THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

HIGH COURT CIVIL CLAIM NO. 211 OF 2007

BETWEEN:

SYLVIA MULZAC

Claimant

V

HENRY COX

Defendant

Appearances:

Ms. Niara Fraser for the Claimant
Mr. Grant Connell for the Defendant

2008: November 12
2009: February 11, March 5
August 25th

CLAIMS

[1] **Joseph, J (Ag.):** This suit relates to a breach for contract for services that were provided by the defendant, following an oral contract to build a residential house for the claimant in Ashton, Union Island. Claimant Sylvia Mulzac claims that the defendant Henry Cox breached his contractual obligations and she terminated his services. She further claims that she paid him $110,000.00 but as he completed work valued at $50,000.00, she is entitled to a refund of $60,000.00.

[2] The defendant denies that he was in breach of the contract. His answer was that he complied with all explicit and implicit terms of the contract and the claimant unlawfully terminated his services. He denies that the work completed under the contract was valued at $50,000.00 and counterclaims for $55,000.00 as his loss of benefit under the contract.

WRITTEN SUBMISSIONS: 29TH JULY 2009 AND 4TH AUGUST 2009

ISSUES ON BEHALF OF THE CLAIMANT:

[3] 1) Whether there was a breach of the contract.
2) If there was a breach who breached the contract?
3) Who is liable to pay damages?

ISSUES ON BEHALF OF THE DEFENDANT:

[4] 1) Value of work done by the defendant to date of termination.
2) Which contracting party breached the contract?
3) The legal effect of the termination letter.
4) In what capacity was Roger Mulzac acting on behalf of the claimant?

APPROACH TO CASE

[5] In April 2005 the parties entered into an oral contract to build a residential house. An estimate (estimate document) was prepared by the defendant that was accepted by the claimant. The estimate document detailed cost of construction: $285,000.00 for materials and $165,000.00 for labour. I consider the evidence led by both parties and decide on a balance of probabilities.

CASE FOR CLAIMANT

[6] The claimant supplied two witness statements and gave sworn testimony. In cross-examination the claimant stated that she instructed her son, Roger Mulzac, to handle the matter on her behalf. She testified that construction was to run from January to September 2006 - nine months. At first, construction of the residence was satisfactory, she said, but in April construction started slowing down, sometimes there were only two or three men on the job. She instructed Roger Mulzac to terminate the contract and would not agree that 40% of the work was completed at the date of termination.

[7] Roger Mulzac who is a quantity surveyor, architect and construction manager, supplied two witness statements and gave sworn testimony. In cross examination he stated that he provided services of design of building and construction management. By a verbal

contract, completion date for construction of the house was September 2006, approximately nine months. In reexamination he stated that the verbal agreement was that completion date July 31st.

[8] In cross examination he said that, in July/August, he told the defendant to stay 500 yards from the property. He admitted that no work could be done on the building after that direction. At that date, he said, 40% of the work had been completed. He agreed that 40% of the total cost of $165,000.00 is approximately $50,000.00.

CASE FOR DEFENDANT

[9] The defendant testified that the contract was for $168,000.00, not $165,000.00. The agreement was that the claimant would pay him for labour and that she would be responsible for purchasing materials. Responsibility for restoring of the materials was the claimant's, not his. He agreed that Roger Mulzac's letter of 20th August 2006 contained the terms of the oral contract entered into in New York. When the contract was terminated he had completed 40% of the work.

REGISTERED AGENT

[10] The point arose as to whether Roger Mulzac, not being a registered agent, could act for the claimant. Ms. Fraser submitted that it was unnecessary for the claimant's son to be registered as her agent as the defendant understood and accepted that he was representing the interest of his mother the claimant and was therefore authorized to terminate the contract on her behalf. I think that Sylvia Mulzac authorized her son to act for her and that arrangement was accepted by the defendant.

COMPLETION DATE:

[11] There were conflicting dates for completion of construction of the project. Roger Mulzac's evidence:

> "In that contract (verbal) it was agreed that construction would be eight or nine months. Work commenced on building in January 2006..."
>
> "Verbal agreement time frame for completion was approximately nine months. September completion date. Given the delay by absence of cement the project

that would have been added to completion date. Whatever time frame lost would have been added to original completion date of project."

"I gave him further instructions based on not providing a steady labour force and also because of the fact of shortage of cement. Mr. Cox agreed to provide a steady labour force. Verbal agreement was completion date end of July 31st. Mr. Cox knew that project was to be completed by end of July."

[12] The defendant's evidence was that Roger Mulzac never said to him that the house was to be completed by 31st July 2006: it was stated that completion would be 'eight to nine months'.

