he asserted that the Claimant agreed to pay the consequential increase in price. The Defendant denied the allegations of bad workmanship and defective work and he further denied that he refused to complete the works in a timely manner. In fact, he stated that he could not continue performance because the Claimant refused to pay him further sums for the extra work. He admitted receiving the sum of $295,878.78 from the Claimant. The Defence included a counter claim from the Claimant for the sum of $12,341.28 being the balance of the original sum and the sum of $46,342.00 being the sum for the cost of the extra work.

[5] There are three main issues which arise for determination, to wit, what were the terms of the contract between the parties; is the Claimant liable to the Defendant with respect to payment for the extra work done and did the Defendant fulfill his legal obligations to the Claimant under the contract

[6] TERMS OF THE CONTRACT BETWEEN THE PARTIES

The parties filed an agreed bundle of exhibits, which contained several pieces of pre-contract correspondence. The final contract executed by the parties is dated 27th January, 1997, which provides *inter alia* that the contract sum is $306,720.00, that the "works comprises the construction of a residential house as per contract drawings by Mr. Phil Leon and previously agreed upon by all parties concerned"..; that the Contractor shall …carry out and complete the works as per the contract drawings and to the reasonable satisfaction of the Client" …; "that the Contractor shall carry out his work diligently and within the allotted time period"…;and that the works shall be completed by July 15th 1997.

[7] Under cross-examination, the Defendant admitted to Counsel for the Claimant that the contract between the parties was signed on 27th January, 1997. The Court makes a finding of fact that the document of 27th January, 1997 constituted the main contract between the parties upon which the claim is based.

[8] EXTRAS

The Defendant made a valiant attempt in cross examination to say that the document signed on January 27th 1997 did not constitute the entire agreement between the parties and that he performed extra work for which he ought to paid. There is no disagreement with the fact that "extras" did feature in this contract. The issues are, were the "extras" performed and if so, is the Defendant entitled to payment for them. The Defendant himself admitted under cross-examination that the work which he regarded as "extras" was not done. In fact, when the documentary evidence is examined, it is clear that there was no concrete agreement by the parties concerning the extra work to be done. In any event, from the documents, an undated document from the Defendant to the Claimant, the letter dated 21/7/97 from the Claimant to the Defendant and the letter dated 15/9/97 it was recognised by the Claimant that the Defendant did work extra to the contract. That work comprised extra work on the foundation and extra costs with respect to windows and doors. However, the evidence reveals that when the Claimant retained a Quantity Surveyor to assess the value of the works performed by the Defendant up to the date of termination, it was discovered that the contractor, as Counsel for the Claimant put it in his Reply, "had been overpaid for the work he had done". This evidence was not contradicted by the Defendant. The Court makes a finding that the Defendant has not proved his case with respect to being entitled for payment for "extras".

[9] LEGAL OBLIGATIONS OF THE DEFENDANT - BUILDER/CONTRACTOR

Counsel for the Claimant laid the legal basis of the Claimant's case within the provisions of Article 1588 of the CIVIL CODE OF SAINT LUCIA. That article states:

> If a building perish in whole or in part within ten years, from a defect in construction, or even from the unfavourable nature of the ground, the Architect superintending the work and the Builder are jointly and severally liable for the loss.

It is noted that the Architect was not sued or brought in as a party in this action so that Article 1589 of the CIVIL CODE OF SAINT LUCIA does not apply.

[10] Counsel relied on the case of WALTER WARDLE v THE VERY REVERAND JOHN BETHUNE L.R. 4 P.C. 33 an Appeal from the Court of Queen's bench for the Province of Quebec, Canada, and which proved to be very instructive in this matter. In short, a Builder was employed contracted to execute certain works on the Christ Church Cathedral in Lower Canada according to plans and drawings made by an Architect, and upon foundations laid by a previous builder. The Builder erected the Cathedral in strict conformity with the contract, under the direction of the Architect and in a workmanlike manner but the Tower Cathedral, shortly after it was erected but before the completion of the works, sunk and considerable damage was done. The cause of the sinking was found to be insufficiency of foundations as planned by the original architect and constructed by the former builder. On appeal, their Lordships had to consider "the right apprehension and application of this law, by which liability is imposed on Architects and Builders, irrespective of contract, that is not so imposed on them by the Law of England.". It was held by the Judicial Committee of the Privy Council that pursuant to the Article 1688 of the Civil Code of Lower Canada, which is in exact terms as the Civil Code of Saint Lucia, that the present Builder was responsible for the defect in the foundations and was not freed from liability, either by acting under the directions of his Employer's Architect, or by reason of the defective foundations being the work of a previous Builder.

[11] Counsel for the Defendant made much of the meaning of the word "perish". Counsel asserted that the building did not "perish" in such a way as to attract the attention of the Article. In order for a builder to be fixed with liability under this Article, the building must have been totally destroyed and be incapable of revival. In other words there must be some act of finality rendering the building obviously in habitable. This was not the case here. Counsel supported his conclusion from the testimony of the Engineer when he said that "the building appeared habitable. If remedial works had not been effected, certain sections could have collapsed".

[12] The Judicial Committee of the Privy Council in interpreting the Article stated that the Code contains strict provisions with respect to responsibility of Builders and Architects, which, if not expressly stated in a building contract are implied by law. Sir Joseph Napier who delivered the judgment of the Judicial Committee said at pages 54 - 55:

> That there is annexed to the contract, by force of law, a warranty of solidity of the building that it shall stand for ten years at least. …

Thus, if there is a breach of that warranty the building is said to have perished within the meaning of the Code. The Court finds that the provisions of Article 1588 of the CIVIL CODE OF SAINT LUCIA will apply in this case.

