BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.1 OF 2001

BETWEEN:

[1] MICHAEL HELM ARCHITECTS LTD
[2] MICHAEL HELM

Appellants

and

[1] CURT BASS
[2] SERENA BASS

Respondents

Before:

His Lordship, The Hon. Sir Dennis Byron	Chief Justice
His Lordship, the Hon. Satrohan Singh	Justice of Appeal
His Lordship, the Hon. Albert Redhead	Justice of Appeal

Appearances:

Mr. Moverly Smith for the Appellants
Mr. Sydney Bennett for the Respondents

2002: January 14; 15;
2003: January 28.

JUDGMENT

[1] **REDHEAD, J.A.**: The Respondents are citizens of the United States of America. The first-named Appellant is a registered company in the British Virgin Islands providing Architectural services. The second-named Appellant is the sole Director Shareholder and Executive of the Company. In 1991 the Basses desired to build a dwelling house in the British Virgin Islands, towards that end they purchased a lot of land comprising 1.643 acres at Shannon Estate from Shannon Common Limited a company in which the second-

named Appellant was a shareholder. On 18th October 1998 there was an agreement between the Appellants and the Respondents. I reproduce the agreement hereunder:

> "Agreement for the provision of professional services.
>
> Michael Helm Architect, P. O. Box 845, Road Town, Tortola, B.V.I. hereby agrees to provide architectural services to Curt and Serena Bass in connection with their proposed house on Lot 5 of the subdivision of parcels 16 and 22, sheet 2537B, West Central, Plan No. C.A.537B-34T.
>
> The overall architectural fee for all services up to negotiating the contract will be determined as a fixed fee, based upon not more than 8% of the project cost. A deposit of $15,000.00 receipt of which is hereby acknowledged, is paid to cover the cost of services up to the time when a further agreement detailing the work stages and break down of fixed fees for work stages will be agrees said deposit will form part of the fixed fee.
> Agreed.
>
> Cuth Bass Michael Helm
>
> Serena Bass"

[2] The respondents alleged that shortly after the purchase of the land in Tortola they employed the Appellants for reward to design, prepare plans, specifications, bills of quantities and contracts for works namely the construction of a dwelling house and ancillary building on the said land.

[3] The Respondents also alleged that in pursuance of the said employment which the Appellants accepted, the second-named Appellants designed and the Appellants prepared plans, drawings, specifications and other documents in relation to the house and ancillary buildings which the second Appellants initially represented could be completed for about $325,000.00 but subsequently stated could be completed for approximately $425,000.00.

[4] The Respondents alleged that it was an expressed term of the contract and a condition or alternatively an implied term of the said employment that the said plans for construction of the residence were to be such that the total cost of construction including fees agreed to be paid should not exceed $350,000.00 or a reasonable approximation of the said sum.

[5] Finally the Respondents alleged that in breach of the warranty, the Appellants allowed the cost of construction of the residence to exceed the sum of $350,000.00 in that, by December 27 1992, a sum in excess of $ 570,000.00 had been expanded on the construction of the residences.

[6] On the 21 April 1992 the Respondents filed an action in the High Court of the British Virgin Islands against both of the Appellants. In that action they alleged breach of warranty and negligence .

[7] The Respondents alleged that the Appellants were guilty of negligence and of breach of their duty to the Respondents in that the Appellants negligently or incompetently superintended the construction of the said residence that they allowed the cost of construction to exceed some $570, 000.00 by the 27th December 1991 on which date the residence was approximately 65% completed.

[8] The trial of that action came on before Georges J on 27th June 1994 and on 12th December 2000 he delivered judgment in favour of the Respondents. In his judgment the learned trial Judge held that there was a contractual relationship between the plaintiffs [the Respondents] and each of the Defendants [the Appellants] and that Mr. Helm [the second-named Appellant] in his view was clearly negligent in failing to put the project over to competitive tender "which would have revealed his gross underestimation of the cost of executing it."

[9] He also held the Appellants on their own admission had failed to monitor the cash flow against the progress on site " to which they were obligated under the project agreement."

