THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

SKBHCV2021/0009

BETWEEN:

WAYNE WILLIAMS doing business as
WILLIAMS ELECTRICAL SERVICES

Claimant

and

KRL HOSPITALITY INC. trading as KOI RESORT

Defendant

Before:
The Hon. Justice Tamara Gill

Appearances:
Mr. Jason Hamilton for the Claimant
Ms. Christiane Prowell and Ms. Derriann Charles for the Defendant

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2024: January 24;

March 1.

JUDGMENT

[1] **GILL, J.:** An electrician seeks damages for breach of an agreement by the defendant company's failure to pay retention fees for electrical works carried out for the company. The company counterclaims and seeks damages for losses incurred for breach of the said agreement for the claimant's abandonment of the project before completion.

[2] The claimant Wayne Williams is an electrician who operates a business under the trade name Williams Electrical Services also known as WES. The defendant company KRL Hospitality Inc. carries on business as a hotelier, trading as Koi

Resort situated at Half Moon Terrace in the parish of St. George in the island of St. Christopher.

[3] In 2017, the parties entered into an oral agreement for the claimant (hereinafter "WES or "Mr. Williams") to perform electrical installation works at construction sites owned and managed by the defendant (hereinafter "KRL"). WES carried out works but did not complete the project. The parties accuse each other of breaching the agreement.

[4] On 17th May 2021, WES filed an amended claim for the sum of $37,578.14, allegedly the amount payable and as a debt due and owing to WES as retention fees which were withheld by KRL.

[5] On 4th October 2021, KRL filed a defence and counterclaim pleading that WES did not complete the works so as to trigger the release of the retention fees, and as such, WES forfeited any entitlement to the payment of retention. KRL counterclaimed the sum of US$15,516.10 equivalent to EC$41,428.00 for loss and damage suffered as a result of being forced to engage a new team to complete the works.

[6] WES filed a defence to counterclaim on 19th December 2022 and KRL filed a reply to defence to counterclaim on 4th January 2023.

The claimant's case

[7] WES contends as follows:

(1) By contract in or around 2016, KRL retained WES to perform electrical installation services at two of KRL's buildings on KRL's premises at Half Moon Terrace, St. George, St. Christopher.

(2) During the currency of the contract WES submitted invoices and statements for work completed, and KRL made payments to WES pursuant to the said invoices and statements.

(3) It was a term of the contract that KRL subtract and withhold 5% of each invoice as retention until completion of the contract as a contingency for defective work performed.

(4) The sum of EC$37,514.14 was accordingly retained by KRL during the performance of the contract.

(5) In 2017, KRL, through its project manager, sought to renegotiate the terms of the contract. The parties could not agree, and the contract was unilaterally terminated by KRL.

(6) KRL made no claim to WES for any defective or remedial work that was required to be performed nor was WES notified of any defective or remedial work that was outstanding relative to the work performed, nor was WES requested to correct any defective work.

(7) KRL has failed to pay WES the retention sum and the said sum remains due and owing.

(8) KRL has breached the contract in its failure to release and pay the retention sum to the claimant.

The defendant's case

[8] KRL contends as follows:

(1) WES is not entitled to the retention payment.

(2) Provisions for retention are routine in standard construction contracts to ensure the completion of works by a contractor.

(3) WES, by its own admission, confirmed that the works were not completed when WES terminated the contract. WES further confirmed that KRL had cause to retain new electrical subcontractors to complete the works.

(4) WES forfeited any entitlement to the payment of retention.

(5) KRL is entitled to recover from WES the additional sums it was forced to spend in the amount of US$15,516.10 or EC$41,428.00 to bring the electrical work back on schedule and complete the scope of works.

(6) WES breached the agreement by failing and/or refusing to complete the works and abandoning the works.

(7) WES' breach of the agreement caused financial losses to KRL, which it is entitled to recover.

Issues

[9] The court must determine:

(1) whether there was a valid and subsisting contract between WES and KRL, including an agreement to pay a retention sum to WES;

(2) whether KRL breached the contract by unilaterally terminating it, or whether WES breached the contract by abandoning the works prior to completion; and

(3) whether WES is entitled to the retention sum.

The evidence

[10] Only two witnesses were called at the trial, one for each party – Wayne Williams ("Mr. Williams") and KRL's project manager at the material time, Naeem John ("Mr. John"). One intended witness for the defence was absent for the trial and learned counsel for KRL informed the court that KRL would proceed with the evidence of Mr. John only.

