ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO ANUHCV1995/0273

BETWEEN:

DAVID CARLISLE

Claimant

and

CONRAD STEVENS
CARLTON ROBERTS

Defendants

Appearances:
Gerard Watt QC for the Claimant
E Ann Henry for the 1st Defendant

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2003: July 25, September 24, October 13
2004: March 31, April 7
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JUDGMENT

[1] MITCHELL, J: Mr David Carlisle is a builder in Antigua. He contracted to build a four-storey office building for Dr Conrad Stevens according to the plans drawn by and under the supervision of Mr Carlton Roberts, an architect. The building contract included a clause that Dr Stevens would pay any balance due on receipt of a final certificate issued by Mr Roberts. When the building work was complete, Mr Carlisle requested the final certificate. He requested it both orally and in writing. Mr Roberts failed to issue it. He has advanced no explanation for his failure to act.

[2] Mr Carlisle has sued them both. He claimed against Dr Stevens a balance due. Part of this is the "retention" or final payment of $22,500.00. Part is the agreed sum of $7,400.00 for extras. He claimed against Mr Roberts damages for his failure to issue a final

certificate, and for an order compelling him to inspect the work and to issue the final certificate. By the time of the trial that last was moot. Dr Stevens filed a defence in which he conceded that neither the amount of the final payment due under the contract nor the extras had been paid, but denied that he owed any money. On Mr Roberts not filing and serving a defence, Mr Carlisle has entered a default judgment against him for damages and costs to be assessed. Mr Carlisle has not yet applied for assessment.

[3] Dr Stevens' defence was that he did not owe any money, first, because of defective and unfinished work by Mr Carlisle, and, second, because he had not received the required final certificate from Mr Roberts. Mr Carlisle had on several occasions requested of him particulars of the alleged defects and unfinished work. Dr Stevens failed to produce any particulars. He failed to do so even after a judge had ordered him to do so. For that failure, that part of his defence alleging defects and unfinished work has now been struck out. There is no longer any issue relating to either defective work or unfinished work. It is assumed that there is no complaint with any of the work done by Mr Carlisle. Mr Carlisle has fully completed the work and the contract has been fully performed.

[4] Dr Stevens is left with only one defence to Mr Carlisle's otherwise uncontraverted obligation to pay the balances claimed. It is that Mr Roberts had never issued the necessary final certificate. His counsel's submission was that the issuing of the final certificate by the supervising architect was a condition precedent to Mr Carlisle having the right to demand the final payment, and the certificate not having been issued, Mr Carlisle had no right to bring these proceedings. The relevant clause is clause 5 of the contract. Let us look at it. The applicable part of it states:

> Final payment shall be due 90 days after substantial completion of the work, provided that the work be then fully completed and the contract fully performed. Upon receipt of a letter or written note that the work is ready for final inspection and acceptance, the architect shall make such inspection and when he finds the work acceptable under the contract and the contract fully performed, he shall promptly issue a final certificate over his own signature, stating that the work

provided for in this contract has been completed and is accepted by him under the conditions thereof, and that the entire balance found to be due the contractor and noted in the said final certificate is due and payable.

[5] All types of certificates may expressly be made a condition precedent to payment[1]. Whether a certificate is a condition precedent to payment is a question of construction. Where the architect or engineer exercises skill and judgment in making the certificate, the courts have leaned towards a view that a certificate is a condition precedent to the contractor's right to sue[2]. The general principle is that where a building contract makes the issuance by an architect of a final certificate a condition precedent for the payment by the owner, the non-issuance of it in the absence of proof of fraud or collusion between the owner and the architect precludes the building contractor from instituting a claim against the owner for monies due in respect of which the final certificate should have been issued[3]. If the refusal to certify is caused by a mere unreasonableness or capricious exercise of the discretion vested in the architect or engineer, the contractor has neither a cause of action against the employer, nor grounds for equitable relief[4]. The law is that generally, where a certificate is a condition precedent, even though the works are complete the contractor cannot recover the contract price in the absence of the certificate.

