

SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV2008/0659

BETWEEN:

(1)	BENJAMIN DRAKES	
(2)	GERALD FRANCIS	
	(trading as Turnkey Engineering Contractors)	Claimants
	and	
	PLANTATION BEACH ST. LUCIA LTD.	Defendant

Appearances:

Mr. Colin Foster for the Claimants
Ms. Diana Thomas and Ms Renee St. Rose for the Defendant

2011	: October 20;
2015	: January 15.

JUDGMENT

- [1] **BELLE, J.:** Article 945 of the Civil Code states:
- "When the meaning of any part of a contract is doubtful, its interpretation is to be sought rather through the common intent of the parties than from a literal construction of the words."
- [2] Article 946 of the Civil Code states:
- "When a clause is susceptible of two meanings, it must be interpreted as that which would have effect and not of that which would have none."
- [3] Article 947 of the Civil Code states:
- "Expressions susceptible of two meanings must be taken in the sense which agrees best with the context."
- [4] A construction contract has many component parts which create obligations between builder and owner and those responsible for the many aspects of the building works. In a case such as this

where the central purpose was the completion of a number of units of a resort complex it is at the core of the matter and the burden lies with the Claimant to prove that it had adhered to the contract terms and completed such work as was required and was reasonably possible in the circumstances.

- [5] The Defendant, would bear the evidential burden to rebut allegations of the Claimant intending to show that the contract has been breached and that the Claimant did not interpret the contract reasonably and in keeping with its context.

The Claim

- [6] I agree with the approach taken by the Defendant in describing the Claimant's claim as follows:

The Claimant's claim is for:

1. The sum allegedly due and owing and unpaid on a contract for the sum of \$806,080.00
2. The sum allegedly due and owing for the purchase of sundry items plus charges and interest on the goods purchased at the rate of 35% being \$163,297.44 and \$57,154.10
3. The sum allegedly due and owing for extra remedial works completed plus supervisor's fee of 15% being \$165,907.56 and \$24,886.13 respectively. The total amount is \$190,93.69
4. The total claim is for \$1,217,325.00 less \$688,000.00 admitted to have been received by the Claimant from the Defendant. The Claimants therefore claim that a balance of \$529,325.00 is due and owing to them.

- [5] The Defendant has defended the claim on the following grounds:

1. The contract between the Claimants and the Defendant was for \$698,310.00 inclusive of Builder's Work (\$597,000.00) and Mechanical, Electrical and Plumbing Work (\$101,310.00)
2. The Claimant only delivered materials valued at \$147,453.23 and that an amount of 12.5% was payable for overheads and profit amounting to \$165,884.88.
3. That the Claimants only claimed a sum for additional works of \$30,139.34 but that the value of the additional work amounted to \$10,396.75. No additional claims were made and assessed.
4. The Defendant also filed a counterclaim on the basis that the work done within the contract, the materials delivered, and the additional work done, the Defendant had overpaid the Claimants by \$208,071.5. The Defendant claimed that it also paid other persons an additional \$44,476.67 to make good the Claimants' poor workmanship and to mitigate its losses. Special damages of \$252,548.42 were claimed.

- [6] I also agree with the Defendant's counsel that the Claimant would be required to prove the following:
- (i) The contract sum was in fact for \$806,080.00
 - (ii) The Claimants delivered materials costing \$163,297.44 to the Defendant.
 - (iii) The Defendant agreed to pay the Claimants a commission of 35% on top of the cost of material deliveries;
 - (iv) The Claimants undertook additional works valued at \$165,907.56;
 - (v) The Defendant agreed to pay the Claimants a supervisor's fee of 15% of the value of the work done; and
 - (vi) There were facts to support a claim for aggravated and /or exemplary damages.

Was the contract sum in fact for \$806,080.00?

