

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

IN THE HIGH COURT OF JUSTICE

**Claim NO: ANUHCV2018/0159
BETWEEN:**

**SEAN O'MARDE trading as
O'MARDE & ASSOCIATES**

Claimant

-AND-

GLENROY ASKA

Defendant

Appearances:

Asheen Joseph for the Claimant
Charlesworth Tabor for the Defendant

2023: July 17th

2024: February 7th

April 22nd

JUDGMENT

- [1] **DRYSDALE, J.:** This matter concerns damages arising from a breach of a building contract.

BACKGROUND

- [2] The claimant's case is that he entered into an oral contract with the defendant to complete an unfinished foundation on his property. However, he was prevented from completing the works resulting in loss and damage. The defendant whilst agreeing that there was a contract for the construction of the foundation attributes blame to the claimant for the disintegration of the

relationship and the inability to complete the contract. The defendant also disputed the claimant's entitlement to damages based on inter alia payment received and discrepancies in the receipts for materials purchased for the project.

- [3] During the trial of this matter the parties agreed that the issue was that of quantum and a judgment on liability was entered for the claimant. The matter thereafter proceeded on the issue of damages. The court is now solely concerned with determining the extent of damages.

THE PLEADINGS

The Claim

- [4] The claimant is a building contractor carrying on works in the island. He asserts that he was contracted by the defendant to complete the foundation on the defendant's premises in order to facilitate the construction of the defendant's home.
- [5] The claimant expressed that in pursuance of the agreement that he proceeded with the work and expended money on labour and materials. In a letter exhibited to the pleadings the claimant asserts that he worked for a period of 14 days before he was prevented by the defendant from completing the works.
- [6] The claimant also admits that he was paid the sum of \$10,000.00 which he contends was used to purchase material and for the payment of associated labour costs. He contends however that the said sum was insufficient and the actions of the defendant in preventing him from completing the contract resulted in damages as the monies previously paid did not cover the sum already expended for materials and labour. The claimant computes this loss to be the sum of \$27,340.00.

The Amended Defence

- [7] The defendant admits the existence of the contract and that he commenced work in pursuance of this agreement. However, the defendant contends that the contract came to an abrupt end as a result of threats made by the claimant wherein the claimant specifically states that 'he was up to his throat and some head will roll.' This threat the defendant contends, made him uncomfortable in continuing the works.

- [8] The defendant acknowledges making a payment to the claimant but disputes the amount, claiming it was \$15,000.00 instead of the \$10,000.00 stated by the claimant. The claimant asserts that the payment was divided into two instalments with the sum of \$5,000.00 being paid on 14th July 2017 and the sum of \$10,000.00 paid on 16th November 2017.
- [9] The defendant denies that the claimant purchased the materials he claimed to have purchased and instead counters that the only materials purchased by the claimant were some plumbing fixtures and marl which amounted to less than \$6,000.00.
- [10] The defendant disputes the suggestion that the claimant purchased materials on his behalf with his own funds. He asserts that he purchased materials himself or any materials provided by the claimant were paid for by him. Additionally, he claims that he was never provided with receipts or invoices supposedly supplied by the claimant, and that the materials provided were not new.
- [11] The defendant disputes the claimant's assertion of working for a period of 14 days on the foundation preparation, stating that the work was completed in less than 10 days. He attributes the extended timeframe to adverse weather conditions and, particularly heavy rain and difficulty in accessing the property. Additionally, he states that the claimant's tasks were limited to ramming the foundation with marl and placing PVC fittings, along with installing decking for the cistern which he believes did not require a full ten days.
- [12] The defendant denies that the claimant sustained any loss and that he is owed monies as claimed or at all.

THE EVIDENCE

- [13] The parties each filed witness statements or summaries in these proceedings. For the purposes of brevity only the salient information will be explored below.

