

**EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2011/0760

BETWEEN:

[1] FLETCHER PROSPERE

and

[1] ATTORNEY GENERAL

[2] MINISTER OF PUBLIC WORKS

Appearances:

Mr. Lawrence Daniel and Ms Samantha May for the Claimant
The Attorney General Mr. Justin Simon Q.C. for the Defendants

2014: October 17

JUDGEMENT

[1] **HENRY, J.:** The claimant's claim is for damages for breach of a contract to construct curbs, drains, "U" drains and 6,600 square feet of concrete roads in Pigotts Village for the sum of EC\$3,946,800.00 or such sum as should become due and payable under the contract. His claim is that in pursuance of the contract, he commenced work in January, 2007 and enquired about the written contract on three occasions and was told that the contract will be forthcoming. He completed 1,470 square feet of road in January, 2008. He again inquired for the written contract in order to submit his bill for payment. He was told that the contract was awarded to Antigua Concrete Services Limited on 19th July 2007. When he protested, he was informed by the second defendant to cease all construction work. Consequently, he has suffered loss, damages and incurred expenses. The claimant therefore claims:

- (1) Damages for breach of contract
- (2) The sum of \$1,328,000.00 due and owing to him under the contract

(3) Prescribed costs

(4) Interest

The Pleadings

- [2] In his statement of claim, the claimant alleges that he was contracted by the Government of Antigua and Barbuda to construct certain works at Pigotts Village. At the material time he was a contractor and worked as such for the Public Works Department constructing curbs, drains, "U" drains and roads in Pigotts Village. In or about December 2006, he attended a meeting at Pigotts Village with two employees of the second defendant (the Minister), namely Gary Edwards, the then Road Superintendent and Desmond Charles, the General Manager. Discussions were held and an oral agreement was made between the claimant and the Government for the construction of concrete roads, curbs and "U" drains in Pigotts Village immediately south of Pigotts Primary School. The concrete roads to be constructed measured approximately 6,600 ft in length and 20 ft in width. The contract price was the sum of EC\$3,946,800.00 or such sum as should become due and payable thereunder. He avers that the Minister promised him that the written contract would be forthcoming, as a result he agreed to carry out and complete the construction works.
- [3] The claimant avers in paragraph 6 and 7 of the Statement of Claim that pursuant to the oral agreement he entered upon the site and carried out construction works where he mobilized a team of 12 men to construct the concrete roads. He commenced work in January 2007. The first road he constructed measured 731 sq. ft.; the second approximately 538 sq. ft.
- [4] Desmond Charles and Gary Edwards, according to the claimant gave him specific instructions to obtain Workman Compensation Insurance before commencing the road works. He states that he duly complied and obtained a policy with First Domestic Industry & Commerce Insurance (FDICI). A copy of the letter from (FDICI) is attached to his pleadings.
- [5] According to the pleadings, he enquired from the Minister when he would receive the written contract and was told to carry on with the works and the contract will come. During the course of the works, the Minister visited the site in or about April, 2007 and complimented the claimant on the construction works carried out at that stage.
- [6] The claimant sets out in his pleadings a quantity of materials he purchased pursuant to the contract. In addition he employed 12 men on a weekly basis and made a weekly payroll of \$16,000.00 for over 25 weeks at a total of \$400,000.00. Further, he also took a loan of \$50,000.00 from Bank of Antigua and \$50,000.00 from Antigua Development Bank to pay his staff and buy materials in lieu of payments from the Minister.
- [7] According to him he also excavated 3 ponds in the Pigotts Primary School compound which served as a water catchment. He also hired a suction truck for the sum of \$25,000.00 to pump out the water from the ponds. This work was necessary, he says to alleviate flooding which was preventing the road works from being carried out.