[6] As with all legal principles, this is not an unqualified rule. It is not absolute. There are several exceptions to it. There are cases where the certifier may be disqualified, or the case may be one in which the need for a certificate can be dispensed with. The first disqualification is disqualification for interest. This will arise where the certifier has a sufficient interest in the outcome of his decision to create a likelihood of bias. In such a case, he will be disqualified from exercising jurisdiction[5]. The second is disqualification for fraud or collusion. Neither the employer nor the contractor will be bound by a certificate given or failed to be given as a result of collusion between certifier and one of the parties.

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[1] Halsbury's Laws of England, 4th Ed, Vol 4, para 428
[2] ibidem
[3] Eaglesham v McMaster [1920] All ER Rep 674; Neale v Richardson [1938] 1 All ER 753
[4] Emden and Watson on Building Contracts, 6th Edition, page 149.
[5] Halsbury's Laws of England [supra], para 436

In such a case, the certifier is disqualified[6]. The third is abuse or excess of jurisdiction by the certifier. The certifier abuses his powers if he persistently refuses to certify or if he expressly refuses to come to a decision on a matter over which he has jurisdiction by virtue of the contract[7]. In these circumstances, the contractor can recover without a certificate. It seems that the contractor may recover where in refusing a certificate a certifier has not conducted himself with impartiality.

[7] In our case, Mr Roberts has not given any reason for his failure to issue the certificate. He has simply not responded to Mr Carlisle's several requests for the certificate. Those requests were spread out over several months. Based on that, counsel for Mr Carlisle relies on the Canadian High Court case of Alsip v Robinson (1919) 18 WLR 39. In that case, the contract provided that it was a condition precedent to payment that the architect should issue either the certificate or a written statement showing in what respect the work was incomplete within 72 hours of being notified by the contractor that the work was complete "unless the architect is in default in issuing the same." The architect did not issue the final certificate for 11 months. The contractor sued. The owner asserted that the issuance of the certificate was a condition precedent to payment. The court determined that the delay of 11 months was inordinate and amounted to default within the language of the contract. The court ruled, in the light of the particular phrasing of the clause in that contract, that the certificate had been dispensed with as a condition precedent to the contractor's right of recovery. The language of clause 5 in our contract is quite different. There is no time limit for the issue of the architect's certificate, and also, the condition is not qualified by a provision for default by the architect. There is no general rule that the court will disregard the requirement for a certificate where there has been wrongful delay or refusal to certify.

[8] Counsel for Mr Carlisle cited the Canadian high court case of Lawrence v Kern 14 WLR 337 as authority for the view that if the architect refuses to certify in pursuance of the contract, and the owner remains passive and so retains money which belongs to the

[6] ibidem, para 437
[7] ibidem, para 440

contractor, that would be prima facie evidence of collusion. In that case, the building contractor sued the owners for monies due under the contract when no certificate had been issued by the architect, and the issuance of the certificate was a condition precedent to payment. The building contractor alleged collusion between the owners and the architect and urged on the court that the owners remaining passive amounted to collusion. Wetmore CJ sitting alone noted in his judgment that he could find no case where it had been held that a builder was entitled to recover without the certificate of the architect when the contract provided for such a certificate as a condition precedent to payment, unless it is established that there was collusion between the owner and the architect. He found that there was no evidence to establish collusion between the owner and the architect. He dealt with the submission by the contractor that the fact that the owner remained passive in face of the failure of the architect to certify should be treated as evidence of collusion. He opined that, at best, the owner's remaining passive could be treated only as prima facie evidence of collusion. He then considered the evidence before him in the case and came to the conclusion that the evidence did not support a finding of collusion. The case is not authority for a general rule that if the architect refuses to certify in pursuance of the contract, and the owner remains passive and so retains money which belongs to the contractor, that would be sufficient evidence on which to base a finding of collusion.

