

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
BVIHCV 2011/0146**

BETWEEN:

McARTHUR ENGINEERING CO. LTD

Claimant

AND

**(1) AUTLAND HEAVY EQUIPMENT AND CONSTRUCTION COMPANY LIMITED
(2) MR NOLAN DAVIS DBA AN DAVIS PLUMBING AND ELECTRICAL SERVICE**

Defendants

Appearances: Mr William Hare and Ms Kamika Forbes for the Claimants, Mr Kisob Laing and Mr Michael Maduro for the First Defendant, Mr Richard Rowe for the Second Defendant.

JUDGMENT

[2012: 11th, 12th, 13th, 18th, 20th July, 3 October]

- [1] **Wallbank J [Ag]:** Mr Monroe McArthur Penn is an electrician by trade. He operates in the Virgin Islands through his own company, McArthur Engineering Co. Ltd, of which he is the Managing Director. He is quite a senior tradesman and over the last few years his eye-sight has deteriorated badly, such that he is now visually impaired to a considerable extent.
- [2] On 6 June 2011 Mr Penn caused his company to file a claim for payment of US\$30,566.00, alternatively, damages for breach of contract, against the First Defendant, Autland Heavy Equipment and Construction Company Limited ("Autland").

- [3] In essence Mr Penn claimed that he had entered into a sub-contract agreement with Autland, through a director of Autland known to him, Mr Nolan Davis, to perform certain electrical installation work on the ground floor of the Peebles Hospital Annex Building in Road Town, Tortola, but that after termination of the Claimant's work on the project there remains a balance of payments due to the Claimant.
- [4] Mr Penn alleged that his company and Autland, through Mr Davis, had entered into a first contract (the "First Contract") in around February 2004, which was partially evidenced by a quotation letter from the Claimant company addressed to Autland dated 3 February 2004.
- [5] Mr Davis is also an electrician operating in Tortola. He does business as "A.N. Davis Plumbing and Electrical Service". Mr Davis has an office in the same building as Autland. Autland is a construction contractor company operated by Mr Davis's business partner Mr Autley Crabbe.
- [6] The price for this initial work was US\$12,040.00. In around February or March 2004 work on this part of the project was suspended. It appears to have been agreed that about 15% of the work had been completed by the Claimant as at that point. The Claimant was paid US\$1,806.00 from a personal account of Mr Davis and his wife for this work.
- [7] Mr Penn and Mr Davis had further discussions, and Mr Penn provided a revised quotation reflecting variations in the project. Mr Penn did so in a letter dated 10 May 2004 which he provided to Mr Davis, again addressed to Autland. The price for this second contract (the "Second Contract") was US\$33,634.00.
- [8] This revised quotation letter broke the work down with reference to the type of electrical item to be worked on. For example, the Claimant quoted US\$3,760.00 for "Ninety four switches". The quotation did not break the work down by labour and materials, or in phases. The only notation to the quotation was that any cutting of existing walls would have to be treated as an extra. In this quotation letter Mr Penn gave credit for the earlier payment received of US\$1,806.00, thus presenting a quotation of US\$33,634.00.
- [9] In around August 2004 Mr Penn was asked to provide temporary lighting to the project, by way of additional work, and he billed separately for this on a number of occasions, typically addressing his company's invoices to Mr Davis at Autland.

- [10] While the Claimant carried out the work Mr Davis paid Mr Penn at intervals. The typical mode of payment was by a cheque drawn on Mr Davis's personal account, in favour of Mr Penn, for a round figure.
- [11] Mr Davis's last payment, apparently, to Mr Penn, was on or about 4 February 2005, for US\$1,000.00.
- [12] Precisely what happened then, as so many of the other facts in this case, is in dispute. However, it is clear that Mr Penn then solicited a payment from a contractor higher up the chain, ADC Construction Company Limited ("ADC"), and on 15 April 2005 ADC wrote Mr Penn a cheque for US\$2,500.00.
- [13] In all, Mr Penn (or the Claimant) gave credit for payments towards the work done, including installing the temporary lighting, of US\$14,306.00. All of this, except US\$2,500.00 paid by ADC, had been paid by Mr Davis personally, or from a joint account of Mr Davis and his wife.
- [14] At some point around this time – which again is in dispute – the Claimant's involvement with the project was terminated. On 6 June 2005 Mr Penn, on behalf of his company, addressed a "final bill" to Autland claiming a balance of US\$39,010.00. In essence, Mr Penn claimed that the Claimant had performed the contracted works, and indeed had cut existing walls as an extra and had worked until June 2005.
- [15] Autland did not pay, and on 11 April 2011, almost, and possibly more than, six years after the events in question, Mr Penn sent Autland a demand letter before action, seeking a payment of US\$30,566.00. The Defendants have consciously not taken a limitation period point.
- [16] After the Claimant commenced proceedings against Autland, it enlarged its claim by also bringing its claim against Mr Davis, in his capacity as doing business as A N Davis Plumbing & Electrical Service. Autland defend the claim against Autland by saying that the Claimant had contracted with Mr Davis, not Autland, as Autland was not involved in the electrical contract for the project.
- [17] Mr Penn, in his testimony, gave evidence that his negotiations for the Claimant's subcontract had involved Mr Crabbe. Mr Crabbe in his evidence forcefully denied this. During cross-examination, Mr Penn was rather ambivalent and strangely indirect about his assertions that Mr Crabbe had been present on certain identified occasions and he maintained that Mr Crabbe's presence had been possible. This suggested to the Court that Mr Penn was not in fact certain that Mr Crabbe had been present as Mr Penn had initially maintained.

