

COMMONWEALTH OF DOMINICA
DOMHCV2009/0438



BETWEEN:

DANIEL MARIE-SANTE

Claimants

NADIA MARIE-SANTE

and

TRANS NATIONAL ENGINEERING CONSULTANT INC

Defendants

KEN LINTON

Before:

The Hon. Justice Brian Cottle

Appearances:

Mrs. Zena Dyer for Claimants

Mr. Gildon Richards for Defendants

[2011: June 29th, 30th]
: September 15th

JUDGMENT

- [1] COTTLE J:** The Claimants and the Defendants entered into a contract in or about October 2007. The Defendants agreed to build a residential building at Warner in Dominica for the Claimants at an agreed price of \$303,276.60. The Claimants paid the Defendants \$20,000.00 for design works and \$210,000.00 towards that actual building works. Works commenced in January 2008 and progressed to May 2008 when the Defendants stopped work. The Defendants explained that they were

experiencing difficulty in getting lumber they had ordered from Guyana for the project.

- [2] The initial completion date agreed upon between the parties was June 2008. This was later extended to August 2008. Disappointed with the lack of progress the Claimants consulted solicitors, De Freitas and De Freitas. The parties met at the chambers of Messrs De Freitas in an effort to resolve the impasse.
- [3] As a result of that meeting Mr. Severin McKenzie was engaged to visit the project site and prepare a report assessing the value of the work done to date. Mr. McKenzie is an architect. He visited the site on 1st December 2008. He examined the approved drawings, the construction cost estimate and work schedule of the Defendants. He was shown photographs of the status of the project from February 2008 to October 2008. In his building assessment report Mr. McKenzie noted what he described as "issues of quality" of the work done. He concluded that the works which he observed were valued at \$103,439.00. He therefore concluded that the Claimants had overpaid the Defendants the total of \$106,361.00.
- [4] The Claimants seek a refund of that amount together with damages for the loss they incurred by reason of the delay in completion of the house. The Claimants ultimately engaged other builders and the house was completed in December 2009. The costs of the completed construction was said to be \$338,500.00.
- [5] In the pleaded defense the Defendants plead that they agreed that a quantity surveyor be engaged to value the work. They disagree with Mr. McKenzie's valuation and instead value the work done at \$170,000.000. This is at paragraph 21 of the pleaded defence. However at paragraph 22 the Defendants also aver that they had instructed their solicitor to write to the Claimants setting the value of work done at \$176,059.27 and offering a refund of \$33,940.73. It is thus common ground that the Defendants did not complete the building and they have been paid a sum in excess of the value of the works actually carried out.

The Evidence

- [6] The First Claimant testified that he paid the Defendants \$210,000.00 for building works and the Defendants left his building unfinished having done works which are valued at \$103,439.00 by Mr. Severin McKenzie. He was forced to engage new builders who completed the house at a cost of \$338,000.00. The increase in cost he partly attributes to the need to correct certain faulty building works done by the

Defendant. In cross-examination he admitted that included in the \$338,000.00 is the sum of \$2,000.00 for insurance.

- [7] Severin McKenzie is an architect. He was engaged by the parties to produce a building assessment report. He was also engaged by the Claimants to supervise the new builders who completed the house. He confirms that a total of \$338,000.00 was spent to complete the building. \$15,000.00 of that went to retrofit the foundation columns and suspended beams. Other costs for correcting defective works are subsumed in the amounts paid to the contractors who completed the building. Mr. McKenzie issued receipts to the individual contractors but did not adduce these at trial. Instead he produced a summary in which he detailed how the funds provided by the Claimants were disbursed. He explained that he retained copies of the receipts at his office but did not think to produce them as he did not consider that the fact of payment of the amount to the new builders was being disputed.
- [8] Mr. McKenzie identified substandard concrete as one of the quality issues in the Defendants work. He said this was patent on observation but he carried out no specific tests of the concrete strength.
- [9] Randy Alexander was the electrician engaged to complete the electrical works. He testified that the Defendant's electrical works were faulty and had to be re-done. Curbon Thomas and Angello Allen also gave evidence on behalf of the Claimants.
- [10] Mr. Ken Linton is the Second Defendant. He is Managing Director of the First Defendant. He agrees that he contracted with the Claimants to build a house at Warner. He agrees that he has been paid \$210,000.00. He says that he had a Mr. Malcolm Bertrand do a detailed analysis of the works done before he stopped work on the project. It is on this basis that he values the works done at \$170,000.00. He did not disclose the report, if any, of Mr. Bertrand. Mr. Bertrand did not give any evidence. Mr. Linton agrees that he had agreed with the Claimants to have a quantity surveyor value the works. He hoped to use the services of Mr. Angol in this regard. Mr. Angol was not available. He says the Claimants selected Mr. McKenzie without consulting him.
- [11] Having considered the evidence and pleadings it is clear that judgment must be entered for the Claimants. The Defendants failed to perform the agreed building works after they had been paid a substantial sum. The court will thus award damages to the Claimants. The aim is to place the Claimants in the position they would have been had the contract been properly carried out by the Defendants.

- [12] I accept the building assessment report of Mr. McKenzie as affording the best available evidence of the value of works done. I will award the Claimant \$106,561.00 under this head as being the difference between the amounts paid to the Defendants and the value of works done. I will also award \$15,000.00 as the costs of retrofitting the foundation works done by the Defendants.
- [13] I make no award for the costs of correcting other works badly done as the evidence in that regard was not sufficiently detailed for the court to ascertain how much of the money paid to the new builders can be attributed to remedial works. Similarly I make no award of damages for delay in construction as no explanation was offered the court as to why it took until December 2009 to complete a project initially scheduled to be completed in 8 months. It remains for the Claimant to establish his loss and the evidence concerning this head of damages is unsatisfactory.
- [14] The total award to the Claimants will thus be $\$106,491.00 + \$15,000.00 = \$121,491.00$. The Defendants will pay the Claimant prescribed costs on this award in the sum of \$27,223.65

