

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE**

CLAIM NO. GDAHCV 2008/0440

BETWEEN:

OSCAR WILKINSON

Claimant

and

STEPHEN MAPP

Defendant

Appearances:

Mrs. Celia Edwards, Q.C and Mrs. P N Byer for the Claimant
Mr. Derick Sylvester and Ms. S Chitan for the Defendant

2013: May 13, 14
2013: July 31.

JUDGMENT

- [1] **MOHAMMED, J.:** The Claimant has pleaded that by a written agreement dated 1st March 2006 ("the contract") the Defendant agreed to build the ground floor of a two story house ("the house") situate at Spring Garden, St. George's for her. According to the contract, the Defendant agreed to commence work on 13th March 2006 and complete on or before 14th June 2006, payments to the Defendant were to be disbursed in 4 phases of \$19,362.96 after the completion of each phase with a retainer fee of \$4,046.41. The total contract price was \$82,000.00 for the provision of labour and materials. The Claimant paid the sum of \$69,227.00 to the Defendant but he failed to complete the work and in February 2007 the Claimant terminated the contract after serving the appropriate notice.

- [2] In his Defence, the Defendant agreed that he entered into the contract with the Claimant for his labour but not for the provision of labour and materials. He pleaded that the money was not disbursed to him in conformity with the contract and he denied receiving the sum of \$70,000.00 but instead stated that he received \$40,175.00 for labour only. He also denied that under the contract he was responsible for the electrical installation, plumbing, painting, and the provision of cupboards and joinery.
- [3] It was the Defendant's position that it was the Claimant who was responsible for the delay in the completion of the contract since she failed to provide electricity to the premises, the materials in a timely fashion and to disburse payments to him in accordance with the contract. He claimed that it was the Claimant who had breached the contract by terminating it without notice and he counterclaimed for the sum of \$21,825.00 or \$5,525.00 as outstanding labour and the sum of \$1,500.00 for the costs of two construction reports. He also made a claim for his tools detained by the Claimant, but this was not pursued at the trial since arrangements have been made for their return.
- [4] I have taken the time to set out each party's pleaded case since it appeared to me that during the evidence and the closing submissions there were some material deviations from the pleaded case for which I have attached no weight. I refer specifically to Counsel for the Defendant's cross-examination of Nigel Noel on the prices and availability of construction material since it was not the Defendant's pleaded case that this was one of the reasons the contract was frustrated.
- [5] Further, in the closing submissions filed by the Defendant, Counsel for the Defendant submitted that the Defendant did not have the benefit of independent legal advice before signing the contract and as such the sum he agreed to provide his services was undervalued. With respect to Counsel for the Defendant, the fairness of the contract was not part of the Defendant's pleaded case. I have disregarded this submission on the basis of irrelevance.

[6] In my view the issues to be determined from the pleadings were :

- (a) Was the written contract between the parties for labour only or for labour and material ;
- (b) What were the Defendant's responsibilities under the contract?
- (c) Who caused the delay in the performance of the contract?
- (d) Did the Defendant perform the work in a professional and workmanlike manner?
- (e) Did the Claimant properly terminate the contract?
- (f) Is the Claimant entitled to her pleaded loss ?

[7] For the reasons set out hereafter, I find that the contract was for the Defendant to provide both labour and materials. The Defendant was not responsible for the electrical installation, plumbing, painting, tiling and cupboards. However the delay in the completion of the contract was due to the Defendant and not the Claimant. In my view, there was compelling evidence which persuaded me that the Defendant failed to perform the work which he was responsible for in a professional and workmanlike manner and as a result the Claimant properly terminated the contract. I have assessed the Claimant's special damages in the sum of \$2,600.00 and general damages in the sum of \$7,500.00 to be paid by the Defendant with statutory interest. The Defendant's counterclaim is dismissed and he is to pay the Claimant prescribed costs in accordance with CPR 2000.

Was the contract between the parties for labour only or for labour and material?

