THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA

CLAIM NUMBER SLUHCV 1999/413

BETWEEN:

CLIFF EDWIN

Claimant

AND

MONICA DAVIS

Defendant

Appearances:

Mr. Alvin St. Clair for Claimant
Mr. Bota Mc Namara for Defendant

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2005: February 7
February 25

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JUDGMENT

Introduction

1. SHANKS J: The Claimant is a builder. In October 1998 he agreed to build the Defendant a house at Bexon for a total price of $259,780. In March 1999, when he had carried out a substantial part of the work and had been paid $160,158, the Defendant terminated the contract. He claims the balance of the price by way of

damages. The Defendant says she was entitled to terminate the contract and counterclaims the sum of $45,000 (which she says is the difference between the amount paid and the value of the work actually done) and damages for poor workmanship.

2. Unfortunately the case has taken over five years to come on for trial. I heard evidence from the Claimant and his expert engineer Adrian Dolcy and from the Defendant, her expert Gilbert Fontenard, her son Frederick (who was present when the agreement was made), and a friend Joseph Samuel (who was also present when the agreement was made and on site occasionally thereafter). I also received helpful written submissions from counsel after the trial.

3. I found the Claimant a careful witness who was prepared to make admissions when appropriate. The Defendant was obviously not a businesswoman and I can imagine that her wishes may not have always been clear to herself let alone to others. Her son had a very peripheral role and his evidence was of little assistance. Mr. Samuel himself is a builder by trade; he seemed a generally reliable witness who had a good grasp of what was going on. Both the experts were exemplary in the way they gave evidence. Although their reports did not strictly comply with all the requirements of CPR 32 they complied fully with the spirit of those provisions. In light of my assessment of the evidence I make the following findings of fact.

Facts

4. The Defendant had lived in the United Kingdom most of her life. She wished to build a retirement house in St. Lucia. She had some back problems and needed to have a house to suit her needs. It is clear (though no part of her evidence) that she owned a plot of land in Bexon and that she asked an architect to design a house for the plot. Drawings were provided by a C. Brown in April 1998 (see pages 81 – 88 of the trial bundle).

5. She was introduced to the Defendant in September 1998. She says she explained to him that she did not want an "ordinary builder" but someone who she could work with to produce her desired retirement house. It is not clear to me exactly what the significance of this allegation is and I do not believe it can have any bearing on the contractual position. She says the Defendant assured her he was experienced and could do what she wanted. She gave him the architect's drawings so he could study them and estimate costs and a meeting was arranged for 5 October 1998, which was attended by all the lay witnesses in the case.

6. The meeting lasted four to five hours. There must have been detailed discussions about the plans and estimates. The Defendant says she explained various changes that she required from the plans, in particular that two of the bedrooms should have a concrete roof for hurricane protection, that there should be a reduction in the number of window in the bedrooms from three to two (larger) ones, that there should be additional electrical outlets, that there should be a third balcony, and that Caribbean Metal Ltd should install the roof so as to get a guarantee. She says she made it clear that nothing was to be done without her express permission. The Claimant remembered only a discussion about changes to the roof arising from the Defendants' indication that the roof as shown on the plans was too "bulky". He accepted that the Defendant indicated that there were some things on the plan she was not happy with and that they agreed to work together on any variations as they went along.

7. Mr. Samuel and Frederick's witness statements both say that there was specific agreement on the changes that the Defendant had indicated she wished at the meeting. I do not accept this evidence. It was clear that Frederick was not sufficiently involved to know what had or had not been agreed. As for Mr. Samuel, I think he must have been mistaken. His evidence on this was not really consistent with the Defendant's own. Further, it was common ground that the Claimant took no notes and that contracts were signed at the end of the meeting based on the estimates he had made which were themselves based on the plans already in existence. None of

this is consistent with a firm agreement having been reached as to variations at the meeting.

8. As indicated it is not disputed that the Defendant signed two contracts at the end of the meeting. The first was based on a letter of estimate dated 4 October 1998 (see page 46) which was to build "under existing building as on plan". This was apparently an idea of the Claimant's. In the event the estimate was only accepted and signed for up to the "floor slab" stage at a price of $24,030. The second was a more formal contract. By it the Claimant undertook to build a house for a total amount of $235,750 and to complete the work in six months. Phases were shown for payment of various amounts. There was no express mention of the plans in the contact but, given the reference to them in the other document and the fact that the figures had clearly been prepared on the basis of the plans, it seems to me that the clear implication is that, subject to any agreed amendments, the Claimant was agreeing to build a house in accordance with the plans. The Defendant says in her statement that she only signed the agreement "after much co-ercion". I entirely reject that evidence, which was contradicted not only by the Claimant but by Mr. Samuel who said in evidence that the Defendant signed the contract willingly having gone through it with him.