- [7] The Claimants state that there was a contract which was both written and oral. According to the Claimant this contract was created during meetings between the parties along with several discussions and conversations between Michael Pilgrim, Garvin French and Martin Matthews and the Claimant.
- [8] The Defendant claims that the only evidence of a written agreement between the parties was an undated document bearing the signature of Ian Harrison, Project Quantity Surveyor for the Defendant and Benjamin Drakes and Gerald Francis on Behalf of the Claimants. The Defendant points to a schedule to the document No 15 under the head "Contract Rates" which is found at Trial Bundle 324. This document shows the total contract sum to be \$698,310.00.
- [9] The Defendant also refers to another document at page TB328 where another version of document 15 is exhibited labelled as document 16 which contains the same details as document 15 except that it is endorsed with the words "N.B. Not as per the original agreement" along with what appears to be the signature of Benjamin Drakes.
- [10] Counsel for the Defendant argues that the Claimant appears to be using the two documents to suggest that Documents 15 was not the written contract between the parties. No allegation was made neither was any evidence led to the effect that any person representing the Defendant

agreed to accept Mr. Drakes endorsement made after he had signed the agreement, counsel argues.

[11] It is important that specific aspects of this much scrutinized document be examined at this point. The document is Titled "Subcontract Agreement" and the parties to the said agreement are Plantation Beach (Saint Lucia) Ltd the Defendant and TECC, the third Claimant. The Description of the works is General Building Works.

[12] The parties have disagreed as to whether this document forms the substance of the contract. The Claimant says it does not and that it is a modification of what was agreed yet the representative of the Claimants signed the Document. He explained however that this document was required to access funds from the company's bankers and was signed under pressure.

[13] Some of the pivotal clauses in the document include:

- "2. Subcontractor shall provide sufficient labour to execute the works programme.*
- 3. Subcontract commencement -26 March 2007*
- 4 Duration of subcontract -3 months*
- 5. Completion date-26 June 2007*
- 9. There shall be no Retention withheld*
- 10. Payments will be made 7 days from the receipt on each monthly valuation submitted by the Subcontractor.*
- 11. Subcontract rates are fixed.*
- 12. Subcontract sum is EC\$698,310.00 as per the attached schedule of Rates.*
- 13. Subcontract is not subject to remeasure, however if buildings are deleted from your scope of works then the contract sum shall be adjusted using the rates as per the schedule.*
- 14 Subcontractor shall have an experienced supervisor on sight at all times.*
- 15. Main Contractor shall ensure that sufficient areas are available to progress the Subcontract works.*
- 16. Subcontractor is responsible for making good all defective works.*
- 18. Main Contractor shall free issue specialist finishing items, namely, but not limited to, sanitary ware, faucets and the like, tiles, kitchen surfaces and work tops etc.*
- 19. Subcontractor shall supply all other "locally available" materials namely but not limited to , paint, salient, stains, fixings, cornice, skirting, sundry timber, tile gout, thinset, drywall, compound and the like. All said materials shall be delivered to and registered in to the Main Contractor stores and then reissued to for use in the works by the Main Contractor's staff. The cost of the said materials shall be reimbursed to the Subcontractor within his monthly valuation payments."*

- [14] The document was signed by Ian Harrison, Project Quantity Surveyor for the Defendant and Benjamin Drakes for the Claimants. It is evident that many of the issues central to the arguments between the parties are referred to in the agreement while others are not. Indeed this is indicative of the weak framework of the working agreement between the parties.
- [15] The court has formed the impression that there was a very poor contractual framework supporting whatever agreement existed between the parties. Consequently we are left with a totally unsatisfactory situation in which the court is being asked to determine the rights of the parties based on conversations and discussions.
- [16] From the very outset the Defendants were unable to pin down the terms of the contract when they pleaded in their amended Defence:
- “The Defendant denies paragraph 7 of the Statement of Claim and states that the whole of the agreement between the parties as it relates to the retrofitting of buildings was made in writing and contained in the Agreement referenced PBL/01/TECC. This said contract was varied orally where the Defendant agreed to an extension of time after the 26 June 2007 deadline. The Defendant further states in respect of additional remedial work that it was not given an opportunity to negotiate said work with the Claimants but that the Claimants carried them out in any event.”
- [17] The Defendant further repeats that the whole of the contract was contained in the Agreement referenced PBL/01/ TECC except as it relates to variations which were discussed after the contract was commenced. As further regards paragraph 9 of the Statement of Claim, the Defendant states that the endorsement made on the contract by Benjamin Drakes “Not as per original agreement” was made when the units E1, A25 and A26 were removed from the Agreement. Since the terms of the contract had not yet been finalized prior to removal of the units the Defendant found it unnecessary to agree to or make such an endorsement.
- [18] Counsel for the Defendant quoted Article 1164 of the Civil Code in support of her submission that:
- “testimony cannot in any case be received to contradict or vary the terms of a valid written instrument”
- [19] I am of the view that following the Code, the correct approach would have to be that if the parties did not jointly sign a document to vary the contract then the variation is not part of the agreement between the parties. Since testimony about verbal agreements cannot be evidence in the case

reference to such agreements is not to be taken into account unless acted upon by the parties. Consequently if the contractor was paid for the work done then this would suggest the discussion or conversation ended with an agreement to make such a payment.

