

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV 2003/0108

BETWEEN:

NOEL JOSEPH

Claimant

And

AZARIAH RUSSELL

Defendant

Appearances:

Ms E Ann Henry for the Claimant

Ms Stacey Ann Saunders for the Defendant

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2005: September 21st
December 21st
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JUDGMENT

- [1] **Blenman, J:** This is a claim and a counterclaim based on a dispute over a building contract.
- [2] Mr Noel Joseph (Mr Joseph) is an Antiguan who lived and worked in Japan for several years. He desired to return home to Antigua, to live on his retirement, so he entered into an agreement with Mr Azariah Russell (Mr Russell), a contractor with vast experience to build a dwelling house on land he owned at Weirs Estate in St Georges, Antigua and Barbuda.
- [3] Mr Joseph required a single storey house, which consisted of three bedrooms. He made arrangements for the contract moneys to be disbursed to Mr Russell over a period of time by the local Barclays Bank PLC (Barclays Bank). They agreed that the contract price of the house would have been \$350,000.00 (three hundred and fifty thousand dollars) and that Mr Joseph would have provided the building plans for the house.

[4] Mr Joseph contends that Mr Russell breached the agreement they entered into when he failed to complete the house in a timely manner and built an additional floor. Mr Joseph seeks compensation from Mr Russell for the losses that he suffered. He maintains that he did not permit nor agree to Mr Russell's purported variation of the contract. He seeks to be compensated for the alleged breach of contract including hotel and storage costs he incurred for several months.

[5] Mr Russell denies that he breached the contract as alleged or at all. He claims that it was Mr Joseph who was at fault and solely responsible for his non-completion of the construction since Mr Joseph failed to pay him the additional sum of \$52,517.50, which represents the costs of additional works he did on the bottom floor. Mr Russell submits that the contract was varied with the express consent of Mr Joseph, the latter who reneged on the terms of varied contract, which included an agreement by Mr Joseph to pay Mr Russell an additional sum of \$100,000.00. He asserts that the contract price was thereby increased to a new contract figure of \$450,000.00. He alleges that he has suffered losses and counterclaims against Mr Joseph for damages in the sum of \$52,517.50.

[6] The issues that arise for my determination are as follows: -

- (a) Whether Mr Joseph agreed to or authorized the variation of the agreement;
- (b) Whether Mr Joseph breached the contract that he entered into with Mr Russell and is therefore liable to compensate Mr Russell;
- (c) Alternatively, whether Mr Russell is in breach of the contract that he entered with Mr Joseph and is as a consequence liable to him in damages.

Law

[7] I find it convenient to deal with the legal principles at this juncture.

[8] Ms E Ann Henry, learned counsel for Mr Joseph relied on **Nurse v. Campbell (1966) 10 WIR 139** together with **Mc Gregor on Damages 15th Ed. (1988) Chapter 25** in support of her contentions.

- [9] Learned Counsel Ms Stacey Saunders, relied on **Gilbert and Partners v Knight [1968] 2 ALL ER 248; Moore et al v. Knight [1972] 1 WIR 376** together with **Halsbury's Laws of England Fourth Edition Reissue Volume 4**.
- [10] It is the law that if a contractor carries out unauthorized work he is not entitled to be paid in the absence of special circumstances. See **Halsbury's Laws of England Fourth Edition Reissue, Volume 4(2) paragraph 372**. However, if a contractor does work outside of the contract he would be entitled to sue for such work, even though he has not completed the work for which he was contracted, in order to do so he must satisfy the Court that the work was ordered or authorized. Should a contractor or builder abandon the work due to frustrating circumstances occasioned by the fault on the part of the employer, the contractor has a right of action either under the contract or on the basis of quantum meruit for work and materials supplied.
- [11] It is also the law that a contractor will be entitled to recover payment, and will not be liable in damages, if he can show that the non-completion of the work was due to some act or default of the employer.
- [12] This is a civil matter and the burden of proof is on the balance of probabilities.
- [13] Each party gave evidence on his own behalf. Mr Joseph and Mr Russell provided conflicting evidence as to terms of the agreement that existed between them. They called no other witness in support of their case but relied on the bundle of documents which they agreed would be utilized in the trial.
- [14] Mr Joseph asserts that he entered into a lump sum contract (an entire contract) with Mr Russell for the fixed price of \$350,000.00 and there was no variation. For his part, Mr Russell maintains that the original contract was varied (with the consent of Mr Joseph) and that the total construction costs are \$450,000.00.

