

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2014/0163

BETWEEN:

JOSEPH SCHRETZMAN

Claimant

And

**ST.KITTS-NEVIS & ANGUILLA TRADING
& DEVELOPMENT COMPANY LIMITED**

Defendant

Appearances:-

Ms. Stacy-Ann Aberdeen for the Claimant.
Mr. Garth Wilkin for the Defendant.

2017: June 26th

JUDGMENT

- [1] **WARD, J.:** On or about 4th May, 2007, the claimant entered into an agreement with TDC Real Estate and Construction Company Ltd for the sale of land and the construction of a villa (#36) thereon as part of a residential development known as Sunrise Hill Resorts situated at Frigate Bay.
- [2] The purchase price of the said Villa #36 was USD \$550,000.00 which was to be paid in accordance with the payment schedule set out in Clause 3 of the Agreement for Sale.
- [3] The claimant has withheld EC\$ 25, 601.85 claiming that the defendant is in breach of contract and has rendered defective works in the construction of the villa as particularized in its statement of claim filed 12th August, 2014.

- [4] In particular, the claimant asserts that the defendant breached the contract by negligently failing to ensure that the villa was constructed in a workmanlike manner and free of structural defects when it used softwood timber to construct the deck and external stairs to the villa. This material, the claimant asserts, was unsuited to the villa's physical environment.
- [5] Further particulars of breach/defective work are that the defendant:
- (i) Used galvanized steel brackets and screws instead of stainless steel brackets on the deck;
 - (ii) Built the insect screens too wide to allow for tilting and removing of bottom sash;
 - (iii) Used unsuitable materials for the timber base trim that were unsuited to the environment, leading to its deterioration;
 - (iv) Failed to construct a roof over the courtyard;
 - (v) Failed to construct the entrance wall from natural rock.
 - (vi) Fastened the trapezoid roofing sheets to the timber laths along the valleys of the sheets instead of along the ridges or crowns of the sheets;
 - (vii) Failed to commission the cistern which is not sealed and is without a cover.
- [6] The claimant seeks special damages in the sum of \$18,918.65 plus interest as costs of repairs of the said deck, specific performance of the contract to remedy the defects to the property or in the alternative the sum of \$153,185.00 being the actual cost of repair of the deck, external staircase and cistern.
- [7] The claimant also seeks special damages for the cost of an electricity bill from the St. Kitts electricity Company (SKELEC) in the sum of \$4,230.48.
- [8] For its part, the defendant contends that it is wrongly sued since the claimant entered into a contract with TDC Real Estate and Construction Ltd ("TDCREC

Ltd”) and not St. Kitts-Nevis & Anguilla Trading and Development Company Ltd. (“TDC”), which is a separate legal entity albeit the sole shareholder of TDCREC Ltd.

- [9] Further, the defendant asserts that upon execution of the agreement for sale on 4th May, 2007, attached thereto were building plans which did not specify what materials were to be used for the construction of the external staircase.
- [10] The defendant maintains that by way of letter dated 17th November, 2008 the claimant was notified that the construction of villa 36 was completed in or about November, 2008. No representative of the claimant visited villa 36 or contacted TDCREC Ltd. to obtain keys to the unit until in or about February 2010 when the keys were delivered to the claimant’s sister, Carolyn Schretzmann. At about that same time and again in August, 2010, the claimant’s sister inspected the unit and prepared a list identifying defective work which required attention (referred to colloquially as a “snag list”). All items on this snag list were repaired by October 2010.
- [11] The claimant visited villa 36 in 2007 and 2008 and did not return until 2011.
- [12] During the early stages of construction of villa 36 the claimant visited the construction site while the external wooden stairs were being constructed and made no objection. Visible completed neighbouring villas were also outfitted with wooden external staircases.
- [13] The defendant therefore maintains that at all material times, the claimant was aware that the external staircase would be constructed of wood.
- [14] The defendant asserts that villa 36 was constructed in a workmanlike manner and that the materials used for the construction of the outer decks and staircase were adequate, appropriate and in compliance with the applicable contractual construction drawings. The state of disrepair into which the claimant’s property fell was as a result of his failure to maintain the property between the date of its completion in November 2008 and March 2011 when he returned to the Federation.