[8] The contract clearly provided *"Now it is hereby agreed that the said Contractor shall provide labour and materials to execute the work as follows..."*. Although the Defendant pleaded in his Defence that the contract was only for labour, under cross-examination he admitted that it was for both labour and material where he stated:

" Q. You said it was a labour only contract?

A. It was a mistake. It was for both labour and materials"

- [9] I need to go no further than highlight this inconsistency between the Defendant's evidence and his pleaded case with respect to the contract to find that the contract was for the Defendant to provide labour and materials, which he knew and understood. Having made this finding, it is clear that the sum of \$69,227.00 which the Defendant admitted receiving under cross-examination, was for both the materials and labour which he provided.

What were the Defendant's responsibilities under the contract?

- [10] Only paragraph 1 of the contract detailed the work to be done by the Defendant and the sums to be paid after each phase. It provided:

"(1) Payment will be made in Four (4) disbursements;

1st disbursement 19,362.96 Foundation to Slab

2nd disbursement 19,362.96 Walls to ring beam

3rd disbursement 19,362.96 Roof

4th disbursement 19,362.96 Windows, Doors & Finishing"

- [11] The only relevant evidence in determining the scope of the work under the contract came from the Claimant and the Defendant. According to the Claimant's evidence-in-chief :

" We agreed that the one floor would be built so that I could later add the other floor. In order to cut costs, we agreed that the kitchen would have one set of cupboards with the counter and the sink. The counter would be tiled. There would be no bedroom cupboards. The bathroom would be tiled. The

electrical would be a separate contract and he brought his brother to me to do the electrical with him. The Defendant would do the plumbing.”¹

- [12] However under cross-examination she admitted that the contract did not provide for electrical, plumbing, painting, tiling, damp-proofing or sealing of the roof of the ground floor, yet she still understood that the Defendant had to do these things. She also agreed that kitchen cupboards was joinery and she admitted that the Defendant never indicated to her that “*Finishing*” referred to under phase four of paragraph 1 of the contract referred to cupboards. On the electrical, the Claimant’s response under cross-examination were:

“Q. Would you agree that the written contract does not include electrical

A. It does not say that.”

- [13] With respect to the arrangements for the plumbing, under cross-examination the Claimant stated:

“Q. Did you have a separate agreement to do the plumbing?

A. The contractor said he would do the plumbing and his brother the electrical. It was not mentioned here but this was our agreement.

Q. Did you agree on a labour and material price for the plumbing work?

A. Yes

Q. What was the price for labour and material?

A. I do not remember, it was oral.”

- [14] The Defendant’s evidence was clear that under the contract he was not responsible for the electrical installation, plumbing, painting, provision of cupboards and joinery². Under cross-examination he admitted that his responsibilities under the contract was not to put the house in a habitable condition since he did not expect the Claimant to live in a house without plumbing. He agreed that the plans he received for the

¹ Paragraph 11 of witness statement of Stephen Mapp filed 30th June 2010

² Paragraphs 11 and 12 of witness statement of Stephen Mapp filed 30th June 2010

house showed the plumbing and that if the concrete slab at the top of the ground floor was not sealed, it would have leaks when it rained.

[15] I agree with the Claimant that the problems started with the contract. There were separate oral agreements for the electrical and plumbing, both of which were not incorporated into the contract as provided by paragraph 8 which expressly stated: *"Any deviation to the said Contract should be a written agreement signed by the Property owner(s) and the contractor"*. It was not the Claimant's pleaded case that she was relying on these separate oral agreements. There was no definition in the very bare contract of the term "Finishing" set out in "Window, Doors & Finishings" and I was not convinced that it could mean any rudimentary plumbing, electrical, tiling, cabinetry or any step to make the house habitable. Having examined the contract and assessed the evidence of the Claimant and Defendant on the actual scope of work to be performed under the contract, I agree with the Defendant that the contract limited the scope of works to be performed by him to Foundation to slab, walls to ring beams, roof and windows, doors and finishings.

