

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

GRENADA

GDAHCV2019/0534

BETWEEN:

ANN MARIE JOHNSON

Claimant

and

KISSINGER NICHOLAS

Defendant

BEFORE:

MASTER MICHELLE JOHN-THEOBALDS (AG.)

APPEARANCES (via Zoom)

Ms Deborah St. Bernard of Counsel for the claimant

No appearance for the defendant

2021: February 22, 25;
2022: February 2

JUDGMENT

[1] **JOHN-THEOBALDS M [AG.]:** Ms. Ann Marie Johnson (“Ms. Johnson”), the claimant in this matter contends that she entered into an oral agreement with the defendant, Mr. Kissinger Nicholas (“Mr. Nicholas”) to construct the decking and flooring and the entire construction, including the roof, of her retirement home, as well as repairs to another building which she owned, both situated at Belmont in the parish of Saint George.

[2] In her statement of claim, Ms. Johnson pleaded that during the period of May 2016 to January 2018 she advanced payments to Mr. Nicholas for the completion of the work on her retirement home by cheques totalling \$64,300.00 and cash totalling \$19,100.00. The sum of \$7,000.00 was also advanced for

repairs to the other building, which she does not state how this was paid. The total amount paid to Mr. Nicholas for the completion of the works as claimed by Ms. Johnson was \$90,400.00.

[3] Mr. Nicholas failed to complete the works on the building and as a result Ms. Johnson had to expend further monies to have someone else complete these works. On 26th July, 2019 Ms. Johnson issued a claim against Mr. Nicholas and sought the following:

- (a) The sum of \$86,085.00 being monies expended by her to complete the project which Mr. Nicholas failed to complete, including the sum of \$4,500.00 for the purchase of equipment for the project and taken away by Mr. Nicholas.
- (b) Interest on the said sum of \$86,085.00 at the rate of 10% per annum.
- (c) The sum of \$4,066.00 being money spent by her to purchase items for Mr. Nicholas at his request.
- (d) Interest on the said sum of the \$4,066.00 at the rate of 10% per annum
- (e) General damages for breach of contract, inconvenience, hardship and distress.
- (f) Costs.

[4] On 24th January, 2020 the claimant obtained judgment in default of acknowledgment of service and defence with damages to be assessed. The matter is before me for the assessment of damages. It must be stated that Mr. Nicholas has not responded to the application for the assessment neither has he taken part in these proceedings.

Special Damages

- [5] Ms. Johnson has made a claim for special damages as follows:
- (i) The sum of \$81,585.00 for monies expended by her to complete the project.
 - (ii) The sum of \$4,500.00 for the purchase of equipment for the project which was later taken away by Mr. Nicholas.
 - (iii) The sum of \$4,066.00 being money spent by her to purchase items for Mr. Nicholas at his request.

I will deal with each in turn.

- [6] Ms. Johnson alleges that she expended the sum of \$81,585.00 to complete the work started by Mr. Nicholas. Ms. Johnson has produced a report from an engineer, ("the report"), the purpose of which was to provide an assessment of the construction works. The report concluded that the construction works were incomplete in several respects and were not done to acceptable standards and building codes, good workmanship and construction practices. The report also provided estimated costs of the remedial work which would need to be done. It is noteworthy that the report does not state the value or costs of the construction work done by Mr. Nicholas, which would have been helpful at this assessment phase.

- [7] Ms. Johnson has relied on this report to detail the remedial work which was required to remedy the shoddy work done by Mr. Nicholas and estimated the costs of these works to be \$35,785.00.

- [8] Contrary to her statement of claim, in her witness statement, Ms. Johnson submits that she spent an additional \$45,800.00 to complete the project and particularized these expenses as follows:
- (i) Roof at \$26,500.00
 - (ii) Front Step at \$15,000.00
 - (iii) Doors at \$2,000.00

(iv) Windows at \$1,200.00

(v) Guttering at \$1,100.00

[9] This would be a good juncture to highlight the discrepancies in relation to this award. In the claim Ms. Johnson has stated the amount expended for completion of the project as \$86,085.00. This amount is said to include the repairs estimated in the engineer's report, the additional monies expended and the sum of \$4,500.00 for the purchase and rental of equipment for the project, which I will come to shortly. This is also buttressed in Ms. Johnson's witness statement provided for the assessment phase. In both the statement of claim and the witness statement, the additional monies expended were particularized and totaled \$45,800.00. However, at the assessment hearing, counsel for Ms. Johnson clarified that the amount of \$45,800.00 spent was not additional, but was in fact the total amount spent to complete the works. This is contrary to what has been pleaded. Unfortunately, the court did not have the benefit of substantiating which amounts was in fact correct as Ms. Johnson has failed to produce any evidence as proof of the amount spent.