- [18] The Defendants' Counsel submitted at trial that Mr Penn was trying to implicate Mr Crabbe only in order to succeed in establishing that the Claimant had a contract with Autland, as the documentary evidence of such a relationship was not conclusive, and indeed unilateral on the side of the Claimant. Essentially, although Mr Penn had addressed his quotations and invoices to Autland, payment, such as it had been, had come from Mr Davis personally.
- [19] I should say at this point that I am not persuaded by Mr Penn's account that Mr Crabbe had been involved in the negotiations for the Claimant's sub-contract. As Autland's Learned Counsel submitted, Mr Crabbe is by his demeanor a forceful character. Having seen Mr Crabbe give evidence, I agree with Autland's Learned Counsel on this point and go further to say that Mr Crabbe has a considerable presence which is not easily overlooked (both in a literal and, for someone possibly seriously visually impaired, metaphorical sense). Mr Penn's demeanor as a witness indicated that he was stretching his version of events beyond credibility on this aspect.
- [20] Having heard all the witnesses, what I believe took place, and I so find on the facts, is that in the relatively small close-knit community of Tortola, Mr Davis as an electrician sought the assistance of a fellow electrician on the island known to him, Mr Penn, in order to perform the electrical installation phase of this relatively large and time sensitive public building project. Mr Davis therefore subcontracted electrical work to Mr Penn's company. This was not a situation where the parties, as tradesman of a special technical area, paid much attention to the formal corporate identity of their contractual counterparties, even though some, rather unconvincing, effort was made after the event and during the course of these proceedings to address this. There is no conclusive contemporaneous documentary evidence that either Mr Penn or Mr Davis tried to establish definitively who, legally, they were each dealing with at the time they were establishing a working relationship. Even though Mr Penn may be forgiven for thinking that he might have been contracting with Autland, given Mr Davis' connections with Autland and its premises, Mr Penn was content to do the work, to deal with Mr Davis, and to take payments from Mr Davis and sometimes Mrs Davis jointly too, and on one occasion from ADC.
- [21] I therefore have no hesitation in finding that the Claimant's claim against Autland fails.
- [22] The question therefore remains whether the claim against Mr Davis succeeds. Mr Davis accepts that if either of the Defendants is liable, it should be he, not Autland. This is not a case in which one Defendant seeks to claim that the other Defendant, not he, is liable.

- [23] The facts in dispute revolve around when the Claimant's work on the project stopped and how much of the contracted works the Claimant had completed at that point.
- [24] Not only did the Claimant's quotation letter for the Second Contract not break down the works in phases, but there is no third party evaluation or assessment in evidence to indicate what the state of the works was at the point that the Claimant stopped work, whatever that point was.
- [25] The closest document akin to an assessment, was a schedule of works prepared by Mr Davis and purportedly signed by him on 17 May 2005, which indicated that the Claimant had completed a very low percentage of the works. In cross-examination, Mr Davis claimed that he had prepared this document from his notes. Mr Penn gave evidence that he had not seen this document contemporaneously. Mr Davis's notes had not been disclosed in these proceedings. Mr Davis admitted in cross-examination that he had not signed this document in May 2005, but more recently. Mr Davis also prepared a schedule purporting to break down Mr Penn's work, which he attached to his Witness Statement. There is however documentary evidence that evaluations were carried out. A letter dated 27 October 2004 from ADC to Mr Davis apparently concerned a fifth assessment, up to the end of October 2004, finding that a sum of US\$40,000 was at that point due to Mr Davis. None of the assessments performed were disclosed in this action.
- [26] Mr Davis's position is that he had been contracted by ADC to perform the electrical works on the project, and that ADC had in turn been contracted by the Government of the Virgin Islands. Mr Davis subcontracted some of the work to Mr Penn through the Claimant company. As all the materials were to be supplied by ADC, it was a labour only sub-contract. Mr Davis asserts that Mr Penn failed to complete the works contracted for and the little work he did do was not performed in a professional and workmanlike manner. Mr Davis claims that Mr Penn was paid for all the work he did, including the additional temporary lighting and cutting of one wall to put in three outlets, thus that nothing further is owing to the Claimant or Mr Penn. Mr Davis claims that as a consequence of Mr Penn's deficient work he had to hire other workers to make good the defects and keep the project on track. Mr Davis claimed that he terminated the Claimant's contract on or about 9 March 2005. Mr Davis's worker, Mr Lincoln Caesar, in his Witness Statement, also indicated that the Claimant stopped working on the project in March 2005.
- [27] Mr Davis claimed in his Witness Statement at paragraph 14, with regard to the termination of the Claimant's contract, according to him on or about 9 March 2005: "I said to him that we would come to an agreement on the

