

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

SA I N T VINCENT AND T HE GR E NADINE S

SVGHCV2012 / 00 1 1

BETW E EN :

SONDRA MC DOWALL-ROBIN

Acting by he r duly appointed Attorn e y on r e cord Ca r lit a S . Daniel

CLAIMANT

- AND-

BUTE HOME BUILDERS LTD

DEFENDANT

Appearances :

Mr. Ronald Marks and Mrs. Patricia Marks-Minors of counsel for the Claimant Mr. Sten Sargeant and Ms. Moureze Franklin of counsel for the Defendant

2016: July 13, 29

2017: January 20

October 18

JUDGMENT

[1] **Co ttle, J:** This claim concerns a buildingcontract. The claimant avers an agreement between the parties was concluded for the construction of a dwelling house at a total cost of EC\$552,68.077.The project was to be completed within eight (8) months.

[2] It is the claimant's case that the works began in February 2010 and were scheduled for completion by October of the same year. She paid to Mr. Julian Bute, the mind and management of the defendant company a sum of EC\$50,00.000 as mobilization fee. A total amount of EC\$100,29. 50 was intended for use to purchase lumber to erect the building profile. This lumberwas to be kept and returned to the claimant for future use.

[3] The Claimant says that she paid the defendant a total of EC\$439,876.08 of the contract sum but by November4, 2010, the defendant had not completedthe agreed buildingworks. She obtained a progress report, preparedby professionals, which showed that as at November 4, 2010, the value of the works done was only EC\$383,846.01, of which the claimant herself had contributed an additionalEC\$75, 224.03 on materials and labour.

[4] The claimant also seeks to recover the sum of EC\$4,500.00 which she expended to rent accommodation as the house was not habitable by the agreed time.

[5] On November 4, 2010 the defendant assured the claimant that the house would be complete by November 15, 2010. The claimant, who was residing abroad, indicated that she would return to St. Vincent and the Grenadines in December 2010 and that time was of the essence. The defendant did not complete the house but left the state on December 13, 2010. He retained the lumber used to erect the building profile. The claimant pleaded the sum of EC\$160,784.62 as special damages being the difference between the money paid to the defendant and the value of materials and labour supplied by her and the value of the works actually performed by the defendant. The claimant also sought compensation for the lumber retained and the cost of her rental accommodation.

[6] In its defence, the defendant company denied that there was any concluded contract between the parties as pleaded. Instead the defendantssay the agreement between the parties contained the following terms expressedor implied:

"Acc ordingly , it was furthe r amongst others , exp r ess , or alternative l y implied terms of the agree m e n t t h a t ;

a. The Defendant hold themselves out as a building contractors and will exercise through its employees reasonable care and skill in carrying out the building works ;

b. The Claimant is to be represented on the building site by her agent one Caretha Thomas;

c. As no price was fixed by the agreement, the Claimant would pay the Defendant a reasonable price;

d. As no time was fixed by the agreement, the Defendant would complete the works within reasonable time ;

e. The Defendant would carry out the works at all material times in accordance with final approved drawings (blueprints) for the project from the Physical Planning Authority dated 20 January 2010 ;

f The Claimant agreed to advance the Defendant a mobilization fee of \$50,000 . 00 to get the project underway ;

g. The Claimant agreed to pay the Defendant as the work progressed specified sums in claims they would submit for the price of work done and materials supplied to the claimant at her request ;

h. The Defendant would claim \$12 , 500.00 less on each claim for materials and

labour cost incurred in four (4) installments to set-off the mobilization fee advanced by the Claimant ; t

i. The Claimant arranged to have one Sabata Caesar to settle the claims with the Defendant ' s Managing Director Mr . Julian Bute . "

[7] The defendant denies any knowledge of an agreement concerning the profiling lumber. He says this was paid for out of the mobilization advance and this has been repaid to the claimant by deductions from invoices for works done.

