ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO ANUHCV1997/0135

BETWEEN:

KEITHROY PHILIP

Claimant

and

WALTER ARMSTRONG
HEATHER ARMSTRONG

Defendants

Appearances:

Kendrickson Kentish for the Claimant
Clare Roberts for the Defendant

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2003: May 14, 22, 26, 27, July 22, August 19
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JUDGMENT

[1] **MITCHELL, J**: This is a building contract dispute between a builder, Mr Philip, and the husband and wife Defendants, Mr and Mrs Armstrong, for whom he built the house. He claims that they wrongfully brought to a premature end their written contract for his supply to them of materials and labour, owing him a balance. On the other hand, they claim that it was an oral labour-only contract and that he had wrongfully discontinued performing it and that he has been paid in full for all the work that he had done. The first question for the court to determine is whether the contract was in writing or oral. The second is whether it was a labour-only contract or a contract for both labour and materials. The third is whether it was Mr and Mrs Armstrong or Mr Philip who wrongfully broke the contract. The fourth is how much, if anything, do the Armstrongs still owe Mr Philip. It really depends on which of their two versions of the history of the transaction is believed.

[2] Having heard the evidence, the following facts are established. Mr and Mrs Armstrong are Antiguans who had lived and worked in Canada for many years. Since their return to live in Antigua in about the year 1995, they have built up a factory at Paynters. They have also built their home at McKinnons. They had a variety of different building contractors work on these two projects over the years. Mr Philip worked on both, but the dispute relates only to the home at McKinnons. Their experiences with some of these building contractors has not been good, and they now have a very jaundiced view of local building practices.

[3] There is in evidence a document that Mr Philip claims was the building contract between the parties. It was prepared by Mr Philip and signed by all three of them. It was dated 8 July 1995. This is the contract upon which Mr Philip sues. It is not a very detailed document. It sets out the stages of construction and the sums to be paid for each stage. It says that Mr Philip will build a house for the Armstrongs providing both labour and materials, at a fixed contract price of $649,296.00, and payable in ten stages. The stages are described in only very general language. The Armstrongs were adamant that the document should be ignored. They explained that in their view it had never been intended to be a building contract. Their recollection was that it was nothing but a "draw-down schedule" prepared at their request by Mr Philip for them to take to their bank when they were negotiating for a loan to pay for the construction. Mr Philip denied that it was intended to be a mere draw-down schedule. He testified that it was in the complete form of a building contract that he is accustomed to prepare for all his customers. Whatever Mr Philip's views on what a building contract should look like, it is immediately obvious that the document in question is missing many of the terms that any experienced builder would normally insist should be included. There is no clause relating to performance. It does not avert to the consequences of non-performance. There is no mention of plans or specifications, though the evidence is that in the case of the Armstrongs' home there were plans and specifications prepared by the Armstrong's architect. Nor does it contain the date of commencement or of completion. It contains no provision for an architect or other supervisor to approve the quality of construction or to certify the stages of construction. There is no provision for deviations from the plans or specifications, for fixing the cost of extras, or for settling disputes between the parties if any should arise.

[4] It is not disputed that the Armstrongs borrowed funds from a bank to pay for the construction. The court takes notice that it is general banking practice, before a bank disburses funds for the payment of a stage, for the appropriate banking officer or supervising architect to be required to visit the construction site and certify to the bank that the appropriate stage has indeed been completed and that payment is due under the contract. What was meant by the term "a draw-down schedule" was not explained by the Armstrongs, but they clearly meant it to be something other than a contract. It appears they considered it to be a timetable or schedule for draw-down or payment out of the loan proceeds to be made by the bank. The court asks itself the question, would a bank properly advised agree to give a construction loan on the basis of a draw-down schedule without there being in place a binding building contract between the borrower and the builder? From general commercial experience, the answer must be no. A bank properly advising itself concerning a substantial loan to be made for construction purposes would insist on seeing and approving the building contract. While this contract did little more than set out the parties, the price, and in very general terms the work to be done, it was a signed contract. The loan in this case, or at least the contract sum, was a substantial one. The bank would have required the Armstrongs to produce a signed agreement between the parties. Whether the bank was wise in this case to have accepted so inadequately drafted a building contract is not an issue in this case. The only dispute is between the parties to the contract. The general principle is that a party of full age and understanding is normally bound by his signature to a document, whether he reads it or not. This principle is subject only to vitiating factors such as "non est factum," fraud, mistake and undue influence. None of these issues arise in this case.

[5] The testimony given by the witnesses, particularly in cross-examination, on the issue whether the contract was for labour only or for labour and materials was revealing. Mr Philip had disclosed and produced his receipts to show that he had purchased the materials for the construction up to the time that he left the site. He had a convincing explanation for those few receipts that Mr and Mrs Armstrong and their witness, Ms Christian, were able to produce. He had permitted them on specific occasions to purchase

particular materials, to be debited from the contract price. Mrs Armstrong testified that each week Mr Philip presented a bill for labour which she and her husband paid to him. Mr Philip denied that, and instead produced evidence of substantial lump sum payments. Mrs Armstrong did not produce one of the alleged weekly labour bills or cancelled cheques or other evidence of payment of the alleged bills for labour. There was no evidence of relatively small weekly payments that could have been ascribed to weekly labour bills. I do not believe that Mr Philip submitted bills for labour only weekly or otherwise. I am satisfied that the Armstrongs did not generally purchase materials for the construction. I am satisfied that the document in evidence was the building contract between the parties, and that it was a contract for labour and materials. Mr and Mrs Armstrong are bound by the terms of the contract they signed.

