

THE EASTERN CARIBBEAN SUPREME COURT

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv2018/0282

BETWEEN:

ODAIN HERON

Trading as HERON CORNER STONE CONSTRUCTION

Claimant

And

CHRIS BENTO

Trading as CHRIS BENTO PROJECTS INC

Defendant

Appearances:

Ms. Alincia Williams-Grant for the Claimant

Ms. Rika Bird for the Defendant

2022: July 13th

2023: March 1st

JUDGMENT

[1] **ROBERTSON, J.:** The Claimant, Odain Heron, Trading as Heron Corner Stone Building Construction initiated proceedings seeking damages from the Defendant, Chris Bento, Trading as Chris Bento Projects INC for alleged breach of contract resulting from wrongful termination.

- [2] The Claimant claims the amount of EC\$60,665.72 for work done under contract. The Defendant defends the action and counterclaims for damages for breach of contract and special damages in the sum of EC\$25,000.00.

Overview

- [3] The parties had a contractual relationship in which the Claimant was required to paint a specified portion of Evangeline, a property located at the Jumby Bay resort. The Defendant was a sub-contractor to another entity Square One Limited. The contractual agreement between the Claimant and the Defendant was partly an orally and partly a written. The initial agreement was for the Claimant's services to be rendered for the cost of \$209,800.00 and this is reflected in the purchase order dated 24th February 2018. The parties also signed a document captioned "Purchase Order Terms and Conditions" with the same date. The sum of EC\$209,800.00 was increased to \$230,700.00 as the Claimant indicated that the original price did not include the scaffolding costs. It was agreed that the works would be completed no later than 30th June 2018. A deposit of EC\$39,960.00 comprising the mobilization fee (\$37,960.00) and transportation fee (\$2,000.00) was paid to the Claimant by the Defendant and the Claimant commenced work on or about 26th February 2018.
- [4] Approximately three weeks into the Claimant's engagement the Defendant determined that the Defendant was dissatisfied with work done by the Claimant's worker with respect to the spraying of certain doors. It was the Defendant's position that the doors in the kitchen and the breakfast room areas were ruined in that the profile and the design of the door could not be seen. The Defendant was of the view that if the workers were retained there would be much remedial work which would have to be done by the Defendant and such would be at the Defendant's cost. Although the Claimant disagreed with the assessment of the Defendant and offered an explanation for the particular issue the Defendant took the decision to remove the spraying of the doors and windows from the scope of works for the Claimant and this task was given to another sub-contractor. As a consequence of the removal of the items which were in the scope of works the Claimant's budget was reduced by EC\$28,000.00 to EC\$202,700.00. The position of the Claimant is that the reduction in sum was the unilateral decision taken by the Defendant.

- [5] The Defendant terminated the Claimant's services on 29th March 2018. The Claimant contends that at the time of termination the Claimant completed 75% of the scope of works but was only paid EC\$112,359.28 and the sum of EC\$60,665.72 remained outstanding.
- [6] The Defendant pleaded that the work contracted to be done was not executed in a professional workmanlike manner nor was it executed within the contractual term¹ and that this was the reason that the Claimant's services were terminated.
- [7] In these proceedings the Claimant gave evidence in support of his case and the Defendant's case was supported with the evidence of the Defendant, Peter Reitz, Shem London and Terry Pollard. The evidence in this matter was extensive and the trial was undertaken over a number of days.
- [8] The issues for the Courts determination are:
- (1) What were the terms of the contract and the scope of works which the Claimant was required to undertake.
 - (2) Did the Claimant complete 75% of the scope of works?
 - (3) Did the Claimant breach the terms of the Contract by failing to execute the work in good workmanlike manner; failing to submit detailed completion stage reports for approval prior to payment becoming due and by the Claimant making claims from the Defendant without producing a proper and detailed invoice?
 - (4) What compensation, if any, is payable.

The Contract

- [9] A contract is an agreement giving rise to obligations which are enforceable or recognisable in law². The agreement relating to the contractual relationship between the Claimant and the Defendant was largely captured in an agreement dated 24th February 2018. The completion dated of the contract was 30th June 2018. It was agreed that the parties would execute certain works for the costs of EC\$209,800.00. Thereafter, by oral agreement the parties increased cost of EC\$230,700.00 to include scaffolding costs. The Defendant paid the deposit of \$39,960.00 and the Claimant commenced working from on or about 26th February 2018.

¹ Paragraph 4 of the Defence

² Treitel, The Law of Contract (8th Ed. 1991) p.1.