[20] In the final analysis the contract is to be determined partially by the parties' deeds and partially by the verbal and written communications.

[21] I therefore conclude that the argument that the contract was for \$806,080.00 is defeated by the facts and the law.

Did the Claimants deliver materials costing \$163,297.44?

[22] The Claimants argue that they persisted in good will even though entitled to terminate the contract, by financing the project by making disbursements out of their own funds up to the sum of EC\$158,000 in labour costs and towards the purchase of locally sourced materials. The Claimants did this for a period of three (3) months without reimbursement from the Defendant.

[23] The Defendant argues that they have admitted receipt of materials worth \$147,453.23 from the Claimants and admit that the Claimants are entitled to a reasonable amount for overheads and profit for the provision of the service at the rate of 12.5%.

[24] Counsel argues that the refund for the cost of the materials must be reasonable. Citing **Keating on Construction Contracts**, counsel quotes the words, "the actual cost honestly and properly expended in carrying out the works." Consequently costs means the actual amount properly and honestly expended in obtaining the materials.

[25] The remainder of the Defendant's argument goes as follows:

"The Claimants provided no documentary evidence to prove that the Defendant received the materials at the cost claimed. In this regard the evidence of Olivia Felicien, which was not refuted or even challenged is crucial. Ms Felicien in her evidence in chief stated that she was responsible for receiving and recording material deliveries. That information she would pass to the accounts department. The information was then passed to the computer system. Importantly, during cross-examination, Ms Felicien stated that when the materials

were delivered by TECC she would make a receipt and sign for the delivery. She would keep a copy of the receipt and leave one with TECC, Curiously, TECC did not produce any receipt to assist the Court with its alleged claim counsel argues."

- [26] It is therefore the Defendant's case that this Honourable court, without any evidence confirming the Defendant received the materials which the Claimants claim it received, should accept the information compiled by the Defendant. Alternatively, this Honourable court should hold that the Claimants have not proved their claim and reject this claim altogether.
- [27] More importantly, the Claimants claim that during conversation with Mr. Martin Matthews, they agreed on a commission of 35%. Mr Matthews was not summoned to give evidence. No one on the Defendant's side agreed to 35%. There is no documentary evidence of this. Further, if the Claimants have no written evidence the prudent thing to have done was to bring an expert in the industry to give an opinion evidence as to a reasonable sum allowable in the industry for a commission or for overhead and profit.
- [28] One has to wonder why no impartial person came to speak on behalf of the Claimants to support their claim to a 35% commission. It is the Defendant's case that this percentage claim is so high and so farfetched as to be out of all proportion to any reasonable sum that can be claimed in the construction industry. The Defendant, despite the terms of Clause 19 of the written agreement, which provides that the Claimants will be refunded the cost of the materials supplied, has admitted to a "12.5% addition for overheads and profit."
- [29] I agree with this submission. But I have already said that if the parties agreed on something which they intended to enforce then they should have put it in a written document and attached their signature. The court will not enforce the outcome of a discussion or conversation unless it is shown that some action was taken based on the said discussion or conversation. I therefore see no basis for varying the 12.5% fee proposed by the Defendants. The court totally rejects the sums claimed by the Claimants under this head and the interest of 35% which cannot be supported by documentary evidence.

Extra/ Additional Work

Did the Claimants undertake additional works valued at \$165,907.56?