[15] The defendant denies that it is responsible for the electricity bill incurred by the claimant since its servants and or agents who accessed the property in March 2011 did not use any electricity supply at villa 36 nor did they leave any power lights or any panels on

[16] **The court considers that the issues that fall for resolution in this case are as follows:**

- (i) **Whether the right party has been sued;**
- (ii) **Whether the defendant is liable for breach of contract in failing to carry out the works in accordance with the contractual blue prints and designs and in a proper and workmanlike manner;**
- (iii) **Whether the defendants are liable for the electricity bill incurred by the claimant.**

The Party Issue:

[17] In this case, the claimant has brought the action in the name of a corporate entity, TDC, which is in the same business structure as the intended defendant TDCREC Ltd. and is its sole shareholder.

[18] While it is a fact that the party to the agreement for sale with whom the claimant contracted was TDCREC Ltd, the court does not consider it irrational for the claimant to have named or regarded TDC as the proper defendant given that correspondence to the claimant regarding the subject property was sent via emails and letters under TDC's letterhead as evidenced by exhibits in this case such as "N.M1", which is correspondence under a TDC letterhead dated 17th November, informing the claimant of the completion of Villa 36. The same observation may be made about "N.M.2" which notifies the claimant about the cost of an extension to the basement of villa 36.

[19] Further, the claim has been served on Mr. Nicholas Menon, a Director of both TDREC Ltd. and TDC. There could be no doubt that the facts as contained in the

claim are sufficiently particularized such that he must have known that litigation was aimed at TDCREC Ltd regardless of the particulars in the statement of claim. Indeed, a full defence has been mounted and I cannot see that the case for the defendant would have been put on any different footing had the error not occurred.

[20] Accordingly, the court does not apprehend that the defendant has been misled or unduly prejudiced as a result of this error.

[21] Civil Procedure Rules 2000 (CPR) Part 19 provides a remedy where a party perceives that it has been improperly added as a party to litigation. As part of its case management powers, the court may order any person to cease to be a party if it considers that it is not desirable for that person to be a party to the proceedings.

[22] In this case, the defendant did not move the court at the case management conference to remove it as a party to these proceedings.

[23] In all of the circumstances, I consider that it would not be in furtherance of the overriding objective to permit this point to be relied upon now and would, in any event, exercise my discretion under CPR Part 19.4 and hold that it is necessary to substitute TDCREC Ltd for the defendant and would so order.

Did the defendant fail to carry out the works in accordance with the contractual blue prints and designs and in a proper and workmanlike manner:

[24] In so far as material, the Agreement for Sale provides:

“2. The property forms part of a villa residential development situated at Frigate Bay in the island of St. Christopher to be known as Sunrise Hill Resorts (hereinafter called “the Development”) which development is shown on the Development plan annexed hereto and marked “A”. The purchaser acknowledges that the said Development Plan is attached hereto for illustrative purposes only and that the Development may in its absolute discretion vary the plan in any manner save for the location of the property hereby sold.

4. (i) The Building and any other improvements shall be constructed in accordance with the Plans and List of

Specifications annexed hereto and marked "B" (hereinafter referred to as "the Plans")...

- (iv) Notwithstanding the foregoing:- (a) The Vendor reserves the right to substitute for any of the materials fixtures and other items that may be specified in the Plans with materials, fixtures and other items of a similar or better kind, quality or utility, or of a different colour as the circumstances may reasonably require; and (b) minor variations in dimensions and/or other improvements of the building or any part thereof shall not vitiate this agreement.*
- (v) The Vendor warrants to the Purchaser that the Building will be constructed in a workmanlike manner, that it will be free from defects in materials and that upon delivery it will be fit for habitation and that it will be free from major structural defects PROVIDED THAT this warranty applies only to defects which become apparent within a period of six months following the Closing date and of which the Purchaser has notified the Vendor in writing within a period of fifteen months following the Closing Date...*
- (ix) The purchaser agrees to inspect the Building and any other improvements, or to arrange for his authorized agent to inspect the same, upon the vendor's request and with a representative of the Vendor not less than 30 days prior to the closing date. At the time of such inspection, the Purchaser and Vendor, or their respective representatives, shall execute a Certificate of Inspection listing any and all outstanding, incomplete or apparently defective items in the building and other improvements. Except as to those items specifically listed in the Certificate of Inspection, the Purchaser shall be deemed to have acknowledged that the Building and other improvements have been duly completed in accordance with the Plans and this Agreement and the Purchaser shall accordingly be deemed to have conclusively accepted the said Building and other improvements."*