<u>The claimant's evidence</u>

Mr. Williams' evidence revealed, *inter alia,* the following:

[11] In or about February 2016, he was engaged by Mr. John, KRL's project manager at the time, to perform services as an electrical sub-contractor in respect of two of KRL's buildings in the Half Moon area. Pursuant to this engagement, he provided KRL, through Mr. John, with an estimate of the costs and the rate of payment in relation to the estimate. KRL agreed to engage his services.

[12] WES began the execution of the contract on or about 10th February 2016. In cross-examination, Mr. Williams told the court that they did not have a contract, they had an agreement. I understood this to mean that because there was no written contract, Mr. Williams called the arrangement an agreement.

[13] The work entailed, *inter alia,* providing the necessary manpower, setting up the necessary points, providing roughing, and overall supervision of the electrical sub-contract work for the project.

[14] During the currency of the project, WES provided KRL with invoices for work done at the agreed rate. These invoices were provided to Mr. John via email. Mr. John accepted these invoices and paid WES in relation to each invoice.

[15] The contract for services entailed the retention of the sum of 5% on each bill submitted, for any defects or remedial work in relation to the project. A term of the contract was that should there be any defects or remedial work to be undertaken, WES would be advised of said defects and remedial work and be afforded the opportunity to rectify same. During the currency of the contract, WES was not notified of any such defects or bad work done under the contract.

[16] In 2017, KRL, through Mr. John, attempted to renegotiate the terms and conditions of Mr. Williams' rate of remuneration and rate of billing for work performed by WES for KRL. At the trial, he stated that they wanted to pay him less. The parties did not agree to a new rate. Therefore, in or about March 2017, Mr. Williams terminated his working relationship with KRL. In cross-examination, he told the court that he informed Mr. John that he would not be completing the work. KRL agreed to the termination. He said Mr. John told him he could get the work done for cheaper. Mr. Williams stated that he communicated this termination to Mr. John. He did not have a record of this. "It was a verbal thing," he said. At that time, he was not informed of any defects or remedial work that needed to be done for work WES had performed to date.

[17] Mr. Williams drove in the area and witnessed that the projects were completed in or about November 2019. In cross-examination, he testified that he was not aware that KRL hired another company to complete the work. When referred to his amended claim which stated that KRL retained new electrical subcontractors to complete the project, he agreed with what was said in his pleading.

[18] Since the termination of his services in March 2017 and the completion of the buildings in November 2019, Mr. Williams made several demands of KRL for the sums owed by way of retention. He exhibited a letter dated 8th October 2020 sent to Mr. John. There was no response to that letter. Under cross-examination, after stating that he did, he conceded that he did not have a record of any demands between March 2017 and November 2019. He said he did so verbally and by email. The last payment he received from KRL was in May 2017. He did not send any further invoices until January 2020.

The defendant's evidence

Mr. John, KRL's project manager at the material time, gave evidence, *inter alia,* as follows:

[19] Prior to and upon WES' engagement, he and Mr. Jeffrey Estrella, a project engineer, had numerous conversations with Mr. Williams regarding the amount of manpower that would be needed to complete the electrical work by the agreed upon project deadline. Mr. Williams assured them on numerous occasions that WES would provide a team consisting of at least eight electricians at any given time.

[20] In September 2016, It was observed that WES was falling behind the agreed upon deadlines. Instead of providing a team of at least eight electricians, WES provided only three or four. At that time, Mr. John and Mr. Estrella informed Mr. Williams that he needed to greatly increase the number of electricians as per the parties' agreement, otherwise, WES would not be able to complete the electrical work on time.

[21] Despite their repeated conversations with Mr. Williams about the need to increase the number of electricians, WES failed and/or refused to do so. Instead, WES simply ignored the repeated requests and blew off the agreed upon deadlines. In cross-examination, Mr. John conceded that copies of those requests by email were not filed and that he did not write an email or letter to WES. WES' refusal to provide more manpower to complete the electrical work created a negative ripple effect whereby other construction work and deadlines were also crippled and had to be delayed.

[22] In April 2017, KRL received an invoice from WES requesting progress payment for electrical work performed to date. The invoice indicated the percentage of work preformed to date for the progress payment. It stated that it was "for 80% of the Finish Electrical work done on the Forth *(sic)* and Fifth Floor". On 19th May 2017, KRL issued payment on the said invoice.

[23] A few days after payment was issued, Mr. Wiliams called Mr. John and informed him that he would not continue working on the projects and was essentially abandoning his engagement. None of the electrical work was completed

[24] As a result of the delay, onsite progress came to a grinding halt for about eight weeks until KRL was able to assemble a new team of electricians to restart and complete the electrical work. In so doing, KRL incurred significant costs. Mr. Estrella, who is a quantity surveyor, was charged with the responsibility for, and provided, the relevant information to KRL in respect of the costs occasioned on KRL as a result of WES abandoning the job. (Mr. Estrella is the said intended witness not called by KRL at the trial).

