SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2008/013

BETWEEN:

ROSS K. BOWRING

Appellant/Defendant

and

KEITH NOEL

Respondent/Claimant

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mde. Janice George-Creque	Justice of Appeal
The Hon. Mr. Davidson Baptiste	Justice of Appeal [Ag.]

Appearances:

Mr. Gerald Williams for the Appellant/Defendant
Mr. Alvin St. Clair for the Respondent/Appellant

2009: October 20; 21.

ORAL JUDGMENT

[1] EDWARDS, J.A.: This is an appeal against the decision of Cottle J who on 20th February 2008, upon the trial of a claim and counter claim for breach of a building contract found that it was the appellant/defendant who prevented the respondent/claimant from finishing the works. Consequently, the learned judge found that the claimant had proven his case and the judge made the following award for damages to the respondent/claimant while dismissing the counterclaim with no order as to costs:

(a) Completed works as per contract as evidenced by the certificate of works $82,000.00

(b)	Materials on site	$16,682.40
(c)	Form works & Supports	$3,376.00
(d)	New works	$87.991.50
Total Award to Claimant		$190,049.90

Interest to the claimant at the rate of 6% per annum from the date of the filing of the claim until full payment.

Prescribed costs in the sum of $37,507.49.

[2] The appellant's grounds of appeal complain: (1) that the learned judge erred when he found as a fact that the claimant had proved his damages as particularized in his statement of claim when in fact, damages pertaining to the claimant's case had previously been assessed before the court; (2) that the learned judge erred when he awarded prescribed costs to the claimant in the sum of $37,507.49 which costs were based on his award for damages. The appellant sought to set aside the decision of the trial judge as to damages and costs and requested the court to remit the matter to the court below for the assessment of damages.

[3] The respondent/claimant's counter notice of appeal allege: (a) that the learned judge erred in not awarding the claimant costs on the dismissal of the counterclaim; (b) that the learned judge erred in awarding the claimant prescribed costs of $37,207.49 on the sum of $190,049.90; and (c) that the learned judge erred in failing to award or calculate prescribed costs on the summation of the amount of $190,049 and the interest awarded.

[4] The agreement called for the construction of a two storey residential building to be carried out under the direction of Adrian Dolcy & Associates Consulting Engineers. Clause 9 of the conditions of the building contract stated:

> "The Engineer shall if requested by the Contractor, at intervals of no less than two weeks calculated from the date of the commencement of the works, certify progress payment to the Contractor in respect of the value of the new Works properly executed (based on a measurement of the works carried out), including any amounts either ascertained or agreed under clauses 11 hereof, and the value of any material and goods which

> have been reasonably and properly brought upon the site for the purpose of the Works and which are adequately stored and protected against the weather and other causalities less a retention of ten percent … and less any previous payment made by the Employer and the Employer shall pay the Contractor the amount so certified within fourteen days of the date of the certificate."

[5] The thrust of the argument put forward by learned counsel, Mr. Williams is that the learned judge should have relied on a document identified as "certificate No. 4" at page 55 of the record in assessing the damages since this document was disclosed by the appellant in a supplemental list of documents filed by the appellant's counsel on 4th December 2007. This was 5 days before the trial which commenced on 10th December 2007. Certificate No. 4 was described as a copy of reevaluation report of works from Dolcy & Associates in the supplemental list of documents; and learned counsel, Mr. Williams alleged that the parties had agreed on the contents of certificate No. 4 which reflected that the adjusted value of the works to date was $288,100.55 and variations were $20,478.35. The transcript of the trial proceedings disclose that certificate No. 4 was not admitted in evidence as an exhibit that the respondent/defendant was relying on as part of his case. The transcript shows that Mr. Clair objected to the attempt that was made by counsel for the respondent/defendant to allude to a document during the cross examination of the engineer, Mr. Adrian Dolcy; whereupon the trial judge intervened, and requested that confidence be reposed in the court. The document that was the subject of the attempt was never described, and no evidence was adduced at the trial concerning the origin and contents of certificate No. 4. At a later stage of the trial during the oral submissions of counsel for the defendant, the learned judge did not permit counsel to develop his argument regarding the document.