Evidence

- [15] Mr Joseph stated that he worked in Japan for several years. In 1999, he contacted Mr Russell to construct a house for him. They agreed that Mr Russell would construct a single storey three-bedrooms, two bathrooms dwelling house on land situate at Weir Estate owned by Mr Joseph. They discussed the time of completion of the house and agreed that it was to be finished within 6 (six) months. Mr Joseph undertook to send the drawings which he faithfully did. Mr Russell having received the drawings advised Mr Joseph that the drawings could not be used since the Development Control Authority of Antigua (the DCA) would not accept them in as much as they were not drawn by Antiguan architects. Mr Russell recommended that Mr Butler, an Antiguan, architect prepare the drawings for submission to the DCA to which he (Mr Joseph) agreed.
- [16] The Butler's drawings having been prepared the parties agreed that the estimated cost of construction would be \$350,000.00. Mr Joseph remained in Japan working for the duration of the contract and caused disbursements of moneys to be made through Barclays Bank to Mr Russell in the total sum of \$350,000.00; he spoke to Mr Russell by telephone from time to time during the construction of the house.
- [17] Mr Joseph received certain information that was of concern to him. As a consequence, a series of discussion ensued between them, which concluded with Mr Joseph telling Mr Russell that "even though he was not happy with what he had done as he had so much money for him, he should go ahead and finish the house and that he would deal with the matter when he came down." Mr Joseph insists that he told Mr Russell that he would not be paying for any "extra costs" because the house was not built in accordance with the plan. His brother Mr Lionel Joseph, on his instruction, visited the construction site during the building of the house and communicated with him regularly. Mr Joseph says that, at no time did he agree to have Mr Russell landscape the land. However, around August 2000, Mr Russell told him that the job was coming to an end so he requested that Mr Russell enquire of the cost for back-filling the land and placing topsoil on the land. He later received a letter from Mr Russell in January 2001, which referred to the cost of the landfill and topsoil. During a subsequent telephone conversation with Mr Russell, he told him that

he would pay the invoice when he returned home and saw what he was doing but that he was not prepared to pay him until such time.

[18] He advised Mr Russell that he was returning to Antigua and told him the date of his return. On his return home, to his surprise, Mr Russell advised him that the house was incomplete and uninhabitable, when they met at the airport. Mr Russell took him to the house and he observed that the house was not what he expected and was also unfinished. He could not occupy it. He was forced, as a consequence, to live at a hotel for several weeks thereby incurring costs. He obtained the services of other persons to complete the house and incurred additional costs.

[19] Until receiving a letter dated 29th June 2001 from Mr Russell's solicitor, Mr Joseph says that he was unaware that Mr Russell was claiming the additional sum of \$50,000.00 for extra construction work that he did on the lower floor, together with the sum of \$8,500.00 the latter being the cost of effecting remedial work to verandah, upon his (Mr Joseph's) instructions. Although he telephoned Mr Russell regularly and spoke to him during the construction of the house he never gave him permission to do additional work. Infact, Mr Russell told him that the extra work that he did to the house would be at no cost to him (Mr Joseph). He admits that he did not pay Mr Russell for some of the items he installed in the lower floor or for the construction of the lower floor since he never authorized Mr Russell to do so.

[20] Until the filing of the Defence Mr Joseph was unaware of the document listing the "Extras" to which Mr Russell refers, Mr Joseph admits that he did not pay Mr Russell for them. He agrees that he has to pay for some of the items such as the costs of the Butter plan.

[21] During cross-examination by learned counsel Ms Stacey Ann Saunders, Mr Joseph stated that he knew Mr Russell for approximately 50 years and had confidence in him. After they entered into the contract, they agreed that any communications in relation to the construction of the house would be by means of telephone or through his brother Mr Lionel Joseph. He maintained that Mr Russell provided the estimate for the cost of construction

based on the building plans and was sure that Mr Russell had viewed the land at Weirs Estate before providing the estimate, and this is contrary to what Mr Russell was now asserting. He expected, as agreed, that the building would have been completed in 6 months while Mr Russell told him that he (Mr Russell) was going to London for 1 (one) month and he agreed for the work to stop and await his return, at no time did Mr Russell tell him that the construction of the house would have taken 9 months to complete.