[8] The defendant pleads that only EC\$430,406.79 was paid by the claimant. Additionally, the defendant says that the claimant requested, and he performed, the making of several alterations to the approved building plans. He particularized the alterations as follows:

- a. The powder room was omitted , and converted into a study area ,*
- b. The area under the Laundry enclosed to accommodate a laundry,*
- c. The garage floor level is 28 " below the main floor ,*
- d. Garage No . 2 is enclosed and divided to accommodate a storeroom and laundry ,*
- e. Several areas in the ground floor have suspended ceiling instead of finished concrete ceiling,*
- f. The square footage of the kitchen increased ,*
- g. The location of the bathroom has been altered,*
- h. Some block wall internal partitions have been changed to drywall or timber studded partitions,*
- i. One bedroom has been totally omitted ,*
- j. The location of the dining room has changed ,*
- k. Concrete decorative moulding made on-site and installed around the roof and wooden fascia board is omitted ,*
- l. The location of the internal staircase is altered ,*
- m. The roofing was changed from Corrugated Painted Industrial V-Groove Galvanize Sheets to Corrugated Painted Spanish Style Sheets."*

[9] As I understand the pleaded defence, the defendant is here averring that the claimant has thereby contravened the relevant provisions of the Town and Country Planning Legislation. Since this amounts to a breach of the statutory duty, the court should apply the maxim "ex turpi causa non oritur actio" and dismiss the claim. However this argument was not pursued at the trial.

[10] He also seeks general damages for breach of contract by the claimant for her failure to pay his invoices for works carried out in full.

THE EVIDENCE

[11] The claimant testified that she agreed with the defendant company to build her retirement home at Prospect in St. Vincent. She showed the defendant's managing director a set of architectural drawings. In return he provided her with a quotation to construct the house for a total of \$525,680.77. The sum comprised EC\$344,3q7.02 for materials and EC\$181,323.75 for labour.

[12] The claimant agreed to have the defendant construct the house based on the stipulated price. The construction period was agreed to be eight (8) months. In her evidence in chief, the claimant commented on the defendant's witness statement. She said that all changes to the house as depicted in the architectural drawings were agreed before construction began.

[13] She showed the defendant the changes she required. One interior stairway was to be relocated and one bathroom was to be eliminated to leave more space. The claimant denied that she requested any additional changes during construction. When cross-examined the claimant admitted that there was no signed written contract.

[14] The terms of the agreement are contained in the quotation she received from the defendant. She accepted those terms. She agreed that the document does not specify the separate costs of material and labour. It does not specify a start date. It does not say how the payment would be made. She denied giving the defendant an approved plan which differed from the drawings he was shown. When shown the cancelled cheques paid to the defendant, the claimant agreed that they added up to EC\$9,470.01 less than the amount she claimed to have paid to the defendant in her pleadings.

[15] The claimant also agreed that the other changes were made to the house. She said it was the defendant who called her and informed her of changes he was making on his own. She was content to allow him to proceed as he thought best. She insisted that the defendant did not complete the project. She hired Peter Cumberbatch to do so.

[17] Sarita Thomas gave evidence for the claimant. As the claimant resided abroad during the building phase, she acted as the claimant's agent. She was cross-examined. She accepted that the approved plan put in evidence at the trial was not the plan discussed by the parties before the agreement to build was arrived at.

[18] There were differences between the two plans. The first expired and planning permission had to be obtained for the second. The first plan showed three bedrooms on the top floor instead of two as reflected on the second plan. Eventually only two bedrooms were built.

[19] Peter Cumberbatch was the last witness for the claimant. He worked on the building. He was an employee of the defendant company. After the defendant's managing director left St. Vincent and the Grenadines and stopped paying him he completed the house for the claimant who paid him for his work. The claimant also purchased the materials needed to finish the house. When cross examined; he said it was in December 2010 that the claimant began to buy the building material. She did so until the end of the project.

[20] The defendant called Raphael Smart. He was an employee of the defendant. He swore that the defendant continued to work on the project until 2011 in the month of February. He remained working on the house until then and was paid by the defendant. Strangely, he said that Peter Cumberbatch remained the foreman.