- [30] The Claimant gives evidence about having to remedy a great deal of defective work. The Claimants refer to moisture appearing through concrete walls indicating a plumbing leakage. This meant that concrete walls had to be cut down. When the walls were cut down the Claimants' workmen discovered cracked pipes. The Claimants state that they observed defective plumbing throughout all three storey villas that the Claimants worked on.
- [31] The Claimants also complained of badly constructed swimming pools which forced their team to adjust the skimmer baskets and the inlet lines. The Claimants claim that the remedial work was not easy because it involved the removal of sludge. This occurred because previous contractors used lagoon water which contained waste sludge and faeces which had the negative effect of stench adhering to the walls of the plumbing pipes. The Claimant claimed that the clearing of the pipes involved them having to consistently pump clear fresh water into the plumbing pipes.
- [32] An extract from the Witness statement of Anthony Eleuthere states:
- "At the beginning of the project neither I nor any of my team of workers or contractors Mr Gerald Francis and Benjamin Drakes were aware of such difficulties. I have worked on other projects namely , The Bank of Saint Lucia, The Maternity Ward at Victoria Hospital, Castries,, the water Front Building Block A to Block C and many more projects. In the course of my work I have never encountered such bad, poor, untidy and dirty plumbing work. I have never known any plumber to use lagoon water and sludge to test plumbing lines. This is the situation which we encountered and which we had to remedy, repair and successfully deal with over a prolonged period of time."*
- [33] This extra work could not have been foreseen according to the Claimants but all parties agreed that this work had to be carried out as an inevitable stage towards the completion stage of the contract. But the defective work was hidden away within concrete walls, floors and ceilings and could not be foreseen at the assessment stage.
- [34] The Defendant submitted that the Claimants were entitled to a reasonable sum for additional works and this sum should be calculated in accordance with the contract rates or a reasonable sum acceptable with the construction industry.

- [35] The Defendant has questioned whether the Claimants' simple list of works done with rates attached were in fact extra works and further challenged the rates charged for these works. Counsel submitted that the burden of proof is always on the Claimants, whether the question be the rate to be applied or whether the work was within the original contract. This, counsel suggested, would be proved by expert evidence in support of the contention that it was extra work and what the Claimants should be paid for the additional works.
- [36] Counsel question the claim for an additional supervisor's fee for additional works. Counsel contends that a rate for extra works would include an allocation for supervision and profit.
- [37] Counsel submitted that the claim for payment for additional work would be covered under the concept of quantum meruit. Counsel relied on the text **Keating on Construction Contracts** at paragraph 4-019 to argue that the amount must be assessed as a reasonable sum. Again, the Claimants have not given the court sufficient information to assess the reasonable sum for extra work and as such the amount admitted by the Defendant is the amount which ought to be allowed. This sum according to counsel, has already been paid.
- [38] I accept these submissions. Based on the loose nature of the contract between the parties the Claimants are not able to show that the additional work was classified as additional work or was indeed authorised. The Claimant would have to accept that the contract sum was paid as fulfilment of the terms of the contract and is not on any solid ground to claim that they should be paid more. There was nothing in the contract terms to establish what methods would be used to establish what was extra work and what rates should apply to such work. This claim is therefore dismissed.

The Counterclaim

Can the Defendant prove that the Claimant should repay the sum of \$208,071.75?

- [39] The Defendants say that they filed a counterclaim which was based on an overpayment made to the Claimant. The Defendant relies on the valuation of the works done which is dealt with in the witness statement of Ian Harrison quantity surveyor. Mr Harrison, it is presumed, reviewed and assessed the work performed by the Claimants.

- [40] The Defendant also relies on the authority **D. O. Ferguson & Associates (A Firm) v Sohl** (1992) Times, 24 December. According to dicta in this decision the measure of damages payable by a contract or for breach of a part-completed building contract included an amount to compensate the employer for an overpayment for the work done. Counsel argues that the Defendant was able to show that the total value of the works completed by the Claimants was \$479,928.25 inclusive of materials supplied and additional works carried out. The Claimants having been paid \$688,000.00 were overpaid by \$208,071.75 according to the Defendant.