[16] I therefore find that the Defendant was not responsible under the contract for plumbing, electrical, painting, tiling and cupboards (joinery) which are some of the defects pleaded by the Claimant at paragraph 7 of the statement of claim³.

Who caused the delay in the performance of the contract?

[17] The Claimant alleged that one of the reasons for her terminating the contract was the delay in its completion. The Defendant alleged that the delay was due to the failure by the Claimant in providing electricity⁴, in providing materials used in the construction⁵ and in her disbursements of funds under each phase of the contract⁶.

³ Filed 1st September 2008

⁴ Paragraph 8 of witness statement of Stephen Mapp filed 30th June 2010

⁵ Paragraph 9 of the witness statement of Stephen Mapp filed 30th June 2010

⁶ Paragraph 6 of the witness statement of Stephen Mapp filed 30th June 2010

[18] However, it is not that the Claimant failed to do anything. She hired the Defendant's brother Alber Mapp to provide the electrical installation but he failed to do so. While I accept that the failure by Albert Mapp to provide the electrical services to the property may have contributed to some delay I do not hold the Claimant responsible for Albert Mapp's failure. In any event, the parties, through the Defendant, were able to obtain the electrical supply from a neighbour at a costs of \$200.00. In any event there was no evidence from the Defendant indicating how long this delay was and how it affected his work. I therefore do not agree with the Defendant that the failure by the Claimant to provide electricity was a major cause for his delay in completing the house.

[19] The relevant evidence concerning the provision of materials and the disbursement of funds turned on the evidence from the Claimant and the Defendant. The Claimant stated that both parties purchased materials for the house. However she only purchased material during the first phase based on what the Defendant requested her to purchase. She admitted that although the Defendant purchased material she was never provided with any receipts.

[20] It was clear from the contract that the Defendant was responsible for providing materials. Yet the Defendant's position on the supply of materials by the Claimant was unclear and inconsistent. First he said that, *"There were occasions when the Claimant would give me money to pay for the material, for example, the payment for the concrete was made to me. I then paid the company Valucrete⁷".* Then he stated *"The Claimant failed to supply materials in a timely manner so as to facilitate the construction work⁸",* and finally his position was *"My financial records, though some were destroyed, shows that to date the Claimant has paid the sum of \$40,175.00 towards the labour costs. I do not have the accurate sum, as sum of the money given to me for labour went towards material purchase⁹".*

⁷ Paragraph 7 of the witness statement of Stephen Mapp filed 30th June 2010

⁸ Paragraph 9 of the witness statement of Stephen Mapp filed 30th June 2010

⁹ Paragraph 16 of the witness statement of Stephen Mapp filed 30th June 2010

- [21] I accept that the Claimant provided the materials as requested by the Defendant in a timely manner. She was clear on the phase of the project for which she purchased materials as opposed to the Defendant's evidence which was vague, general and failed to set out the particulars of materials which the Claimant failed to purchase and/or provide for him. In my view, her evidence was unchallenged by the Defendant.
- [22] According to the contract *"Payments would be made five (5) working days after the submissions of claims, upon certification of required completed works by the G.U.T.C.U Technical Supervisor."* The Claimant stated that *"Under the said agreement the money was to be disbursed in four phases of \$19,362.96 each. The arrangement was that the Credit Union would visit the site to ascertain that the work was done in respect of the preceding phase and upon giving them notice would make the next disbursement to me. The Defendant would then request money from me¹⁰".* Both parties agreed that the Claimant did not disburse the sums to the Defendant in accordance with the phases as set out in the contract. The Defendant stated that he received money *"ranging from \$1,000.00 to \$11,000.00 or more¹¹. I cannot recall the exact amount paid on every occasion except I did not receive the money as contracted."¹²*
- [23] While I find that the Claimant was direct and forthright in her evidence on the disbursements made to the Defendant, in contrast I find the Defendant's evidence was vague and general. There was no evidence by the Defendant indicating that he was unsatisfied in the manner in which disbursements were being made. He failed to indicate how inadequate disbursements delayed him and/or adversely affected the construction work. The Defendant did not deny receiving payments or that the payments he received were inadequate. In my opinion, it is unacceptable for the Defendant to receive the disbursements albeit at sums less than the contract and then make an about turn without giving any details and assert that this is his reason