- [8] The claimant asked the General Manager for his written contract so that he could submit his bills for payment to the Minister, but was informed that the written contract was made with Antigua Concrete Services Ltd (ACS Ltd) on 19th July 2007.
- [9] The claimant pleads that he again requested the written contract from the Minister, and was told to stop all construction works on the roads in Pigotts Village, He avers that his contract was immediately terminated without any payments.
- [10] The claimant never received the written contract for the construction work he completed at Pigotts Village that was promised by the Minister.
- [11] According to his pleadings, at the time he was ordered to stop all construction works, a total of 1,470 sq. ft. of road was already completed at a cost of \$1,328,000.00. The claimant has received no payment from the defendants for the construction work completed. Consequently, the claimant has suffered loss, damages and incurred expenses. He therefore seeks the relief set out in paragraph 1.
- [12] In their defence, the defendants deny that the claimant was contracted by the Government of Antigua and Barbuda to construct concrete roads at Pigotts Village. The defendants aver that the claimant was initially contracted by the Ministry of Public Works to flush public drains with water trucks. They deny that the claimant was instructed to construct roads as alleged.
- [13] The defendants admit that in or around December 2006, there was a meeting called where two representatives of the Ministry of Works were present namely, Desmond Charles and Gary Edwards. However, they deny that either of the two representatives of the Ministry, at any time, engaged the claimant in a contract on behalf of the Ministry.
- [14] The defendants deny paragraphs 6 and 7 of the Statement of Claim and state that a contract was awarded to Antigua Concrete Services Limited, to perform the construction and road works referred to by the claimant. A copy of the letter from the Chairman of the Tenders Board is attached to the Defence.
- [15] The defendants further state that there is no record at the Ministry of Works that a contract was awarded to the claimant to perform the road works or to provide any of the services as alleged by the claimant. In fact the defendants state that the services of the claimant were engaged as a subcontractor by the said ACS Ltd.
- [16] The defendants deny that representatives of the Ministry of Works gave instructions to the claimant to obtain Workmen Compensation Insurance as alleged.
- [17] The defendants deny the further allegations contained in the Statement of Claim and aver that at all material times the claimant was a subcontractor of ACS Ltd and was never contracted by the Ministry of Works as alleged.

- [18] Defendants therefore deny that the claimant is entitled to the relief claimed.
- [19] In his Reply, the claimant disputes the Defence, except where it consists of admissions. The claimant specifically asserts that at no time did the Minister contract him to flush public drains as alleged or at all. He maintains that he is a contractor by profession. The claimant further asserts that the representatives of the Minister, his employees, servants or agents inspected the claimant's work on a daily basis and gave instructions and directives which the claimant was bound to follow and did carry out.
- [20] The claimant repeats that he was contracted by the Minister through his employees, servants or agents to construct 6,600 feet of concrete road in Pigotts Village.
- [21] In regard to the defendants' assertion that the claimant was engaged by ACS Ltd as a subcontractor, the claimant states that he has no knowledge and puts the defendants to strict proof. He repeats that at all material times, he was an independent contractor engaged by the Minister through his employees, servants or agents Desmond Charles and Gary Edwards and that he acted on their instructions alone.
- [22] The claimant re-asserts that he is entitled to the relief claimed.

Issues

- [23] The issues before the court are:
1. Was there a contract made between the claimant and the Government?
 2. If so, did the defendants breach the said contract?
 3. If there was no contract between the claimant and the Government, is the claimant entitled to any relief?

The Evidence

- [24] In the claimant's witness statement, he asserts that he was asked to visit Paynter's Development (referred to as Pigotts Village in his pleadings) where Desmond Charles and Gary Edwards and the claimant held a meeting. At the meeting they looked at the condition of the roads. The roads, he says, were in terrible condition and the residents complained of flooding in the area. Paynter's was a new development and the roads were unpaved. They discussed ways to solve the problem. In the meeting he was told to start the work in January 2007. His evidence is that both Desmond and Gary pointed out exactly the extent of the work that should be carried out - this included construction of drains, "U" drains, curbs and roads. The length of the road to be constructed measured 6,600 feet; the width 20 feet butting and bounding the drains on both sides.
- [25] Claimant's evidence is that he was not contracted by "a third party to construct the roads in Pigotts". He is adamant that he received all instructions directly from the officials at Public Works Department in the person of Gary Edwards and Desmond Charles.