[21] Julian Bute is the managing director of the defendant company. I do not distinguish between Mr. Bute and the defendant for the purposes of this decision. In his evidence in chief, he says that he met with the claimant at the home of one Edwin Gibson at Cane Garden. He was shown an architectural drawing. He discussed the drawing with the claimant and agreed to provide a quotation for the construction of the house shown in the drawing. He later submitted a quotation to build the house for EC\$525,680.77 within a proposed period of eight (8) months. According to Mr. Bute, "the claimant agreed to those terms".

[22] He adds that on January 20, 2010, he was asked by the claimant to begin works in February 2010. He was provided with a set of plans approved by the planning authorities. He says he observed that there were differences between the approved plans and the drawings which he had seen before. He explained to the claimant that the cost of construction would change. She responded that she had no additional funds and he should try to make do with the agreed amount. It was on this understanding that the defendant commenced the works. He swore that during the construction, the claimant kept making changes which he set out in his pleadings.

[23] On November 4, 2010, the defendant says the claimant visited the site. She made no complaints about the progress of the works. By that time the claimant had paid him EC\$430,406.79 in addition to an initial sum of EC\$50,00.000. He says that after that point he expended EC\$32,365.93 for materials and paid his workmen EC\$35,517.64. He has a claim of EC\$67,883.57 which he did not submit to the claimant for payment because he was informed of this litigation which was

impending.

[24] Mr. Bute was cross-examined. He admitted that at the initial discussions at Mr. Gibson's home the parties agreed that there should be two bedrooms instead of three. A bathroom was to be omitted. He suggested a concrete parapet instead of fascia boards. He said he stopped working at the house around the end of January 2011. Peter Cumberbatch continued.

[25] In addition to the testimony of the parties, the court also had the benefit of an expert report by quantity surveyor, Mr. Arthur Guy. At the start of the trial this document was agreed by the parties

as an exhibit. It details a progress report on the claimant's home as at November 4, 2010. Mr.

Guy examined the state of the building. He found that \$411,000.00 had been disbursed to the builder. EC\$141,834.76 was needed to complete the building. EC\$114,680.77 remained of the contract amount.

[26] The value of works completed was EC\$371,703.51. Mr. Guy assessed the total expenditure to that date to be EC\$383,486.01.

[27] Additionally, Mr. Guy observed several variations to the scope of works. He listed these as:

"Variations to Date

There are several variations observed during the inspection. Variations are in the form of omissions, some additions and changes in the scope of works as indicated on the Architectural drawings issued for perusal. I have not been assessed.

The following are variations observed:

Ground Floor:

The Cost implications of these variations have

- The layout of the Ground floor has been altered as follows:*
- The powder room is omitted*
- Area under Laundry enclosed to accommodate a laundry*
- Garage floor Level is 28' below main floor*
- Garage No.2 is enclosed and divided to accommodate a storeroom and laundry*
- Some area on the ground floor has suspended ceiling in lieu of finished concrete ceiling*
- The size of the kitchen is increased*
- The location of the bathroom has been altered*
- Some block wall internal partitions have been changed to Timber stud partitions*

First Floor

- One Bedroom has been omitted*
- The Kitchen & Dining room has changed*
- The Powder room has been converted to a Study area*

- *Some block wall partitions have been substituted by drywall partitions*

Roof

- *In-situ-concrete decorative moulding has been installed around the roof. Fascia board is omitted where mouldings are installed*
- *The location of the internal staircase is altered ."*

He did not assess the cost implications of the changes.

THE SUBMISSIONS

[28] At the conclusion of the evidence the court ordered the parties to file closing submissions in writing within seven (7) days. Neither party complied. Counsel for the claimant filed his closing submissions on January 20, 2017.

[29] Despite the delay the submissions were of limited assistance to the court. Counsel submitted that the evidence showed a concluded contract between the parties, one term of which can be found in the defendant's quotation letter. That was to the effect that the contract period would be eight (8) months. Building began in February 2010, and on November 4, 2010 the defendant assured the claimant that the house would be completed by November 15, 2010.