9. Work on site started the day after the meeting. The Claimant described how he laid out the position of the house as shown in the plans on site and the Defendant immediately made a decision to turn it around. The Defendant denied this and maintained that the Claimant made a unilateral decision to change the position of the house which she did not approve. I am afraid I again reject the Defendant's evidence about this. It is not credible that a builder would make such a fundamental change from plans without being told to do so when, so far I can see, he had nothing to gain by doing so. I also note the Defendant's own expert's view that the new position was an improvement on what was shown in the plans.

10. The Defendant left for the United Kingdom shortly after this, leaving her cousin Marcia Cherry as her attorney looking after her affairs in St. Lucia. She says in her

statement that she gave instructions to the Claimant before she left that he should only work up to completion of phase 1 of the main contract (floor slab) and do nothing further until she returned to St. Lucia. Again, I do not accept that evidence. I do not see why a builder who had just entered into an agreement to finish a house in six months would start work and at the same time accept instructions to stop work at an early stage for an indefinite period.

11. The bulk of the work on the lower floor (except the laying of the floor slab) and phase 1 of the main agreement had been completed and paid for by early December (see page 89 – 91). The Claimant then started to put up the block work. He had constructed the outside wall to the level of the ring beam when he received a call from the Defendant who told him to stop work so she could come to St. Lucia and see where everything should be positioned. He stopped work for three weeks before the Defendant arrived in St. Lucia.

12. The Defendant returned to St. Lucia on 10 January 1999. It is common ground that she complained about the position and number of windows and doors and that the Claimant changed them. Having made the changes required the Claimant was paid the $31,128 required by the contract for phase 2 on 26 January 1999. The Defendant says that the Claimant acknowledged he had carried out work contrary to instructions and says that she only reluctantly agreed to him continuing . The Claimant says that he has been instructed to build in accordance with the plans by the Defendant's attorney and that he had done exactly that. In the absence of the evidence to the contrary from the attorney I accept the Claimant's evidence about this.

13. The next stage in the building was the roof. The Claimant's evidence was that before he started building the roof he and the Defendant agreed to various changes on site designed to make it less "bulky". Under the plans the roof was to be gabled with 2" X 8" rafters and 1" X 6" T4G close boarding. The Claimant says that he agreed with the Defendant that he would use 2" X 6" rafters and 5/8" T1 11 plywood and that the roof would be a hip roof. This is the roof he constructed. He also said the price was

varied by agreement to $40,000. The Defendant says she never agreed to this change and that she objects strongly to the roof that was put up. Nevertheless she paid $40,000.00 for it (the contract provided for a figure of $35, 150 for phase 3 so the Defendant paid an extra $4,850).

14. On balance, I prefer the Claimant's evidence about the roof for three reasons:

(1) Again I find it inherently unlikely that the Claimant would depart from the plans without the Defendant's sanction, particularly if this involved a more expensive solution (as was the case).
(2) The Defendant was present on site at this stage and she paid for the work.
(3) Mr. Samuel gave evidence about discussions about changes to the roof and expressly remembered a discussion (at the first meeting he said) of 2" X 6" rafters and 5/8" plywood (although not a change from gabled to hip). He also said that he understood the Defendants' complaint in relation to the roof to be the fact that Caribbean Metals Ltd had not installed it (rather than that the whole structure have been contrary to the plans). All this evidence is inconsistent with that of the Defendant in relation to the roof.

15. The Defendants' evidence was that the "last straw" was the quality of the plastering work being done by the Claimant. She said she complained about the roughness and was told by the Claimant that it could and would be smoothed down with a rubbing stone. She said she took a second opinion which revealed this was not so and when she raised this with him he became angry and rude in front of his workers. In spite of my encouragement Mr. McNamara for the Defendant did not put the alleged rudeness and anger to the Claimant while he was giving evidence. In those circumstances I must reject the Defendant's allegation that he was angry and rude, although I do not doubt that there may have been some irritation shown.

16. In any event, there is no doubt that the Defendant decided to dispense with the Claimant's services. A letter dated 25 March 1999 (which was not before the court for some reason) was sent terminating the contract.

