SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SUIT NUMBER 666/1998

BETWEEN:

RUFINUS BAPTISTE

Plaintiff

AND

ANTOINE MURRAY

Defendant

Appearances:

Mr. Vern Gill for Claimant
Ms. Beverly Downes for Defendant

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2005: January 17, 21

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JUDGMENT

Introduction

1. SHANKS M: The Defendant owns 30.56 acres of development land at La Feuillet in the Quarter of Castries. In March 1996 he received approval from the Development Control Authority (DCA) for the sub-division of the land into 99 lots. The approval was subject to a condition that a performance bond be posted in respect of the provision of infrastructure (including roads) or that the infrastructure be installed. The approval was based on a plan showing the proposed subdivision dated September 1995 prepared by Fergus Gilbert which indicated that there would be three phases to the development. Phase one included 30 lots numbered 1 to 34 but excluding lots 27, 29, 31 and 33 (this was the source of some confusion

at trial and apparently from the outset). Each of the lots was shown as larger than 8,000 square feet.

2. The Claimant is a licensed Land Surveyor who had worked for the Defendant previously. In July 1996 the parties agreed that the Claimant would carry out survey work in relation to phase one. It was certainly agreed that the Claimant would be paid a total of $40,800.00 including a deposit of $4,000.00 for his work but the precise scope of that work and the timing of the payment of the balance of the fee are in issue.

3. The Claimant carried out a survey between 10 August and 1 September 1996 and in due course a revised plan dated 25 November 1996 was presented to the Defendant. The Defendant made a further payment of $5,000.00 to the Claimant in December 1996 but nothing else has been paid. The Claimant therefore started this claim in July 1998: he claims $30,000.00 being $39,000.00 less the $9,000.00 paid (it is not clear why the basic claim was reduced from $40,800.00 to $39,000.00). In his defence the Defendant says that the work done by the Claimant was unacceptable and that he is not therefore entitled to be paid. The Claimant says in response that even if this was so the Defendant accepted the work and must pay for it accordingly.

4. The matter finally came to trial in January 2005. The parties and Mr. Wendell Phillips, an expert surveyor instructed by the Defendant, gave evidence. In general I found the Defendant to be a more credible and convincing witness than the Claimant. Mr. Phillips was a perfectly good witness but, as I shall explain, his evidence did not assist me because it became apparent that his instructions were flawed.

5. The issues to be resolved are as follows:

(1) What were the precise terms of the contract between the parties?
(2) Was the work carried out by the Claimant in conformity with the contract?
(3) If not, has the Defendant nevertheless accepted the work?

Contractual Terms

6. There is no doubt that the Claimant was provided with the Gilbert plan and he accepted that he knew that the Defendant wanted lots in excess of 8,000 square feet and that there was enough land comprised in phase one to accommodate the requisite number of lots of this size. In those circumstances it seems to me clear that there was a contractual obligation on the Claimant to produce a survey which included 30 lots in excess of 8,000 square feet and which followed the general lay-out of the Gilbert plan.

7. Although the Gilbert plan showed an access road to the north-west of the lots as part of phase one the Claimant denied that he had any obligation to survey the access road. It was accepted on both sides that there was no express discussion about whether the road was included in the work and the Claimant made the point that surveying a road is different to surveying lots. Given that the access road was shown on the plan as part of phase one and that the infrastructure required by the Development Control Authority (DCA), would to the knowledge of the Claimant have included the provision of the access road and given that the surveying of the lots would necessarily have involved the surveying of the road running through the lots themselves, I am satisfied that the contract must be taken to have included an obligation by the Claimant to survey the access road as well.

8. The Claimant relied on an offer letter dated 25 July 1996 in which he stated that the balance of the money after the deposit would "be collected after the survey plan is produce prior to be lodged (sic)". The Defendant denied receipt of this letter and stated that he and the Claimant only ever communicated orally. He said that the agreed payment terms were that the balance would be "paid in instalments as and when the lots were sold after completion of survey and lodging of the plan". On balance I am not satisfied that the Defendant did receive the letter of 25 July 1996 but nor do I think that the Claimant would have agreed to take on such a big job on the basis of such a vague arrangement as to payment which might never materialize. I therefore find that the time for payment was on completion of the Claimant's work, that is when he had carried out his survey properly and produced

an acceptable plan: I make this finding either on the basis that the parties must have expressly agreed such a term or that, in the absence of express agreement, it would be implied in any event.

9. I therefore find that the terms of the contract between the parties included the following:

(1) the Claimant was to produce a survey which provided for 30 lots in excess of 8,000 square feet;
(2) the survey was to follow the general lay-out of the Gilbert plan;
(3) the survey was to include the access road to the north-west;
(4) payment of the balance of the price was to be made on completion of a proper survey and production of an acceptable plan.

Was the work done by the Claimant in conformity with the contract?