Conclusion

- [41] I have concluded that the normal contractual safeguards which provide the relevant definitions of over payment and extra work were not spelled out in the contract between the parties. In this context the only act which serves as proof the contract was being performed was the payment for work done. The fact of the payment therefore determined that the work was done or would be done. The Defendant therefore should have permitted the Claimant to complete the work to the amount paid if they knew that the work had not been done at the time when termination was contemplated. Having failed to insist on completion the Defendant waived any breach of the contract in that regard. The often used mechanism of retaining money to force completion was not used in this case. There was no retention. In my view there was therefore no mechanism under the contract to force the Claimant to complete the work for the payment made.
- [42] In summary then, the parties started with a weak contractual framework which did not provide any proper mechanism for dealing with issues which could frustrate the construction works and indeed the contract. When the disagreements of this issue and the related matter of cost of materials and extra work came to a head the Defendant did not terminate the contract. It instead reassigned the quantity surveyor Mr. Harisson. On the Claimants' part when they concluded that the requirement to source material was delaying and frustrating the construction work along with the bad work of previous contractor or contractors they did not demand that these problems be fixed contractually and sign off on the remedy. They accepted verbal assurances that better would be done and pursued the contract incurring the expenses according to what they thought was reasonable. The Defendant rejects their right to do this and have rejected the estimates of their costs even though

they had no quantity surveyor on site and paid the Claimants for work done. Thus they say in their defence that they overpaid the Claimants.

[43] The confusion over the agreement is demonstrated in the words of Ian Harrison the quantity surveyors and Michael Pilgrim one of the Directors of the Defendant.

[44] Ian Harrison states in his witness statement (paragraph 18):

"The statements of fact made by TECC in the Statement of claim that the town houses were butchered and sabotaged are untrue. I was on the site and I say that the previous contractors who were on site were terminated for bad workmanship. No work had been done between the time that the work was tendered and inspected by TECC and the time they commenced work. There was no evidence of sabotage as they now say. Electrical power was not available on the first day because of a generator failure but said power was quickly restored

During the first four weeks I noted personally that TECC's resources were not sufficient to complete the works in the time allotted. After the first four weeks he had now increased resources to approximately 20 men.

Sometime in May the company noticed that TECC had not commenced works on a number of critical units which were originally allocated to him prior to execution of the contract. It was therefore considered prudent not to include these units in the contract but that PBL would undertake them directly in order to meet the deadline requirements of the owners of those units

At a similar time Benjamin Drakes contacted me by phone and asked for a copy of the formal contract, as he needed this to seek funding from a local bank.

At about 1: 00 p.m. that day he entered my office and collected the contract. He said that it was not in line with the original contract as some of the units has been removed. I agreed but then reminded him of the earlier decision to remove some of the units. He signed the agreement and left."

[45] I conclude that there was an agreement to fix bad work but the extent of the bad work was unknown. I also conclude based on this evidence that the signed agreement was executed after the work had commenced but that no clear guidelines were given as to the adjustment of the contract sum in light of possible extra work

[46] Under cross examination by Mr Colin Foster Mr Michael Pilgrim further confirmed the confused state of affairs in the following account of his testimony.

"There were serious difficulties between Drakes (Benjamin Drakes) and Harrison. Between his removal and termination there was no full time project quantity surveyor on site."

- [47] When asked to comment on the postscript to a letter from TECCC to Martin Matthews of Plantation Beach dated 18th May, 2007 Mr Pilgrim had this to say.

"My response from what I understand is that payments will be made on agreement between the parties for amounts due and materials purchased for inclusion on Plantation Beach Resort based on works executed."

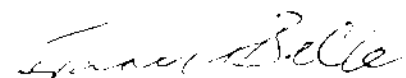
- [48] When asked whether this was in conflict with a "lump sum" contract Mr Pilgrim said it was not that materials would represent expenditure. Works were carried out by a system where the contractor was paid for materials used and labour costs incurred for the period in which materials were used. This was being supervised by Mr Carlyle Octave, based on materials paid for and labour costs incurred for that period.

- [49] Based on these statements and the previous conclusions of the court I do not understand how either side can question the payments made in the contract or the consequences of the uncertainty as to the scope of the contract. Consequently it is impossible to determine the intention of the parties other than by way of the work done and the remuneration received.

- [50] In my view both sides have proceeded to trial without any contractual bases upon which to pursue their claims.

- [51] I therefore dismiss the Defendant's counter-claim for \$208,071.75 and based on my earlier statements I must and do dismiss the Claimant's claims for the remainder of the contract sum, the damages for Extra /Additional Work and for the commission/interest for materials delivered to the construction site and any other sum claimed. Consequently there can be no award for aggravated or exemplary damages.

- [52] I make no order as to costs in the circumstances.



Francis H V Belle
High Court Judge