[13] A reference to completion date being 31st July 2006 appears in Roger Mulzac's letter dated 20th August 2006 to the defendant dealing with Final Completion Date which reads:

"As per our conversation on 08/19/06 (which the defendant denied) I need you to fully (100%) complete the above referenced project by 12/01/06, including all punch list items. The start date of within the first two weeks of January 2006. The project started within the first two weeks of January 2006 and to date you have only completed approximately 40% of the project.

I am aware of the fact that there was a shortage of cement for approximately five weeks; however this is no excuse why the project should not be completed five weeks subsequent to 07/31/06....."

[14] I think when Roger Mulzac refers to a conversation on 19th August 2006, he must have been referring to the abortive meeting when the defendant walked out. The reason the defendant gave for walking out is that he had no desire to sign a contract, bearing in mind there had been problems with the supply of materials.

[15] I do not accept that there was an agreed completion date of 31st July 2006. I accept that completion date was stated to be eight to nine months of commencement of construction in January.

CONSTRUCTION

[16] The claimant was dissatisfied with the progress of work from April. She stated that there were just a few men on the project. It is significant that Roger Mulzac who is qualified in that area of expertise, in letter dated 20th August 2006, acknowledged that there was

shortage of cement for approximately five weeks, which would probably have been around April when the work had slowed down.

[17] The claimant and Roger Mulzac agreed that, with the shortage of cement, construction would be held up. The defendant's evidence was that during shortage of materials, workmen did different work on the house, for example, tying steel and making boxing for columns.

[18] Although the defendant denied that he rotated workers between the project and other projects, it is reasonable to conclude that, with the shortage of materials, there would be fewer men on the job. Workmen under-utilized on a project would have to be paid which might result in financial loss to the defendant: the defendant being responsible for paying for labour.

[19] The common sense thing for the defendant to do, in those circumstances, is to use his men in a way that would not cause him a loss. So that although there were fewer men on the job there was a good reason: shortage of materials. Of course at the same time, there must be an attempt to ensure that the claimant does not suffer, financially and otherwise. I think that is why a meeting was arranged – to discuss the situation - but the parties could not agree and the defendant exited the meeting.

[20] The contractor who completed construction of the project stated that the defendant completed items number one through to ten, which was approximately 30% of the scope of the work. He wrote: "I would be starting the project from the first floor level commencing with the pouring of the first floor slab, ring and partition beams. (Using scope of wok dated 1st October 2006: 10/01/06).

[21] The assessor Edric Lewis Associates who conducted a construction cost estimate during the trial, using 2004 rates stated that the value of the completed work was $83,723.26. I deduce from the differing figures and percentages given that the defendant's construction estimate may have been a very reasonable figure.

[22] The accepted estimate document listed items to be executed but there is no indication against the listed items of the time frame for the various items to be completed. For example, when were the items listed 17-21 expected to be completed? The answer is that there is no indication on the estimate document. The arrangement between the parties gave a commencement date of January 2006 and a completion timeframe – eight or nine months, without giving a timeframe for executing the several stages of work. The contract was open-ended (timeframe-wise) for the different stages of construction.

[23] In the claimant's eyes the work on the project had slowed in April 2006. However, it is not possible, in the absence of a stated time frame for the several stages of the construction, to establish that construction was behind schedule, and that the defendant was therefore not complying with the contract.

TERMINATION - BREACH OF CONTRACT:

[24] Without giving a date when he orally terminated the contract, Roger Mulzac in his witness statement of 3rd November 2008, at paragraph 15 said:

> "I did in fact terminate the services of the Defendant orally and then confirmed it in a letter dated 12th September 2006 addressed to the defendant."

[25] Ms. Fraser submitted that the defendant was in breach of the contract by failing to complete construction of the house within the agreed time. Further, she submitted that the defendant was also in breach of the terms of the contract which would have led to the inefficient working of the defendant. If the defendant had not taken on so many jobs at the same time, counsel submitted, he would have been able to maintain a steady labour force which would have allowed him to complete his contractual obligations within the time stipulated.

[26] Mr. Connell's submission was that the defendant continued to fulfill his contractual obligations until the claimant unlawfully terminated his services and breached the contract by preventing completion of the project. He submitted that the defendant's evidence was supported by the report of Lewis Associates which gave a figure in excess of the claimant's finding.

[27] It is therefore necessary to consider the circumstances outlined in the texts of letters of 20th August and 12th September, 2006 to determine if there was failure generally to execute the work agreed on. A starting point is to determine what are the terms of the contract. To do that it is necessary to consider what the parties said and what they wrote.

Letter of 20th August 2006 – re Final completion date

[28] The first paragraph of the letter mentions a verbal agreement to complete the project by 31st July 2006. I have found that there was no such agreement. The second paragraph acknowledges the five week cement shortage and comments that there is no reason why the project cannot be completed five weeks 'subsequent' to 31st July 2006, inasmuch as materials are readily available, which is September 2006. (There was no agreement on a completion date of 31st July 2006).