[10] The second amount claimed for special damages was the sum of \$4,500.00 which Ms. Johnson avers she gave to Mr. Nicholas for the purchase and rental of construction equipment and machinery for Mr. Nicholas to perform the construction works. She contends that not only did Mr. Nicholas fail to provide copies of the receipts for the rental and purchase, but he also took this machinery away from the work site when he left and to date has refused to return it, despite a written request to do so from her attorney-at-law, a copy of which was exhibited to the claim. Ms. Johnson urges the court to find that this amount is due to her by Mr. Nicholas although she is unable to provide any proof of purchase or rental of this equipment. Aside from the bald assertion made by Ms. Johnson, there is no evidence to prove that the amount expended on the purchase and rental of the equipment or that it was subsequently removed from the site by Mr. Nicholas.

- [11] The third claim made for special damages by Ms. Johnson is for the sum of \$4,066.00 being the amount expended on purchasing household items at the request of Mr. Nicholas for his personal use, with the agreement that he would repay her for it. Ms. Johnson states in her witness statement that although she delivered the goods as well as the invoices to Mr. Nicholas, and has issued a demand letter, he has not refunded her. Like the other claims for special damages, Ms. Johnson has failed to show proof of these purchases by way of these receipts or invoices for this amount. The court has no way of proving the same.
- [12] It is settled law that special damages must be pleaded and proven. In **Bonham-Carter v Hyde Park Hotel**¹ Lord Goddard CJ opined:
- “On the question of damages I am left in an extremely unsatisfactory position. Plaintiffs must understand that, if they bring action for damages, it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying: "This is what I have lost, I ask you to give me these damages". They have to prove it.”
- [13] The law in relation to an award for special damages is also quite settled. Special damages represent expenses which have been incurred and consequently these are capable of exact proof. It is for this reason that the law requires claimants to strictly plead, particularize and prove all items of special damages for these to be awarded. It is not enough for a claimant to say that loss has been sustained and to place unsubstantiated figures of this loss before the court. A claimant must prove the damage pleaded and to justify an award of these damages he must satisfy the court both as to the fact of damage and its amount.²
- [14] Ms. Johnson claim's for an award under this head is plagued with difficulty. The challenge faced by Ms. Johnson is that she has not provided receipts for any of the amounts claimed as special damages. Although she has particularized some of these expenses, she has not placed a scintilla of evidence before the court to

¹ 64 TLR 177.

² British Transport Commission v Gourley [1956] AC 185.

prove any of them. There is nothing, other than Ms. Johnson's assertion in her claim and witness statement, that she expended these amounts for the purposes stated. This is exactly what the courts have countlessly cautioned claimants against doing.

[15] In **Michael Laudat v Danny Ambo**³ the court of appeal held that:

"30. At an assessment of damages hearing ... the only issue for the court is how much in compensatory damages is due to the claimant upon the evidence adduced by the claimant in proof of general damages and any special damages claimed. Where damages for any pleaded causes of action have not been proven by the evidence, the claimant would generally not be entitled to damages under that head of claim.

31. A claimant's failure to prove damages under a pleaded head of claim in the evidence adduced ... is not a matter which a court of its own initiative should put right by an order which gives the claimant a further opportunity to prove such damages ... Regardless of whether or not a defendant is permitted to be heard on the issue of quantum, the court should critically carry out the assessment on the scheduled date on the evidence adduced, with the overriding objective of minimizing the costs of the assessment, ensuring that it is dealt with expeditiously, and that the judicial time and resources of the court are not disproportionately allotted in assessing the quantum of damages in the claim."

