

**THE EASTERN CARIBBEAN SUPREME COURT  
IN THE HIGH COURT OF JUSTICE**

**MONTSERRAT**

**CLAIM NO. MNIHCV2020/0028**

**BETWEEN:**

**[1] JANICE SERGEANT**

Claimant

**and**

**[1] LINCOLN MULCARE**

Defendant

**Appearances:**

Ms. Marcelle E. M. Watts for the Claimant  
Mr. Jean E. H. Kelsick for the Defendant

---

2024: JUNE 3

2024: AUGUST 21

---

**JUDGEMENT**

**FITZPATRICK [AG.]:**

**THE COURT CONSIDERED THE FOLLOWING:**

- [1] Janice Sergeant (the “Claimant”) is an individual and the lawful owner, along with her late spouse, Hogarth Sergeant, of a property with residence located at Block 12/1, Parcel 171, Beachettes Registration, Montserrat (the “Residence”).
- [2] Lincoln Mulcare (the “Defendant”) is an individual resident of Montserrat who carries on business offering general contracting services to the public at large.
- [3] The Claimant retained the Defendant to complete various works at her Residence to make it habitable.

- [4] The Claimant says the Defendant was paid in full but overcharged for some and failed to complete other of the agreed works and unlawfully converted some of the funds paid to him for his personal use. The Claimant says she is thereby owed \$69,384.80 EC.
- [5] The Defendant denies all allegations and takes the position that nothing is owed to the Claimant.

### **The Trial Evidence**

- [6] The trial for this action took place over one day along with a site visit. Both the Claimant and the Defendant testified and were cross-examined. There were no other witnesses called by either side. I review the material evidence below.
- [7] At the start of this trial, the Claimant adopted the contents of her Witness Statement filed March 1, 2023 as her evidence in chief. However, some of the contents of this Statement were successfully challenged by the Defendant thereby delivering an early and, ultimately, mortal strike for the reasons that follow.
- [8] Similarly, the Defendant adopted the contents of his Witness Statement filed January 31, 2023 and Supplemental Witness Statement filed April 28, 2023.
- [9] The Claimant and her late husband, Hogarth Sergeant hired an unnamed contractor who did unspecified construction at the Residence prior to the Defendant being engaged. It is unclear when this work was done.
- [10] The Sergeants obtained an architectural drawing of their intended basement floor plan at the Residence, which was also referred to as the first floor during the trial. The plan dated November 16, 2015 was drawn by Mervin Francis of the architect firm, Galloway and Associates (the "Floor Plan").
- [11] In or about August, 2016, the Claimant contacted the Defendant towards retaining him to complete the intended works to the basement level.
- [12] The Claimant's evidence was that the Defendant suggested she obtain a bill of quantities detailing the scope of the desired work and related costs. The Claimant states that she authorized the Defendant to do so on her behalf. Further to that authorization, the

Defendant hired D & V Best Quality Surveying Services to provide a bill of quantities for the intended work.

- [13] Damion Williams of D & V Best Quality Surveying Services was provided with the Floor Plan. He attended at the Residence for inspection two times, namely on August 18, 2016 and August 22, 2016. On this basis, Mr. Williams prepared his Bill of Quantities dated August 23, 2016 (the “BOQ”) detailing the intended scope of work “to complete the dwelling to livable standard for occupation in 4 months” and related costs.
- [14] The Claimant’s evidence was that she was presented with the BOQ on August 23, 2016.
- [15] The Claimant, in her trial testimony, acknowledged that she had the opportunity to get another quote for the proposed work in addition to the BOQ but that she declined to do so.
- [16] The Claimant stated that she communicated her acceptance of the BOQ on August 24, 2016 and authorized the Defendant to proceed with the work.
- [17] The Claimant testified that she subsequently requested additional tiling work. The Defendant quoted her and she accepted the amount of \$10,254.84 EC for the tiling.
- [18] The parties did agree on three seminal points. One, that the initial agreement between them for the intended scope of work was as detailed in the BOQ. Two, that they entered into a subsequent, oral agreement for the Defendant to tile certain areas of the Residence and that this work did not form part of the scope included in the BOQ. Three, that the Claimant paid the full amount of \$122,189.00 EC quoted by the BOQ and the additional \$10,254.84 EC requested by the Defendant for the tiling work.
- [19] The Defendant commenced work at the Residence on or about September 5, 2016. The parties share little common ground regarding recollection of what transpired over the period that the Defendant worked at the Residence, including what work was agreed to and what work was done.
- [20] This Court would need to take on the role of transcriptionist to detail all of the conflicts in the evidence between these parties. Fortunately, that level of forensics is not