work he did and he would be paid for it". This is, in my view, very significant, because it indicates that whenever the termination took place, Mr Davis was conceding that his payments on account previously did not cover all the work done by the Claimant or Mr Penn and that those payments on account had left a short-fall.

- [28] Mr Davis prepared a letter carrying a date of 9 March 2005, recording, so the letter appeared to say, unsatisfactory performance on the part of Mr Penn and that Mr Davis had cancelled the contract. The letter ended by stating "It is necessary that we meet to settle up what you did so you could be paid as soon as possible". This again indicated that Mr Davis recognised that at the time he prepared this letter Mr Penn or the Claimant had not been paid for all the work he or it had done.

- [29] In a remarkable twist, on 4 July 2012 Mr Davis' Counsel provided the Claimant's Counsel with three letters, purported to be dated 14 February 2005, 25 February 2005, and the letter referred to above, of 9 March 2005. Mr Davis's Counsel stated that they were informed by their client that these were copies of letters on the hard drive of Mr Davis's computer. Entirely properly, and commendably, Mr Davis's Counsel then informed the Claimant's Counsel that the evidential value of these letters was a matter for the Claimant's Counsel. Mr Davis tried to retract those letters.

- [30] The Claimant's Learned Counsel accused Mr Davis in cross-examination of having fabricated these letters after the dates they purportedly carry and that he did so with a view to bolstering his position in these proceedings. Mr Davis, in a display of candor which was startling and admirable in its simplicity and directness, admitted that he had prepared these letters after the event to bolster his position.

- [31] To the extent that the content of these letters was self serving, their probative value in my estimation was very much diminished by the fact that the dates of these letters were false, and that Mr Davis had tried to place a construct on events after the event that would help him. These letters, and in particular the last entry in the letter dated 9 March which is quoted above, however do demonstrate Mr Davis's mind-set prior to this trial (whenever he drew up those documents) with regard to his own acceptance that Mr Penn had not yet been paid in full for his work.

- [32] This understanding on Mr Davis' part was reiterated in a letter from him to the Claimant ostensibly dated 4 July 2005. In that letter, Mr Davis stated "You are reminded that you'll be paid for what you have done at the rate you have quoted". Mr Davis continued: "You are invited to discuss this situation with the electrical foreman the electrical coordinator and myself Nolan Davis at your earliest convenience so we can compare, agree and

certify that you have performed the work that you fabricated and bill for recognition of payment.”

- [33] Such an invitation to discussion and certification does not sit well with Mr Davis’s purported evaluation, which he ostensibly signed about a month and a half previously, on 17 May 2005, which gives the impression that as at that earlier date Mr Davis had already decided what percentage of the works the Claimant had done. Mr Penn claimed in his Witness Statement that he only received the letter purportedly dated 4 July 2005 sometime around mid-2008.
- [34] In his Supplementary Witness Statement Mr Penn asserted that he did not leave the site until after May 2005.
- [35] This is however at odds with a letter from the Claimant dated 20 April 2005 addressed to Mr Davis, with copy to the Minister of Natural Resources and Labour, whose stamp shows that he received it on 22 April 2005. In this letter Mr Penn intimated that Mr Davis had demonstrated on 20 April that he no longer required the Claimant to continue working on the project, that Mr Davis had prevented Mr Penn and one of his employees from obtaining material to continue the work, and that as of 9 a.m. on that day, Mr Penn would charge for hourly rates for workers on standby. In other words, that as of that moment the contractual relationship between the parties changed.
- [36] In this letter Mr Penn accused Mr Davis of using threatening language. in cross-examination, Mr Davis denied using threatening language, and explained that he had simply and directly told Mr Penn that he had been fired. From Mr Davis’s general demeanor as a witness, I prefer Mr Davis’s evidence on this point.
- [37] The Managing Director of ADC, Mr Dion Stoutt, also gave oral evidence. He appeared an excellent witness, direct, bright, well presented, and dependable. His evidence was that he had paid Mr Penn US\$2,500 by cheque on 15 April 2005 after he had been approached by Mr Penn who claimed that he was not receiving funds for his work from Mr Davis, crucially, “in the interest of getting my project moving”. Mr Stoutt said that he made the payment because he did not want conflicts on the site. This strongly indicates that as at 15 April 2005 Mr Penn was still working on the project and that his contract had not yet been terminated as at that date.
- [38] I therefore find as a fact that to all intents and purposes the Claimant’s contract was terminated on 20 April 2005. That is around mid-way between the time Mr Davis claims to have fired Mr Penn, in the first half of March 2005, and the time Mr Penn claims to have left the site, after May 2005.