[22] He is adamant that he contracted with Mr Russell for him to build a one level house and all of the drawings were for a one level house. Mr Russell never told him that due to the elevation of the land it became necessary for him (Russell) to construct a bottom flat. Infact, at no time was his (Joseph's) permission sought nor obtained to construct the bottom flat. He would never have agreed to give Mr Russell the job had he known that it would have cost more than \$350,000.00 to construct the house.

[23] During further cross-examination, Mr Joseph admitted signing the faxed letter dated 11th January 2001, sent by Mr Russell in which he was requested to sign and return same if he agreed to have the additional works. He signed the letter and returned it to Mr Russell but maintains that he agreed only to the top part of the letter which states "Additional work", - and deal with the cost of landfill and topsoil, solar heater, pump and storage tank and the attendant costs. Even though he signed and returned the entire letter he did not intend to pay Mr Russell for the costs stated for in the bottom part of the same fax. The fax stated, "The following items downstairs, if agreed please sign and return." He denies that he was aware of the additional works that Mr Russell carried out in constructing the additional bottom floor even though in the faxed letter he signed is listed under the heading referred to above the following items – "toilet; hand rinse basin; wash tub; entrance doors and 9 windows."

[24] He maintains that he is not liable to compensate Mr Russell for the additional works since he never authorized nor agreed to any variation of the contract. He insists on being compensated for the losses he suffered as a consequence of Mr Russell's breach of contract.

- [25] For his part, Mr Russell states that himself and Mr Joseph have been very close friends since childhood. In 2000, they entered into agreement for him to construct a dwelling house for Mr Joseph on land situate at Weir Estate St Georges Antigua at a construction cost of \$350,000.00. Mr Joseph, as agreed, provided the plans for the construction but the plans had to redrawn since they would not have met the approval of the DCA in Antigua and Barbuda. With Mr Joseph's approval, he caused Mr Butler to redraw the plans and they were approved by the DCA. He incurred \$1,112.50 in costs in this regard.
- [26] Having entered the contract with Mr Joseph in March 2000, he later examined the land and observed its elevation and formed the view that Mr Joseph would incur extra costs of construction in the sum of \$100,000.00 since he proposed to construct a lower floor on the dwelling house comprising 3 bedrooms; 2 staircases from the lower floor to the top floor; excavate and backfill the land with topsoil. He advised Mr Joseph of this by telephone before he started construction in May 2000.
- [27] During the construction of the house he informed Mr Joseph about the work and progress of the construction. At no time did Mr Joseph voice any concern to him about the construction or anything at all for that matter. He maintains that he agreed to complete the house within 9 months and at no time during their several telephone conversations did Mr Joseph tell him that he was in breach of his obligations. To the contrary, on several occasions Mr Joseph repeated to him his commitment to pay (Mr Russell) the additional sum of \$50,000.00 for the extra work. He insists that verbally he advised Mr Joseph of the nature and cost of the additional work which Mr Joseph approved. By facsimile dated the 11th day of January 2001 he listed a number of items as additional work and required Mr Joseph's written approval. On the same day, he received by faxed written approval from Mr Joseph authorizing his performance of the additional works.
- [28] While Mr Joseph has paid the sum of \$350,000.00, he has failed to make any further payments to him despite repeated requests. Mr Russell says that he stopped working due to the fact that Mr Joseph failed to pay the cost of the additional work. He says that in April

2001, when Mr Joseph returned to Antigua and Barbuda the house was nearly completed. He maintains that Mr Joseph is in breach of their contract and is therefore indebted to him in the sum of \$52,517.58

[29] During cross-examination he told learned counsel Ms E Ann Henry that during his excavation of the land he realized that he had quite a bit space that could have accommodated a lower floor. He contacted Mr Joseph by telephone and told him that "with a bit of digging he could give him 3 extra rooms at the bottom floor and that it would cost him extra money." Mr Joseph replied, "you are the builder I leave everything in your hand" and that he (Mr Joseph) "had lots of money and that on his return home he would settle the extra costs." He maintains that he communicated by telephone to Mr Joseph the extra work and while he did not initially tell him that precise figure, he also wrote Mr Joseph and particularized the additional works.