[29] The third paragraph refers to the amount of $110,000.00 paid to the defendant and informs the defendant that the remaining $55,000.00 from the original contract would not be released to him until the completion of the contract. The fourth paragraph refers to an agreed additional amount of $17,000.00 for the casting of extra labour cost for the casting of concrete slabs on the second floor. The defendant was requested to prepare a written breakdown (labour and materials) for the additional work. In addition, reference was made to an agreement to prepare a written estimate for the bank (denied by the defendant). The documentation was to be given to the claimant by 25th August 2006.

[30] The letter referred to the defendant's responsibility to make an inventory of materials on site and to arrange for safe storage. That letter's central theme is completion date of 31st July 2006. I have found that 31st July 2006 was not the completion date.

Another letter dated 20th August 2006 - Re Construction Schedule

[31] Roger Mulzac's letter refers to a conversation on 19th August 2006 (presumably during the meeting) that he needed the project to be completed by 1st December 2006 'broom swept and ready for occupancy'. It recites that upon completion, the remaining balance of $72,000.00 would be paid to the defendant upon a number of stated conditions being met.

[32] Those two letters dated 20th August 2006, say different things: one referred to completion date of July, the other referred to a proposed completion date of 1st December 2006. The completion date history: It was nine months- September. It was 31st July. It was five weeks subsequent to 31st July. It was 1st December 2006.

Letter of 12th September 2006 – Termination letter

[33] The first paragraph: 'effective September 12th 2006 the owner Mrs. Sylvia Mulzac of Ashton Union Island no longer request your services.....for the following reasons:

1. "Failure to co-operate with the owner regarding the ordering materials'

In what way was there lack of cooperation? Roger Mulzac said he was informed that a few months after the project started there was failure in the ordering of materials and that there was no proper account for the order of materials. There is no evidence of an arrangement for this.

2. Failure to supervise your limited crew of one to three workers on a daily basis.

3. Failure to maintain a steady workforce on a daily basis. The evidence coming from the claimant was that the progress of the work to the month of April was good, so that the alleged failure must have taken place after April. The defendant admitted that he went to the project daily and stayed there about an hour or half an hour, leaving his foreman on the project. Did the oral contract call for personal supervision for a stated time, or does it allow supervision through a foreman? There is no evidence of what part a foreman is expected to play vis a vis the defendant. I have commented earlier relative to reduced number of workers following shortage of materials.

4. Failure to provide a written estimate to the owner for financial purposes as promised by you since May 2006. I accept that there was agreement to prepare this letter that was not fulfilled. There is no evidence as to whether there was a deadline for this letter.

5. Failure to complete the project on or before July 31st 2006 as verbally agreed. Roger Mulzac admitted that delay caused by the shortage of cement was not the defendant's fault. He stated that he had verbally explained to the defendant that whatever time was lost due to shortage of materials or weather conditions would be added

to the original completion date of project. I have found that there was no July 31st completion date.

6. Failure to sign the work schedule stipulating the project completion date on or before December 1st 2006. (YOU CONFIRMED RECEIPT OF THE WORK SCHEDULE VIA A TELEPHONE CONVERSATION). Paragraph 6 relates to completion date of 1st December 2006, which was not agreed. The termination letter cannot therefore be based on that completion date.

7. Failure to provide weekly written report as to the status of the project.

8. Failure to provide a Two Week Look Ahead Schedule of construction activities/tasks to be performed.

[34] Where was there an agreement relative to paragraphs 7 and 8? The claimant's evidence was that the contract was terminated because the defendant failed to comply with letter of 20th August 2006. Roger Mulzac's evidence was that the termination letter was not sent because the defendant failed to comply with letter of 20th August. He said that letter was sent because of the overall incompetence and on failure to provide further work on the project as per the contract.

[35] To determine who committed a breach of contract, I look at the conduct of the parties. The defendant was on the job when Roger Mulzac ordered him in July to keep away from the project. The defendant from then, could not perform his obligations under the contract. Roger Mulzac had effectively terminated the contract in July when he gave that direction to the defendant. When the meeting was held in August and the letters of 20th August 2006 were dispatched to the defendant, the contract had already been terminated in July 2006. I think the breach of the contract was committed by Roger Mulzac acting on behalf of the claimant.

[36] I pose the same question that is asked when the question of repudiation arises: Whose act or conduct struck at the root or essence of the contract? Was it the act or conduct of the defendant? The defendant's work on construction was seemingly slow from April, but the estimate document does not indicate stages of construction with time frames.