[10] The purchase order 1002 dated 24th February 2018 contained the following items, Tennis Court Room, Pool Room/Gazebo, Office, Kitchen and Laundry, Red Room (Not including ensuite addition), Garage, Pergola, Trellis. The cost reflected on this document was \$209,800.00. The purchase order 1002b contained the following items Tennis Court Room, Pool Room/Gazebo, Office, Kitchen and Laundry, Red Room (Not including ensuite addition) Garage, Pergola, Trellis, Clay Lights and a notation "Less: Windows and Door Spraying". The cost reflected on this item was \$202,700.00.

[11] Evidence regarding the alteration of the scope of works can also be found in the WhatsApp messages between the Defendant and the Claimant. The Defendant responses to the Claimant's enquiry about whether the Claimant was required to make arrangements for "spray persons" to be present³ on the site. In that exchange, the Defendant responds, *"My spray guy Terry is already set to go and is starting Friday. The spraying of windows and doors is no longer your responsibility. I thought I got that point across to you. His spray amount will be deducted from yours and Colin's original contract and will be documented in a new contract along with the removal of Colin and I will be sending that to you either tonight or early tomorrow for us to review together Friday Terry will be starting on Friday independently of you. So focus on your remaining work and that's it"*.

[12] The Claimant throughout the Claimant's evidence noted that after the task of the doors and windows was removed from his scope of works, he was not responsible for same and ought not to be held accountable for same. Accordingly, this Court accepts that the initial scope of works included the doors and the windows but that this was removed from the scope of works as detailed in the purchase order 1002b.

Submission of Detailed Completion Reports

[13] There is a term of the contract relating to 'payment terms'. This provides:

"Payment Terms

³ See pg. 62 (under leaf) of trial bundle.

Remaining Balance to be paid weekly starting 3 weeks to Team Manager after start date when a detailed completion report is submitted and approved by Square One and CBP Inc before all draws for funds are considered and/or paid.”

[14] The Defendant contends that the Claimant failed to submit these reports and that the invoices produced did not match the completion or stage of the Claimant’s work. The Claimant contends that this requirement was not generally observed.

[15] It is noted from the WhatsApp communication between the parties in evidence it can be observed that although this was a term of the contract it was not necessarily being observed and that payment was dependent on the inspection of the Defendant and the Defendant’s approval of the work completed. The Defendant would also engage with his principal, Peter Reitz of Square One Limited to discuss progress reports, payment schedules and the coordination of matters related to the overall construction project. Peter Reitz’s evidence is that he made progress payments to the Defendant and the Defendant paid the sub-contractors.

Whether the Claimant completed 75% of the Scope of Works

[16] The Claimant’s evidence is that he completed 75% of the work as set out in the scope of works. The Claimant identifies this in his witness statement and indicates the work executed to be as stated hereunder:

- a) Garage: The Claimant indicated that this task required two days to completed. There was one more coat to be applied outside and the underside of the roof was prepped. However, the Claimant indicated that the garage was being used for storage so the Claimant intended to have this area painted last.
- b) Laundry area: The roof and walls of the inside the laundry were painted. The outside walls required one more coat of paint to be applied. This job was estimated to take one day.
- c) Kitchen: The ceiling was prepped and primed. The outside walls were also prepped and primed. The Claimant stated that two days were required to complete the

kitchen. On this item the Claimant indicated that he could not complete this area since the masons were not finished tiling the area.

- d) Building by Tennis Court: Overhangs were completed, and the exterior walls were prepped and were to be primed. This area would have taken 3 to 4 days to be completed.
- e) Office: This area was taped and would have taken two to three days to complete. It was not done because the owner's employee was still working in the location.
- f) "Red room" by the sea: Inside was prepped and the overhangs outside was prepped. The Claimant anticipated that this job would have taken three days to be completed. This area could not be finished since the plumbers were working and an annex was being made in this area.
- g) Pool room: This was taped and masked and the Claimant indicated that the area would have been completed in three days.

[17] The evidence of Peter Reitz, who was, according to the Claimant, often present on the job as often as 3 to 4 times per week, was of the view that the Claimant completed approximately 40% of the scope of works. Mr. Lallman Singh, a construction supervisor of Square One Limited a witness on behalf of the Defendant gave evidence and indicated that he was experienced in the field of painting, masonry, tiling and carpentry. Mr. Singh was assigned to the project to supervise the work of the painters daily. His job was to represent Square One Limited and ensure that the requirements of the project were being satisfied. In Mr. Singh's assessment the Claimant completed 37% to 40% of the work. The evidence of this witness is that "the kitchen area, tennis area and garage were all incomplete. The tennis areas were not finished properly, and the ceiling of the kitchen was not painted properly. The need for the doors to be redone was one of the largest issues".