¹⁰ Paragraph 13 of the witness statement of Oscar Wilkinson filed 30th June 2010

¹¹ Paragraph 5 of the witness statement of Stephen Mapp filed 30th June 2010

¹² Paragraph 6 of the witness statement of Stephen Mapp filed 30th June 2010

for the delay. I therefore do not accept the Defendant's position. I find that the failure by the Claimant to make the disbursements in accordance with the terms of the contract did not cause and/or contribute to the Defendant's delay in the performance of the contract.

[24] I therefore find that the Claimant was not responsible neither did she contribute to the delay in the performance of the contract.

Did the Defendant perform the work under the contract in a professional and workmanlike manner?

[25] Under the contract the Defendant was responsible for the Foundation to Slab, Walls to Ring Beams, Roof, Windows, Doors & Finishings. The Claimant's pleaded defects with respect to these aspects of the work were: (a) Crooked walls (b) Building not set out correctly (c) Poor foundation – water seeps into the house from the floor when it rains (d) Substandard and incomplete plastering of walls and (e) Incomplete installation of doors and windows. The evidence on the structural defects were from the Claimant, Akenson Mc Burnie, Ernest Douglas, Nigel Noel, the Defendant and Anthony John.

[26] The Claimant is a teacher who visited the property at least once per day during the construction of the building. She noticed that the Defendant did not put the house on pillars¹³ and she notice that the walls did not meet in right angles, some converged in a curve while for others the top angle was wider than the base¹⁴. Although the Claimant is a lay person without any special expertise in construction, she had the approved plans and at least she would have known if there was a requirement for pillars for the house. I also do not discount her observation of the defects in the walls. I therefore accept her evidence on the defects she observed.

¹³ Paragraph 15 of witness statement of Oscar Wilkinson filed 30th June 2010

¹⁴ Paragraph 16 of witness statement of Oscar Wilkinson filed 30th June 2010

[27] Akenson Mc Burnie stated that according to the approved building plan the house was being built on a slope and therefore it had to rest on beams both to the centre and the back of the house. In his view, the Defendant did not follow the plan but instead rested the house flat¹⁵. I attached no weight to his evidence since he was not present when the house was being built, and his expertise was carpentry. Similarly, while Ernest Douglas had 5 years experience as a construction worker with skills in carpentry and masonry, his evidence that "*Foundation work was not done properly and so there was water seepage from the bottom*"¹⁶, in my view, was purely speculative since he was not present when the house was being built and his expertise did not allow him to make such assessment.

[28] In my view, the evidence of Nigel Noel, a civil engineer with experience in the field since 2003 was critical on the structural defects. When Mr. Noel visited the house in 2010 he had the approved plans for the house. He made two visits. On the first occasion he spent four hours conducting visual tests and on the second occasion he spent one hour taking pictures. He observed that the house was located on the wrong spot and level. The house was 4-5 feet away from the location where it was supposed to be built, according to the plan. He observed that the entrance was not done correctly¹⁷, that the actual construction varied from the plan, since the number of beams he observed were 9 and there were 16 on the plan and while the plan had 11 pillars, he observed were only 6. He noted that the placement of the beams were different from that set out in the plan¹⁸. He observed many structural gaps and diagonal cracks above the window and doors. In his view this variation accounted for the multiple cracks on the floors and wall¹⁹. He also observed that there was no reinforcement allocated in the structure to anchor the steps towards the first floor²⁰.

¹⁵ Paragraph 4 of witness statement of Akenson Mc Burnie filed 30th June 2010

¹⁶ Paragraph 6 of witness statement of Ernest Douglas filed 30th June 2010

¹⁷ Paragraph 4 of witness statement of Nigel D Noel filed 30th June 2010

¹⁸ Paragraph 5 of witness statement of Nigel Noel filed 30th June 2010.

