

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT VINCENT AND THE GRENADINES

SVGHCV2011/0347

BETWEEN:

PATRICK MARKS & SONS LTD

CLAIMANT

-AND-

ELFORD WYLLIE

DEFENDANT / ANCILLARY CLAIMANT

AND

TROY PETERS

ANCILLARY DEFENDANT

Appearances:

Mr. Ronald Marks and Mrs. Patricia Marks-Minors of counsel for the Claimant

Mr. Akin John of counsel for the Defendant/Ancillary Claimant

Mrs. Zhing Home-Edwards of counsel for the Ancillary Defendant

2016: November 8
2017: January 11, 23, 27
September 8

JUDGMENT

- [1] **Cottle, J:** The claimants operate a hardware store. The first defendant is a building contractor. The ancillary defendant is the owner of a dwelling house constructed by the first defendant. The

claim is for the unpaid balance for goods supplied by the claimants and used in the construction of the ancillary defendant's home by the first defendant. There is also an ancillary claim by the first defendant against the ancillary defendant for an indemnity as well as payment for additional requested building works.

- [2] In its statement of claim, the claimants aver that they supplied certain building materials on credit terms, to the first defendant. They seek recovery in the sum of Twenty-one Thousand One Hundred and Fifty-six Dollars and Forty-four cents (EC\$21,156.44) being the unpaid balance.
- [3] The first defendant accepts that he received building materials from the claimants. He further accepts that some of the goods have not been paid for. He denies liability for payment on two bases. Despite pleading that he acted at all material times as principal, the first defendant contends that this is a mere typographical error which has misled none of the other parties. His true position is that he was at all material times, the agent of the ancillary defendant.
- [4] The first defendant alternatively avers that there was an oral agreement between himself and the ancillary defendant whereby the latter contracted to pay for the materials supplied by the claimants and used in the building of the second defendant's home.

BACK GRO UND

- [5] The ancillary defendant contracted with the first defendant to build a two storey dwelling house at Richland Park in St. Vincent at a total cost of Two Hundred and Thirty-four Thousand Dollars (\$234,000.00). The ancillary defendant would finance the project from his own savings and a One Hundred Thousand Dollars (EC\$100,000.00) loan from CIBC, a local bank.
- [6] Architectural drawings were appended to the written contract. Shortly after the project commenced, the parties to the building contract agreed that a third storey would be added to the house. This was because of the slope on which the house was being built was below the road level.

- [7] A third storey was needed to bring the building up to road level. An amended agreement was therefore entered into. An amended contract in the sum of Two Hundred and Five Thousand, Eight Hundred Dollars (EC\$205,800.00) was agreed as the balance to be paid to complete the building as funds had already been disbursed. A further variation was agreed but no written memorandum was prepared to reflect this change.
- [8] It was agreed that the first defendant would extend the verandah to connect it to the car port being built. A credit account was opened. This was done by the first defendant in his own name. At the time the account was established Mr. Marks did not know the name of the second defendant. Mr. Marks knew the first defendant was building a house for a "sailor man". When cross-examined by counsel for the second defendant, he explained that he was not concerned about the identity of the "sailor man".
- [9] It was the first defendant who undertook to pay for the goods ordered and delivered. Mr. Marks was content to operate this way because he had known the first defendant for many years. They come from the same small area in St. Vincent. Mr. Marks relied on his witness statement as his evidence in chief. He was the only witness for the claimant.
- [10] Elford Wyllie is the first defendant. He filed a witness statement. He obtained most of the building material for the project from the claimant's hardware store. He would receive money as it was disbursed by the bank on behalf of the second defendant.
- (11) He would make payments to Mr. Marks on account. That is the way in which they chose to conduct business. When cross-examined, Mr. Wyllie agreed that the money claimed by the claimant is in fact owed to the claimant.
- [12] Under further cross-examination Mr. Wyllie accepted that it was his custom to establish credit arrangements with the claimant. He said Mr. Peters left all responsibility for making payment arrangement with supplier in his hands. He added that in October funds were low. He thought the amount which remained was insufficient to complete the project. He explained that the extra works

requested would cost between \$20,000.00 and \$30,000.00 and this would include the cost to extend the verandah. He also made this fact known to Mr. Guy, the Quantity Surveyor.