[30] During further cross-examination, he denied that Mr Joseph learnt of the additional works that Mr Russell had effected through third parties. He was sure that he had advised Mr Joseph personally of the extra works he had planned to undertake including the provision of 3 extra bedrooms on the bottom floor. Mr Joseph approved the variation. After the excavation of the land, he realized that he had adequate space to accommodate a bottom floor and he thought it best to construct that extra bottom floor, with Mr Joseph's approval. He admits that there was other solutions but stated that "he went with the one that suited the client."

[31] He was aware that his Attorneys had earlier claimed \$100,000.00 for the extra work, on his behalf and maintains that is the correct figure. He had communicated that sum to Mr Joseph who told him that it was too high so he reduced the figure and required Mr Joseph to only pay for the cost of material and labour. He did not intend to benefit personally from the cost of the extra work.

[32] He says that while he had previously filed a claim against Mr Joseph for the extra money it was not served since Mr Joseph could not be located.

[33] During further cross-examination, Mr Russell admitted that he counterclaimed for \$100,000.00 and in his evidence in court he seeks \$50,000.00. He explains that this is so because he had deducted his personal cost of \$50,000.00 and was only seeking to recover from Mr Joseph the cost of the material and labour for the additional work he did by constructing three additional bedrooms on the bottom flat among other things, he was prepared to forego his personal costs.

[34] Earlier he had sent an invoice to Mr Joseph, which documented the cost of the extra work. He denied that the first time that Mr Joseph was made aware of the costs that he (Russell) was seeking was when Mr Joseph returned to Antigua and Barbuda in April 2001. He denies that when he discontinued construction of the house, he left incomplete works for which he was originally contracted. At the time of his departure from the building the top floor was complete and livable only the bottom floor was incomplete. He maintained that he had a good relationship with Mr Joseph and when he learnt that Mr Joseph was returning to Antigua (from Joseph's brother), he went to the airport to meet him. He saw Mr Joseph at the airport and greeted Mr Joseph who appeared to be surprised. Mr Joseph requested that he (Mr Russell) take him to the hotel and he obliged. Mr Joseph had the keys for the house and was "in and out" of the house. He found it strange that Mr Joseph never contacted him to inspect the house but instead, "he took an enemy's attitude" towards him. He is aware that someone else completed the house after he left but maintained that the top floor was livable.

[35] Mr Russell says that he is aware that Mr Joseph claims the costs of hotel accommodation from April 2001 to September 2001 but says that he is at a loss as to why he did that since his house was ready and could have accommodated him. He maintained that Mr Joseph is in breach of his contract and should compensate him for the losses he incurred.

Findings of Fact

[36] I have had the opportunity of hearing both Mr Joseph and Mr Azariah Russell testify. I have closely examined the documents agreed by the parties to be used in trial. I am more

convinced that Mr Russell's version of events more accurately reflects what transpired between the parties. The facts as I find them are as follows: *The parties entered into a contract for Mr Russell to construct a single storey house on the Weirs land for Mr Joseph at construction costs of \$350,000.00. The plans were provided by Mr Joseph but had to be redrawn by a local architect in order to obtain approval from the DCA. With Mr Joseph's permission, Mr Russell caused Mr Butler, a local architect, to redraw the plan for a single storey building. Mr Joseph agreed to make stage payments to Mr Russell through Barclays Bank since Mr Joseph was residing and working in Japan at that time.*

[37] Mr Russell commenced construction of the house and while excavating the land he formed the view that the topography of the land enabled it to accommodate a bottom or ground floor. He communicated this information to Mr Joseph and proceeded to construct the house, which included a ground floor that consists a three additional 3 bedrooms, with Mr Joseph's permission. As a consequence, extra costs were incurred with the consent of Mr Joseph.

[38] I do not believe as Mr Joseph contends that he did not permit nor authorize Mr Russell to build the ground floor and therefore did not sanction the extra expenditure. I have no doubt that Mr Joseph agreed to the variation of the contract. I believe Mr Russell when he says that he told Mr Joseph about his proposal to build the ground floor consisting 3 bedrooms and indicated that extra costs would have been incurred and obtained Mr Joseph's permission to do the extra work and to expend extra money in that regard. I am of the firm view that Mr Russell, with Mr Joseph's approval, carried out additional work on Mr Joseph's house and built a two-storey house instead of a single storey house with the owner's (Mr Joseph) permission. He used the entire sum of \$350,000.00 to construct the two-storey house and when the monies were exhausted he sought to obtain the extra money, since Mr Joseph had committed to paying for the additional work. Mr Joseph reneged on his commitment to pay the outstanding sums of money as a consequence Mr Russell discontinued the work but only after a substantial portion of the construction was completed.