The Claimant

- [14] The claimant accused the defendant of breached the contract by not paying for completed work and materials and for failing to allow him to complete the agreed scope of works. The claimant states that despite spending more on material that the defendant only paid the sum of \$10,000.00.
- [15] The claimant deposed that as the defendant was a Driver with West Indies Oil that pursuant to industry standards, he purchased the materials for the job and expected reimbursement upon presenting the bills or receipts to the defendant.
- [16] The claimant further deposes that he initially retained to extend the columns on the cistern from 3ft to 10 ft deep and states that for this job he was paid the sum of \$5,000.00.
- [17] The claimant denies making any direct threats and asserts that the defendant never reported him to the police for any such allegations.
- [18] The claimant also denied the assertion that he worked less than 10 days stating that he used his 4-wheel drive vehicle in which he transported all the workers to the job site for 14 days, for which period he compensated his employees.
- [19] During cross examination the claimant acknowledged that some receipts were not solely for the defendant's materials but included purchases for multiple clients. However, he claimed to have deducted irrelevant expenses when calculating the amount owed. He asserted that mixing receipts was acceptable based on their agreement.
- [20] He denied knowing about the defendant's need to produce receipts to the bank, and denied giving him only three receipts, stating that he provided all relevant receipts.
- [21] The claimant revealed that he approached the defendant, stating that he had a foundation problem and needed assistance to complete it. The defendant inquired on when he could start the project and was advised of an immediate start. The defendant then mentioned that he had some materials on site and agreed to purchase any additional materials needed. However, the defendant

encountered difficulty purchasing materials and asked him to procure them and instructed him to secure the receipts for reimbursement.

[22] During questioning the claimant maintained that despite rainfall during the month of October that the project was not affected as there was no full day of rain that caused them to halt work. He reiterated that rain did not impact the project. The claimant also disagreed with the suggestion that despite having a four-wheel drive that it would be difficult to navigate the area.

[23] During re-examination, the claimant stated that he paid the sum of \$150.00 for labourers and \$250.00 for supervisors for an 8-hour working day. These payments were made in cash from previous jobs where he received payments and had cash on hand. He further admitted that his workers were regular employees and from the group that worked on the project two workers named Courtney and Clarke are both still employed with him.

[24] The claimant stated that when he took over the project, the foundation as approximately 30% complete and needed correction for the beam to support the weight of the second floor. He retied approximately 50% of the steel with the correct size, cleaned out the cistern and decked it bringing the floor and the cistern to the same level. He stated further that whilst he did not cast the foundation which was approximately 4,000 sq. ft that he did cast the ring beams for it.

[25] The claimant stated that to complete the project, he had to buy stell and hire a backhoe for compaction and marl. Regarding compaction, when he began there was about 8 inches of backfill and he added an additional 12 inches.

The Defendant

[26] The defendant amplified his evidence and emphasized that the transaction was fraught with dishonesty by the claimant, stating that there was never an agreement for a start and or end date when they met on site. He stated that the claimant informed him that he was due to start on another project in the east of the island. Additionally, he claimed that the claimant was observed loosening the steel, on the premise that half inch steel was used whereas 5/8 steel was supposed to be used.

However, upon consultation with other contractors he was advised that there was nothing wrong using half inch steel.

- [27] During cross examination the defendant recounted that he met the claimant at a job in the Mount Joy area and discussed hiring him to complete an incomplete foundation. He explained that the previous contractor failed to install four columns as agreed, which were meant to surround the cistern. Therefore, the agreement with the claimant was for him to install these four columns and complete the foundation.
- [28] The defendant denied that it took the claimant 7 days to install the columns and further denied that he paid the claim \$5,000.00 after the columns were installed.
- [29] The defendant admitted to living a 5-minute walk away from the construction site but denied being aware when the claimant started work on the foundation, stating that he only became aware when his girlfriend called him. He claimed to have allowed the claimant to finish the beams he had loosened but disputed the claimant's assertion of working 14 days, saying that he only met him once on the property. However, he acknowledged that work was indeed being done on the property which he suggests was between 5 – 6 days and which is the reason why he paid the claimant \$10,000.00. Further the defendant, despite acknowledging a lack of experience in construction work, disputed his ability to give an opinion on the amount of work the claimant did.
- [30] The defendant refuted the suggestion that \$550.00 was owed for labour and an additional \$11,350.00 for the foundation work. He also disagreed with the assertion that whilst he was at work that the claimant was working on his foundation.
- [31] The defendant acknowledged that the claimant provided an estimate of the work to be done in order for the bank to release the monies but denied that the document in the trial bundle was the estimate, stating that he did not recognise it. He also confirmed receiving an estimate of \$90,000.00 from the claimant for the foundation work disagreed with the assertion that \$90,000.00 was released by the bank, stating that it was \$77,000.00 and denied that these funds were intended to pay the claimant.

