

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

GRENADA

CLAIM NO. GDAHCV2023/0050 (formerly GDAHCV2020/0248)

BETWEEN:

KAYRAN CROSDALE

Claimant

and

BARRY'S ENGINEERING COMPANY LTD.

Defendant

Before:

The Hon. Mde. Justice Agnes Actie

High Court Judge

Appearances:

Ms. Sheriba Lewis for the Claimant

Mr. Kadeem Strachan for the Defendant

2024: July 9th; 17th; 30th
October 31st

JUDGMENT

- [1] **ACTIE, J.:** The parties claim damages for breach of the implied terms of a contract for engineering services provided by the defendant company.

The Claimant's case

- [2] The parties entered into an oral contract in the month of August 2017 for the defendant company to provide the claimant engineering services for the construction of a chicken farm in Felix Park, St Andrew (hereafter referred to as "the project"). The claimant avers that a contract price was not agreed however he paid the defendant the sum of \$7000.00 as a deposit on its fees.

- [3] The claimant asserts that the defendant's services were required to obtain final approval of the project from the Physical Planning Unit for a complete set of drawings together with pre and post construction support as the project requirements. The claimant asserts that he informed the defendant's representative, Mr. Leslie Barry, of his intention to commence the project no later than November 2019 and any delays beyond June 2019 would result in financial loss to him.
- [4] The claimant contends that the defendant breached the implied term of the provision of services in a timely manner by failing or otherwise refusing to provide complete services to the claimant. The claimant further contends that the defendant by its conduct repudiated the contract resulting in loss and damage to the claimant.
- [5] The claimant seeks damages for breach of contract, loss of earnings from July 2019 to October 2019, interest and costs.

The Defendant's case

- [6] The defendant denies that the claimant paid a deposit. The defendant states that the agreement between the parties was that the defendant would bill the claimant, and the claimant would pay the defendant for all services provided at the defendant's rate for such services. The defendant states that the claimant has failed or refuse to settle its fees in an invoice issued on 30th August 2019.
- [7] The defendant further states that the project being undertaken by the claimant was massive and challenging which required extensive architectural, engineering and project managing services over an extended period.
- [8] The defendant denies that it was an implied term that its services would be provided in a timely manner or that it delayed in providing engineering services for the project. The defendant avers that any delays experienced were largely caused by the claimant, or by factors not within the defendant's control.

- [9] The defendant contends that it did not repudiate the contract with the claimant resulting in financial loss. The defendant asserts that it continued performing and providing the services until the contract was unilaterally terminated by the claimant orally on 20th August 2019 and by email dated 21st August 2019. The defendant counterclaims the sum of \$440,485.50 for services rendered to the claimant.

Legal Analysis

Whether the defendant breached an implied term of timely provision of services

- [10] The test for implying terms into a contract was described by Lord Pearson in **Trollope and Colls Ltd v North West Regional Hospital Board**¹ as follows:

“An unexpressed term can be implied, if and only if, the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which although tacit, formed part of the contract which the parties made themselves.”

- [11] The authors of **Halsbury's Laws of England**² give further insight to the implication of terms in a contract:

“...the law admits of certain other terms to be implied as follows: (1) terms which the parties probably had in mind but did not express; (2) terms which the parties, whether or not they actually had them in mind, would probably have expressed if the question had been brought to their attention; and (3) terms which, whether or not the parties had them in mind or would have expressed them if they had foreseen the difficulty, are implied by the court because of the court's view of fairness or policy or in consequence of rules of law...”

- [12] The claimant argues that the defendant breached an implied term for the provision of the engineering services in a timely manner and/or otherwise failed or refused to provide the complete services for the November 2019 commencement date resulting in financial loss. .