[6] The parties eventually fell out, and Mr Philip withdrew from the site in February 1996. I am satisfied that the reason the contract came to an end is that the Armstrongs for whatever reason refused or failed to pay the stage payment when it was due. They had habitually made late stage payments, and small amounts were owing on some of the earlier stages when the Mr Philip withdrew from the site. I accept that the reason why Mr Philip withdrew from the site was that the stage payment was not forthcoming. He had intended to return to the site when the next payment was made. The payment was never made, and Mr Philip never returned. I am satisfied from the figures pleaded and proved that Mr Philip was owed the sum of $13,500.00 on the preceding stages.

[7] The question of certain extras arose. In December 1995, Mr Philip had submitted bills of $18,060.00 and $18,975.00 for extras done at the request of the Armstrongs in relation to the construction of a cantilever and the extension of a bedroom. Needless to say, these amounts have not been certified by any architect. Mr Philip does not make a claim in *quantum meruit* for payment of a reasonable sum for the work done; he claims only the two specific sums he charged the Armstrongs. The Armstrongs admit the two items of extra work were done, but object to the bills as being unreasonable. They have produced no evidence to suggest that the charges are unreasonable. They also say that nothing further is owed to him. In February 1996 after Mr Philip had stopped work, the Armstrongs

had paid Mr Philip a further sum of $18,000.00. They say that he had earlier been paid in full for his labour on the contract, and that this last payment was an advance payment for the plastering stage, which he had never commenced. They do not claim a refund. Mr Philip says that this payment was part-payment on his bills for extras done that he had submitted in December, and not a deposit on the next stage. I am satisfied from the evidence, not least the admission made by the Armstrongs through their letter to Mr Philip stating that they were prepared to pay for the extras in stages, that these sums were due, and that the payment was for the extras and not an advance payment for the plastering. If the Armstrongs had not put in writing their agreement to pay for these extras, Mr Philip would have been entitled to nothing. In the circumstances, however, Mr Philip is entitled to the balance of $19,035.00 he claims on his extras.

[8] As Mr Philip had done before when payments were overdue and he ceased work on the site, he had left his tools and materials in the construction shed he had built for storage purposes, so that they would be available to him when he resumed work after he was paid. The Armstrongs deny that he left any tools or materials of any value behind on this occasion when they employed another builder to complete the building. They say that what materials he left on the site belonged to them and, if any belonged to him, it was only junk which they had disposed of. Mr Philip had attempted at an early stage to return to the site with his solicitor to recover his materials, but Mr Armstrong had ordered them off. The Armstrongs had no inventory taken before they disposed of the tools and materials, and they must take responsibility for the consequences. In October 1996, Mr Philip produced a detailed inventory and costing, and there is no reason to doubt his testimony that the items were worth a total of $12,504.64.

[9] Mr Philip also claims for loss of profit. It is settled law that the basic remedy in breach of contract cases is restitution. The successful claimant is entitled to compensation both for actual damage and also for lost profits. In this case Mr Philip has set out in his claim and in his evidence a calculation of lost profits of $34,405.00. He has not been challenged on the accuracy of this calculation. He is entitled to this sum.

[10] Mr Philip has also claimed interest at 13.5% per annum from the date of the writ, and his costs. He has explained that this rate was the commercial rate at which he would have had to borrow the money. The only authority produced to the court on the question of interest payable on a judgment sum in a case of contract is the 1996 unreported decision of the Court of Appeal delivered by Liverpool JA in the St Kitts case of **The Saint Christopher Club Ltd v Construction Services Ltd [St Kitts Civ App 5 of 1994]**. The court has a wide discretion under the **Eastern Caribbean Supreme Court Act, Cap 143, s.27**, to award interest. The general principle is that unless there are special considerations affecting the particular case, this discretion should be exercised in such a manner that the successful party should be compensated by the losing party for having kept him out of money to which he had been entitled at or before the commencement of the proceedings. The approach of the courts has been to compensate successful parties by awarding interest at a rate which broadly represents the rate at which they would have had to borrow the amount recovered over the period for which interest is awarded. This matter is a simple case of work done and materials supplied under a contract, and no special considerations arise. Mr Philip is entitled to the exercise of the discretion in his favour in relation to the interest he claims. The legal costs of this action have been agreed at $5,000.00.

[11] In the circumstances, I would award judgment to Mr Philip and order the Armstrongs to pay him the sums of:

(a) $19,035.00 as the balance due on the extras;

(b) $13,500.00 as the balance due under the contract;

(c) $12,504.64 for materials and tools converted by the Armstrongs to their own use;

(d) $34,405.00 loss of profits;

all with interest at the rate of 13.5% from the date of issue of the writ until the date of judgment.

Mr Philip is also entitled to his costs of this action in the sum of $5,000.00.

Don Mitchell, QC
High Court Judge