

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO. ANUHCV 2009/0613

BETWEEN:

REYES MORALES

Claimant

and

FLAT POINT DEVELOPMENT LIMITED

Defendant

Appearances:

Mr. Steadroy Benjamin for the Claimant
Mr. Conliffe Clarke for the Defendant

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2011: July 26
2012: May 29
November 29
.....

JUDGMENT

[1] **MICHEL, J.:** This case arises from a contract for services entered into by the Claimant and the Defendant under the terms of which the Claimant (a stone cutter and stone wall layer) carried out certain stone works for the Defendant (a building construction company) at a construction site where the Defendant was undertaking building works. The Claimant had been carrying out similar work for the Defendant since 2007 and the Defendant would normally pay the Claimant for his services "on a fortnightly basis for work performed". There appeared to have been no difficulties

between the parties between 2007 and September 2009, with the last payment being made by the Defendant to the Claimant on or about 17th September 2009 for work carried out for the period from 1st to 15th August 2009.

[2] Between 16th August 2009 and either 30th September 2009 (according to the Claimant) or 14th September 2009 (according to the Defendant) the Claimant carried out the usual stone works for the Defendant at the Defendant's construction site at Emerald Cove, Willikies Village, Saint Phillip. The cost of these last works undertaken by the Claimant for the Defendant was assessed by the Defendant to be of the value of \$30,260.

[3] It is the Claimant's case that the aforesaid sum of \$30,260 became due and payable to him as of 30th September 2009 but, when he went to the Defendant's office for payment, as was his custom, the Defendant refused to pay him the sum due and payable to him. The reason given to him by the Defendant's officials for refusing to pay him was that his son, Jose Manuel Molares, who was one of his employees, had stolen a quantity of copper wire belonging to the Defendant on its construction site at Emerald Cove and the Defendant was requiring him to forego the amount of \$30,260 due to him and to continue to work for the Defendant without payment until the sum of \$75,000 had thus been repaid to the Defendant for losses incurred as a result of his son's theft. The Claimant alleged that he refused to agree to this and, as result, the Defendant not only declined to pay him the amount which they owed him, but also ordered him not to return to their construction site. In fact, he said, they posted signs on the compound prohibiting him and his employees from entering the compound.

- [4] In its defence, the Defendant alleged that the work performed by the Claimant for which he claimed the \$30,260 was unsatisfactory and not up to the standard required and that its officials had been in negotiations with the Claimant with reference to the theft by his son and the deficiencies in the work done for the period in question, and that is why the Claimant had not been paid.
- [5] The Defendant counterclaimed against the Claimant "for damages for the unauthorised and unlawful conversion of property belonging to the Defendant", for which the Defendant claimed amounts totalling \$211,335. The Defendant also claimed damages for "breach of contract because of shoddy workmanship".
- [6] The trial of the case was set for 11th October 2010, but was adjourned upon application. It was later set for 7th March 2011, but was again adjourned upon application. On the third scheduled trial date of 26th July 2011, the trial did commence, with the Claimant being examined, cross-examined and re-examined and the Defendant's witness, Lorenzo Contu, being examined and cross-examined. The trial was then adjourned upon application. The continuation of the trial was set for 14th December 2011, but was adjourned upon application. On the next scheduled date for continuation of the trial, on 29th May 2012, re-examination of Mr Contu was declined by Counsel for the Defendant (Mr Contu not being present) and the trial continued to its conclusion, with the Defendant's other witness, Guillermo Guerra, being examined, cross-examined and re-examined.
- [7] The evidence of the Claimant was that he did sub-contract work for the Defendant on various construction sites as a stone cutter and stone wall layer from sometime in 2007 until September 2009. The way in which he was paid for his work by the Defendant was that at the conclusion of a period of work (usually a fortnight) the Defendant's engineer would prepare a document detailing

the work which he (the Claimant) had done for the period covered by the document, which document would then be presented to him for verification (by his signature) and he would thereafter be paid the value of his work as calculated by the Defendant's engineer.