- [26] Further due to heavy rains during the rainy season in 2007, the ground at Paynters was saturated with water, compaction of the road, therefore became impossible. A decision was taken to dig 3 ponds on the compound of Pigotts Primary School as temporary water catchments. However, the ponds did not have the capacity to hold all the water that was draining from the roads. So he had to hire a suction truck to remove water. He admits that this was not included in his contract. The overall cost of the added work was \$50,000.00.
- [27] The claimant further describes in detail the process he employed in preparing the surface of the road for paving. He alleges that he was told by Gary and Desmond specifically that the concrete for the casting of the road would come from ACS Ltd. In preparing the road for casting, he used 3/8 steel which he purchased from 3D Enterprises Ltd and used them in the foundation of the road. He was later told by the engineer inspector not to use steel or BRC mesh but to use 1 x 3 load barrier every 10 feet, and he did so.
- [28] His evidence is that he cast the road surface using concrete supplied by ACS Ltd – 64 trucks totaling 540 yards were delivered.
- [29] He alleges that at the time he was ordered to stop all construction works on the roads, a total of 1,470 feet of road was already completed at a total cost of \$1,328,000.00. He therefore claims that sum as due and owing to him under the contract.
- [30] The defendants admit to a meeting at Paynters. However, the details of what transpired at that meeting differ substantially from claimant's account. Desmond Charles gave evidence that in 2007 there was a site visit in the area of Paynter's East, adjacent to Pigotts Village. The purpose was to examine a major drainage problem that existed in the area, which was causing flooding. According to his evidence, the persons present were: The Minister of Public Works, Mr. Wilmoth Daniel; Mr. Barry Davis; Engineers from the Ministry; and the claimant, who he was meeting for the first time. His evidence is that he is not aware on whose invitation the claimant was there.
- [31] At the conclusion of the meeting, it was determined that immediate construction of a designed drainage system leading from east to west across the said main road to alleviate the flooding was imperative. Not too long thereafter, he saw the claimant working on the drainage system in the area. He was constructing "U" drains only.
- [32] Sometime thereafter, another meeting was convened with the then Minister of Public Works, which he attended. The Parliamentary Representative of St. Georges, representatives of ACS Ltd, and Ministry Engineers were also in attendance. After examination of the roads, it was decided that the road network was in poor condition and needed immediate repairs and reconstruction. The contract for the road works was awarded to ACS Ltd. A copy of the contract was submitted in evidence. Also submitted in evidence were the payment vouchers submitted to the Government by ACS Ltd and the schedule of payments showing that ACS Ltd was paid the full contract price of \$3,946,800.00 for the construction of concrete roads in Pigotts.

- [33] His evidence is that the decision to award contracts is normally discussed at the level of the Minister and Director of Public Works and such large contracts, such as the one the subject of this claim, would go through the process of being tendered at the Tender's Board. His evidence is that this contract was tendered and awarded to ACS Ltd.
- [34] His evidence is that sometime later he was told by Elmore Charles, a representative of ACS, that they were looking to subcontract some of the aspects of the road construction under their contract. Having seen the claimant's team working on the "U" drains in the area, he suggested that the claimant could be a possible candidate to assist and do some subcontract work. He later came to realize that the claimant had entered into an arrangement with ACS Ltd whereby he provided labour to some aspects of their road construction project and the company provided claimant with concrete and other related materials. He subsequently became aware that the claimant had submitted bills to ACS Ltd for his subcontracted labour when he, Desmond Charles, was asked to review the bill and give his professional advice, as to the validity and the cost based on the dimension of the project contract. He, along with the senior engineer in the Ministry, reviewed the bills and submitted their conclusions and findings to ACS Ltd.
- [35] Mr. Charles is adamant that at no point in time did he contract the claimant to perform road works or construct roads in that area on behalf of the Ministry of Public Works. Nor did he, at any time, ever enter into any contract with the claimant. His evidence is that the claimant had petty contracts to build 'U' drains, for which he was paid.
- [36] Furthermore, Mr. Charles evidence is that based on the large volume of work that was to be done, the award of this contract and like contracts are in the authority of the Tender's Board and he has no such authority.
- [37] On cross-examination it was put to Mr. Charles that the claimant had started to cast the road before the contract was awarded to ACS Ltd. Mr. Charles' response was "definitely not". It was also put to him that at the meeting in 2007, a promise was made to the claimant that the contract to construct the roads would be awarded to him. His response was that there was no such meeting to award anything.
- [38] Mr. Charles denies that he ever told the claimant to obtain Workman Compensation. He admits however, that it is a general policy of Public Works that all contractors have such coverage.
- [39] Finally, according to Mr. Charles' evidence, two contractors were working in the Pigotts area: ACS Ltd which was given the road contract and the claimant who was working on drains.