¹⁹ Paragraph 6 of witness statement of Nigel Noel filed 30th June 2010

²⁰ Paragraph 7 of witness statement of Nigel Noel filed 30th June 2010

- [29] It was Mr. Noel's opinion that the cracks were caused by drastic settling which all buildings experience but are usually designed to minimize any drastic effects of settling. His overall assessment was *"in the event the Claimant proceeds to have the first floor constructed there is a significant possibility that a structural collapse will occur"*²¹. He agreed that the cracks can be remedied but he stated that it would be costly since it entailed going into the foundation of the structure to do remedial works to reduce the stress on the building.
- [30] While the Defendant sought to challenge Mr. Noel's evidence on the basis that he did not conduct any scientific test, in my view Mr. Noel's evidence remained unchallenged by the Defendant. It is based on Mr. Noel's expertise and the failure by the Defendant to challenge Mr. Noel's evidence that I accept his evidence.
- [31] The Defendant would have been aware from the house plans that it was the Claimant's intention to construct a first floor above the ground floor. He stated that the house's location was correct since it was where he *"pulled his tape"*. This is unacceptable and purely unscientific. While I appreciate that he was a contractor since 2000, I was left with doubt on the quality of his expertise as a contractor. While the Defendant insisted that his work was in conformity with the Grenada Building Code and based on the plan²², he gave no details of the aspects of the said building code which he followed. He also failed to advance any explanation for the cause of the significant cracks. His only explanation with respect to the beams and slabs which Mr. Noel did not observe was some of the beams were covered underground and some of the slabs were covered with concrete.
- [32] Even the Defendant's expert, Mr. Anthony John failed to convince me that Mr. Noel's assessment was inaccurate. Mr. John admitted that he was not a civil engineer and although he did some engineering courses, he worked in valuation, surveying, general contracting, site supervision and project management. Under cross

²¹ Paragraph 8 of witness statement of Nigel Noel filed 30th June 2010

²² Paragraph 10 of witness statement of Stephen Mapp filed 30th June 2010

examination he admitted that he only inspected the outside of the house and valued the costs of work. In my view Mr. John's role was that of a quantity surveyor and not an engineer and therefore added no value in assisting the court to determine the quality of the workmanship.

[33] I therefore find that based on the evidence of the Claimant and Mr. Noel, the Defendant was responsible for the structural defects of crooked walls, building not being set out correctly and poor foundation causing water to seep into house. This cannot be work done in a "good, professional and workmanlike manner".

[34] The other incomplete and defective construction works pleaded by the Claimant were: substandard and incomplete plastering of walls and incomplete installation of windows, doors and finishings. I accept the evidence of the Claimant and Akenson Mc Burnie who stated that there was incomplete plastering of the walls and columns, since it was not challenged by the Defendant. I have no reason to doubt the evidence of both Akenson Mc Burnie and Ernest Douglas who stated that they installed windows, doors inside the house and repaired the back door. Mr. Douglas also described having to chip the floor inside the house to allow for the doors inside the house to be able to close. He placed locks on the doors and he had to block a space in the back door. The Defendant even admitted under cross-examination that he did not put doors inside the house.

[35] I also find that the plastering and the doors and windows were substandard and incomplete and that the Defenadnt failed in his duty to perform such works in a good, professional and workmanlike manner.

Did the Claimant properly terminate the contract?

[36] The Claimant stated that the project was not completed in June 2006, the proposed completion date. When she returned from England in August 2006, a few windows

were up and some plastering was completed²³. She was unable to contact him so she notified the Defendant through an attorney calling upon him to complete the project and she gave him until March 2007, but he failed to complete. The Defendant instead stated that he was always willing to complete but was unable to do so since the Claimant had locked away his tools in a shed on the site and he could not enter the site to complete.

- [37] I cannot find any fault with the Claimant in terminating the contract. The Defendant was given ample time to complete the work he was contracted to do and he failed to do so. I find that the Claimant properly terminated the contract.