[6] Learned counsel, Mr. St. Clair disputed Mr. Williams' contention that certificate No. 4 was prepared as a result of directions by Justice Shanks given in an order made on 28th January 2005. It emerged from the electronic record on JEMS of the proceedings in the claim that Shanks J on 28th January 2005, made an order

adjourning the claim to 31st January 2005, for report on settlement. There was never any order for prior assessment of damages for the claimant's case in terms of certificate No. 4 as contended by Mr. Williams. Mr. St. Clair submitted that the learned judge in assessing the damages to be awarded to the claimant had correctly relied on the contents of certain documents at pages 111 to 116 of the record which were tendered in evidence by the claimant in proof of his claim; and that no evidence was adduced by the respondent which challenged the correctness of the contents of these documents. The trial judge at paragraph 19 of his Judgment stated:

> "The defendant has offered no evidence to suggest that the sums claimed by the Claimant for the works carried out or the materials on site are in any way inflated. I am content to use them as a basis for the award."

[7] It is quite clear that the rules which would have permitted the appellant to adduce the contents of certificate No. 4 into evidence after its late disclosure 5 days before the trial were not complied with. There was no prior notice to the claimant and the trial judge that the defendant would make use of certificate No. 4 at the trial. This certificate was never a documentary exhibit to a supplemental witness statement filed and served on the claimant before the trial after obtaining permission from the court to file such a witness statement. In my view, merely disclosing certificate No. 4 was not sufficient for the appellant to rely on it as evidential material at the trial.

[8] Although clause 9 of the conditions stipulated how, when and by whom the value of the works were to be assessed the appellant adduced no evidence which permitted the trial judge to award damages in keeping with clause 9; and in the absence of such evidence the trial judge was entitled to make the award based on the evidence adduced by the claimant. Ground 1 of the appellant's notice of appeal therefore fails.

The Counter Notice

[9] Since the claimant was the successful party of the counterclaim, under the general rule in CPR 64.6(1) and 65.5(1) the defendant as the unsuccessful party should have been ordered by the court to pay the costs of the claimant to be determined in accordance with CPR 65.5. The defendant in his amended defence, counterclaimed for special damages in the sum of $119,523.00; and since the learned judge gave no reasons as to why the general rule should not prevail, the claimant would be entitled to $26,928.45 as prescribed costs on the amount counterclaimed by the defendant.

[10] Article 1008 of the Civil Code provides:

> "The damages resulting from the delay in the payment of money to which the debtor is liable, consist only of interest at the rate legally agreed upon by the parties, or, in the absence of such agreement, at the rate fixed by law. These damages are due without the creditor being obliged to prove loss. They are due from the day of the default only, except where from the nature of the obligation, the law otherwise provides…"

[11] Article 1685 fixes the rate of legal interest at 6% yearly. Consequently, it is not in dispute that the respondent would be entitled to have his prescribed costs calculated on the award of damages in the sum of $190,049.90 plus the interest on this amount at 6% yearly from date the claim was filed i.e. 24th July 2003, to 20th February 2008, when the judgment was delivered. The relevant period is therefore 4 years and 200 days and the yearly interest is $11,403.00. The total interest is therefore calculated as $50,629.32. The Prescribed costs would therefore be calculated on the total sum of $240,679.22 which amounts to $45,101.88.

[12] For all of the reasons previously stated the appellant fails on both grounds of appeal and the respondent must succeed on his counter notice of appeal. The appellant's appeal is therefore dismissed. The respondent's counter notice of appeal is allowed; and the award made for damages by Cottle J is affirmed. The prescribed costs of $37,507.49 is set aside and the appellant/defendant shall pay

the sum of $45,101.88 as prescribed costs to the respondent/claimant on the claim. The appellant/defendant is also to pay the respondent/claimant the sum of $26,928.45 on the counterclaim for prescribed costs; and the costs on the appeal being 2/3 of the total prescribed costs in the court below.

Ola Mae Edwards
Justice of Appeal

I concur.

Janice George-Creque
Justice of Appeal

I concur.

Davidson Baptiste
Justice of Appeal [Ag.]