

COMMONWEALTH OF DOMINICA

DOMHCV2010/0112

BETWEEN:

OCTAVE MOREAU

Claimant

and

KEVIN HUNNEYBELLE

Defendant

Before: The Hon. Justice Brian Cottle

Appearances:

Mr. Wayne Norde for Claimant

Mr. David Bruney for the Defendant

[2013: January 30th]

[February 8th]

[May 1st]

JUDGMENT

- [1] **COTTLE J:** The parties entered into a written agreement. The terms were contained in an invoice issued by the claimant and signed by the defendant. The claimant agreed to cut a road for the defendant, approximately 900 ft in length and 9 ft wide. This involved drilling, blasting and clearing a rocky part of the road. The works were expected to take three weeks to complete at an agreed price of \$27,000.00. The claimant also averred that the parties concluded a second agreement. This agreement was oral and called for an extension of the agreed works by 300-600 ft for the payment of an additional \$14,000.00. The claimant says that he performed all of the works required under the contract but has only been paid a total of \$4,000.00 by the defendant. He filed the present claim seeking to recover the unpaid balance of the contract sum.
- [2] In his defense, the defendant denies the existence of a second, oral agreement with the claimant. As far as the first written agreement is concerned the defendant says that it was implicit that the road to be cut by the claimant would be able to accommodate the driving of small vehicles and would be sufficiently compressed to facilitate the repulsion of rain water. It was also intended that the road would be provided with adequate drainage.
- [3] The defendant avers that the claimant failed to execute the works properly. The road as excavated was only 3.5 ft wide. The route excavated was too steep because the claimant did not follow the route indicated to him by the defendant. The resultant steep road as cut contributed to erosion and

collapse. The defendant says the claimant failed to prepare ravines in preparation for the installation of concrete drains. The defendant brought a counterclaim averring that the claimant had failed to properly execute the agreed works. As a result the defendant was forced to engage new contractors to repair the faulty road works. He says that the failure of the claimant to follow the agreed route has caused him to incur additional expense by concreting the road for some 155 ft. The defendant now seeks to recover this amount along with the cost of the remedial works.

- [4] In his defense to the counterclaim the claimant denies that the works were poorly done. He says the road cut was 9 ft wide, not 3.5 ft, and that all ravines were filled in to permit the defendant to install drains and culverts. He attributes any erosion problems to the failure of the defendant to put in drains and culverts to deal with rainwater runoff. He adds that the provision of adequate drainage was not part of his contractual responsibilities.
- [5] When the matter came on for trial the claimant and one Johnson Casey gave evidence for the claimant. Casey is a corporal of police. He says that on the 5th June 2010, in company with the claimant, he drove a four wheel drive pick-up truck along the newly cut road. He says about 300 ft of the road which was unpaved was accessible by his vehicle easily. A chain across the roadway impeded his further progress.
- [6] In his witness statement the claimant says that he agreed to excavate 900 ft of roadway to a width of 9 ft. He undertook only to cut, drill, blast and batter the banks of the road to be cut. There was no mention of drainage. He says he completed the works as agreed. The claimant also testified that there was another verbal agreement that he cut a smaller tract of road that he agreed to cut for \$14,000.00. He does not say that he in fact completed this additional work. At paragraph 14 of his witness statement he says that at the completion of the works the defendant got 900 ft of road which could accommodate four wheel drive vehicles. I therefore disregard the claim for payment for the additional verbal contract.
- [7] The defendant gave evidence. He also adduced the evidence of Hendricks George on his behalf. Hendricks George is a heavy equipment operator who worked for Fast Company Equipment Services, the contractors who were engaged by the defendant to do remedial work on the roadway. He says that when he first reported to the site he found that the route for the road had only been "roughed in" by the previous contractors. Areas which appeared to be done turned out to consist of discarded trees with a thin cover of lightly compacted tarish material. All of this material had to be removed and replaced with properly compacted tarish. Additional excavation was needed in places as when the loose rubble and branches were removed only a narrow roadway remained. He did additional works to permit the installation of drains.
- [8] From the evidence led before this court several things emerge. I accept that the road as cut by the claimant appeared to meet with the terms of the written agreement. It could have been approximately 9 ft wide and 900 ft long. I accept the evidence of Corporal Johnson that he was able to drive his pick-up along it as at June 2010. This Court notes that in Dominica, the early part of June is just about the beginning of the annual rainy season. I also find that the suitability of the works performed by the claimant was only apparent. I believe Mr. Hendricks George that the road way in large part consisted of loose rubble and branches covered by a thin layer of lightly compacted tarish.

[9] The onset of the rainy season quickly revealed the underlying deficiencies. The roadway began to erode. That erosion was contributed to by the absence of proper drainage. I find that the contract between the parties did not require the claimant to provide drainage to the road as cut but his failure to lay a properly compacted driving surface was also a large contributing factor.

[10] I conclude that the claimant was in breach of his contractual obligation to cut the roadway. It must have been within the contemplation of both parties that the roadway once built would be suitable for vehicles to use. The roadway cut by the claimant fell far short of this standard. As I have found the claimant to be at fault he can recover no benefit under the written contract. His claim is dismissed. I turn to consider the counterclaim. The claimant did not perform his obligations under the contract. He is liable to compensate the defendant in damages for his default.

[11] In awarding damages to the defendant this court aims to put him in the position he would have been in had the contract been properly performed. The defendant says that he had to pay \$17,115.00 for excavation services, \$10,324.84 to concrete the road in part and \$30,307.50 to the new contractors for correction works. Of these items the cost of concreting the roadway cannot be recovered. It formed no part of the original contract. I do not accept the defendant's contention that the claimant cut the road in the wrong area. The defendant was present when the works were being done. He would have objected if any deviation to the agreed route for his road was made by the claimant. The fact that he now opts to lay a concrete surface is at his own choosing. It is not for the claimant to compensate him for this.

[12] Included in the fees paid to the new contractors are amounts for additional works outside the scope of the initial contract. Swale drains were constructed. Debris washed down by the river was also removed. The roadway was significantly widened in places. While it is clear that the claimant did not fulfill his contractual obligations it remains for the defendant to satisfy the court of his losses. The evidence led by the defendant was not sufficient to permit the court to be able to calculate a proper award for damages. In the circumstances the best I can do is to award the defendant nominal damages which I fix in the amount of \$1,000.00 in the circumstances of this case.

[13] As the claimant has failed to prove his claim I award the defendant prescribed costs on the amount of \$37,000.00 claimed by the claimant.

[14] The final order is thus

1. the claim is dismissed
2. judgment for the defendant on the counterclaim
3. nominal damages of \$1,000.00 to the defendant
4. the claimant will pay prescribed costs on the claim in the sum of \$5,550.00

Brian Cottle
High Court Judge

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA**

SUIT NO. DOMHCV2010/0112

BETWEEN:

**OCTAVE MOREAU
and**

Claimant

KEVIN HUNNEYBELL

Defendant

Before the Hon. Justice Brian Cottle

Dated the day of April, 2013

Entered the day of April, 2013

Appearances:

Mr. Wayne Norde for Claimant

Mr. David Bruney for Defendant

ORDER

1. The claim is dismissed
2. Judgment for the defendant on the counterclaim
3. Nominal damages of \$1,000.00 to the defendant
4. The claimant will pay prescribed costs on the claim in the sum of \$5,550.00

BY THE COURT

REGISTRAR –HIGH COURT