17. On 26 March 1989 Mr. Joachim Henry, who had visited the site on 25 March for the Defendant, reported that, taking into account the quality and quantity of works done and the available agreements and drawings, the Claimant had done works to a value of $162,120 against payments of $160,158. A few days later Mr. Cornelius Dolcy (the Claimant's expert's brother) prepared a valuation of $174,558, which may not have taken account of defects.

Issues

18. The issues are:

(1) What were the terms of the contract between the parties?
(2) Was the Defendant entitled to terminate it on 25 March 1998?
(3) If not, what damages is the Claimant entitled to?
(4) If so, what if anything must the Claimant repay?

Contract

19. In the light of my findings of fact I can deal with this briefly. The basic contract was contained in the written documents signed by the Defendant as I have described, which incorporated (by implication if not expressly) the existing plans. The Claimant was to carry out all the works for the prices laid down. He obviously had to carry out his work with reasonable care and skill and use materials of appropriate quality. It was understood that variations may be required and that these would be agreed as the work progressed but there were no agreed variations at the outset.

Was the Defendant entitled to terminate?

20. The Defendant would only be entitled to terminate the contract if the Claimant had acted in repudiatory (or fundamental) breach. The Defence at paragraph 6 alleges that the Claimant "fundamentally breached" the contract in that he:

(1)deviated from him the approved house and roof plans "in reckless disregard of the Defendant's failing health"
(2)"as such" provided work of inferior quality
(3)"refused to listen to any instructions" and
(4)on one occasion "it turned away from the Defendant when she attempted to speak to him."

I will consider the extent to which these allegations are made out and whether they amount to a repudiatory breach of contract whether individually or cumulatively.

21. As to (1), the only deviations from plans of which evidence was given related to the position of the house and to the roof. I have already found that what the Claimant produced was in accordance with agreements made with the Defendant on site (see paragraph 9, 13 and 14 above). This allegation is clearly not made out.

22. As to (2), as I understand the statement of case, the inferior work relates to the alleged situation from plans so this adds nothing to (1). If this is wrong, it is true that the Claimant and his expert acknowledged that there was some inferior workmanship as set out in the technical report produced in April 2004 by Mr. Fontenard. Leaving out the roof he estimated the costs of corrective works to be $14,750 (see cost estimate at pages 78 – 80: Mr. Dolcy came up with a substantially lower figure). It follows from my finding about the roof that I do not accept Mr. Fontenard's case that the whole roof should be replaced (which would

cost $114,000 on his figures). There are acknowledged problems with the roof as installed which Mr. Dolcy said could be repaired for a total of $2,700 (see items 3, 4, and 5 on page 58). Since Mr. Fontenard was not in a position to comment on these figures (given his radical solution of replacing the roof altogether), I am driven to accept them. The highest repair cost in respect of the inferior workmanship is therefore $17,450 ($14,750 + $2,700). In the context of work valued at ten times this figure and bearing in mind that six years have passed, I do not think this level of poor workmanship can be categorized as a repudiatory breach.

23. As to (3) and (4), on the facts I have found the Claimant did not refuse to listen to the Defendant's instructions and whatever may have passed between them at the end was nowhere near sufficiently serious to justify terminating the contract.

24. Even taking these points together, I therefore find that the Defendant was not entitled to terminate the contract on 25 March 1999.

Damages

25. It follows that the Claimant is entitled to damages for the Defendant's own repudiatory breach in dismissing him from the contract. The level of such damages will prima facie be the difference between the contract price (including the extras for the roof) and what he had already received, namely $104,562. There may have been some mitigation resulting from the fact that the Claimant did not need to complete all the works but this was not raised by the Defendant. The cost of repair of the defective works (which I assess at $17,450) must be deducted from this figure, however, which leaves $87,112 due to the Claimant for damages.

Defendant's entitlement

26. On my findings, this does not arise. If I had found for the Defendant, however, there would have been a difficulty in that there was no admissible evidence valuing the work actually done (as opposed to valuing the cost of repair in relation to that work) or the cost of completing the job. In the absence of such valuations, the best that I could have done for the Defendant would have been to take Mr. Cornelius Dolcy's figure of $174,558 and deduct from it the payments actually made ($160,158) and the $17,450 I have already mentioned. This would have resulted in a balance in the Defendant's favour of $3,050.

Result

27. However in the event I order as follows:

1. Judgment for the Claimant on claim for $87,112 with interest at 6% from 25 March 1999 to date ($30,925) making a total $118,037
2. Counterclaim dismissed

I will hear the parties on costs.

Murray Shanks
High Court Judge (Acting)