necessary for the determination of the issues herein for reasons that follow. That said, some examples will serve to illustrate the degree of divergence in the evidence.

- [21] The parties could not agree about how long the Defendant attended at the Residence to work. The Claimant says the Defendant ceased work after eight weeks with much of the work that was agreed to be done left incomplete.
- [22] The Defendant says and the Claimant confirmed (see: Claim paragraph 5 and Witness Statement paragraph 3) that he was pressed to complete the works on an expedited basis by the Claimant who was then residing with her husband in expensive rental accommodations. The Defendant's testimony was that he completed all agreed upon work within those ten weeks.
- [23] The parties could not agree on what physical area the scope of work covered. The Claimant described three sections, which were referred to as sections 1, 2 and 3, of the Residence where the work was to be done. Although the BOQ did not make any reference to sections 1, 2 and 3, the Claimant says the BOQ intended that the Defendant would "complete the downstairs of the property which comprised three sections" (see: Claimant's Witness Statement at paragraphs 3 and 28).
- [24] The Defendant says that two of the sections referenced by the Claimant, namely sections 2 and 3, were part of the foundation structure and not intended by the BOQ to be made into finished rooms, including construction of floor slabs. Sections 2 and 3 were very much unfinished when viewed on the site visit.
- [25] The Claimant's trial testimony initially denied that the Defendant did any work outside of what was detailed in the BOQ. For example, the Claimant denied that the Defendant removed an interior staircase and in proximity constructed a laundry and storage room. The Claimant subsequently acknowledged that the Defendant did complete work outside of what was detailed in the BOQ, including the laundry and storage room that was observed during the site visit.
- [26] The disputes about the scope of work were not limited to the interior building at the Residence. The Claimant took the position that the BOQ required the Claimant to excavate the driveway. The Defendant denies this saying the excavation works noted

in the BOQ were related to the “superstructure” or, in other words, the building and area proximate to the building at the Residence not the driveway.

[27] The Defendant constructed exterior concrete stairs leading to an alternate entry door to the first floor. The structure consists of three steps leading to a platform in front of the door observed during the site visit. The Defendant states that this is one of three “staircase” described in the BOQ. The Claimant rejects this saying the structure is a step and not a staircase.

[28] Given the above, it should come as no surprise that the parties disagree respecting what areas were to be tiled by the Defendant pursuant to their subsequent, oral agreement.

[29] The few examples above suffice to identify the near universal opposition in the evidence of the parties.

## **Analysis**

[30] The Claimant at trial had three complaints. One, that she was overcharged in the BOQ and the separate agreement for the tiling. Two, that the Defendant did not complete all agreed works although he was paid in full. Three, that the Defendant converted to his personal use funds she paid to him as part of the total quoted in the BOQ, which were monies designated for the work at the Residence.

[31] It appeared at trial that the Claimant primarily seeks to be compensated for the work she says was agreed to be completed, that was paid for and not done along with the converted funds although she did not unequivocally abandon her allegations of being overcharged.

[32] The starting point for the analysis here is to characterize the agreements entered into between the parties.

[33] It is well established that construction contracts fall into two basic types. There are contracts for a fixed price and contracts where the price is based on time spent and materials used (“cost plus” contracts).