[25] In answer to counsel in cross-examination, Mr. John stated that there were defects but he did not indicate any defects to WES, and he did not have any documentation in respect of defects.

[26] Mr. John admitted that he attempted to renegotiate the rates with WES. He wanted to make them lower. Mr. John further admitted that Mr. Williams told him that those

rates were too low. In answer to learned counsel for the claimant as to whether Mr. Williams told him the rates were too low and he ended the contract, Mr. John answered, "Yes."

[27] Mr. John's evidence is that WES worked at the new rate as shown in a payment certificate. He stated that Mr. Williams accepted the new rate. The said payment certificate dated April 2017 was in respect of the last payment received by WES under the contract. The payment certificate specifically referenced the new rate as 75% of the original rate.

[28] In relation to WES being behind on the work, Mr. John testified that KRL could have fired WES, but they did not. He stated, "I wouldn't fire him until I had a better way." He conceded that if he had fired Mr. Williams, he would have had to pay him out, including the retention fees.

Law and analysis

[29] At the end of the trial, I ordered closing submissions to be filed on 14th February 2024. Learned counsel for KRL complied. Learned counsel for WES did not file submissions by the deadline or at all. This judgment is written without the assistance of submissions from WES.

Whether there was a valid and subsisting contract between the parties

[30] It is undisputed that the parties entered into an agreement for WES to carry out electrical work for KRL. It appears that this issue was highlighted by counsel for the parties in their pre-trial memoranda and KRL's closing submissions because there was no formal written contract between the parties. As learned counsel for KRL submits, in the absence of formal writing, the court must look at the conduct of the parties, other material supporting documents and apply relevant legal principles to ascertain the existence and terms of the contract.

[31] In this case, in addition to the existence of a contract, KRL submits that it is also particularly relevant to understand what was the entire contract that existed between the parties, as completion is a pivotal aspect of this matter.

[32] KRL contends that the agreement was in accordance with the Joint Contracts Tribunal (JCT) Standard Building Contract, a form of construction contract widely recognised and utilised globally. It sets out the responsibilities of all parties involved in the construction process and provides a legal framework for the completion of construction projects. KRL admits that the provisions in the JCT contract in relation to retention are similar to the principles in general law.

[33] In the context of construction contracts, KRL cites the case of **Clearlie Todman-Browne v Melvin Ryder d/b/a Mervin Rymer Architect Inc.**[1] where Hariprashad-Charles J, extracting from leading texts, explained the concept of an entire contract as follows:

> "A contract to carry out the whole of certain works in consideration for a fixed sum of money is an entire contract. However, even where the contractor undertakes to construct works in consideration for a specified price made up of separate payments for each separate part of the works, the contract may be entire. An entire contract may provide for payment by instalment or for what has been termed "milestone" payments which are payable at stated intervals or by reference to stages of the work. Whether or not the contract is entire is a question of construction. A familiar instance is when the contract provides for progress payments as the work proceeds, but retention money to be held until completion. Then **entire performance is usually a condition precedent to payment of the retention money. However, a contractor is not entitled to the retention money until the work is entirely finished, without defects or omissions**." *(Emphasis added)*

[34] I agree with KRL's submission that although the agreement was not memorialized in a formal written contract, the parties' actions, including WES' submission of detailed invoices (including percentages of the works completed) and KRL's issuance of payment certificates, reflect a 'meeting of the minds' and an implicit agreement to the terms discussed, including those pertaining to work completion and retention.

[35] On the evidence and the applicable law, although not a point in dispute, I find that there was a valid agreement between the parties for WES to carry out electrical

[1] BVIHCV2009/0195 at paragraph 44, delivered May 11, 2011

works on KRL's projects. The agreement included the payment of retention after the completion of the electrical work.

Whether KRL breached the contract by unilaterally terminating it, or whether WES breached the contract by abandoning the works prior to completion

[36] The basis of WES' claim for the retention sum is that KRL breached the contract and therefore, WES was entitled to terminate it. Where there is a breach of an essential term of a contract, the breach creates a right to the injured party to terminate the contract.

[37] The evidence shows that WES' allegation, that in 2017 Mr. John attempted to renegotiate the terms and conditions of WES' rate of remuneration and rate of billing, is true. Apart for Mr. Williams' evidence, Mr. John admitted this in cross-examination. Crucially, the evidence from both sides is that Mr. Williams did not agree to the lowering of the rates.