[10] The learned trial Judge then entered judgment for the Respondents against the Appellants jointly and severally for the following amounts namely:

Approximate cost of completion of residence -	$700,000.00
Guaranteed final cost of completion of residence as per Exhibits [Bills of Quantities]	$504,632.00

	$195, 368.00
Less changes, and modification to design by clients	$40,000.00
Net sum payable	$155 368.00

[11] The Appellants are dissatisfied with the judgment and have appealed to this Court. Thirty four grounds of appeal have been filed on behalf of the Appellants. It would neither be practical nor prudent to set out all of them.

[12] The theme running through most of the grounds of appeal is that the learned trial Judge having taken 5 1/2 years from hearing of the case to delivery of judgment he was in no position to properly and accurately recall or take into account the voluminous evidence both oral and documentary in this case, the submissions of counsel on both the factual and legal issues and failed to consider or to properly consider at all material and relevant evidence and submissions" [ground 1].

[13] Under ground 34 the Appellants argue that the learned trial Judge either did not have before him in the year 2000 when he came to consider his judgment in this case, or if he did unjustifiably completely ignored the written and oral submissions of counsel for the Appellants and the many voluminous exhibits in this case produced by either party and as such the judgment ought not to be allowed to stand as to do so would offend against the rules of fairness and natural justice which any litigant is entitled to in the proper and timely consideration and determination of a matter before a court of competent jurisdiction.

[14] The gravamen of the Respondents' case as pleaded in paragraphs 5 and 6 of their Statement of Claim is that the appellants for reward would prepare plans, specifications, bills of quantities and contracts for works for the construction of a dwelling house and ancillary buildings.

[15] The Respondents alleged that it was an expressed term of the appellants' employment that the plans for the construction of the residence were to be as such that the total cost of

the construction including the fees agreed to be paid to the Appellants should not exceed the sum of $350,000.00 or a reasonable approximation of that sum.

[16] The Respondents alleged that the appellants in breach of that warranty allowed the cost of construction to exceed the cost of $350,000.00 in that by December 27,1991 a sum in excess of $570,000.00 had been expended on the construction of the said residence.

[17] At paragraphs 27 and 28 of his judgment, the learned trial Judge said:

> 27: "… the estimated cost of construction was stated by Mr. Helm as $350,000.00 who was quite clear that was the correct figure. This would not have included kitchen fixtures but this would not have made a significant difference.
>
> 28: The obvious inference is that by 27th June 1991 when all the design changes had already taken place and all matters complained of by the plaintiffs had been taken into account the defendants were representing that the cost of building the Bass residence basically as it is ie. in it's present shape and dimensions was approximately $350,000.00 and they were fully aware that cost containment from the very outset was of crucial importance to the plaintiffs."

[18] Learned Counsel for the Appellant, Mr. Moverley Smith, submitted in his skeleton argument that this finding ignores Mr. Bass's own evidence that in June 1991, the projected cost of the project had increased to $410,000.00. Indeed Curt bass, the first-named Appellant said in evidence in chief [transcript 28.6.94 p.32]:

> "I was then given a new figure of projected cost as a result of coming out of the ground which was now the time frame I was talking about is in June, and a new projected cost had gone up to now $410,000.00 because of the scope of heavy work….. I was resigned to the fact that I broke ground and that was what my cost was going to be, because I was not very happy and I told Michael that, and I told him that it was important for him to be accurate in what he was telling me."

[19] It is abundantly clear to my mind that the learned trial Judge was incorrect in the assessment of the evidence when he said that it was obvious from inference that by 27th June 1991 when all the design changes had taken place that the appellants were representing that the cost of the building Bass residence "basically as it is in i.e. in its present shape and dimensions was approximately $350,000.00.

[20] Having regard to the evidence of Carl Bass, the first-named respondent, to which I referred to above, there is no doubt in my mind that when he was given the figure of $410,00.00 in June 1991 as the new projected cost he accepted that figure.

[21] Mr. Bass not only accepted the figure of $410,000.00 but he also further requested additional work which entailed an additional expense of $40,000.00.

[22] He was asked in examination in chief. Now after it went to $410,000.00 did you do anything? He replied:

> "Yes. We went on site. It occurred to me …. that the bottom half of the pavilion and the bottom half of the covered deck from the main house were wasted space but there were supporting walls that I could do something with half that space, so I asked Michael what we could do with those because there were walls already and if we could turn that into useful space instead of dead space. He said yes, we could. He said it shouldn't cost much. The walls are there, it is just a matter of finishing off the room. I asked him to give me an estimate of what he thought, and he said he thought $40,000.00. We could finish that space off. So I decided I already spent $410,000.00 already. According to what he was telling me, if I spent another $40,000.00 I found that two more rooms, I can have a house represented of a bigger house, square footage house, so I said I wanted to do it".