- [34] A fixed price contract is one where the scope of work and related total cost are particularized in the agreement. The work to be done by the contractor and the amount to be paid for the work described are thereby crystalized. The contractor assumes the risk of accurately forecasting the project cost plus desired profit when quoting the fixed price and then completing the scope of work within that construct. If the work is completed on or under the agreed price then the contractor achieves a profit. If the work is completed at a cost greater than the agreed price then the contractor absorbs all of the losses. The owner is protected by the contractually fixed price. Accordingly, the owner bears none of the risk in a fixed price contract, which can make such agreements very attractive to owners.
- [35] A cost plus contract places all of the price risk on the owner. The owner is charged based on the contractor's actual costs for labor and materials often with an agreed upon surcharge. As such, the owner has no guarantee of the total contract price. Clearly, the contractor bears no risk of losing money, which can make such agreements very attractive to contractors.
- [36] In a cost plus contract the contractor must keep track of all costs, including labour hours, hourly rates, proof of costs for materials and other related items. This makes complete sense as the owner is entitled and typically very motivated to be provided with copies of all receipts, invoices and proofs of payments to support the sums being sought. This is not the case with a fixed price contract.
- [37] Contractors who have entered into a fixed price agreement are not required to justify their costs. The parties have agreed to a price that is fixed. The contractor is not required to keep or provide copies of receipts, invoices and other proofs of expenses to support the fixed sum. The owner is required to pay the fixed price regardless of what the contractor's actual costs are to do the agreed upon work.
- [38] Here, there is no doubt that agreement the parties entered into based on the BOQ was a fixed price contract. The subsequent, oral agreement for the Defendant to tile certain areas of the Residence was also a fixed price contract. For each, the Claimant was presented with a defined scope of work and a related set price that she accepted.

- [39] The Claimant was obligated to pay the Defendant the sums agreed to given the two agreements in this narrative were fixed price contracts presuming that the specified work was completed with no workmanship issues. The Defendant was not required to provide copies of receipts, invoices and proofs of payments or to otherwise justify the fixed sums payable.
- [40] One of the fundamental difficulties here is that the scope of work described in the BOQ was amended as the work was being done.
- [41] It is not unusual for parties to a fixed contract price to add and/or delete items from the initially agreed scope of work. That said, it is of the utmost importance for the initial agreement to specify the process to be followed when doing so. In particular, the initial contract should describe how such amendments are to be recorded to confirm the particulars of the change agreed to and any related price adjustment calculations.
- [42] The BOQ did not provide a mechanism to address and record amendments to the initial scope of work. The parties did not otherwise create and follow such a process. Instead, they made changes to the BOQ work scope on an ad hoc basis. These changes were never confirmed in writing and were made with the overarching understanding that the amended scope of works would be completed for the same fixed price quoted by the BOQ, namely \$122,189.00 EC.
- [43] It was the repeated testimony of the Defendant that he was managing the ongoing additions and deletions to the BOQ with the understanding that all agreed upon work would be completed for the quoted fixed price of \$122,189.00 EC.
- [44] The Claimant did not challenge this evidence from the Defendant. Her claim is in fact premised on the notion that she paid the quoted fixed price of \$122,189.00 EC and is owed repayment on the basis that the Defendant did not complete all agreed works (see: Claim paragraphs 7 and 14 and Witness Statement paragraph 13, 15, 21, 28 and 31).
- [45] As already noted, the Claimant agreed that there were amendments to the BOQ scope of work in her trial testimony (she also acknowledged this in her Witness Statement for example at paragraph 25).