[9] In our case, Mr Roberts had been paid for his services by Dr Stevens. Dr Stevens had employed him. Dr Stevens had it in his power to request Mr Roberts to issue the final certificate, subject to such faults and defects as Mr Roberts using his skill and training determined to exist and was prepared to certify. Or, he could have requested Mr Roberts to give Mr Carlisle written reasons why he was not issuing the final certificate, or what corrections had to be made before it could be issued. He could not simply stand mute, do nothing, and rely on the failure of his architect to act professionally. Mr Roberts did not give any reason for his failure to issue the certificate. He has simply not responded. Based on these facts, I might have been prepared, if it were necessary or possible, to find prima facie evidence of constructive collusion due to the passivity of Dr Stevens in the face of his architect's failure to act. Counsel for Dr Stevens has pointed out, however, that Mr Carlisle has not pleaded collusion between Dr Stevens and Mr Roberts. The

consequence was that Dr Stevens had not led evidence to establish that there had in fact been no collusion between himself and Mr Roberts. Unless collusion was pleaded by Mr Carlisle, the court cannot now make a finding on it. I reluctantly conclude that Mr Carlisle cannot now rely on an inference of collusion. Nor, for completeness, can he rely on any question of bias or interest on the part of Mr Roberts. There is nothing in either the pleadings or the evidence to suggest bias or interest.

[10] On the issue of abuse of jurisdiction by the architect in persistently refusing to issue the certificate in this case, counsel for Mr Carlisle relies on the UK case of Neale v Richardson [1938] 1 All ER 753. In that case, the contract provided that the builder was to be paid by instalments when a certificate was given by the architect. In case of disputes, the architect was to act as arbitrator. A dispute arose and the architect refused either to arbitrate or to issue a certificate. The contractor sued the owner for the balance due. The owner took no steps to appoint another arbitrator or to stay the action, but relied on the absence of the certificate as a bar to recovery. It was held by the Court of Appeal that given the wording of that particular clause in the contract, it was the duty of the architect, acting as arbitrator, to decide whether the unissued certificate ought to have been issued. He having failed to do this, the lack of a certificate was no bar to the contractor's right to recover the balance of the money due. As the editorial note to the head-note makes clear, in this case there was a submission of disputes to the architect as arbitrator. In such a case, the architect having refused to act as arbitrator, the proper course for the owner, if he wished to resist an action by the contractor, was to proceed to the appointment of a new arbitrator or to apply for a stay of the proceedings in the action. He had failed to do so, and judgment was given against him. It is difficult to see how this case assists Mr Carlisle. It does not change the general rule that apart from fraud or collusion the issue of a certificate by the architect is a condition precedent to an action to enforce payment.

[11] From the wording of clause 5, I am satisfied that the issuing of this final certificate was an unqualified condition precedent to Mr Carlisle's right to sue Dr Stevens for the retention money of $22,500.00. The claim for that sum must fail. Mr Carlisle must hope to recover that amount or a part of it from Mr Roberts when his damages and costs come to be assessed. It is conceded by Dr Stevens that the amount of $7,400.00 for the extras has not been paid, and that he has no justification for having withheld payment. The certificate did not apply to it. Mr Carlisle is entitled to judgment for that sum, and for a nominal amount which I assess at $2,500.00 as general damages for breach of contract. As this court is not aware of the situation of Mr Roberts, no directions will be given at this stage for assessment of damages against him. It will be for Mr Carlisle to make an application for assessment, which on being served on Mr Roberts will bring him before the court for the giving of the appropriate directions.

[12] The question of costs arises. Counsel for Dr Stevens submits that under Rule 65.5 of CPR 2000 inasmuch as Dr Stevens has conceded the claim in respect of the amount of $7,400.00, Mr Carlisle is entitled to $2,220.00. She submits that inasmuch as Mr Carlisle has failed in respect of the sum of $22,500.00, Dr Stevens is entitled to costs of $6,750.00. Counsel for Mr Carlisle leaves the question of costs to the court. I take into account the fact that no proper reason was given to Mr Carlisle for the failure to pay him after all these years the amount due to him for the extras. He should have been paid it long ago. On balance, in exercise of the discretion as to costs given to the court by the rules, no order for costs is made.

[13] There will accordingly be judgment for Mr Carlise against Dr Stevens for:

1. Special damages of $7,400.00;

2. General damages of $2,500.00;

3. interest on these sums at the rate of 5% per annum from the date of the filing of the writ;

4. No order as to costs.

Don Mitchell, QC
High Court Judge