10. Nine of the 30 lots produced in the initial survey plan were smaller than 8,000 square feet (numbers 4, 13, 14, 15, 16, 17, 18, 19 and 20), some significantly so. In the revised plan lots 17 and 18 and 19 and 20 were combined to produce two lots of around 13,000 square feet but there were still five lots under 8,000 square feet and only 28 lots in all. There is no doubt that the access road to the north-west was not surveyed. It is also clear that the survey done by the Defendant did not correspond with the Gilbert plan in that there was provision for a road running along the northern boundary of lots 1 and 10 within the phase 1 land when there was no such provision in the Gilbert plan (this had the effect of removing a road width from the land available for lots) and the open space provided by the Claimant was 1 ¾ acres as opposed to 1 ½ acres shown on the Gilbert plan (this had the effect of removing ¼ acre from the land available for lots).

11. It was also part of the Defendant's case that the road within the area covered by the lots as surveyed by the Claimant was on the wrong alignment with a similar result; however the evidence for this was provided by Mr. Phillips who had been asked to compare the road shown by the Claimant with that shown by a plan produced by the Defendant under a subsequent scheme which was presented to

or approved by the Development Control Authority (DCA) in 2002; since Mr Phillips had not been asked to compare the Claimant's work with the existing Gilbert plan I did not feel able to accept this part of the case.

12. In any event, it is clear that the Claimant's survey and plan were in breach of the contractual requirements in that:

(1) it provided for five lots smaller than 8,000 square feet and for two fewer lots than the Gilbert plan;
(2) it did not include the access road to the north-west;
(3) it did not follow the general lay-out of the Gilbert plan in that there was a road along the northern boundary of lots 1 and 10 and the open space was significantly larger.

I have no doubt that, subject to the next issue I must resolve, these breaches were sufficiently serious for the Defendant to be entitled to withhold payment for the entire job.

Has the Defendant nevertheless accepted the work?

13. The Claimant's case was that when he presented his initial survey plan to the Defendant reviewed the plan and asked him to adjust four of the lots by combining lots 17 and 18 and 19 and 20 to create two larger lots. This the Claimant did by producing his plan dated 25 November 1996 which is otherwise identical to his original plan. The Claimant says that apart from this matter the Defendant did not indicate any problem with his work until after the claim was started.

14. There is no doubt that thereafter the Defendant paid him a further $5,000.00 in December 1996. The Defendant also had a road cut following the alignment of the road shown by the Claimant's plan and he employed the Claimant on behalf of his company National Enterprises Ltd on another job relating to a lot sold to a Mr. Soni for which the Claimant was paid promptly in 1997. The Claimant says his work was accepted and the complaints now relied on have only now been raised to resist payment.

15. The Defendant's case is that when he saw that some of the lots were too small and that the access road had not been surveyed and that the survey was not in accordance with the plan approved by the Development Control Authority (DCA) he told the Claimant that he would not accept the plan and asked him to re-do the work and produce a survey in conformity with the approved plan. He says that the Claimant went away and some time later presented him with the plan dated 25 November 1996. This surprised him and he again objected and asked the Claimant to re-do his work. The Claimant told him he was under pressure and trying to pursue his studies in the United Kingdom but promised that the work would be done properly.

16. The Defendant said that he was on good terms with the Claimant and still wanted him to complete the job; he knew that re-doing the survey would be expensive for him and for this reason he gave him the payment of $5,000.00 and employed him to do the job for National Enterprises Ltd. He did have work done on a road which followed the position shown on the Claimant's plan: this was on the basis of the Claimant's assurance that the position of the road would not affect his ability to re-do the survey to provide lots of the correct size.

17. The Defendant said that his falling out with the Claimant happened in 1997 because he discovered that the Claimant had misled him about the lodging of a plan in relation to the National Enterprises Ltd job and the Claimant was embarrassed by this and would not return his calls. Even after this he continued to hope the Claimant would carry out the work (based on discussions with his lawyer) until he abandoned the scheme shown on the Gilbert plan altogether in 2000 and pursued a different scheme. He never accepted the Claimant's work.

18. I have found it difficult to decide whose version of events I prefer but on balance I have come down in favour of the Defendant's. As I have indicated I found him a more convincing and reliable witness in the box. I also found the Claimant's assertion that the Defendant asked him to combine lots 17 and 18 and 19 and 20 an incredible one: this action seemed to me a clear case of a professional who has not done a proper job trying to correct it with the minimum of time and effort.

19. I have taken account of the points forcefully made by Mr. Gill and in particular the fact that the Defendant appears not to have been in a position to proceed with the original scheme for reasons that must have been extraneous to the Claimant's work (after all he had only paid the Claimant $9,000.00 and could have employed a new surveyor to do the job properly); but the fact remains that the Claimant did not do the job he should have done (precisely why is not something I need to resolve) and in those circumstances he cannot expect to be paid

Result

20. Accordingly the Claimant's claim is dismissed. Unless the parties submit otherwise I shall order him to pay the Defendant's costs at the prescribed rate for a claim of $30,000.00.

MURRAY SHANKS
High Court Judge