[38] KRL's filed Defence pleads that "the breakdown of the relationship between the parties was not due to a disagreement in relation to fees, but instead that after payment on or around the 19th May, 2017, the Claimant failed and/or refused to return to complete the outstanding electrical works for which he was contracted".[2] Nowhere in Mr. John's witness summary is there any mention of his conversation with Mr. Williams as to the renegotiation of the rates of payment to WES. The admissions came out only in cross-examination.

[39] WES submitted Invoice #10 in April 2017, and was paid pursuant to that invoice on 19th May 2017. The difference in dates given by the parties is cleared up by the documentary evidence. The payment certificate confirmed that KRL had reduced WES' rate of payment to 75% of what was originally agreed upon and paid to WES up until then. On KRL's own evidence, Mr. Williams called Mr. John a few days after payment was issued on Invoice #10 and informed him that he would not continue working on the projects. The actual payment to WES solidified KRL's intention to

[2] Paragraph 9.b. of the Defence filed on October 4, 2021

reduce WES' rates. It is my considered view, and I find that the reduction of the rates without WES' consent or agreement amounts to a fundamental breach of the terms of the contract between the parties. I do not see WES' acceptance of the payment on invoice #10 as an acceptance of the new rate. To the contrary, when WES received the payment, the payment certificate indicating the reduced payment, with which Mr. Williams did not agree, this was the manifestation of the unilateral alteration of the terms of the agreement in respect of payment to WES. The payment certificate provided WES with proof of the unagreed reduction in remuneration. In short order, that is, a few days after receiving the lower payment, Mr. Williams terminated the contract as he was entitled to do for KRL's breach.

[40] Accordingly, I reject KRL's case and counterclaim that WES breached the contract by abandoning the works, thereby forcing KRL to incur losses.

Whether WES is entitled to retention

[41] I accept KRL's explanation in its submissions that retention serves as security for the satisfactory completion of a contractor's obligations and that this structure is designed to ensure that the contractor has a financial incentive to complete the works to the required standard and to rectify any defects that may arise.

[42] The earlier cited case of **Clearlie Todman-Browne v Melvin Ryder d/b/a Mervin Rymer Architect Inc.** explains that entire performance is typically a precondition for the release of retention money, and a contractor is not entitled to retention money until the work is completed without defects or omissions.

[43] KRL submits that WES admittedly terminated the contract before the work was completed. This is clear from the evidence. KRL contends that the condition precedent for the payment of retention was not met.

[44] In relation to defects, I accept Mr. Williams' evidence that he was never notified or informed about any defects in WES' work. Mr. John did not produce any documentation or emails to that effect. There is no credible evidence of any defective work carried out by WES on the projects.

[45] The purpose of an award of damages for breach of contract is to put the injured party in the position he would have been in had the contract been performed in its entirety. On the finding that KRL breached the contract between the parties, WES is entitled to be put in the same position as if it had completed the works pursuant to the contract. On completion, without defects to be remedied, WES would have been entitled to retention. The non-completion, which I find was as a result of KRL's breach, cannot be attributed to WES. Therefore, KRL is liable to pay the retention sum claimed by WES.

Conclusion

[46] Having considered the evidence of the parties, and the submissions with authorities of KRL, I am of the view that KRL, by unilaterally changing the rates of payment to WES under the agreement, breached the binding agreement between the parties for WES to carry out electrical work on KRL's premises. WES was never informed of any defective work up to the time Mr. Williams lawfully terminated the contract. As a result of KRL's breach, WES is owed the retention sum claimed.

Costs

[47] In light of WES' failure to file closing submissions as ordered, I will discount the costs to be awarded to WES by 20%. Subsequent to a chamber matter involving counsel on both sides on 23rd February 2024, learned counsel for WES indicated that he did not file the submissions. I informed counsel that I would proceed to write the judgment "with what I had". Being aware that counsel had been ill, as evidenced by a medical report submitted in another matter, I told counsel that he was free to file brief submissions by the end of that day, "even if a page", to assist the court. Nothing was forthcoming.

Order

[48] Based on the foregoing, it is hereby ordered as follows:

1) Judgment is entered for the claimant.

2) The counterclaim is dismissed.

3) The defendant shall pay retention sums to the claimant in the amount of $37,578.14 plus interest pursuant to section 29 of the Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act.

4) The claimant is awarded prescribed costs of the claim pursuant to Rule 65.5 of the Civil Procedure Rules in the sum of $4,509.38 ($5,636.72 less 20%).

5) The claimant is awarded prescribed costs of the counterclaim in the sum of $4,971.36 ($6,214.20 less 20%).

Tamara Gill
High Court Judge

By the Court

Registrar