[30] The defendant failed to complete the house by the agreed date. Counsel also submitted that the defendant breached the contract by only performing EC\$383,84.601 worth of work when he was paid EC\$439, 876.80. The other instance identified as a breach of contract by counsel for the claimant is the removal of the profiling lumber.

[31] It is for these breaches that counsel wishes the court to award EC\$160,784.62 as special damages.

[32] Counsel for the defendant filed more ample submissions. Firstly, he challenged the very existence of a concluded contract between the parties. He attacks the quotation letter. The claimant in cross-examination relied on the letter for its terms. I will reproduce counsel's submission in full:

" The Defendant submits that the letter dated November 26 , 2009 does not amount to a valid offer nor contract for four reasons:

a) The Jetter does not amount to an offer - the learned authors of Halsbury's

Laws (2008) 4 th Ec/3 , Volume 4(3) (Tab 1) - Creation and Nature of Building Contracts

at paragraph 14 explains:

" Tenders . Where the contractor agrees to carry out work without more but in

expectation of payment, the employer must be a reasonable sum in respect of the work done. To obtain a fixed price for the work, an employer will often seek

estimates or tenders from contractors. **Choice of name is immaterial ; there is no custom that a document headed " quotation " or " estimate " or even "budget price " should be treated as a offer " 4**

The use of the word " quotation " within the letter itself evidences that the letter holds no weight in law and does not amount to an offer capable of acceptance. If the Court accepts this argument that there is no offer and acceptance of a contract from the beginning, then the Claimant case fails and it is a matter of deciding whether the

Defendant can succeed on his Counter claim.

b) The letter is no indication of the agreement - Guidance can be taken from Contract Law A Commonwealth Caribbean Case Book 5 citing the case of **Mahabir and Sons Ltd v Coroni (1975) Ltd 6 (Tab 2)**. At page 13 of the case, Tam J referred to the line of authority of which the following principles emerge as explained at p. 28 of the Practice Text:

i. " Where a contract is alleged to be contained in correspondence, the whole of the

correspondence should be looked at;

ii. The Court should look to discover whether a definite offer and acceptance without qualification are contained therein;

iii. The correspondence must contain all of the essential terms agreed on at the date of acceptance ;

iv. Further negotiations cannot affect a contract already properly established unless the parties consent

v. Words such as " agree ", " offer ", " accep " t when used in relation to price may not necessarily involve a contractual result, but many indicate only that particular element in the contract being negotiated had been indicated. Whether they do or not amount to a complete contract must depend entirely on the construction of the particular documents ."

c) If the letter is found to be an offer , there was no acceptance - The Claimant pleads she accepted the terms relied on to assert that the Defendant is in breach of contract. However, it is trite contract law that "acceptance must be communicated to the offeror". This means that acceptance has to be in the terms that the offeror expressed. Unless this is done, there was no acceptance. This is illustrated in Contract Law A Commonwealth Caribbean Case Book 8 citing the case of **Brisbane et al v Joy/es : (Unreported) VC 1998 CA 1 9 (Tab 3)** at p. 44 and 45 quoting Byron CJ:

" The real issue in this case therefore is what constitutes acceptance . The

appellant contends that payment of the purchase price constituted acceptance . The acceptance of an offer may be made by words , in writing or by conduct . It is **essential however , that the acceptance corresponds with the terms of the**

offer, or there can be no contract.¹⁰¹¹

d) If the letter is taken at its highest and treated as being a " letter of intent", it still cannot be held in law as the contract between the parties . The principles on whether or not a letter could become in law the contract between the parties was distilled by Sir David Simmons CJ in the Court of Appeal of Barbados in William E

Locke Jnr . V Bellington Ltd and Others (No 2) (2002) 65 WIR 19 (TAB 4). Sir David Simmons highlighted at paragraph [1 BJ (p.28 letter a) :

" The determination of this issue will necessitate a consideration of (a) the law relating to letters of intent , and (b) actual construction of the letter of intent itself

After considering a wealth of authority (see paras [18) - [41) , the Court formulated the principle at p . 34 g - h

" [44) It is a question of construction, in light of all the surrounding circumstances, whether the parties have agreed on all the terms of the contract , and merely desire the agreement to be expressed in more formal language ; or whether the execution of a further document is , as it were a condition precedent to the creation of any contractual obligations and thus, whether the parties are still in negotiation and further terms have yet to be agreed .