[16] I am guided by this decision and accept that it is not within my remit to allow the claimant to put in any further evidence to prove her claim. The time for so doing has passed.

[17] In the circumstances, using the guidance of the case law, Ms. Johnson having failed to prove the special damages as claimed, the claim for special damages accordingly fails.

General Damages

[18] Ms. Johnson is claiming general damages for breach of contract, inconvenience, distress and hardship.

³ DOMHCVAP2010/016 (delivered on 15th December 2010, unreported).

[19] In assessing general damages for construction projects, *Mc Gregor on Damages*⁴ states as follows:

“The normal measure of damages is the cost to the owner of completing the building in a reasonable manner less the contract price or that part of the contract price, if any, remaining unpaid.”

[20] In ***Mertens v Home Freeholds Company***⁵ the court held that the proper measure of damages was the cost to the claimant of completion in a reasonable manner at the earliest moment that he is allowed to proceed with the building, less the amount he would have had to pay the defendant had the defendant completed the house, if there was any amount outstanding. It was also held that the costs of completion must be taken at the time the completion is being undertaken.

[21] In ***Kenneth Harris v Sarah Gerald***⁶ the court of appeal also used the principles outlined in *Mc Gregor on Damages* and in ***Mertens*** to find that this is the proper measure of damages in a case where a building contractor wrongfully repudiates the contract to build.

[22] Like the court of appeal, I adopt this approach. In her claim, Ms. Johnson has pleaded that she advanced payments to Mr. Nicholas in the sum of \$90,400.00 for the completion of the work in both buildings. These payments were made in cheques, money transfers and cash. Ms. Johnson has tendered as evidence proof of payment via cheques and money transfers made out to Mr. Nicholas. I have reviewed the receipts submitted by Ms. Johnson and when tallied these amount to \$83,950.00 and not \$90,400.00 as she has pleaded. I do note that in her witness statements she states that she has evidenced receipts of the cashed cheques and money transfers. Ms Johnson did not speak to adducing evidence of the cash transactions neither has such been tendered. I am therefore constrained to use the proven amount of \$83,950.00 as the contract price. The claimant has provided evidence that this amount has been paid in full so there is no part of the contract price remaining unpaid.

⁴ Paragraph 1086.

⁵ 1921 2 KB 526

⁶ *Montserrat Civil appeal No. 3 of 2003*; delivered on 1st November 2004, (unreported).

[23] Although Ms. Johnson has not sufficiently proven her expenses on the amount spent to complete the work, I do however accept, from the engineer's report, that the work which has been done by Mr. Nicholas needed to be remedied and it is likely that Ms. Johnson would have had to expend money to do so. Ms. Johnson has pleaded that she has paid the sum of \$45,800.00 to complete the work. Although this amount differs from the rate estimated in the report, I accept that the actual amount expended by Ms Johnson may have increased from that estimated, taking all the variables into account. For the purpose of calculating general damages, I will therefore use the sum of \$45,800.00.

[24] Therefore applying the Mertens method, general damages would be calculated as follows:

The cost of completing the building	\$45,800.00
Less the part of the contract price remaining unpaid	<u>- \$0.00</u>
Total	<u>= \$45,800.00</u>

[25] I award the claimant the sum of \$45,800.00 for general damages which is the cost to Ms. Johnson of completing the building, less the part of the contract price remaining unpaid.

Interest

[26] Ms. Johnson has claimed interest at the rate of 10%. Counsel for Ms. Johnson however, could not provide the court with any reason for its departure from the statutory rate of 6%. I am not satisfied that I should go outside the statutory rate. Accordingly, I award interest on the sum for general damages at the rate of 6% per annum from the date of judgment to the date of payment.

Conclusion

[27] I hereby order as follows:

- (i) General Damages to the claimant in the sum of \$45, 800.00.
- (ii) Interest on the sum of \$45, 800.00 at the rate of 6% per annum from the date of judgment to the date of payment.

- (iii) Prescribed costs to the claimant in accordance with rule 65.5 of the Civil Procedure Rules.

[28] I am grateful to counsel Ms. St. Barnard for her helpful submissions in this matter and I deeply regret my delay in the delivery of this judgement.

Michelle John-Theobalds
Master [Ag.]

By the Court

Registrar