- [13] Troy Peters testified. He relied on his witness statement. When cross-examined by counsel for Mr. Wyllie, he agreed that he entered into a written contract with Mr. Wyllie. There was an agreed written alteration to that contract. There was also an oral agreement to extend the verandah to connect it to the driveway and to extend the roof to cover the new area. That alteration was proposed by Mr. Peters. He accepted that this alteration would involve additional material and labour although he insisted that the alterations did not involve breaking down any structure already built.
- [14] Theresa Searles was an employee of the bank from which the building funds were disbursed. In her evidence in chief, Ms. Searles explained that Mr. Peters obtained a loan of One Hundred Thousand Dollars (EC\$100,000.00) from her bank. He also had significant savings in the bank. The combination of the loan funds and the savings were sufficient to cover the estimated cost of the building, which was in the sum of Two Hundred and Forty Thousand Dollars (EC\$240,000.00).
- [15] After the project began it was realized that a third storey was needed; this increased the estimated cost of construction to Two Hundred and Seventy-nine Thousand Dollars (EC\$279,000.00). The funds available to Mr. Peters were sufficient to cover the additional expense save for a minute shortfall of One Thousand Eight Hundred Dollars (EC\$1,800.00). She informed Mr. Peters of the financial position and advised him to make additional savings in the event of any cost overruns.
- [16] The bank disbursed the building money to Mr. Wyllie in tranches in advance. As each building stage was completed, Mr. Guy, the Quantity Supervisor would prepare a progress report and submit it to the bank.
- [17] Ms. Searles swore that a total of Two Hundred and Sixty Thousand Two Hundred and Ten Dollars (EC\$260,210.00) was paid to Mr. Wyllie. When she checked with Mr. Wyllie in April 2010 he said that the tiling of the house was not done. He had not purchased or installed the bath tub. Five

; interior doors had not been purchased as no funds remained. Mr. Peters was compelled to hire another contractor and pay him EC \$31,120.00 to complete the building project.

[18] Ms. Searles was cross-examined. She said the bank relied on Mr. Guy's reports in order to disburse funds. Ms. Searles agreed that she had control of Mr. Peter's account in his absence. She interacted directly with Mr. Wyllie. Mr. Wyllie did not tell her of the proposed alternation to the verandah as additional work.

[19] Mr. Arthur Guy was the final witness. He gave a witness statement. He examined the building at all stages and submitted progress reports to the bank. He noted the agreed variation to add the third storey which he estimated then would cost an additional Thirty-nine Thousand Dollars (EC\$39,000.00), which would increase his estimate for the cost of construction of the house from Two Hundred and Forty Thousand Dollars (EC\$240,000.00) to Two Hundred and Seventy-nine Thousand Dollars (EC\$279,000.00). In his fifth progress report he noted the inclusion of bedroom closets and linen closets that he considered would increase the cost by an additional Eight Thousand Dollars (EC\$8,000.00).

[20] He agreed that there was in fact a variation to the verandah to extend it by Seventy-eight Square Feet (78 Sq. Ft.) to link the garage to the verandah. He had omitted this change in his report but he estimated the cost of construction of that variation to be Seven Thousand Six Hundred and Fifty-three Dollars and Thirty-seven cents (EC\$7,653.37).

DISCUSSION

[21] Mr. Peters now has the benefit of a completed house. It differs from the building in the amended written agreement in two areas identified by Mr. Guy. The closets have been built and the verandah extended. Mr. Guy puts the cost of these variations at Fifteen Thousand Six Hundred and Fifty-three Dollars and Thirty-seven cents (EC\$15,653.37). Building materials have been obtained from Mr. Marks. These materials have been used on Mr. Peter's home by Mr. Wyllie. Twenty-one Thousand One Hundred and Fifty-six Dollars and Forty-four cents (EC\$21,156.44) remains due to Mr. Marks for these materials.

- [22] The issues which fall for determination are few and of relatively narrow compass. Counsel for Mr. Wyllie helpfully set them out and I adopt his formulation.

Issue 1

- [23] Did Mr. Wyllie obtain the building materials from Mr. Marks as agent or Mr. Peters?

Issue 2

- [24] Did Mr. Wyllie and Mr. Peters agree for variations and additional works not expressed in the written agreement?

Issue 3

- [25] What value should be placed on the additional works?

Issue 4

- [26] Is Mr. Peters unable to indemnify Mr. Wyllie for the money claimed by Mr. Marks?