[37] As the estimate document did not specify time frames for the different stages of construction, there was not a striking at the root or essence of the contract by the defendant by slow progress of work. Should Roger Mulzac have excluded the defendant from the project in July? I do not think that he should have excluded the defendant.

[38] Did Roger Mulzac's action of directing the defendant to keep away from the project strike at the root or essence of the contract? The answer is: it did. ***Federal Commerce v Molena Alpha Inc.*** (1979) 1 AER at p.319 and 'e' relates to repudiation of a contract, and I have posed a similar question.

> 'e' The question is whether, objectively regarded and in all the circumstances of the case, the conduct of the owners can properly be said to strike at the root or essence of this contract. In my opinion it can."

DAMAGES FOR BREACH OF CONTRACT:

[39] The claimant was in breach of the contract and will have to pay damages for that breach. How do I quantify damages? I consider the differing figures: by the contractor who completed construction: the claim of the claimant and the figure given by the assessor during trial of the matter. I also keep in mind that the claimant did not receive what she expected to receive under the contract. That factor can merely be taken into consideration in awarding damages but cannot be the central factor in awarding damages. Roger Mulzac's letter dated 12th September 2006 refers to the estimate document -

> **SCOPE OF WORK COMPLETED BY THE CONTRACTOR AS OF 09/12/06 (REFER TO SCOPE OF WORK DATED APRIL 10, 2006)**

1.	1-7	$25,000.00
2.	8-16	$20,000.00
3.	Plumbing	$2,000.00
4.	Electrical	$3,000.00
TOTAL		$50,000.00

[40] The claimant's statement of claim recites that the work completed by the defendant was $50,000.00 and claims a refund of $60,000.00. The defendant was paid $110,000.00 and claims $55,000.00. The contractor who completed construction of the project stated that the defendant completed items numbered one through to ten, which was approximately

30% of the scope of the work. He stated that he would be starting the project from the first floor level. Roger Mulzac's assessment was that about 40% of the work had been completed.

[41] The assessor Edric Lewis Associates who conducted a construction cost estimate during the trial, using 2004 rates came up with labour cost of $83,723.26.

[42] Labour costs in the contract is $165,000.00, thus half of that labour cost is $82,500.00. It follows that the defendant was paid by the claimant at the commencement of construction, more than half of the labour cost, that is, $110,000.00. The assessor valued labour cost for work done as $83,726.26, which is a little more than the contracted labour cost. Does that mean that the contracted labour cost was a very reasonable one or is there some other factor? $83,726.26 - $50,000.00 (estimate document) = $33,726.00.

[43] I glean from the assessor's report:

> "3.0 Appraised point of completion: The point of completion as shown in the photographs is defined as a stage just short of casting concrete to the first floor slab of the building. The preparatory works thereto, which includes: the installation of formwork, the placing of reinforcement and the installation of electrical conduits and pvc plumbing lines seems quite advanced. In addition, other elements of work which integrally precedes the floor slab were also constructed. These include the foundations and walls of the water storage tank, the substructure to the entire building, which includes; excavation and earthworks, concreting, block work inter alia.
>
> Also constructed were, the ground floor external walls and columns at ground floor level, lintels to window and door openings on ground floor".

[44] The Assessor's estimated cost for ground floor is $51,072.02, as against $50,000.00 given by the claimant citing from the estimate document. What the claimant seems not to have taken into account is the cost of water tank of $22,604.45 plus $51,072.02 (total $73,676.45). The assessor added $10,046.79 for preliminaries which I am not allowing as I have no details as to what comprises Preliminaries. That is how the assessor arrived at $83,722.45. The sum advanced to the defendant is $110,000.00 minus $73,677.00 (rounding off) completed labour cost, excluding preliminaries) = $36,323.00 owed by the defendant to the claimant. I hold that the claimant is liable in damages to the defendant

for breach of the contract in the sum of $36.323.00. Law of Contract by Cheshire, Fifoot and Furmston 14th ed. at page 659 the learned author states:

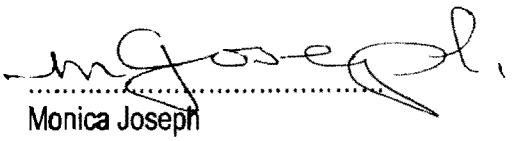
> "Historically it has been treated as clear in principle that what is to be recovered by way of damages is the loss which the plaintiff has suffered, and not the profit which the defendant has made."

ORDER

[45] 1. On the Claimant's claim, the defendant is to pay the claimant $36.323.00.

2. On the defendant's counterclaim, the claimant is to pay to the defendant $36.323.00 as damages.

3. I make no order as to costs.



.....
Monica Joseph
HIGH COURT JUDGE (Ag)
15th August 2009.