[18] The Defendant submitted into evidence the Defendant's evaluation report which the Defendant would submit to the principal, Square One Limited. That report estimated the completion in various areas. The report noted that the Claimant completed 11.36% of the work in the Tennis Pavilion, 1.12% of the work in the Office/Library, 12.2% of the main house completed, staff and 38.77% of the staff and utility area and 0% of Pergola. The Defendant himself estimated that the

Claimant completed 35% of the work. The Counsel for the Defendant noted while cross-examining the Claimant that, although the Claimant contends that 75% of the scope of work was completed the evidence of the Claimant does not indicate that any specific area was complete.

[19] There is also evidence before the Court that there was construction on the property during the period that Claimant's painting works were being executed. The Claimant agreed during cross-examination that construction work was being done in the garage and other areas during the relevant period.

[20] It is accepted law that, subject to cases in which reliance is placed upon evidential presumptions, the evidential burden in relation to any given fact in issue will lie on the party bearing the legal burden on the fact in issue⁴. The burden lies with the Claimant to show that he completed 75% of his assigned project. The Claimant has outlined what the Claimant contends has been done by the Claimant but has done no more. The Claimant, for example, has not produced the square footage of the areas required to be covered so that there can be an assessment of what the Claimant indicated was done compared with the total work which was required to be completed.

[21] Additionally, the presentation of the receipt and the purchase order is noteworthy. The receipts were issued by the Defendant. The receipt numbered 0002 reflected 44.38% of the purchase order, receipt numbered 0004 represented 51.78 of the purchase order, receipt numbered 006 represented 56.71% of the purchase order. It does appear that the Defendant was tracking payments as the payments relate to the contract price and the work progress. It is not as clear that the Claimant was vigilant in this regard. A discrepancy arose between the payment rate of the purchase order and the percentage of work completed which was the source of the tension between the parties. This is reflected in the WhatsApp communication dated March 29 when the Defendant indicated that *"you billing me 25000 is saying you are 65% done when the project is only at 53% and I would have billed up to date Peter only 51%. You are asking for too much money in advanced and I'm guessing its due to overpaying your sprayers who were let go up front. Giving you 15000 will put you at 59% completion. Which still isn't even with peter, the completion of the project rate or Hector level. Hector and them have a larger amount of work and*

⁴ Blackstone's Civil Practice 2020. Para. 49.37.

have made more progress than your team and they've only billed 51%. You also lost 28,000 of the value of your contract to Terry. So your mobilization fee was inflated as well. That is why you are at the level you're at. And it needs to slow down. I'm not paying you out of my pocket again".

[22] Counsel for the Claimant asks the Court to consider the evidence of the Claimant that the Claimant was ahead of schedule and Counsel referred to the WhatsApp exchange in which this was communicated to the Claimant by the Defendant. The particulars of that communication are, *"Great. The architects and planners are telling Peter and everyone to slow down as there isn't approval for some areas. Okay, hector, talk to your guys, its good timing for me to shut down the site tomorrow and Thursday so I would like to do so as our head contractor is as well. Can we all agree no painting tomorrow and Thursday please?"* In another message it was indicated, *"We are ahead of schedule. So if the guys want to have a break they can."* The date of the messages is unclear, and the message does not indicate the actual work which was completed by the Claimant.

[23] The Claimant pleads receipt of the sum of EC\$112,359.28 of the purchase order under the contract. The Defendant contends that the Claimant was to be paid based on the stage, measure and value of the work done and/or completed. In this Court's view this was not expressly stated in the contract and while the Defendant did likely have regard to the stage of the Claimant's work before payment it cannot be said that this was the basis upon which payment was made. In fact, if it were, the Claimant would not have been paid for 56.71% of his work assignment when the Defendant quantified the completion stage to be 40%. Additionally, although there was an indication in the contract that detailed completion reports were to be submitted before draws for funds were considered and/or paid it does not appear to this Court that there was adherence to this provision. This is reflected in a WhatsApp communication in which the Defendant indicated, *"Hey guys, thanks for understanding the amount this week and not making a bid deal About it. I will prove to ...how much work has been done and what I believe you guys deserve by the next invoice. I'll make sure it's laid out detailed so there's no argument. And instead of you giving me the break down, I'll write one up and you guys approve it. Does that sound better? I believe so."*

So basically tomorrow I will come up with a report as to progress from last bill to now. Then from tomorrow to next bill. And go from there”⁵.