- [27] I will deal with the issues in the order that they have been listed. The law of agency is well settled. An agent may have the actual authority of his principal to act on the latter's behalf or he may have apparent or ostensible authority to so act. In the present case there is no actual authority. Belle J considered the concept of ostensible authority in the case of **Rembert Thomas v. Quarry Products Limited & Kerie Emmanuel** SLUHCV2009/0693. At para 29 he cited the dictum, of Lord Diplock in **Freeman & Lockyer Buckhart Park Properties (Mangal Ltd)** [1964] 2 QB 480:

"An 'apparent' or 'ostensible' authority... is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon

by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract".

- [28] In the present case the evidence does not satisfy me that Mr. Peters made any representation to Mr. Marks that Mr. Wyllie had authority to contract on behalf of Mr. Peters. Mr. Marks did not know Mr. Peters. He was content to trade on credit with Mr. Wyllie because of the relationship they had built up over the years.
- [29] I conclude that Mr. Wyllie was not acting as agent for Mr. Peters when he obtained the goods from Mr. Marks. I can discern no evidence to support a view that there was any retrospective ratification by Mr. Peters.
- [30] On the second issue it is common ground between Mr. Wyllie and Mr. Peters that it was agreed that there would be an addition to the scope of works to extend the verandah to connect it to the driveway. Mr. Peters denies that he was told that the cost of this extension would be EC\$20,000.00 - EC\$30,000.00. I accept his evidence on this point. This is buttressed by the estimate given by Mr. Guy that it would cost some Seven Thousand Six Hundred and Fifty-three Dollars and Thirty-seven cents (EC\$7,653.37) to carry out those works.
- [31] Mr. Wyllie also argues that the building of bedroom and linen closets constituted additional work requested by Mr. Peters. Mr. Peters is of the view that the construction of the closets always formed part of the scope of works. An inspection of the written agreement does not reveal any explicit reference to the construction of the closets. I accept Mr. Wyllie's version that this too was additional work agreed between the parties.
- [32] On the third issue I am content to accept the evidence of Mr. Guy as to the value of the additional works in the sum of fifteen Thousand Six Hundred and fifty-three Dollars and Thirty-seven cents (EC\$15,653.37).

: [33] Counsel for Mr. Wyllie submits that Mr. Peters is obligated to indemnify Mr. Wyllie for the cost of materials on the basis that he acted as agent for Mr. Peters. As Indicated earlier, I find no relationship of agency between Mr. Wyllie and Mr. Peters. Mr. Peters has no obligation in my view to indemnify Mr. Wyllie for the building materials. Funds had already been disbursed to Mr. Wyllie. It was from those funds that he ought to have secured building materials.

THE RESULT

[34] The claim by Mr. Marks against Mr. Wyllie has been proven on a balance of probability. Mr.. Wyllie must pay to Mr. Marks the sum of Twenty-one Thousand One Hundred and Fifty-six Dollars and Forty-four cents (\$21,156.44) as claimed with costs on a prescribed costs basis.

[35] The ancillary claim by Mr. Wyllie sought an indemnity. This aspect of the ancillary claim fails. However this court is satisfied that Mr. Peters requested additional works which Mr. Wyllie carried out. It is only fair that Mr. Peters be called upon to pay for these additional works.

[36] Mr. Peters will pay to Mr. Wyllie the sum of Fifteen Thousand One Hundred and Fifty-six Dollars and Thirty-seven cents (\$15,156.37) being the costs of the extension to the verandah and the cost of installation of bedroom closets and linen closets.

THE ORDER

[37] Judgment is entered for the claimant's company against the defendant in the sum of Twenty-one Thousand One Hundred and Fifty-six Dollars and Forty-four cents (\$21,156.44) with prescribed costs of 15% of this sum.

[38] Judgment is entered for the Ancillary Claimant against the Ancillary Defendant in the sum of Fifteen Thousand One Hundred and Fifty-six Dollars and Thirty-seven cents (\$15,156.37) with prescribed costs of 15% of this sum.

[39] I thank counsel for their patience while this long delayed decision was outstanding. An explanation is in order. Shortly after this decision was reserved, tragic personal difficulties caused me to be

- unable to carry out judicial duties for several months. Shortly after resuming duty, I was tasked with conduct of the criminal court cause list. The additional work load caused this matter and several others to be delayed. A sincere apology is offered by the court.



**Brian S. Cottle
HIGH COURT JUDGE**

By Court

Registrar