¹ [1973] 2 All ER 260

² Halsbury's Laws of England 4th edn Vol. 9(1) para 778

- [13] The defendant in response states that the claimant at no point indicate a timeline date of November 2019 by which he intended to start construction of the project. However, it is the evidence that the claimant in an email dated 4th February 2019, wrote to the defendant stating his intention to commence construction in November 2019. The defendant in an email of even date giving a status of the project informed the claimant that a downpayment and other pertinent information required to complete the EIA which was critical to move the project forward was still outstanding together with the surveyor's fees for topographic survey. The penultimate paragraph of the email states *"we implore that you address the outstanding matters urgently. Once this is done, we will have the approvals and can be on target to have a contract signed in August and start construction in November as planned"*.
- [14] It is obvious from the defendant's response there was previous discussion of a start date to give business efficacy to the agreed November 2019 timeline required compliance.
- [15] The defendant further asserts that there were delays contributed by the claimant and third parties which were beyond his control. The timeline of work done, as indicated by the defendant, was as follows:
- (1) On 12th March 2018 the defendant applied for outline planning approval for the project, for which conditional approval was granted on 15th May 2018.
 - (2) On 21st August 2018, a topographical survey of the entire site by licensed land surveyor Mr. Andrew Alleyne was completed by the direction of the defendant. The defendant states that as a result, the design work could only have commenced after August 2018. Moreover, payment for the survey was made by the claimant in February 2019.
 - (3) On 7th September 2018, the defendant sent queries to the claimant for information relative to the Environmental Impact Assessment (hereafter referred to as "EIA"). There is no evidence of a response to the defendant's queries before the court.

(4) Payment to secure the services of Roberts Caribbean to complete the EIA of the project was not made by the claimant until 12th February 2019. The date of the invoice from Roberts Caribbean is 5th March 2019, and there is no evidence of a completed EIA.

(5) It is also the evidence of the defendant through Ms. Shannon Noel-Calliste that the documents required by the claimant would have taken between 4 to 6 months to be produced, subject to the availability of all required documents necessary to complete the drawings.

[16] The court notes the delays on the part of Roberts Caribbean in its production of an EIA which the defendant states was critical for the granting of final approval by the respective authority as well as the claimant's tardiness responding to queries regarding the project.

[17] It is this court's view that the engineering services provided by the defendant depended on the provision of documents and services by third parties and payments by the claimant himself which were not within the control of the defendant. The court finds that the defendant was not in breach of the implied term of the contract for the timely provision of services.

Whether the contract was repudiated by the defendant

[18] The claimant states that the defendant's by its conduct in or about February 2019 and thereafter repudiated the contract by refusing to provide further services or be bound by the contract. The claimant avers that he accepted the defendant's repudiation in a letter dated 21st October 2019 issued by attorney at law on behalf of the defendant.

[19] Lord Wilberforce in **Woodar Investment Development Ltd. v Wimper Construction Ltd**³ described repudiation of a contract as:

³ [1980] 1 All ER 571

“...a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations”

[20] The court notes that the claimant in an email dated 21st August 2019 to the defendant indicated his desire to terminate the contract with the defendant and to engage the services of alternative engineering firms. This termination the defendant thereafter accepted by response in an email of even date. The evidence demonstrates that it was the claimant that expressly terminated the contract with the defendant.

[21] In the circumstances, the court is constrained to find that the claimant has failed to prove that there a repudiation of the contract by the defendant. The claimant also fails to prove the alleged loss of wages from August to October as the contract had already been terminated. Accordingly, the claimant's claim for damages stands dismissed,

Whether \$440,485.50 is a fair value for the cost of the defendant's services

[22] The defendant counterclaims for the sum of \$440,485.50 for its work done on the project. It is the evidence that the parties had not agreed a contract price neither did the defendant invoice the claimant prior to the termination of the contract.

[23] The defendant avers that from the period of initial contracting between the parties in 2017 to termination, the claimant only paid the sum of \$28,000.00 comprising the sum of \$21,000.00 for third parties and \$7,000.00 held on account for tendering.

[24] The court notes the email correspondence between the parties between the 4th February to 12th February 2019 which confirms the claimant deposit of \$28,000.00 for the EIA, Andrew Alleyne, Land Surveyor and costs of tendering for contractors to provide respective bids. The court also notes the contents of the email and the closing paragraph where the defendant concluded “ *We have been working on the project for some time now and have not formally agreed on fees*”.