5. This agreement shall be completed not more than 45 days after service by the Vendor on the Purchaser of a Certificate of Substantial Completion

executed by the Development Architect for the time being of the Building and other improvements hereby agreed to be sold in accordance with the plans (hereinafter referred to as "the Closing Date".)

- [25] In determining this issue the first matter to be resolved is a factual one: did the contract stipulate that the external staircase should and deck be constructed of concrete? This was the case advanced by the claimant at trial. His evidence on this point was that he was relying on drawings contained in a set of blueprints given to him by the defendant in 2007 which depicted the material to be used as concrete.
- [26] As to how he had come into possession of this document, the claimant testified: *"I am pretty sure I saw blueprints. They [defendant] had a set with them at the time. We had gone through the blueprints and schematics when we signed the contract. I was promised I would get my blueprints in short order. So I accepted that in good faith. The next trip down I got the blueprints. I got this from someone in TDC. I'm not sure who exactly gave me blueprints. On my various trips in 2007 I was requesting blueprints from Nick and Sunil which were the plans referred to in the contract."*
- [27] He testified that on a visit to the site in July 2011 he had a lengthy conversation with the defendant's director, Nicholas Menon, about the deck and staircase. He said that he asked him why he had deviated from the blue prints and schematic elevations he was given during the sales presentation whereby the front entrance required backfill up to the height of the front door and should have had 2 feet x 2 feet concrete pavers sitting on compacted fill. Also, the area from the garage should have been concrete steps that came down to concrete pavers on the main entry level.
- [28] The claimant said that instead of having concrete steps and a concrete entry way the defendant constructed wooden steps and a wooden deck with no backfill below so that there was a large drop of over 9 feet between steps and deck.

- [29] He said he asked Mr. Menon why TDC made those changes and Mr. Menon told him because they chose to. When he asked Mr. Menon to revert to the original plan and replace the wooden deck with what was supposed to be there Mr. Menon said he would not.
- [30] The claimant led evidence from an expert, Mr. Raymore, who examined architectural drawings and blue prints which were presented to him by the claimant. In his viva voce evidence he testified that the blueprint represents what any experienced builder would use to construct the building. It provides details of all materials and, in some cases, methods to be applied in constructing the building. In this case, he stated that the material to be used in the construction of the staircase was shown to be concrete.
- [31] He said, it is standard practice to follow details in drawings unless changes are requested by the owner.

The Defendant's Evidence

- [32] The defendant's witnesses testified that the plans referenced in the agreement were not those exhibited by the claimant and reviewed by Mr. Raymore in this trial and, in any event, they did not provide that concrete would be used in the construction of the deck and staircase.
- [33] Mr. Nicholas Menon testified that when the agreement of sale was executed on or about 4th May, 2007, attached to it were building plans which did not specify what materials were to be used for construction of the stairs on the outside of villa 36.
- [34] He said when the claimant visited the site in July 2007, he wanted to make minor modifications to the upstairs balcony of his unit. Since he professed expertise in construction, he looked for some plans on which the claimant could make drawings and gave them to the claimant.

[35] Mr. Menon said that he made it clear to the claimant that these were not final drawings but some older drawings that were the product of a competition held in 2004.

[36] Mr. Menon testified,

“These blueprints were not part of the contract and were never promised to him as part of the contract. He had purchased pre-contract at discounted rate knowing full well we were going to make changes during the course of construction.”

[37] He further testified that he and the claimant had a heated argument in 2011, because that was the first time the claimant was raising the issue of the wooden staircase and refusing to pay the balance owed to TDCREC Ltd. Mr. Menon indicated to him that the state of the deck and staircase was attributable to his failure to maintain it since its completion in November, 2008.

[38] Sunil Baley, construction project manager for the defendant, testified that with respect to villa 36, the construction drawings did not include a car port or steps to the main entry floor. While there were schematic drawings of stair case and entry deck of villa 36 there were no details as to construction method or type. Construction commenced without those details and this was normal practice.