[8] The Claimant alleged that the last payment made to him under this arrangement was made on 17th September 2009 for work done for the period up to 15th August 2009, while the last document prepared by the Defendant's engineer detailing the work done by the Claimant was for the period 16th August to 30th September 2009, which document he signed, but he has never received payment of the amount of \$30,260 due to him in accordance with the document. He alleged that, instead of paying him the amount due to him, the Defendant's representatives asked him to agree to forego that amount and to do further work for the Defendant without payment until a total amount of \$75,000 would have been paid to the Defendant in kind for the alleged theft by his son of the Defendant's copper wire. He further alleged that, when he refused to agree to this, the Defendant's representatives prohibited him and his employees from coming onto the Defendant's construction site.

[9] The Claimant alleged that he has still not been paid the amount due to him, despite having made demand for payment, and that he is claiming the sum of \$30,260, together with fees, interest and costs.

[10] The Claimant conceded that Jose Manuel Morales was his son and his employee, but that his aforesaid son was an adult, who was 25 years old at the material time, and responsible for his own actions. His son was employed as a labourer to work in the preparation of stone to be transported and laid by other employees of the Claimant. He never authorised his son to steal, take away or

otherwise handle any copper wire or other materials belonging to the Defendant, other than the stones which he was hired to work with. He asserted and maintained that he was not vicariously liable for any illegal and unauthorised actions of his son.

[11] Apart from asserting that the Claimant was vicariously liable for the alleged actions of his son and employee in stealing copper wire belonging to the Defendant, the Defendant's witnesses alleged that the work done by the Claimant for the period 16th August 2009 to 15th September 2009, which they valued at \$30,260, was defective and payment had not become due because the document prepared by the Defendant's engineer had been signed by the Claimant only and not also by a representative of the Defendant. They also alleged that a report was prepared by one of the Defendant's engineers identifying the defects in the Claimant's work which were to be corrected before the Claimant was entitled to payment for the work.

[12] Having read the witness statements of the Claimant and the Defendant's two witnesses, and having seen and heard the witnesses when they gave viva voce evidence in court, I am satisfied that the Claimant had carried out stone works for the Defendant for the period from 16th August to 14th September 2009 and had become entitled to be paid the sum of \$30,260, as per the assessment by the Defendant's engineer. I am satisfied too that the Defendant's engineer assessed the Claimant's work for the period in question and presented the resulting document to the Claimant for verification of the work done by him and the amount due to him for the period, and that this was the usual practice which preceded payment to the Claimant by the Defendant of the amount assessed. I am satisfied that the Claimant verified the extent and cost of his work by his signature of the document thus presented to him. Whether and when the Defendant's officials signed the document which they prepared and presented to the Claimant for verification of the

work done and the amount due is of no consequence. I am satisfied that the quality assessment of the Defendant's work was undertaken on a daily basis by the Defendant's engineers and I am satisfied too that no significance should be attached to the report prepared by the Defendant's engineer over one month after the work was undertaken by the Claimant, assessed by the Defendant and verified by the Claimant, and over one month too after the Claimant and his employees had been prohibited from returning to the Defendant's compound, and indeed even after the Claimant had instituted these proceedings against the Defendant. I am satisfied also that the only reason why the Claimant was not paid the assessed cost of his work following verification by him of the work done and the amount due was as a result of the alleged theft by the Claimant's son of a quantity of copper wire belonging to the Defendant and the view apparently formed by the management of the Defendant company that the Claimant (as the father and employer of the alleged thief) should compensate the Defendant for its resulting loss.

[13] Having made these findings of fact, what remains is the legal issue of whether the Claimant was liable for the alleged actions of his son and employee in stealing material belonging to the Defendant on the construction site on which he was employed to work by the Claimant.