- [32] The defendant agreed that he purchased steel for the project after the claim had stopped working but denied that someone else was already working on the foundation. He also contested the suggestion that he did not have receipts, stating that he bought the 5.8 steel before 27th November 2017 and suggested that his lawyer had the receipts. He reiterated this when confronted with the receipts not being in the trial bundle, maintain that he had produced them, even though they were not included.
- [33] The defendant disputed most of the receipts presented to him as related to his project, particularly the cost associated with architectural drawings claimed by the claimant. He argued that there was he had several copies of he plans, one of which was given to the claimant and as such there was no need for the claimant to incur additional expenses for copies.
- [34] The defendant acknowledged receiving an invoice in the sum of \$38,000.00 but contested that the \$10,000.00 which was paid was not paid in pursuance of it.
- [35] The defendant admitted to continuing work on the foundation after ending the arrangement with the claimant but asserts that the house is still incomplete.
- [36] Finally, he asserts that the claimant did not purchase materials for the project except some plumbing fixtures and marl.

ISSUE

- [37] The sole issue for consideration concerns what is the measure of damages that the claimant is entitled to.

SUBMISSIONS

- [38] The parties were each given an opportunity to file submissions on the issue of damages. The defendant's main argument with one exception, is that no damages should be awarded as the claimant has failed to sufficiently prove his entitlement to damages. The claimant did not file submissions.

ANALYSIS

How much money was paid by the Defendant for the contracted works?

- [39] The discrepancy regarding the total amount paid by the defendant to the claimant towards the completion of the foundation must be resolved before determining the quantum of damages for the breach of contract. The claimant asserts that he was only paid the sum of \$10,000.00, while the defendant claims two separate payments totalling \$15,000.00.
- [40] The claimant's evidence regarding two separate jobs, with the first payment of \$5,000.00 made in July 2017 for the cistern and the second payment in November 2017 for the foundation, appears more credible than the assertion that both payments were made solely for the foundation. Considering the timeline and the nature of the payments, it seems illogical to make a payment for the foundation in July when the works did not start until end of September 2017 but in earnest the week of 6th October 2017. Moreover, my considered impression of the defendant is such that it is unlikely that he would allow the claimant to hold on \$5,000.00 for several months before commencing the work on the foundation. It is therefore more likely and reasonable that the \$5,000.00 was for repairing the cistern first and upon successful completion it was agreed that the works on the foundation would commence thereafter. I therefore find that the defendant paid the claimant the sum of \$10,000.00 toward the completion of the foundation with the sum of \$5,000.00 being paid for a separate contract which is not part of these proceedings.

What is the measure of damages that the claimant is entitled to?