[39] He said the defendant had secured approval from the Building Board in principle which allowed them to commence construction and thereafter submit detailed construction drawings for final approval.

[40] It was Mr. Baley's evidence that the defendant constructed the stairs and entry deck for villa 36 of treated pitch pine with galvanized connectors in accordance with standard domestic practice for the construction of decks and stair cases in St. Kitts

[41] He said given the topography of the land of which villa 36 was constructed, it was more practical from an engineering perspective to use a wooden deck.

- [42] Sunil Baley also testified that prior to March 2011 the claimant knew that the steps to the villa were to be constructed of treated pitch pine. His evidence was as follows:

“Joseph Schretzman would have known prior to March 2011 that the steps to the villa were of treated pitch pine. We would have had discussions on site pertaining to the lumber that would be used and the sizes. Basically, that it was yellow pine and the members would be a combination of 2x4, 6x6 and 2x8.

Joseph Schretzmann inquired why not a South American hardwood. I just simply said to him that it was standard construction material we use on the island. In the event of using hardwood he would have to contact the TDC officials.”

- [43] Mr. Baley’s evidence was that the wooden stairs and entry deck was one of the last aspects of construction in 2008. While the claimant did not live in St. Kitts he requested photographs of the progress of the construction which he (Baley) supplied.

- [44] As to the disputed blue prints, Mr. Baley testified:

“These blue prints were not the final blueprints for villa 35 and 36. Final blue prints would have had cut sections. A cut section details how the building sits in relation to the roadway. It is a cross-section of the unit cut at various angles. These cut sections show how the building would function and gives the various elevations for ceiling and floors. There are no cut sections through the deck and entry staircase of villa 35 and 36 in these blueprints. The final blueprints would typically have such cuts.”

Discussion and Analysis

- [45] The question is whether the blue prints relied upon by the claimant formed part of plans annexed and referred to in the agreement for sale.
- [46] I prefer, and accept, the evidence of the defendant’s witnesses that the blue prints on which the claimant places reliance were preliminary drawings and were not the approved plans which informed the construction of villa 36 and which were annexed to the agreement for sale.

- [47] It is instructive that in examination in chief the claimant had testified about how he came into possession of these blue prints. He said that on his visit to the site in July and December 2007:

“...they were at the walls of the 1st floor. I was very surprised at how slow the progress was. My final visit was in December, 2007. They were getting to the 2nd floor. They were beginning to set the steel on the 2nd floor. Once again I reviewed the plans with the contractor on site. By plans I am referring to plans the contractor had on site and plans I had that had been given to me by TDC with the agreement. Both plans were done by R Brisbane and Associates for the Morning Glory model, Unit #35 and #36. Upon signing the contract and at the sales presentation I received architectural renderings showing front elevation, side elevation, floor plans and an overall view of what the villa would look like when finished.”

- [48] It is clear from the foregoing that there were at least two sets of plans in existence: one which the contractor had on site and which apparently informed the construction of villa 36; and another plan that had been given to the claimant at the time the agreement was executed and which the agreement stipulated was subject to change.

- [49] It is also significant that even the expert called on behalf of the claimant concedes that the blueprints which the claimant supplied to him could have been preliminary drawings because they lacked the details typically found in a final drawing; especially for cliff side construction units. Secondly, they lacked the Building Board's approval stamp that would be affixed to all final plans approved by them.

- [50] Under cross-examination, Mr. Raymore's evidence in relation to the blue prints was as follows:

“I do not recall seeing a building board stamp on the drawings. It is usual that the approved plans would have the building board stamp and signature. The blue prints could have been preliminary plans that did not go for approval from the building board...There is no section through the steps...the Blue prints do not show the steps. They show a standard reinforced concrete detail...It is normal to have more details for a cliff side unit. It would be expected to have detail of a section through steps and a specific detail through the stairs.”

[51] Based on the foregoing, I am satisfied, and I find as a fact, the drawings that the claimant received at the time the agreement for sale was executed were expressly stated to be subject to change as the agreement makes plain at clauses 4(i) & (iv). I further find that the drawings upon which he bases his claim (“**JS.3**”) were presented to him at the construction site by Mr. Menon months after the execution of the agreement for sale and that at the time of handing over these blueprints Mr. Menon told him that that these drawings were preliminary drawings.