[25] The court therefore accepts the defendant's evidence that no deposit had been paid by the claimant as averred. The defendant's claims the \$440,485.50 on a quantum meruit basis and that its invoice of 30th August 2019 represents the true and fair value of its services to the claimant under the following factors:

- (1) The extent of time spent by the defendant in obtaining instructions from the claimant, liaising with third parties on behalf of the claimant, and preparing designs and drawings for the claimant's project;
- (2) The extent and scope of the project;
- (3) The fact that the defendant was never paid by the claimant in respect of its services up to the date of the termination of the contract;
- (4) The fact that the defendant had completed drawings, designs and specifications forming part of the contract without compensation; and
- (5) The defendant having obtained preliminary planning approval for the claimant's project.

[26] The claimant states further that it was an implied term of the contract that the defendant would be paid a reasonable sum for the services provided. The claimant argues that the defendant's invoice was malicious and vexatious and created with the intention of causing further delays in moving forward with the project.

[27] The parties at a mediation held on 10th August 2022 agreed to utilize a court appointed expert in the person of Mr Selwyn Woodroffe of the firm Consulting Engineers Partnership Ltd. (hereafter referred to as "CEP") to conduct an audit and valuation to assess the quantity and quality of work done by the defendant.

[28] The CEP report states that all of the drawings disclosed, with two exceptions, had not progressed beyond the conceptual design stage. The report applying regionally accepted fee scales, estimated the value of the consulting work done by the defendant in the sum of \$56,301.00. The CEP report concluded that the

pre-construction work done by the defendant is incomplete and the files produced were only a sub-set of what is required for the project.

[29] In response, the defendant contends that the assessment of CEP speaks only to the assessed value of the computer aided design files produced by the defendant but does not take into account the totality of the services provided by the defendant to the claimant as part of the contract.

[30] Nevertheless, the CEP report in a document entitled "Responses to Queries Submitted by the Defendant" states that:

"The total value of an engineer's pre-construction (design-stage) services for a project is not necessarily solely determinable by the assessment of the engineer's drawings. For example, during the course of a project, in addition to his analysis, design, and detailing work, the engineer would normally offer advice and counselling to his client, all in the best interests of the overall project. Notwithstanding that such advice has an intrinsic value, it is:

- a) generally expected as a normal part of the overall service,
- b) not usually measurable, and therefore
- c) not included as a separate item either in the engineer's fee proposal or in the engineer's interim invoices.

The engineer's total design-stage fee encapsulates all of the services he provides for his client. In the final analysis, all of the engineer's preconstruction work is contained and described in his final deliverable to his client, namely: the Completed Construction Drawings for the project. For the engineering consultant, his total pre-construction fee generally represents the total value of his design-stage services."

[31] Mr. Woodroffe responses to counsel for the defendant in cross examination were unwavering and uncontradicted. The court fully accepts the expert's assessment and finds that the audit and valuation took into consideration the consultative services and time spent by the defendant on the project.

[32] The court accepts the value of the defendant's services under the contract to be in the sum of \$56,301.00. The court also finds that the defendant is indebted to the claimant in the sum of \$7000.00 deposited for tendering service given the fact that the work was incomplete and not at tendering stage. Accordingly, the claimant shall pay the defendant the sum of \$49,301.00 with interest.

ORDER

[33] It is therefore ordered and declared as follows:

- (1) The claimant's claim for breach of the implied term of timely provision of services and repudiation of contract is dismissed.
- (2) The defendant's counter claim is successful in part.
- (3) The claimant shall pay the defendant the sum of \$49,301.00 being (\$56,301.00 - \$7,000.00) with interest at the rate of 3% from the date of filing the claim until judgment and at the rate of 6% per annum from the date of judgment until payment in full.
- (4) The parties each having some measure of success shall bear their own costs.

Agnes Actie
High Court Judge

By the Court

Registrar