- [41] The case of **Hadley v Baxendale**¹ established the foundational principle in contract law regarding damages for breach of contract. It emphasizes the restorative nature of damages aiming to compensate the innocent party for their loss rather than punishing the breaching party.
- [42] The claimant has particularized damages as follows:

Particulars of Damage		
Receipt of particulars on materials	\$10,727.88	
Less items not owing to account	\$ 658.40	\$10,069.48

¹ (1854) 9 Ex 341

20	Bags cement	\$ 290.00
6	Rolls tie wire	\$ 105.00
	Ply and bracing lumber for column casting	\$ 255.00
	Nails and fasteners	\$ 172.12
22	2x4x20 DPP used in cistern	\$ 1,100.00
18	¾" Form Ply used on cistern perimeter	\$ 1,980.00
10	¼" Steel for beams	\$ 50.00
	Bundle of scrap lumber	\$ 700.00
8	Worked hours for Backhoe services	\$ 1,120.00
14	Days work man wages	\$21,000.00
	Transportation	\$ 200.00
	Equipment cost (Mixer, Cutter & Grinder)	\$ 300.00
Total Cost		\$37,340.00
Less deposit made		\$10,000.00
Balance Outstanding		\$27,340.00

[43] From the above the claim for damages can be categorized into four headings being, transportation, labour, equipment rental and materials. Each category has various amounts claimed and will be assessed independently to determine the total extent of recoverable damages, if any.

Transportation

[44] The claimant has claimed the sum of \$200.00 for transportation costs, however no receipt has been provided. Notwithstanding, given the defendant's admission that the claimant purchased materials on his behalf and transportation would have been necessary the sum of \$200.00 as claimed seems reasonable. I therefore award the claimant the sum of \$200.00 for transportation costs.

Labour

[45] The claimant asserts he is owed the sum of \$21,000.00 representing 14 working days on the project. The defendant suggests that no more than 10 days of work was spent on the project.

- [46] The claimant's evidence for labour is based on diary sheets documenting the period of engagement, days of the week, names of workers, amounts earned and total. Whilst the diary sheet do not align perfectly, these sheets provide the only record of the work done and the associated costs. There being a dispute over the number of days worked the diary sheets along with the oral evidence of the claimant will be reviewed to determine the validity of the labour claim.
- [47] In that vein the court notes that although the claimant admits that two of the employees who worked on the project are still employed by him no witness statement or other evidence was solicited from these employees. Considering the ongoing employment with the claimant and their then seniority which the court notes from the amounts paid to them versus ordinary labourers, their testimony could have provided valuable support for the claimant's claim regarding labour and hourly rate.
- [48] Construction projects, especially those with time sensitive tasks like laying foundations may require work on weekends to ensure time completion. However, the details provided by the claimant in his evidence about the nature of the project, particularly the specific tasks involved in the laying of the foundation do not give rise to an urgent need for weekend work. Thus, the defendant's argument concerning industry practice typically not involving work on weekends combined with the lack of substantial evidence provided by the claimant and the questionable reliability of the handwritten diary sheets suggest that the claimant may have worked less than 14 days claimed.
- [49] Further the claimant's insistence that the sole focus was on completing the foundation without involvement of any other tasks, the claimant admitting that the work on the cistern was executed several months prior, further supports my suspicion that the 14-day duration may have been inflated as the workforce would not have been divided between different tasks and could allocate all the time to this job. Therefore, from the totality of the evidence presented the court has concluded that the claimant attempted to inflate the number of days worked to 14. However, the court having found that the claimant did not work on the weekends and was solely engaged in the completion of the foundation has realistically assessed the claimant worked for a period of 11 days. Therefore, the sum owed for labour is \$17,300.00.

Equipment Rental

[50] The claimant claims the sum of \$300.00 for rental of equipment specifically a mixer, cutter and grinder and \$1,120.00 for what he has classified as worked hours for backhoe service. The latter is considered as a service provided by the owner of the backhoe which service includes the rental of the equipment. For this reason, this claim is considered under this rubric.

[51] The documentary evidence provided by the claimant is generally wanting. Therefore, it comes as no surprise that the receipts provided do not align with the equipment specifically identified in the statement of case. In fact, the claimant provided receipts for the rental of a sub pump and a jumping jack for the sum of \$120.00 and \$400.00 respectively but no claim was made for these items. In contrast a claim was made for the mixer grinder and cutter, but no receipts have been provided for them. Regarding all of these items, the burden lies with the claimant to establish his entitlement to reimbursement of them. As stated, the evidence regarding the rental items is incomplete and lacks sufficient documentation to support reimbursement. Without receipts for certain items and a clear pleading for others the validity of these claims is problematic and therefore disallowed.