[14] The common law position on the vicarious liability of an employer for the illegal acts of his employees has evolved over the last century. In cases like **Cheshire v Bailey**¹, **Mintz v Silverton**² and **Abraham v Bullock**³ decided in the early part of the last century, the English courts took the view that an employer could not be vicariously liable for a theft committed by his employee, on the basis that the act of stealing (unless he was employed to be a thief) must

¹[1905] 1 K. B. 237

²(1920) 36 T. L. R. 399

³(1902) 86 L. T. 796

necessarily be outside the course of his employment. Half a century later the Court of Appeal in England decided, in the case of **Morris v C. W. Martin & Sons**⁴, that an employer was vicariously liable for the theft by an employee to whom the items (which became the subject of the theft) were entrusted to him by his employer, on the basis that the employee's theft was in fact an improper mode of carrying out the work he was employed to do. The common law position was settled by the beginning of the new century with the Privy Council, in the case of **Port Swettenham Authority v TW & Co**⁵, approving of the Court of Appeal's decision in Morris, and the House of Lords expressing its approval of Morris in the case of **Lester v Hesley Hall**⁶.

[15] It can now be taken as settled that the common law position on the vicarious liability of an employer for theft committed by his employee whilst "on the job" is that an employer is vicariously liable if the item or items stolen by the employee were entrusted to him by the employer in the course of his employment.

[16] The circumstances giving rise to the vicarious liability of an employer for the theft by an employee of the goods of another were not present on the facts of this case. Jose Manuel Morales was not entrusted by the Claimant with the copper wire allegedly stolen by him. In fact, other than the fact that the Defendant's copper wire was located on the same construction site where the younger Mr Morales worked, there was no evidence of any connection that he was supposed to have had with the Defendant's copper wire. If therefore Jose Manuel Morales, whilst on the construction site on which he was employed to work as a stone cutter, stole copper wire belonging to the Defendant, which item was in no way connected to the work that he was employed to do, he was truly "on a

⁴[1966] 1 Q. B. 716

⁵[1979] A. C. 580

⁶[2002] 1 A. C. 215

frolic of his own" and the Claimant (as his employer) cannot be held to be vicariously liable for his criminal and tortious act. The fact that, in addition to being the employer of Jose Manuel Morales, the Claimant was also his father is of no moment, because a father is not vicariously liable for the wrongful acts of his adult children.

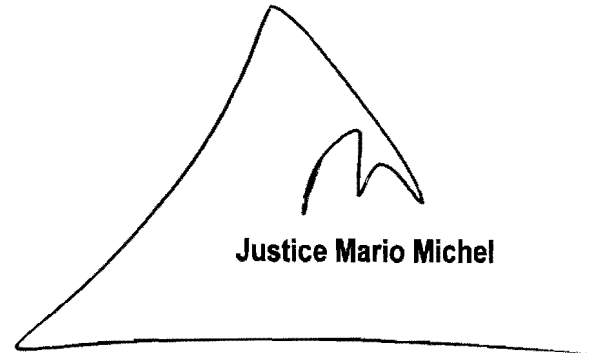
[17] Based on these findings of fact and law, it is clear that the Defendant had improperly withheld payment of the sum of \$30,260 due to the Claimant for work carried out by him for the Defendant company at its request and that the Claimant had thereby suffered loss and damage. It is also equally clear that the Defendant has no legal claim against the Claimant for any loss suffered by the Defendant company on account of any theft by Jose Manuel Morales of copper wire belonging to the Defendant.

[18] The Claimant is therefore entitled to special damages of \$30,260, with appropriate interest. The Claimant is also entitled to general damages for the inconvenience, embarrassment and loss occasioned by his inability to pay his workers and to discharge his other obligations consequent on the non-payment by the Defendant in September 2009 of the amount due to him. I consider that an award of \$30,000 would be appropriate.

[19] My order is follows:

1. The Defendant shall pay to the Claimant special damages of \$30,260, with interest thereon at the rate of 2.5% per annum from the 30th day of September 2009 to the date of this judgment, and general damages of \$30,000, with interest thereon at the rate of 5% per annum from the 20th day of October 2009 to the date of this judgment.

2. The Defendant's counterclaim is dismissed.
3. Costs to the Claimant in accordance with Rule 65.5 of CPR 2000.



Justice Mario Michel