[52] The following additional factors drive me to this conclusion.

[53] First, instead of insisting that the defendant replace the softwood pine deck and staircase material with concrete when he discovered that the material used was not in accordance with the architectural plans, the claimant offered to purchase and import teak from South America at his own expense to replace the softwood pine used by the defendant. He explained this magnanimous gesture by saying,

“My “50/50 solution was rejected. I have only sued because TDC was sending me out for collection. I wanted to solve this as gentlemen. This suit was my only solution.”

[54] I do not view this posture as consistent with the claimant’s vehement assertion that he believed at all material times that the architectural plans and agreement stipulated that the deck and staircase would be constructed of concrete.

[55] Secondly, I find it inconceivable that if the claimant truly believed that his deck and staircase should have been constructed of concrete he would fail to flag this flagrant breach of contract in any of the three snag lists that he caused to be submitted to the defendants between February 2010 and March 2011. These lists are very detailed and condescend to minute particulars and constitute the Certificate of Inspection referred to in Clause 4 (ix).

[56] When confronted under cross-examination with the glaring omission of such an important defect on any of his snag lists, the claimant’s posited reason was to say:

“Nick and I had multiple discussions over concrete vs pinewood. He flat out refused and said ‘don’t even bother to put it on the list.’”

[57] I utterly reject this evidence. I have seen and heard the claimant testify before me and I am not in the least persuaded that he can be so easily bullied into omitting so fundamental a defect and breach in any of his snag lists. I would have expected this to be item No.1.

[58] I find that this matter of the material used in the construction of the deck and stairs was not flagged on any of the claimant's snag list because it was not an issue then as he knew that the deck and stairs were to be constructed of soft wood pine.

[59] It seems to the court that it was only after his several attempts to persuade the defendant to replace the soft wood with teak from Panama were rebuffed that the claimant began to assert that the deck and stair case should have been constructed of concrete. It was only in March 2011 that he first took issue with Mr. Menon regarding the material used to construct the deck and staircase.

[60] This finding is also supported on the claimant's own viva voce evidence that:

"The material of the deck and staircase came up only in conversation with Mr. Menon. It was constructed with pine. Pine, in my opinion, does not have durability. The issue came up in March, 2011. I was still withholding money. I had not accepted the completion of the villa."

[61] The claimant raised the issue again in July 2011. He testified:

"I returned in July 2011. Many, in fact most, items on the snag list had been corrected. The main issue was the window screen. That still needed to be fixed. Even though the decks was treated -they had put stainless steel screws in- I said the deck wasn't going to last. I told Nick Menon that I had bought from TDC a high quality unit of durability and serviceability and here the deck was deteriorating and we hadn't even closed....I told Nick pinewood was not going to hold up; let's do teak. I'll bring it in from Panama. I will pay for the teak and shipping. The defendant would pay for labour. He said no. We got into a heated argument in front of my sister Caroline."

[62] Clearly, it seems the claimant would have preferred his deck and external staircase to have been constructed of teak but that does not mean that he was entitled to have that material used in the construction of the deck and staircase far

less can it translate into a term of the agreement that those parts of the villa would be constructed of concrete.

- [63] Further, I accept Mr. Baley's evidence that he kept the claimant abreast of the progress of the works by supplying him with photos. The claimant's evidence on this was:

"I don't recall requesting photos from Sunil. Most of the communication was done by my attorney, Harry Iglesias."

- [64] I prefer Mr. Baley's evidence on this point since email correspondence from the claimant's agent, Harry Iglesias, dated 10th March, 2010 ("N.M.4") confirms that the defendant had previously sent photos of the Unit. So far as material, it reads,

"Mrs. Carolyn Schretzmann was here in Panama last week and we looked over some pictures that she took at the unit during her recent visit to St. Kitts that had to do with the snag list.