Whether the Claimant’s termination was for Cause

[24] Chitty on Contracts⁶ reminds that:

“Standard of workmanship: the contractor must carry out his works using all proper skill and care, and the standard required in the particular case is to be gathered from all the circumstances of the contract.

Fitness of works: there will be a further implied warranty that the work carried out by the contractor will on completion be reasonably fit for its particular purpose where (1) the employer makes known to the contractor the particular purpose for which the building is required; (2) the work is of a kind which the contractor holds himself out as performing; and (3) the employer relies on the contractor’s skill and judgment. The scope of the implication of a warranty as to fitness for the intended purpose will vary considerably depending upon the nature of the express obligations of the contractor.”

[25] The Defendant contends, among other things, that the Claimant breached the agreement since the Claimant’s work was poorly executed. The Defendant in his evidence supported this position by referencing that there was an area in the ceiling where the painting was not properly executed, that the prepping of work was not properly done, that the profile and the design of doors painted by the Claimant were ruined because the paint was too heavy, that there was spillage of paint on the stone driveway, expensive copper gutters and other areas on the site, nails were not taken out of the walls in the staff area as required but the nails were painted over. The Defendant also indicated that oil-based paint and primer were “unforgiving” and that “the Claimant’s work on the windows and doors really hurt our progress. It was very hard to fix the areas to what it should have been”.

⁵ See Trial Bundle Vol. iii pg. 32.

⁶ 13th ed. Para 37-069 and 37-071.

[26] During cross-examination the Defendant contended that the Claimant and his workers would spray paint on the gutters, on cabinetry and other finishings, and 'the masking' and the protective plastics were being ripped off the walls while the workmen were spraying. The Defendant contends that he could identify that the violations were occurring by the Claimant's team because the Claimant's team was the only team of the two teams which would have been spraying paint.

[27] The Claimant strongly disputes the characterization of his work as being shoddy and noted that he was recommended for the job because of the high standard of his work. The Claimant indicated that in the past he worked for Peter Reitz and that Mr. Reitz reengaged the Claimant for the Claimant's services in the past and that the Defendant requested a quotation from him with respect to another project.

[28] The Claimant also noted that he would not have been permitted to continue on the project for as long as he did if his work was as poor as the Defendant suggests since the project is within a high-end project and there was an expectation for good work. The Claimant also noted that Mr. Peter Reitz was often on the project and that he would have been informed that his work was substandard.

[29] The witnesses, Peter Reitz, Shem London and Terry Pollard spoke about the sub-standard work executed by the Claimant. Terry Pollard indicated that he was required to remedy the Claimant's work in some instances and in other instances complete the Claimant's work assignment. In order not to be blamed for poor execution of his tasks, Terry Pollard indicated that, prior to working in the area he took pictures of paint on items.

[30] Counsel for the Claimant asks that the Court consider that the Defendant's witnesses continue to have a professional relationship with the Defendant and that the witnesses have financial incentives to support the Defendant's account of the period that the Claimant was employed on the project. Nevertheless, this Court accepts on a balance of probabilities that Claimant breached an implied term of the contract that the work would be executed in a good workman like manner.

Damages

[31] Damages for breach of contract are compensatory. Such damages are to compensate the innocent party and to repair actual loss. Compensation is achieved by placing the innocent party in the position, so far as money can do, as if the contract has been performed.

[32] The Defendant claims special damages in the sum of \$25,000.00. This Court has addressed the matter of the Defendant having made payments in paragraph [23]. The Defendant alleges damages and contends that the Defendant had to employ the services of another person, Terry Pollard, to worked on the doors, to rectify the work done by the Claimant and to complete the Claimant's work assignment at a cost of \$28,000.00. The evidence of this payment is not before the Court. During cross-examination Mr. Pollard referred to sums as having generally been received from the Defendant for the work executed. The Defendant has failed to substantiate this loss and the Court has determined that nominal damages are appropriate in the circumstances.

[33] It is Ordered that:

- (1) The Claim is dismissed with prescribed costs payable by the Claimant to the Defendant.
- (2) The Claimant is liable for breach of contract (exclusive of the windows and the doors).
- (3) Nominal damages are payable by the Claimant to the Defendant in the sum of EC\$5,000.00.

Marissa Robertson

High Court Judge

By the Court

Registrar