[23] Having regard to the foregoing the Respondents could not support the allegation that it was an expressed or implied term of the Appellants contract that they would produce plans for the construction of the respondents' residence at a cost of $350,000.00 "or an approximation of (that) sum" inclusive of fees, nor could the respondents support the allegation that the second appellant prepared plans drawing specifications and represented that the premises could be completed for the revised sum $425,000.00. I therefore cannot support the learned trial Judge's conclusion when he said at paragraph 41 of his judgment:-

> "It is obvious that from the outset the defendants' initial estimate was unrealistically low. Granted that changes in design at the plaintiffs' request resulted in a larger swimming pool with an extra elliptical part added plus an apartment below the pavilion and an extra room and bathroom added to the western area below that pavilion and an extra room and bathroom added to the western area below the pavilion would have increased the cost of construction which was estimated at $40,000.00. By then the estimated cost of the project had soared to $410,000.00. As of July 1st the estimated cost of the building was $449,382.60…… that did

not include an error of $13,000.00…..which would have brought the figure to $462,241.60. From 3rd July the total figures stood at $504,693……."

[24] Moreover the respondents pleaded that the budget proposed for the building of the house was $350,000.00 "or a reasonable approximation of the sum" (paragraph 5 of statement of claim). What is more no evidence was led to show that there was any other budget was proposed other than the $350,000.00. And from the evidence, it cannot be said that $350,000.00 was a fixed budget, because as I have said above Mr. Bass himself said that in June the projected costs had then gone up to $410,000.00 because of the scope of heavy work, he not only accepted the new projected cost but he undertook further work for additional expenses.

[25] However the learned trial Judge went on to find:-

> "……..so that when in response to the plaintiffs' demands for a guaranteed figure the defendants prepared Exhibit 3 (Bill of Quantities) calculating that amount to be $504,632.00 and signed the agreement – Exhibit 4 dated July 1991 referring to that sum and charging $20,000.00 (over and above their architectural fees of $32,000.00) to manage the project, this guarantee had contractual force and legal effect being supported by consideration of $20,000.00."

[26] Learned Counsel for the appellants has taken many issues with this finding of the learned trial Judge.

[27] Mr. Moverley Smith, in his skeleton argument, argued that the figure of $504,632.00 in the Bill of Quantities Exhibit 3 included professional fees of $62,000.00 leaving a net figure of $442,632.00.

[28] Learned Counsel argued that it was never part of the Respondents' pleaded case that there was a contract by which the appellants guaranteed that the estimate was $504,632.00 in consideration of being employed as project manager for a fee of $20,000.00. The respondent Curt Bass did however say:-

> "I spoke to Michael (Bass) in August because my fears were hightened. I was fearful of what I was seeing and it was not until the 26th week, it's when I had figures. I didn't rely on anybody. I was working on it myself to get an idea and it was at that time in August that my costs now were projected by Michael to be $540,000.00 and he guaranteed me that was the right number."

[29] Mr. Bennett, Learned Counsel for the respondents argued that the sum of $350,000.00 was an estimate of what the project would cost to complete, whereas $504,693.00 was the guaranteed cost of completion.

[30] Learned Counsel contended that there is no reference in the respondents' statement of claim to the figure $504,632.00 at all.

[31] This to my mind is pivotal in relation to the quantum of damages awarded against the appellants.

[32] Mr. Moverley Smith also argued that Mr. Bass, the first named respondent, referred to various estimates but never suggested that any of them was guaranteed save for the $540,000 "given in October, 1991 (sic) and that was denied by the second named appellant. The appellants' services were terminated in December, 1991. As regards that the learned trial judge said:

> "By December 12, 1991 with estimated cost of construction exceeding $540,000.00 and only 65% of the overall project completed, the plaintiffs terminated the defendants' services. In January 1992 with a reduced crew and with prudent financial constraints the house was completed the court was told for an additional $250,000.00/$300,000.00 inclusive of **fixtures and fittings and furniture and all else**"

[33] Mrs. Bass in her testimony said that the house was eventually completed for "I think $200,000.00 to $300,000.00 including everything furniture sheets and plates and everything.