- [39] The area in dispute which has caused the Court the greatest difficulty is determining how much of the work Mr Penn claimed the Claimant had done had in fact been completed.
- [40] Mr Penn gave evidence in his Witness Statement that that for the Second Contract “[a]t all times there were 4-5 employees of the Claimant working with me”. In cross-examination it emerged that this must have been extremely improbable, as it would have entailed a wage-bill vastly greater than the quotation for the job and the Claimant’s purported final bill for approximately US\$30,000. The evidence from Mr Davis’s side was that attendance of other workmen/women for the Claimant was at best sporadic, and then not of a high level. The Court is more inclined to believe the latter.
- [41] Mr Penn gave oral evidence that the Claimant had done “rough-in” work, which constituted some 80% or 85% of the price quoted for, as well as wiring work, which would constitute some 20% to 15% of the work. Mr Davis gave evidence that usually “rough-in” work constituted a much lower percentage, at about 33%. As the Claimant’s quotations were not broken down into phases, for example, a “rough-in” phase the Court could not derive assistance from that source. I sensed however that Mr Penn realized that it would be relative uncontroversial that he had done the “rough-in” work, but that it was heavily in dispute that the Claimant had done wiring work, and therefore it would be to Mr Penn’s advantage to maximize the proportion of the work that would be covered by “rough-in” work.
- [42] Apart from Mr Penn, the only other witness called on behalf of the Claimant was one of his employees on the project, Mr Montero. Mr Montero gave evidence that he worked on the project for about two months in 2004, and that he ran pipes and did wiring, and worked on the temporary lighting. He was thus not qualified to speak to the work done, or left undone, in 2005.
- [43] Absent any reliable assessment or evaluation, either of quantity or quality of the Claimant’s work, the Court has insufficient evidence to conduct a scientific calculation of a quantum meruit for the Claimant’s work. The Claimant’s Learned Counsel Mr Hare, backing away from an earlier submission he had made that this is an “all or nothing” case, submitted that it is open to this Court to find for the Claimant in a lesser amount than the full amount of the Claimant’s purported final bill. I agree with Mr Hare. In a case such as this, the Court proceeds to do the best it can, upon its view of the documentary and oral evidence and the quality of the witnesses as a whole.

- [44] Although there were other points of evidence heavily fought over during the trial, it seems to me that the solution in this case lies in the fact that the Court finds that both the Claimant and Mr Davis overshot the most probable true position, which most probably lies somewhere in the middle. Although the Court was not persuaded by either Mr Penn's or Mr Davis's versions of events, the Court is persuaded that Mr Davis had underpaid the Claimant, as Mr Davis himself appears to have acknowledged, and as demonstrated by the fact that Mr Davis habitually paid Mr Penn or the Claimant round figure sums, and thus that the Claimant is entitled to recover something, but not all, he claimed for. The Court is further not persuaded that the under-payment was a minor amount, or indeed covered by the payment from ADC, given that the Claimant continued to work on the project for a good 40 or so days from 9 March 2005 when Mr Davis alleged to have fired the Claimant and it had been the 4th of February 2005 when Mr Davis had last made a payment on account, of US\$1,000.00.
- [45] I thus find that the amount owing from Mr Davis to the Claimant is about half of what the Claimant has claimed, or about mid-way between the Claimant's and Mr Davis's positions.
- [46] I have considered whether the fact that Mr Penn has not persuaded the Court that his version of events is reliable should disentitle the Claimant from an award. In the circumstances as a whole I do not think that would be a just outcome.
- [47] The Court therefore awards the Claimant US\$15,000.00 plus prescribed costs calculated on this figure against the Second Defendant and dismisses the claim against the First Defendant.
- [48] The Court awards prescribed costs, calculated on a value for the claim of US\$15,000.00, to the First Defendant against the Claimant.
- [49] Finally the Court expresses its gratitude to Learned Counsel for all parties for the assistance they have rendered the Court.



Gerhard Wallbank J (Ag)
3 October 2012