- [46] Given the above, the Claimant's overall evidence confirms the understanding of the parties that all agreed upon work would be completed for the quoted fixed price of \$122,189.00 EC.
- [47] There is no doubt that the burden of proof will typically be upon the claimant in a civil case. A defendant has no burden of proof where simply denying the claim being made, as the Defendant did here. As such, the burden remained exclusively upon the Claimant to present evidence sufficient to prove her case as pleaded. Did she do so? No.
- [48] The core of the dispute here is determining what the parties agreed to with particular reference to the ad hoc amendments to the original scope of work and whether all such work was completed.
- [49] The Claimant alleges that the Defendant failed to complete agreed upon work that he had been paid in full to do. The Claimant had the burden of presenting evidence to establish, on the civil standard of the balance of probabilities, what the parties agreed to, what was not done and the value for all unfinished works in that order. She failed to do so.
- [50] We have the BOQ. However, the parties disagreed on what work was described in the BOQ. Nobody from D & V Best Quality Surveying Services was called as a witness to bring clarity to the BOQ contents. Further, both parties confirmed that ad hoc, oral amendments were made to the original scope of work as the project was ongoing. Neither party kept any record of the agreed to amendments to the scope of work. Now, eight years after the events, they are at odds respecting the original scope of work, what changes were agreed to and, by direct relation, what work was completed or left undone.
- [51] It was earlier noted that the Defendant successfully challenged several paragraphs in the Claimant's Witness Statement, namely paragraphs 32-37, thereby delivering a mortal strike. These paragraphs identified the work purportedly agreed to but not completed by the Defendant and the related dollar value for each unfinished item. This information was provided by a third party consultant.
- [52] The Claimant hired Phillip Real Estate Solutions in or about May, 2019 to assist her in this dispute (see: Claim paragraph 14). In her words "I found it necessary to retain the services of a real estate consultant to advise on whether or not there were any



discrepancies between the amounts on the BOQ which was paid in full and with what the Defendant delivered” (see: Witness Statement paragraph 31). Clearly, this statement ignores the ad hoc changes made to the BOQ scope of work. Regardless, the Court was provided with no information whatsoever about this consultant. The Claimant did not tender any report from this consultant. The consultant was not presented as a witness at trial. He should have been.

[53] Instead, the Claimant repeated the findings of the consultant as her own at paragraphs 32-37 of her Witness Statement, which is clearly impermissible hearsay. These paragraphs also violated the process mandated by Civil Procedure Rules (“CPR”) 32 for the admission of an expert report and related testimony, including Rule 32.6 requiring both service of the expert’s report setting out his/her evidence and permission of the court for the expert to be called as a trial witness. The offending paragraphs were, accordingly, struck.

[54] The only information before this Court respecting the Claimant was that she earned her living baking and selling cakes from her home to the public. A respectable enterprise to be sure. However, this does not, obviously, establish any training, knowledge or experience in residential construction works or assessment.

[55] As noted, the Claimant bore the burden of proving the overall amended scope of work that she says was agreed to, the work that was not done and the value of those unfinished works. Striking the offending paragraphs was mortal given that the Claimant had no other meaningful evidence to provide regarding the identification and assessment of the works left undone, including the related value for reimbursement purposes. As such, the Claimant failed to meet her obligation to prove her case respecting the identification and assessment of damages claimed for unfinished work.

[56] The Court will now move on to the Claimant’s allegation of conversion.

[57] The Claimant did not specifically plead conversion in her Statement of Claim. This would appear to violate CPR 8.6(1)(b) that provides:

- (1) The Claimant must in the claim form –
  - b) specify any remedy that the claimant seeks

However, the Court retains the discretion to “grant any other remedy to which the claimant may be entitled notwithstanding paragraph 1(b)” pursuant to Rule 8.6(2).

[58] The Claimant did, in the body of the Claim, seek the return of the \$30,000.00 bank draft dated August 24, 2016 that she provided to the Defendant towards the BOQ fixed price (see: Statement of Claim paragraph 10(b) and 25). Admittedly, there is little meat on the bone. The Claimant did not plead the foundation for the requested repayment.

[59] The Court must always be fair to both sides of any dispute. In so doing, the Court should be flexible and purposive when interpreting the Rules and in the execution of its overall case management function in service of the Overriding Objective.

[60] The body of the Claim identifies the Claimant’s request for the repayment of specific funds, namely the \$30,000.00 bank draft dated August 24, 2016 that was provided to the Defendant towards the BOQ price.