[34] Whereas Mr. Bass said that the house finally finished at a sum of **"around" $880,000.00**.

[35] Mr. Moverley Smith argued in his skeleton argument that there was no evidence and that by 12th December, 1991 the estimated cost of construction had exceeded $540,000.00 as no further estimates were given in October, 1991, according to learned Counsel.

[36] The evidence reveals that the amount of money made available to Mr. Hanna for disbursements up to 17th December was $444,292.70. Mr. Moverley Smith advanced the argument that at the time the company's contract was terminated no evidence was given as to the exact amount expended on the building work, which was the subject of the estimate. Accordingly the learned trial judge had no material upon which to decide whether the $540,632.00 had in fact been exceeded. Notwithstanding the principles enunciated in **Benmax v Austin Motor Co. Ltd.** [1955] 1 A.E.R. 326.

[37] Having regard to the way the evidence unfolded I cannot dissent from that view.

[38] What is of critical importance to me is that in order to find liability and the quantum of liability against the appellants the respondents must establish through clear and unequivocal evidence that liability.

[39] The learned trial Judge accepted $504,632.00 as the sum guaranteed by the appellants as the final cost of construction. Counsel for the appellants argued that this could not be so because nowhere in the respondents' statement of claim is that figure mentioned and the first named respondent never testified that that sum was the guaranteed sum. There is much force in Mr. Moverley Smith's argument. Even if the learned trial judge was correct in accepting that $504,632.00 was the guaranteed final cost of construction. There is yet another problem with which the respondents are faced. At the time of the appellants' contract was terminated there is no cogent evidence as to whether the sum of $504,632.00 was spent in building the house. The respondents testified that more work was done after the termination of the appellants' contract. It seems quite clear to me that they are confronted with difficulties on two fronts. The first difficulty the learned trial judge referred to at paragraph 43 of his judgment.

> "Mr. Helm was of the view that at termination the main house was 75% completed. Serena Bass figured 50%. Mrs. Bass felt that 90% of the pavilion had been completed whilst Mr. Bass estimated the guest house to be 98% completed and Mrs. Bass reckoned it was only 80% complete. Mr. Helm opined that it was practically complete and livable although there was no electricity. Mr. Henderickson was of the view that overall the project was 85% complete……."

[40] To my mind the respondents did not know what was the amount of work which was left to be done. They were guessing. That problem could have been overcome by having a professional valuer or quantity surveyor to assess the work that was to be done.

[41] The second problem the respondents are faced with they have failed, in my view, to establish what was the sum spent in the construction of the house after the termination of the appellants' contract or at all. Ms. Bass, for example, when asked how much was the final cost of completion of the house. She replied:

> "I think $200,000.00 to $300,000.00". She also said that sum included fixtures, fittings, furniture and everything.

In my opinion this is hardly the way one establishes a claim of this sort. What were the costs of the furniture, fittings and fixtures? These obviously were unknown or not given in evidence to the court.

[42] Mr. Bass testified that the total cost of construction was $880,000.00. He gave no explanation as to how he arrived at that figure neither did he nor Mrs. Bass produce any figures. In any event, Mr. Bass was not sure about his figures. He said "about" $800,000.00. The learned trial Judge obviously did not accept his figures.

[43] The learned trial Judge having no cogent evidence was faced with a difficultly. Small wonder when he came to assess liability he had to say **approximate** cost of completion of residence, which he put at $700,000.00. How did the learned trial Judge arrive at this figure?

[44] He found that the guaranteed cost of construction to be $504,632.00. I have already commented on this in the judgment. Having deducted for changes, revisions and modification to design, he found the appellants liable in the sum of $155,368.00 on the contract.

[45] I find the manner in which this case was conducted to be most unsatisfactory.

[46] Mr. Moverley Smith argued for a rehearing of this matter. I would have unhesitatingly taken that decision if this case had not taken that long between hearing and delivery of judgment. My only concern is, if such a course is now adopted, can either side obtain justice? That is the awkward dilemma in which I find myself.

[47] Finally, I turn to one last issue. That is the finding by the learned trial judge of personal liability against the second-named Appellant.

[48] There were only two written agreements and they were made between the first-named Appellant, the company and the Respondents. The learned trial Judge so found. However the first-named Respondent testified that Mr. Helm, the second-named Appellant, agreed with him that if he Mr. Helm was given total management control of the job that he could bring the job in on time.