Is the Claimant entitled to her pleaded loss?

- [38] The Claimant sought special damages for expenses already incurred in the sums of \$13,000.00 and \$675.00 (the costs of the valuation report of the construction work) and general damages in the sum of \$20,000.00 as set out in the BMH Services report. I will deal with the claim for special damages first. It is settled law that special damages must be pleaded, particularized and be "strictly" proved²⁴. The onus is therefore on the Claimant to prove her loss.

- [39] The Claimant has relied on the BMH Services report to support her claim for \$13,000.00 for the cost of effecting remedial work. Paragraph 2 states:

"An interview with Ms. Wilkinson reveals that the agreement with the builder was to bring the building to a habitable state with a functional kitchen, bathroom, electrical and painting. This was not done and the owner, M.s Wilkinson, had to do some corrective work (electrical) and complete work that the builder should have done. The owner would have spent approximately \$13,000.00 to effect same."

²³ Paragraph 25 of witness statement of Oscar Wilkinson filed 30th June 2010

²⁴ Grant v Motilal Moonan Ltd (1988) 43 WIR 372 per Bernard CJ

[40] I agree with Counsel for the Defendant that the sum submitted included work outside of the scope of the contract which the Claimant cannot recover. However, having found that the Defendant failed to perform the work which he was responsible for in a professional and workmanlike manner, it is only fair that the Claimant be able to recoup the sums she expended. Ernest Douglas stated *"I did work on the house for 6 to 7 weeks I did cosmetic work on the house not structural... I was paid about \$100.00 a day for working on the house"*. His remedial works included work with the windows, doors and floor, which I have found the Defendant failed to perform in a professional and workmanlike manner. The total fee paid to Mr. Douglas as labour was approximately \$4,200.00. I award one half of this sum which is \$ 2,100.00 since he also did other tasks which were not within the scope of the Defendant's contract. In the absence of any evidence on the sums expended by the Claimant for the materials used in the remedial works I am hesitant to pluck a figure out of the air. I therefore make no such award for the materials.

[41] The costs of the report by BMH Services was submitted to be \$675.00 with the invoice evidencing such payment at pages 135 and 136 of Trial Bundle II. The sum stated in the invoice is \$500.00 which was paid on 7th July 2008 which I accept and so award.

[42] The Claimant relied on page 2 of the BMH Services²⁵ report to support her claim for \$20,000.00 which set out the scope of remedial work as:

"The scope of the works for corrective measures and the completion of the project include the following:

- *Demolition of existing rendering to suspended slab and making good all rendering including appropriate measures to carry rain water away*
- *Completion of outstanding rendering*
- *Completion of all joinery and counters*

²⁵ Dated 4th July 2008

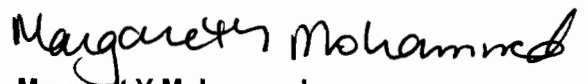
- *Installation of doors and windows (completion of)*
- *Plumbing*
- *Electrical*
- *Tiling (not part of arrangement of builder I understand it)*
- *Painting*

The estimated cost to complete the above listed works is in the region of \$20,000.00."

- [43] There was no breakdown of the costs for each item of the remedial work suggested. However, having found that the Defendant's work was not in a professional workmanlike manner with respect to the plastering (rendering) and the doors and windows, I still am minded to make an award despite the limited evidence. There are eight items listed in the BMH report which made up the \$20,000.00. The best I can do in the circumstances is to award a percentage of the total sum for the three items which the Defendant was responsible for. I therefore award the sum of \$7,500.00 .

Order

- [44] Judgment for the Claimant. The Defendant's counterclaim is dismissed.
- [45] The Defendant to pay the Claimant special damages assessed in the sum of \$2,600.00 and general damages assessed in the sum of \$7,500.00 with statutory interest.
- [46] The Defendant to pay the Claimant prescribed costs in accordance with CPR 2000.


Margaret Y Mohammed
 High Court Judge