*After comparing her set of pictures **with the ones sent by you**, this is what she had to say..." (Emphasis supplied).*

- [65] The foregoing facts give rise to the clear inference that the claimant must have been aware before his 2011 visit that the deck and stairs were constructed of wood since it is reasonable to assume that since photos were sent to him and his sister whom he sent out to inspect the property on his behalf also took photos he must have been made aware of them. I reject his evidence that he had not seen photos of the progress of the work.

- [66] In the court's view, the claimant's failure to highlight such an important deviation in construction material on any of the three snag lists/Certificates of Inspection prepared and submitted by him or on his behalf within the time stipulated in the agreement is significant and fatal.

- [67] The case of **Kaye Ltd Hosier & Dickinson**¹ is instructive. The summary of facts are taken from the head note.
- [68] Contractors agreed in 1966 to build a warehouse and offices for the defendant employers. Clause 35 provided for disputes to be referred to arbitration. Clause 30 (7) provided that unless arbitration had been requested within specified times before and after issue of the architect's final certificate, the certificate *"shall be conclusive evidence in any proceedings arising out of this contract (whether by arbitration under clause 35 of these conditions or otherwise) that the works have been properly carried out ..."*
- [69] In September 1967 when a balance of £14,861, based on the architect's interim certificates, remained unpaid, the contractors took out a summons under R.S.C., Ord. 14 (the 1967 action), for judgment in that sum. The employers' alleged defective work and that they had suffered damage, namely, £13,464 loss of profits, thereby; and they were given leave to defend on payment of £5,000. The parties agreed that that action should stand in abeyance pending rectification of the alleged defects, if any were to be required.
- [70] In September 1969 the architect issued his final certificate for an outstanding balance of £2,360.00. The employers, alleging that the dispute about the defective work was still unresolved, sought to have it referred to arbitration. The contractors said that it was too late, and in October 1969 issued another writ (the 1969 action) for the £2,360. The claim for the balance of £9,861 in the 1967 action was still on the file. The employers delivered defences and counterclaims to both actions in identical terms. The contractors replied that by virtue of clause 30(7) and the employers' failure to request arbitration under clause 35 before the final certificate was issued, the defence of defective work was not open to them in either action after the issue of the final certificate. The official referee on the hearing of the consolidated actions tried that issue as a preliminary point and on his construction of *"any proceedings"* held in favour of the employers that the defence and

¹ [1972] 1 W.L.R. 146

counterclaim based on defective work, having been raised in the 1967 action, were not barred by the final certificate.

[71] It was held (Lord Diplock dissenting), that the words "*conclusive evidence in any proceedings arising out of this contract*" were not limited to proceedings commenced after the date of the final certificate but also covered proceedings previously begun. Accordingly the final certificate was in both actions "*conclusive evidence*" that the work had been properly carried out and was effective to bar the employers from relying on allegations of defective work by way of defence and counterclaim in both actions.

[72] In the court's view, on a proper construction of clause 4 (ix) of the agreement for sale and applying the principles enunciated in **Kaye**, I hold that by failing to highlight such an important deviation in construction material on any of the three Certificates of Inspection/snag lists prepared and submitted by him or on his behalf within the time stipulated in the agreement, the claimant must be deemed to have acknowledged that the building and other improvements were duly completed in accordance with the plans that accompanied the agreement and to have conclusively accepted the building and other improvements to villa 36.

[73] For completeness, I should add that given my finding that the blue prints exhibited by the claimant were not the final drawings that were used in the construction of villa 36, it follows that little or no weight can be attributed to Mr. Raymore's opinion as to the construction materials referenced therein as that would be irrelevant.

Whether the defendant failed to construct the deck and staircase in a proper and workmanlike manner.

[74] Although I have found that it was not a contractual term that the deck and staircase were to be constructed of concrete, the court must nonetheless assess whether the wooden deck and staircase were constructed in a proper and workmanlike manner.