The Alleged Contract

- [40] The claimant has pleaded the existence of an oral contract with the Government of Antigua & Barbuda – specifically with the Ministry of Public Works (the Ministry) . The law does not require a contract to be made in any particular form. A contract may be validly made either orally or in

writing or partly orally and partly in writing¹. However, a valid contract requires an agreement, an intention to create legal relations and consideration².

- [41] A contract may also be inferred from conduct, but it is necessary to distinguish between conduct creating the contract and subsequent conduct which will be rejected as evidence of the terms of the contract³
- [42] The only evidence before the court as to what transpired at the meeting is to be found in the evidence of the claimant and Desmond Charles. While the claimant called 2 witnesses, Denroy Henry and Edwin Joseph, neither one was present at the meeting at which the claimant alleges he was awarded the contract. So though their evidence may be relevant to the claimant's subsequent conduct, their evidence cannot assist the court as to what transpired at the meeting and as to what, if any, promises were made to the claimant.
- [43] The claimant admits that he has no documents which lend support to his claim – no contract letter, no written approval, no breakdown, nothing whatsoever referable to a contract between the parties.
- [44] The claimant has the burden of proving by a preponderance of the evidence that a valid contract was made with him at the meeting. For the following reasons, the court finds that the claimant has failed to meet that burden.

- (1) Inconsistencies: In his statement of claim, the claimant pleads that he attended a meeting with two (2) persons, Gary Edwards and Desmond Charles. A contract was concluded between them. In his witness statement, he again repeated that the meeting was with the two persons named in his pleading. He was told to start work in January 2007. He added that they pointed out to him the exact extent of the work to be carried out. At trial, for the first time, the claimant said that Mr. Davis, the then Director of Public Works, was in attendance at the meeting and that it was Mr. Davis who told him to start work in 2007.
- (2) At the time the claimant asserts that a contract was agreed between himself and the defendant, the Tenders Board Act (the Act) was in force. Under the Tenders Board (Amendment) Act, 2002, the Tenders Board had sole and exclusive authority to act for, in the name of and on behalf of the Government and the statutory bodies to which the Act applies; to invite, consider and accept or reject offers for the undertaking of works or services necessary for carrying out the functions of the Government. The Board has the discretion to exempt the Government from the tender procedure to which the Act applies. The Act was repealed in 2011 by The Procurement Administration Act 2011 #16/2011. The Claimant does not assert that a exemption was granted in regard to the alleged contract. The evidence of Desmond Charles is that given the work to be done and the cost thereof, the contract would fall under the procedures in the Act, as amended, and that he had no

¹ Halsbury's Laws of England, 4th edition, volume 9, paragraph 214

² Supra, paragraph 224.

³ Whitworth Street Estates (Manchester) Ltd v Miller & Partners Ltd [1970] A.C. 583

authority to enter into a contract of this nature on behalf of the Government. The Court accepts the evidence that the contract did initially go to tender and that the contract was awarded to ACS Ltd. A copy of the contract was exhibited. It was signed by the Permanent Secretary, Ministry of Works and Transportation on 13th November 2007 and counter-signed by the Director of Works, Mr. Davis.