[45] To be a good contract there must be a concluded bargain, and **a concluded**

contract is one that settled everything that is necessary to be settled and leaves nothing further to be settled by negotiation between parties¹¹"

³ Butterworths Lexis Nexis

⁴ Emphasis mine .

⁵ By Timothy A. Alphonso - Lecturer of Legal Research and Contract law, UWI St. Augustine. Published by Xlibris LLC 2013

⁶ TT 2002 HG 35 (High Court of Trinidad and Tobago).

⁷ Perry v Suffields Limited [1916] 2 Ch. 187, Clifton v Pulumbo [1944] 2 All ER 497; Bigg v Boyd Gibbins Limited [1971] 2 All ER 183' Storer v Manchester City Council [1974] 3 All ER 824, and Gibson v Manchester City Council [1979] 1 WLR 294

⁸ By Timothy A. Alphonso - Lecturer of Legal Research and Contract law, UWI St.

[33] Counsel therefore urges the court to conclude that as only the contract price and the contract period were settled there can be no valid contract as there was no agreement as to the breakdown of materials and labour as components of the contract price. There is no provision that the defendant be paid in tranches.

[34] Apart from challenging the existence of the contract, counsel also rejects the expert report of Mr. Guy. He describes it as flawed and without explanation by the person who prepared it. Some entries are at odds with the pleaded case of the claimant. She says she paid the defendant EC\$439,876.80 up to November 4, 2010. The report says EC\$411,000.00.

[35] ~. In the alternative counsel says the claim for special damages is "convoluted, flawed from the report of Mr. Guy and speculative." The claim for general damages is also addressed by counsel for the claimant. He began by citing the dicta of Lord Jauncey of Tullichettle in **Ruxley Electronics 1:**

" In Bel/grove v Eldridge (1954) 90 CLR 613 at 617-618 at High Court of Australia in its judgment of the Court , after referring with approval to the rule stated in Hudson on Building Contracts (7th Edn , 1946) p 343 that -

"The measure of damages recoverable by the building owner for the

breach of a building contract is the difference between the contract price of the work or building contracted for and the cost of making the work or building conform to the contract"

[36] There is also a counterclaim by the defendant. He seeks to recover the cost of works he carried out after November 4, 2010.

DISCUSSION

[37] In order for a claimant to recover damages, the claimant must prove his case on a balance of probabilities. This is a claim for breach of contract. Despite the attractive arguments of counsel for the defendant, it is clear that there was a contract between the parties. It is true that the written quotation does not constitute the contract but it does provide the court with evidence upon which to find the terms of an oral agreement.

[38] I find that the parties agreed that the defendant would build the house for the claimant in approximately eight (8) months for the sum quoted by the defendant. The conduct of the claimant by allowing until November 15, 2010 for the house to be completed shows that she was

willing to allow a reasonable period of time beyond eight (8) months for the defendant to complete the house. Other terms of the contract are not as clear.

[39] I am not satisfied that there was any agreement as to the intended treatment of the lumber used for profiling. But I am persuaded that the defendant failed to complete the project as he had contracted to do.

1 Ruxley Electronic s and Construction Ltd v Forsyth [1995] 3 All ER 268 (TAB 7)

[40] The question remains, what damages should be awarded to compensate the claimant for this failure by the defendant.

SPECIAL DAMAGES

[41] These courts have repeatedly emphasized the need for special damages to be pleaded, particularized and proven.

[42] In the instant case the claimant has not led evidence which shows that on a balance of probability, her claim for special damages is established. In her pleadings she says that she paid the defendant in total EC\$439,876.08. When cross-examined, she admitted that the documentary evidence in the form of cancelled cheques amounted to EC\$9,470.01 less than the amount she pleaded.