- [75] The claimant relied on the evidence of an expert, Mr. Raymore, who also produced an expert report. In his view, the material to be used in the construction of the villa stairway and entry, as shown in the blue print, was reinforced concrete. Instead it was constructed of timber.
- [76] In terms of durability, Mr. Raymore testified that it was not practical to use timber to construct the villa's external staircase. He opined that although timber used in the construction of a staircase can be soft wood (Pine), by virtue of being soft wood, its resistance to rot and termites is significantly less than if it were a hardwood.
- [77] Additionally, he found that the type of fasteners used (nails) did not provide the tightness of fit to prevent ingress of moisture from nails into the wood which would lead to deterioration of both.
- [78] He observed that while treated pitch pine is used quite a lot on the island, the more high end developments would not generally use softwood as a permanent external structure. He said the expected lifespan in these climatic conditions hardly goes beyond 5-6 years
- [79] It was put to Mr. Raymore in cross-examination that treated pitch pine deck with stainless steel fasteners could last 15-20 years. He replied that in this case fasteners were not stainless steel and it was hardly likely that they would last 10-15 years.
- [80] He acknowledged that pitch pine has been used on external decks and stairs and one could get 5-6 years out of them depending on how they were constructed and on how maintained.
- [81] He stated that in his experience, it is not common place to use pitch pine stairs and decks externally in St. Kitts.
- [82] In any event, he said, even if the claimant had left the deck unmaintained from 2008, the extent of deterioration that occurred between the completion of the unit and the time of his inspection of the premises in 2014 would not be normal.

- [83] He opined that for clients who prefer the timber appearance, the most appropriate material for external decks in this environment should be hardwood, with fasteners being corrosion resistant: high quality stainless steel screws instead of nails hardware.
- [84] The defendant relied on the expert testimony of architect, Mr. Robert Morris, as it relates to the characteristics, life span and use of treated pitch pine used in the construction of the deck and staircase of villa 36.
- [85] His evidence was that treated pitch pine is widely and commonly used in the construction of decks exposed to the natural elements in St. Kitts and Nevis. He stated that in projects that are located within close proximity of the Atlantic Ocean and exposed to sea salt blasting, treated pitch pine is widely and commonly used for construction and particularly for decks.
- [86] He gave evidence of the type of treatment to which the pitch pine sold by TDC Building Materials Ltd. is subjected which he said tightens the grains of the wood and makes it harder for water to penetrate.
- [87] It is the usual maintenance practice for water sealant or oil paint to be applied to treated pitch pine elements every 6 months to prevent deterioration.
- [88] Mr. Morris opined that if treated pitch pine is maintained every 6 to 8 months, its life span will be approximately 10 to 15 years, meaning that the owner would not have to replace the treated pine before that span.

Findings

- [89] Having considered the evidence in the round, the court accepts the evidence of the defendant's expert and its project manager that the use of treated pitch pine to construct external decks railings and staircases in St. Kitts is commonplace. The court also finds that where this material is used, there is a need for proper maintenance in order to preserve the lifespan of the structure.

[90] While the experts for the claimant and defendant differ in their opinion as to the lifespan of a properly constructed and maintained deck and staircase built with softwood timber, it is common ground that with proper maintenance the structure should last for at least 5-6 years.

[91] The evidence which the court accepts is that Villa 36 was completed in November 2008. I base this finding on the email correspondence exhibited by the defendant which establish that the claimant was notified of this fact through his agent Harry Iglesias and also the Certificate of Completion that was also forwarded to the claimant's agent

[92] When the claimant was confronted with an e-mail of 18th November, 2008 advising him of the completion of villa 36, he responded that he did not recall receiving this e-mail and would have to verify this with Harry Iglesias and that he had not seen the e-mail. He said he did not recall receiving a Certificate of Substantial Completion from the defendant.

[93] He further stated:

"I believe there was some communication between my office and TDC and some phone calls from time to time."

[94] The court did not accept that the claimant's recollection was as hazy as portrayed to the court.

[95] The claimant's alternative contention was that, in his view, the villa was not completed in 2008 because the defendant had not completed the installation of shutters and the construction of a basement which he and the defendant had subsequently agreed in 2008.

[96] In my view these additions were the subject of a new contract. The substantial completion date for villa 36 as per the original agreement was not more than 45 days after service by the Vendor on the purchaser of a Certificate of Substantial completion executed by the Development Architect for the time being of the Building and other improvements.

[97] In November, 2008. The claimant was issued with a Certificate of Practical Completion of villa 36 per the original agreement on as evidenced by "N.M.1". His agent, Harry Iglesias, responded ecstatically via email dated 18 November, 2008:

"It's exciting to hear that the villa is complete and we look forward to the chance of getting some pictures some time soon.