[49] The learned trial Judge found that such an oral agreement was made by the second-named Appellant, Mr. Helm in a personal capacity with the first-named Respondent, Curt Bass. The learned trial Judge also held that Appellants failed to monitor cash flow against progress on site. Such gross dereliction of duty was tantamount to gross negligence for which they must be held liable.

[50] In so holding the learned trial judge opined that Mr. Helm told the court that he did not monitor the cash flow against progress on site yet under paragraph 9[g] of his agreement with the clients [Exhibit 4] in respect of the provision of project management services he specifically undertook and was required to do precisely that. Consequently the learned trial Judge held the view that Mr. Helm could not exonerate himself from tax overruns.

[51] Learned Counsel for the Appellants contended that the obligation to monitor cash flow was an obligation contained in July Agreement and therefore an obligation of the company alone.

[52] It is beyond argument that the agreement was made with the company. The company being a separate legal entity from that of Mr. Helm should be held legally responsible to the respondents.

[53] Mr. Moverley Smith made the obvious point that a shareholder does not have liability for the company's action, the avoidance of that liability being one of the principal purpose of interpretation.

[54] He also contended, however, that the learned trial Judge in his judgment appears to have considered that because Mr. Helm was the sole Shareholder, Director and Chief Executive Officer of the company, this justified the action being brought against Mr. Helm in his personal capacity.

[55] In my opinion, it goes further than that Mr. Helm was the controlling, directing mind of the company. His mind is the state of mind of the company therefore:

> "…….in cases where the law requires personal fault as a condition of liability in tort the fault of the manager will be the personal fault of the company."

[per Denning L.J. in **H.L. Boston [Engineering] Co. Ltd v T.J Graham & Sons Ltd** [1956] 3 AER 624 at 630.

See also **Lennard Carrying Co. v Asiatic Petrol Co.** [1914-15] ALL ER Rep.280 at 282-283.

[56] The gross negligence of Mr. Helm in monitoring the cash flow and other acts of negligence as found by the learned trial Judge will redound to the detriment of the company. From a practical standpoint having regard to Mr. Helm's unique position in the company for all practical purpose the financial liability of the company would be his financial liability, unless, of course, the company is insolvent. In any event the learned trial Judge made no monetary award under this head ie. failure to monitor cash flow.

Conclusion

[57] The Respondents pleaded contract is that [paragraphs 5 and 6 of the Statement of Claim] they employed the Appellants to construct a house for them. The Appellants agreed with the Respondents that they would prepare plans for the residence and that the total costs of the said residence including fees for the plans and drawings should not exceed $350,000.00.

[58] The Respondents also pleaded that in breach of the warranty, the Appellants allowed the costs of the construction of the residence to exceed $350,000.00 in that by 27th December, 1991 a sum in excess of $570,000.00 had been expended in the construction of the residence.

[59] Apart from these two amounts pleaded by Respondents nowhere is there any other amounts pleaded.

[60] At paragraph 24 I have dealt with the $350,000.00 and at paragraph 36 I have dealt with $570,000.00. As I have said above the learned trial Judge awarded damages payable to the Respondents calculated or took the approximate cost of completing the house $700,000.00 which was a guesstimate. This figure was neither pleaded nor proved. He also took into account "the guaranteed final cost of construction" as $504,632.00. Again this amount was not pleaded nor was there any proof of this amount. In order to arrive at the liability of the Appellants the leaned trial Judge subtracted the latter from the former and arrived at a figure of $195,368.00. Then he subtracted $40,000.00 which was for charges revisions and modification to design by clients. The learned trial Judge arrived at a net sum of $155,368.00 payable to the Respondents as damages.

[61] Having regard to the foregoing it is obvious that the learned trial Judge had no basis in law for accepting the two figures of $700,000.00 and $504,632.00. I am therefore driven to one option and that is to allow the appeal.

[62] The appeal is therefore allowed. The Judgment of the learned trial Judge is hereby set aside in respect of the claim against the Appellants. There will be costs in the Court below and this Court agreed in the sum of $45,000.00 for the Appellants.

Albert Redhead
Justice of Appeal

I concur

Sir Dennis Byron
Chief Justice

I concur

Satrohan Singh
Justice of Appeal