Materials

[52] The court has already reproduced the claimant's itemized materials and their associated costs amounting to the sum of \$27,340.00 as the outstanding balance for the material purchased for the project.

[53] The claimant has consistently asserted that this matter concerns a breach of contract to complete a foundation and denied any assertion by the defendant of involvement in the cistern by asserting that the works on the cistern was completed several months prior. Given the claimant's constant assertion that the claim pertains only to the foundation, it waxes strange why materials specifically identified for the system² totaling the sum of \$3,080.00 are included in the list of materials claimed as due and owing. Further the absence of receipts for these items specifically identified for another job not related to the current proceedings raises doubt as to their relevance. Consequently, it is appropriate to disallow these items in the circumstances given their lack of connection to the current case.

² See paragraph 42 above – 2x4x20 DPP used in cistern and ¾" Form ply used in cistern perimeter.

- [54] There also exists a discrepancy between the remaining itemized items to which specific amounts have been allocated, in that no associated receipts have been attached to the claim. Remy J ruling in the case of **Wheatley et al v Waterpoint Caribbean Homes Limited**³ underscores the requirement for special damages to be specifically pleaded and strictly proved. This principle is consistent with the guidance provided by Chitty on Contracts which defined special damages as the 'precise amount of pecuniary loss which the claimant can prove to have followed from particular facts in the pleadings.' The absence of receipts in light of the claimant's admission that the defendant already had some materials on hand and the claimant's admission on at least one occasion to missing purchases with other projects, raises concerns about the validity of this claim. Without proper documentation and reliable evidence to support the claim, the burden of proof remains unmet and is therefore refused.
- [55] Concerning the claim for damages collectively titled as "receipt of particular on materials" this claim faces similar challenges as with the claim for special damages as there are no identifiable receipts to support the claim. Instead of a receipt, the claimant has submitted an invoice. Whilst an invoice details the materials and potential associated costs, it does not confirm payment. The court in the case of **Anthony v Yhap et al**⁴ has previously ruled that receipts are clear evidence of payment whereas invoices lacking indications of payments or pro forma invoices which are merely commitments to purchase are deemed insufficient as proof of payment. This viewpoint finds support from an independent authority in the case of **Germina Cherubin qua Administratrix of the Estate of Anthony Cherubin v The Attorney General of Saint Lucia et al**⁵ wherein Cenac-Phulgence J stated that 'one must admit that there is a big difference between an invoice and a receipt. An invoice does not in any way suggest an amount has been paid but merely represents a charge for a service which is to be paid.' However, the defendant's admission of receiving three receipts totaling \$5,297.79 without pleading their payment or denying their relevance to the project suggests a tacit acceptance of an agreement for the claimant to be reimbursed for materials purchased or provided for the project presentation of the relevant bills. This tacit acceptance suggests that these funds are indeed due and owing for the project. Additionally, the defendant's express acceptance

³ ANUHCv2010/0029 para 86

⁴ ANUHCv2017/0030

⁵ SLUHCv2017/0319

in his closing submissions that the claimant is legally entitled to recover these monies further supports this conclusion.

- [56] Based on the evidence presented and the court's acceptance that the sum of \$10,000.00 was previously paid by the defendant towards this contract, the court will apply the \$10,000.00 against any amounts owed to the claimant as part of the breach of foundation contract thereby making the sum owed by the defendant to the claimant \$12,797.76.

Order

[57] In light of the foregoing, it is hereby ordered as follows:

- a. The claimant is awarded the sum of \$12,797.76 for breach of contract.
- b. The claimant is awarded prescribed costs.
- c. Interest

Jan Drysdale

High Court Judge



By the Court

Registrar