Joseph would like to schedule a trip to St. Kitts once the basement is finished and payment of the remaining \$55,000 UDS will be made during his visit upon a walk-through."

[98] Accordingly, the court finds as a fact that the claimant failed to maintain villa 36 between 2008 and March 2011 and again between March 2011 and 2014. The court further holds that the deterioration of the deck and staircase of villa 36 is attributable to the clear neglect by the claimant to maintain them for between 3-6 years.

[99] Based on the totality of the evidence, the defendant has not been shown to have failed to construct villa 36 in accordance with the contract specifications nor has it been shown that it failed to carry out the work on villa 36 in a good and workmanlike manner.

[100] The court accepts that there were some defects in terms of the material used in the construction process. On the evidence before me, these matters were flagged in the three snag lists prepared by the claimant and resolved by 2011 at the latest. Indeed, the claimant testified that upon his return to St. Kitts in July 2011 most of the issues on the snag list had been corrected. For example, the defendant had replaced the deteriorated trim around the windows with PVC trim and had repainted the wooden siding, replaced wooded railing around the car park. Additionally, the deck had been stained and stainless steel screws had been added to the decking and shutter.

[101] The costs of these remedial works were met by the defendant.

Whether the defendant is liable for the electricity bill incurred by the claimant.

- [102] The claimant alleges that after his last visit to the property in 2011, he secured the property, leaving the shutters closed. He disconnected all the appliances and turned off the circuit breaker before handing over the keys to Sunil Baley in order to facilitate the entrance of workmen who were to install screens.
- [103] On his return to the jurisdiction in February, 2014 he discovered that the electricity company, SKELEC, had taken the power meter at villa 36 and disconnected the unit from the grid. He was met with an electricity bill in the sum of \$4,230.48 which he had to pay in order to have power restored to the unit.
- [104] The claimant asks the court to infer that it was the defendant's agents who left the power supply on thus incurring these electricity charges.
- [105] On behalf of the defendant, Mr. Menon testified about the arrangements in place governing the payment of electricity bills at the Sunrise Hill Resorts development. He said that when the villas were first constructed, one main meter distributed to each villa. That was the arrangement between 2006 - 2011. The development was then being charged commercial rates for electricity, rather than residential rates. Consequently, homeowners' bills were higher than others who were charged residential rates.
- [106] In 2011 they successfully lobbied SKELEC to alter the arrangement so that owners would be charged directly rather than through a central meter. This transition from a single main meter to individual meters occurred in 2011.
- [107] The defendant asserts that by letter dated March 22nd, 2011 the defendant notified the claimant that he would be responsible for his own electricity bill payments. The exhibited supporting correspondence, "N.M.3" makes it plain that the bill was in respect of the period 1st February, 2011 to 28th February, 2011 and payable in full by Monday 4th April, 2011.
- [108] The court accepts the defendant's evidence regarding the arrangements for payment of the electricity bill. I have examined the bill and note that at the date of this letter, the amount then due and owing was \$586.95.

[109] The fact that these bills and correspondence related thereto date from 2011 tends to support the defendant's case that individual metering commenced in 2011. When taken together with the email to the claimant's agent which notified him of the new arrangement, I am led to the conclusion that the claimant was neglectful in attending to his responsibility to pay the bill.

[110] Further, the evidence discloses that between 2010 and 2011 the claimant's sister stayed at villa 36 and that he himself stayed there on his visits in 2011, although he claims an uncertain recollection as to his place of abode on his visit. He was asked in cross-examination where he stayed when he visited St. Kitts in March 2011. He replied:

"I don't recall. I may have stayed in the unit but I don't recall. Most likely I stayed in the unit."

[111] In view of this, it must be clear that the defendant's agents were not the only persons who had access to villa 36 during the material time. Given that the defendant did not have exclusive access, the court finds that the claimant's case is constructed on an evidentiary plinth that cannot sustain the weight of the inference he asks the court to draw.

[112] I would dismiss this claim.

[113] In the premises, the claimant's claims are all dismissed with prescribed costs to the defendant on the basis of Part 65.5(2)(b)(i).

Trevor M. Ward, QC
Resident Judge

By the Court

Registrar