- (3) The claimant describes no process of offer and acceptance. The claimant does not allege that he submitted an offer or bid which was accepted by the defendant.
- (4) The claimant's evidence is that he had previously worked for Public Works Department. In fact he mentioned that he had been awarded as many as 100 petty contracts. It is therefore incredible that a contract to build roads with a value in excess of \$3 million would have been awarded as described by the claimant: he held no discussions with engineers, he did no costing, he submitted no bid. He simply attended one meeting and he was awarded a three million dollar contract.
- (5) The court finds Mr. Desmond Charles evidence credible. The court accepts the evidence that having looked at the problem, two awards were made: petty contracts for building the drains and, after tender, a formal contract to build the roads. The court accepts the evidence of Mr. Charles in respect of the events of the meeting attended by the claimant. The court therefore rejects the evidence of the claimant that a contract was made with him at that meeting for the construction of 6,600 feet of road in Pigotts.
- (6) The claimant has presented no proof that a contract was in place between the parties at the time the contract was awarded to ACS Ltd. Therefore, the award of the contract to ACS, did not amount to a wrongful repudiation.

[45] The claimant submitted into evidence a bundle of receipts and invoices for materials and supplies he allegedly purchased in respect of the contract. The bundle consists of the following:

- (1) 4 money receipts, 2 dated in June 2008 and 2 dated July 2008
- (2) 7 invoices from Mr. Cool Concrete each for various amounts of 2500psi strength concrete
- (3) 2 receipts from 3D Engineering for quantities of steel
- (4) Invoices from Mings Lumber totaling \$35,439.91
- (5) 9 receipts from Midland Building Supplies for quantities of cement totaling \$2,169.50

[46] The money receipts have no business name. Each reflects payment for a quantity of 2500psi strength concrete. Interestingly, the addresses on the receipts are Fitches Creek and Cassada Gardens. In cross-examination, the claimant admitted that at the time he carried out the alleged works in Pigotts, he also had "gangs" (men) working in Fitches Creek and Cassada Gardens. It was put to him that these purchases were delivered to those job sites and had nothing to do with the road works in Pigotts. There was a feeble response of "I do not accept that". The court remains unconvinced that these receipts are connected with work done in Pigotts.

- [47] Five of the seven invoices from Mr. Cool Concrete list the delivery address of the product as Fitches Creek. One invoice has no address and the last invoice is actually a duplicate of a previous invoice. These do not advance the claimant's case.
- [48] The 2 receipts from 3D Engineering for the purchase of steel total a sum of \$9,660.00. One is dated 23rd June 2008 and the other 14th July 2008. There is no indication on the receipts what job site the materials were delivered to. In any event, steel was also used in the construction of the curbs, therefore there is no unequivocal connection with the road works and these 2 receipts.
- [49] Invoices from Mings Lumber: The evidence of Denroy Henry of Golden Grove, witness for the claimant, is that between 2005 and 2007 he was employed at Ming's Hardware part time. He was responsible for delivering materials to the customers. He got to know the claimant as a customer of Mings. His evidence is that the claimant purchased materials totaling over \$34,000.00. The materials included steel, cement, wood, nails and tie wire. On the instructions of the claimant, he delivered these materials to a road construction site at Paynters Development in the area of Pigotts Primary School. He describes what he saw when he got to the site. His evidence is that he saw several workmen preparing the road for paving. Some of the materials were off loaded by the claimant's crew while he dumped the rest of the materials on the construction site in the vicinity of the school. In light of the evidence of Desmond Charles, which the court has accepted, that the claimant was subcontracted to ACS Ltd to perform the labour in respect of the contract awarded to ACS Ltd, and that the claimant actually submitted a bill for his labour, the evidence by Denroy Henry does not amount to unequivocal support for the claimant's case of the existence of a contract.
- [50] The 9 receipts from Midland Building Supplies are all for the purchase of bags of cement totaling \$2,169.50. The evidence that the court has accepted from Mr. Desmond Charles is that the claimant was being provided with concrete for the paving of the road by ACS Ltd as part of the subcontract agreement. In fact the claimant has admitted receiving 64 trucks of concrete from ACS Ltd. The purchase of large quantities of cement might appear curious were it not for the evidence that the claimant was awarded a petty contract for the construction of drains. The claimant's own evidence is that the concrete for the drains were produced by his team of 12 men using a mixer at the site. Therefore, under the circumstances the purchase of bags of cement is quite understandable and referable to the claimant's work on the drains.
- [51] There is one other piece of evidence that requires mention. As part of his case, the claimant placed into evidence a letter dated July 4, 2007, signed by the then Director of Public Works, Charlesworth Davis. It is addressed "To Whom It May Concern". Claimant's evidence is that he needed a letter to take to the bank in order to obtain a loan. This is the letter given to him by Mr. Davis. It reads in part:

"This is to certify that Mr. Fletcher Prosperere is employed as a Private Contractor by the Ministry of Works and Transportation to construct concrete roads, curb and drains and U drains in Pigotts. The estimated value of works to be carried out by him is \$900,000.00.

The Ministry presently owes to Mr. Prosperere One hundred and eighty six thousand dollars (\$186,000.00)."

[52] The claimant relies on this letter as proof that he had a contract with the defendants as alleged. His evidence in regard to the letter is that having received no payments under the alleged contract, he approached Mr. Davis for a letter to take to the Bank and this was given to him.

[53] The court notes that the letter is dated July 4th 2007. According to Claimant's evidence, he started work in January 2007. So by July, he would have been well into the alleged contract. Yet the letter makes no mention of a contract valued at over \$3 million. The value of the works to be carried out is stated as \$900,000.00. This figure was not questioned by the claimant at the time as erroneous. The balance due is stated as \$186,000.00. The court therefore concludes that the letter is more supportive of the evidence that the claimant was awarded petty contracts to build drains than of an award of a three million dollar (\$3,000,000,000) contract.

[54] The un-contradicted evidence is that claimant was a listed contractor with Public Works Department. He had undertaken, according to his evidence, over 100 petty contracts before the alleged contract for over \$3 million, the subject of this matter arose. This letter provides further evidence of other works the claimant was engaged to do by means of petty contracts with Public Works. The letter signed by Mr. Davis does not assist the claimant in this matter.

In light of the above, the evidence of Edwin Joseph that the claimant constructed roads in Paynters between 2007 and 2008, does not assist in establishing the existence of the contract alleged in this claim.

Quasi-contract

[55] Quasi-contract is a term used to denote a series of situations in which a claimant can sue a defendant for payment although no contract between the parties exist. The essence of all such claims is the restoration of some benefit conferred on the defendant by the claimant which it would be unjust to allow him to retain, or to retain without payment⁴. In the case of construction contracts, the most important quasi-contractual remedy is likely to be that of *quantum meruit*. This is a case of recovering the value of work done or services performed and will arise in circumstances where a benefit has been conferred on the defendant which justice requires should be reimbursed to the claimant⁵.

⁴ Hudson's Building and Engineering Contracts, eleventh edition, volume 1, page 142

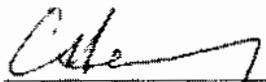
⁵ Supre, page 144

[56] The claimant has not pleaded *quantum meruit*. Nor was it raised at the trial. Further, claimant has not shown that he has conferred a benefit on the defendant in the amount of \$1,328,000.00. The receipts and invoices submitted do not come close to that figure. Many of the receipts have been shown not to be in respect of the work in Pigotts. Finally, the Government, having paid the full contract price to ACS Ltd for the construction of the same roads in Pigotts, it cannot be said that the Government has received a benefit for which it has not paid.

Conclusion

[57] The court therefore concludes that no contract for the construction of roads at Pigotts was entered into between the claimant and the defendants as alleged. The claimant is not entitled to the relief sought or any other relief.

[58] Accordingly, judgment is entered for the defendants dismissing the claim with cost. Cost to be prescribed cost, unless otherwise agreed.


CLARE HENRY
High Court Judge
Antigua & Barbuda