[61] The damages sought in the Claim of \$69,384.80 include the said \$30,000.00 (\$37,494.80 itemized reimbursements for work not done, \$30,000.00 for the requested repayment and \$1,890.00 paid to the Claimant’s expert).

[62] The point is that the Defendant had notice that repayment of this specific payment was being sought. This is not a situation where the relief was not raised in the pleading at all.

[63] There is no doubt that the Claimant should have pleaded the particulars related to this requested repayment. That said, the Defendant could have sought particulars from the Claimant if that clarity was needed to properly prepare his defense or otherwise. I suspect he did not seek such particulars given the Defendant’s overall denial of any funds owing and that some particulars were provided subsequently in the Claimant’s Witness Statement (see: Witness Statement paragraphs 11, 29 and 30) where she specifically alleged that the Defendant “converted these sums for his personal use.”

[64] While not ideal, this is the kind of circumstance that Rule 8.6(2) was intended to address and is here relied upon to permit the Claimant’s conversion claim to proceed.

- [65] The Claimant's claim in conversion was not well developed at trial.
- [66] The only evidence in support of the conversion claim is that the subject \$30,000.00 bank draft was deposited to the Defendant's personal account instead of a segregated client, work account. Related to this, the Claimant speculates that the Defendant was unable to finance work she says was left undone having made personal use of the money paid to him for that work by the Claimant.
- [67] There was simply no basis or meaningful evidence to support the Claimant's conversion allegation.
- [68] The evidence was clear that this \$30,000.00 bank draft was deposited to the Defendant's personal account although he testified to subsequently moving it to his business account. That said, depositing monies to his personal account that he received from the Claimant pursuant to their contract does not constitute conversion.
- [69] The Claimant paid the subject \$30,000.00 to the Defendant as part of the BOQ fixed price. If the Defendant completed the agreed upon scope of work with no workmanship issues then no monies would be owed to the Claimant regardless of where the \$30,000.00 was deposited. If the agreed upon work was not completed then the Defendant would be liable to reimburse the Claimant for value of those prepaid, unfinished items again regardless of where the \$30,000.00 was deposited.
- [70] The subject \$30,000.00 and all other funds were received and retained by the Defendant lawfully under contract. It is completely irrelevant where the Defendant deposited the monies paid to him pursuant to the fixed price contract. The Claimant's remedy for any failure by the Defendant to meet his corresponding obligations was in breach of contract not conversion. There is no separate, additional claim to reimbursement in tort for converting the same monies.
- [71] It is also worth noting that there was no evidence at all of misconduct by the Defendant in his handling of the subject \$30,000.00 or any funds, including no evidence that he used any funds for his personal benefit and thereby lacked monies to finance the agreed upon work.

[72] The Claimant's conversion claim is rejected on the basis that it has no footing in law and/or the trial evidence.

[73] The Claimant did also raise the issue of having been overcharged for the scope of work in the BOQ and the subsequent oral agreement for tiling. She filed various receipts towards evidencing overcharge. However, as noted, the Claimant was ambiguous about whether she was advancing this claim at trial. Given her ambiguity, the claim can and will be addressed in short order for completeness.

[74] The parties entered into two contracts where for each they agreed to a fixed price for a specified scope of work. The Claimant agreed to the price for each contract in advance and gave authorization for the work to proceed. As previously discussed, the Defendant had no obligation to keep records or disclose actual costs. Whether the Defendant made a profit or lost money is irrelevant. These were fixed price contracts.

[75] It is not open to the Claimant to engage in a belated exercise to challenge the Defendant's costs and/or the fixed prices she agreed to. There is simply no basis for any claim by the Claimant related to being overcharged on either of the two fixed price contracts she entered into with the Defendant. This ground of relief is denied.

## **Conclusion**

[76] The Claimant retained the Defendant to complete various works at her Residence to make it habitable.

[77] The Claimant says the Defendant was paid in full but overcharged for some and failed to complete other of the agreed works and unlawfully converted some of the funds paid to him for his personal use. The Claimant says she is thereby owed \$69,384.80 EC.