[43] She adduced the expert report of Mr. Guy in evidence. This was agreed by the defendant at the start of the trial. That document disclosed the amount paid to have been EC\$411,000.00. In the face of these inconsistencies between the evidence and the pleadings this court finds that the award for special damages has not been made out. There is also the issue of the cost of the profiling material and the labour costs and material costs said to have been incurred by the claimant. These sums remain unsupported by any evidence other than the ipsa dixit of the claimant. I therefore decline to make any award of special damages.

GENERAL DAMAGES

[44] It is the aim of an award under this head, to put the claimant in the position she would have been had the defendant faithfully fulfilled his contractual obligations. The best evidence in this regard is the estimation provided by Mr. Arthur Guy the Quantity Surveyor. He thought there was a difference of EC\$27,153.99 between the disbursements and the estimated expenditure based on the contract estimate. He noted that the variations carried out by the defendant would have an impact on this figure but he did not quantify this impact.

[45] The result is that the court is left without a basis on which it can rely to compensate the claimant. As noted earlier it remains for the claimant to satisfy the court on a balance of probability.

THE COUNTERCLAIM

[46] The defendant says that he continued to work on the house between November 4, 2010 and January 2011. Peter Cumberbatch who actually did the work disputes this. The defendant does not detail what works he carried out. Additionally, he was absent from St. Vincent for one month from mid December 2010 to mid January 2011.

[46] He said that during his absence the claimant had paid Peter Cumberbatch to continue working. find that the defendant did no work after December 8, 2010.

[47] The defendant seeks to recover based on quantum meruit. In **S & W Process Engineering Ltd v. Cauldron Foods** the court offered useful guidance.

According to Justice Peter Coulson QC in S & W Process Engineering Ltd v Cauldron

Foods Ltd [2005] EWHC 153 (TCC) (Tab 9) at para. 51 :

" It is trite law that a claim on a quantum meruit cannot arise if there is an existing contract between the parties to pay an agreed sum: see, for instance, The Olanda [1919] 2 KB 728 and Gilbert and Partners v Knight [1968] 2 All ER 248 , 205 Estates Gazette 993. However, where there is a contract for specified work but the contractor does work outside the contract at the employer's request, the contractor may be entitled to be paid a reasonable sum for the work outside the contract on the basis of an implied contract: see Thorne v London Corp (1876) 1 App Gas 120, 40 JP 468 and Parkinson and Co v Commissioners of

Works [1949] 2 KB 632 , [1950] 1 All ER 208. However , this will always turn on what is meant in any particular instance by "outside the contract". Such a claim would , in any event , be subject to the general principle that "no action can be brought for restitution while an inconsistent contractual promise subsists between the parties in relation to the subject matter of the claim . . . if there is a valid and enforceable agreement governing the claimant's right to payment, there is neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration:" Mason P, Court of Appeal of New South Wales in Trimis v Mina (2000) 2 TCLR 346; see also Mowlem v Stena [2004] EWHC 2206 at para 40, where His Honour Judge Richard Seymour QC expressly held that this accurately stated the relevant principle of law."

[48] In the present case I find the variations to the scope of works formed part of the building contract. They are covered under the agreement to pay the sum agreed between the parties. The defendant admitted when examined that the claimant asked him to carry out the works including the variations with budget as she had no further funds. She did so prior to the start of works.

[49] It was on this basis that the defendant embarked on construction. It is not now open to him to impose additional expenses on the claimant. No claim on a quantum meruit arises. The counter claim is accordingly dismissed.

THE ORDER

[50] Judgment is entered for the claimant for nominal damages in the sum of EC\$100.00.

[51] There is no order as to costs as the claimant has had only nominal success.

[52] The counterclaim is dismissed with costs to the claimant in the sum of EC\$7,500.00.

This judgment has been delayed in delivery. The submissions of counsel were very late. Subsequently, the court was constrained by personal difficulties as I had to be away from work for several months. A sincere apology is offered to the parties.

Brian S. Cottle

HIGH COURT JUDGE

BY THE COURT

REGISTRAR