[39] I do not believe that the entire top floor of the house was complete, as Mr Russell would have me believe. I have no doubt that Mr Joseph was speaking the truth when he said that the house was unpainted; the verandah and steps were untiled among other things. I accept Mr Joseph's evidence when he said that he incurred extra costs to have this situation remedied. While initially the parties may have agreed for the original house to be completed in 6 months; in its varied form I am more inclined to the view that with the additional works the house was scheduled to be completed within 9 months. With the variation to include a bottom floor the time of completion must have been extended since the additional works were substantial.

[40] Mr Russell having expended the sum of \$57,512.58, Mr Joseph then refused to forward any further sums of money to him. Mr Russell requested that the additional sum of money be sent to him in order to complete the entire building. With no additional moneys forthcoming Mr Russell refused to continue the work until he received compensation for the additional works.

[41] I am of the considered view having analyzed the evidence that Mr Joseph expected his house to be completed in a timely manner and was upset when approximately one year later it was incomplete. Meanwhile, Mr Joseph was unhappy with the fact that he had gone ahead and done additional work in providing 3 extra rooms and a bottom floor for his friend Mr Joseph and Mr Joseph had reneged on his commitment to pay him for the extra work, so he "downed his tools." I have no doubt that it was the unhappy differences that resulted from Mr Joseph's failure to make good his commitment that caused Mr Russell to treat the contract at an end.

[42] As stated earlier, Mr Joseph was adamant that from the onset he told Mr Joseph the sum of \$350,000.00 was the only sum he would pay and that he never committed to paying any extra moneys for the additional work. I do not believe him.

[43] I have no doubt that given the circumstances of this case Mr Russell is entitled to be compensated for the costs he incurred in carrying out the extra work, which he did with Mr

Joseph's permission. Mr Joseph failed to do this. I cannot allow Mr Joseph to be unjustly enriched in all of the circumstances. I am also of the considered view that Mr Joseph was entitled to have his house completed in a timely manner and while I note that the additional works carried out on the house would have served to delay the completion of the house, Mr Russell was obligated to complete the construction of the house in a timely manner. I am of the firm view that it was Mr Joseph's breach caused Mr Russell's non-completion of the house since it was his repudiation of the agreement that caused Mr Russell to treat the contract at an end.

[44] In passing, I say that in any event Mr Joseph had a duty to mitigate his losses. I am far from convinced that he should have reasonably remained in a hotel for the inordinately length of time that he stayed. Be that as it may, Mr Russell had evinced an intention to communicate with Mr Joseph on the latter's return and even met him at the airport. This is hardly the attitude of someone who is angry with the other person or who is acting unilaterally as Mr Joseph would have me believe. I believe Mr Russell when he said that he was willing to forego his personal fees and only seek reimbursement for the other costs from Mr Joseph. This was however not to be, so they parted ways.

[45] In view of my earlier findings that there was a variation of the contract works, this obliged Mr Joseph to pay Mr Russell for the extra works the latter carried out. On this issue I accept Mr Russell's uncontroverted evidence and find that he is entitled to recover the sum of \$52,517.58 from Mr Joseph. As stated earlier, I have no doubt that it was as a result of Mr Joseph's failure to pay the additional sum of that caused Mr Russell to discontinue the work. In view of the circumstances I am of the view that it is Mr Joseph who breached the contract and is liable for the non-completion of the house.

[46] In view of the foregoing circumstances and for the reasons stated, I am of the considered opinion that Mr Joseph has failed to establish his claim of breach against Mr Russell. On his counterclaim, Mr Russell succeeds in maintaining the action against Mr Joseph for breach of contract.

[47] I therefore dismiss Mr Joseph's claim against Mr Azariah Russell and give judgment for Mr Azariah Russell against Mr Noel Joseph on the counterclaim. I award Mr Russell damages in the sum of \$52,517.58 together with costs agreed in the sum of \$12,000.00.

[48] The Court gratefully acknowledges the assistance of both learned counsel

Louise Esther Blenman
High Court Judge