[78] The Defendant denies all allegations and takes the position nothing is owed to the Claimant.

[79] There is no doubt that agreement the parties entered into based on the Bill of Quantities ("BOQ") was a fixed price contract. The subsequent, oral agreement for the Defendant to tile certain areas of the Residence for the total sum of \$10,254.84 EC was also a fixed

price contract. For each, the Claimant was presented with a defined scope of work and a related set price that she accepted.

[80] The parties disagreed on what work was described in the BOQ prepared by D & V Best Quality Surveying Services. Surprisingly, nobody from D & V was called as a witness to bring clarity to the BOQ contents.

[81] The parties both confirmed that ad hoc amendments were made to the original BOQ scope of work as the project was ongoing. Neither party kept any record of the agreed to amendments to the scope of work. The parties subsequently have disagreed on what changes were agreed to and, by direct relation, what work was completed or left undone.

[82] The Claimant hired a real estate consultant to assess whether the Defendant failed to complete all agreed upon works and to quantify any unfinished works. However, the Claimant did not file any report from the consultant or call the consultant as a witness at trial. Clearly, she should have. She, instead, attempted to enter the consultant's evidence as her own through her Witness Statement, which is inadmissible hearsay and a violation of CPR 32 requirements for the receipt of expert evidence. The offending paragraphs from her Witness Statement were struck and the evidence was not admitted.

[83] Striking the offending paragraphs was a mortal blow given that the Claimant had no other meaningful evidence to provide regarding the identification and assessment of the works left undone, including the related value for reimbursement purposes. As such, the Claimant failed to meet her obligation to prove her case respecting the scope of work that she says was agreed to along with the identification and assessment of damages claimed for unfinished work. Her claim for reimbursement is, accordingly, denied.

[84] The only evidence in support of the Claimant's conversion claim was the deposit of the subject \$30,000.00 EC bank draft into the Defendant's personal account instead of a segregated client, work account. Related to this, the Claimant speculates but presented no evidence to establish that the Defendant was unable to finance work left undone having made personal use of the money paid to him for that work by the Claimant.

[85] The subject \$30,000.00 and all other funds were received and retained by the Defendant lawfully under contract. It is completely irrelevant where the Defendant deposited the monies paid to him pursuant to the fixed price contract. Thereafter, the Claimant's

remedy for any failure by the Defendant to meet his corresponding obligations was in breach of contract not conversion. There is no separate, additional claim to reimbursement in tort for converting the same monies.

[86] The Claimant's conversion claim is rejected on the basis that it has no footing in law and/or the trial evidence.

[87] The Claimant filed various receipts towards evidencing she was overcharged for the scope of work in the BOQ and the subsequent oral agreement for tiling.

[88] The parties entered into two contracts. For each they agreed to a fixed price for a specified scope of work.

[89] The Claimant agreed to the price for each contract in advance and gave authorization for the work to proceed. The Defendant had no obligation to keep records or disclose actual costs. Whether the Defendant made a profit or lost money is irrelevant. These were fixed price contracts.

[90] It is not open to the Claimant to engage in a belated exercise to challenge the Defendant's costs and/or the fixed prices she agreed to. There is no basis for any claim by the Defendant related to being overcharged on either of the two fixed price contracts she entered into with the Defendant. This claim is, accordingly, denied.

[91] The Claimant had the burden of presenting evidence to establish, on the civil standard of the balance of probabilities, the various components of her Claim. She failed to do so and her Claim is, therefore, dismissed in its entirety.

**IT IS HEREBY ORDERED THAT:**

1. The Claimant's Statement of Claim is dismissed in its entirety.

2. The parties should attempt to resolve the issue of costs between them. If they are unable to then counsel may contact the Registrar by email to request that the matter be listed on a date to be scheduled to speak to the matter of the costs of this trial and action.

**The Hon. Dale Fitzpatrick**  
(Ag) High Court Judge

**By the Court**

**REGISTRAR**