[13] The evidence in the case at bar disclosed that during the plastering of the walls, the Claimant noticed that numerous large cracks were seen in the kitchen and in other parts of the house. Some of the cracks were large enough to fit a match. The Claimant engaged the services of a Structural Engineer and his report was admitted into evidence almost unchallenged. The report was detailed and was accompanied by photographs. The Report stated that "…Though still under construction and only some 19 months since commencement of the works, cracks and defects were observed in all structural elements of the building. Every room has a wall, slab and beam which showed signs of cracking. The suspended floor slab also shows signs of distress. Their soffits reveal cracks in some classic failure patterns and pointed to the need for a comprehensive design review of the structure. …". The quality of the materials used in construction and workmanship were of some distress to the Consultant Engineer. The findings were that the building was constructed on expansive clay soil, the major characteristic of which is its shrinking and swelling capacity. The report states that "…The consequential effect of such seasonal movements is the cracking of structures supported on the soil…" The report outlined the tests done in this particular case and concluded that "… However, most distressing is the fact that the concrete in the building is about a year old and it has not attained the compressive strength it had been designed for or even the minimum of 3.000 psi normally specified…. Thus the aggregate was simply not suitable for concrete mixing…". The Engineer opined as well that there was an absence of proper architectural/engineering detailing and construction.

[14] In WARDLE v BETHUNE (*op. cit.)* the Judicial Committee gave a detailed analysis of the duty of a builder under the Civil Code. For convenience, this duty is summarized as follows:

(1) Where there is a breach of warranty of the stability of the building, the *onus* is on the Builder to shew that he is exempted from liability, by some exception in his favour. It is of primary importance that he should make sure of the sufficiency of the foundation on which he proceeds to build, for without a sufficient foundation the warranty could not be kept. It is an inseparable incident, an essential part of the warranty; the warranty of stability of the edifice includes, by necessary implication, the warranty of sufficiency of foundation…

(2) The exemption from responsibility, on the part of the Builder, for breach of warranty, must be made out (if at all) by legal implication. There is not in the Code any express exception in favour of the Builder; and there is none in his contract.

(3) The special responsibility for a breach of warranty has been incurred by the Builder, not as constructor of an insufficient foundation, but because the stability of the edifice erected has in fact failed, and the failure has not been shewn to have been excused by law.

(4) If a Builder thinks it fit to trust to the vigilance or skill of the Architect, without the independent exercise of his own judgment, he acts at his own risk. He cannot escape from liability when he has omitted to use such known and proper precaution as he ought to have used if he had had the sole and undivided responsibility.

(5) If then, for public safety, the Builder cannot act upon the design and under the direction of the Architect, except upon his own responsibility for the consequences, how can it be consistently maintained that he can, without incurring any such responsibility, adopt and act upon the design of the foundation.

[15] Further, in that case, the Judicial Committee found as a fact that:

> "The parties concerned have proceeded on what proved to be a common error, but this cannot alter the rule of law. To use the language of Lord Mansfield as to a rule somewhat analogous, 'At first the rule appears to be hard, but it is settled on principles of policy, and, when once established, every man contracts with reference to it, and there is no hardship at all.' BARCLAY v Y GANA 3 Doug. 390. The contract here has been drawn up so as not to contain any express provision with a view to exclude or modify the full responsibility imposed by the law on the Appellant. It superadds special clauses, protective of the Employer, by which he is exonerated from contingent liabilities. The Appellant must have assumed to have known the law when he entered into the contract. …What ever the hardship of the case may be, it is not within the province of their Lordships to relieve.

This Court is of the view that the learning could not have been stated more succinctly and concisely and wishes to associate itself with it.

[16] What then ought the Claimant to have done? Should the Claimant have waited until the building collapsed under him and his family and then reacted? The Court is of the view that the Claimant took the correct approach to deal with this issue. It is not disputed that cracks did appear in the building. In fact as stated above, there was no material challenge to the Engineer's Report. The Court received evidence from an Engineer, a Contractor and a Carpenter and Contractor who corroborated the evidence of the Claimant. Employing the Engineer and performing remedial works before the collapse of the building should not to my mind enure to the benefit of any other party but to the Claimant.

[17] The issue to be determined though, is did the Builder breach the warranty of solidity which is implied in the contract by force of law? In that case, the issue of solidity related to the sufficiency of foundations. In the case at bar sufficiency is tested in terms of faults in the structural elements of the building. In relation to point 4 above, the Defendant stated quite

plainly in cross-examination that "If the architect drawings are not good, it is not my fault. It is the architect's fault…". In further response to a question put to the Defendant by Counsel for the Claimant whether, as "far as you are concerned your job is not to look for wrong things in drawings?", the Defendant categorically stated "No".

[18] Based on the above learning and the evidence as presented, and as stated above, the Court makes a finding that the Builder had in fact breached the warranty of solidity as implied by law.

[19] The Court therefore makes the following Order:

ORDER:

1. That judgment be and is hereby entered for the Claimant against the Defendant herein on the Claim;
2. That the Counterclaim filed on behalf of the Defendant herein be and is hereby dismissed.
3. That Assessment of Damages and determination of costs be adjourned to the Master in Chambers on a date to be notified by the Court Office.

The Court gratefully acknowledges the assistance of Counsel.

Charmaine Pemberton
High Court Judge

Building Contract – Duty of Builder – Article 1588 of the CIVIL CODE OF SAINT LUCIA – Whether Builder in breach of duty under the Code – Whether duty under the Code can be displaced.