

ANGUILLA

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. AXAHCV2009/0019
BETWEEN:

CYMA RECTA MASONRY SOLUTIONS LIMITED

Claimant

AND

FLAG LUXURY PROPERTIES (ANGUILLA) LLC

Defendant

Appearances:

Mrs. Cara D. Connor instructed by Caribbean Associated Attorneys for the Claimant
The Defendant not appearing or represented

2009: July 20, 27, 31
August 28

JUDGMENT ON ASSESSMENT OF DAMAGES

[1] **SMALL DAVIS J (Ag):** Flag Luxury Properties (Anguilla) LLC ("the Defendant") is the developer of the Temenos Resort and Golf Course which was expected to be a first class golfing destination and luxury resort in Anguilla. Anguilla was poised to benefit tremendously from this development which would enhance its well deserved reputation as a fine destination in the Caribbean. Unfortunately, it appears that the Defendant may have been a victim of the worldwide economic downturn and all work on the Resort and Golf Course came to an unexpected and unhappy halt in June 2008.

[2] The Claimant is a limited liability company incorporated in England in June 2003. Colin Burns is the Claimant's sole shareholder and director.

The Pledged Facts

[3] The pleaded facts are that there was an oral agreement made by the parties after negotiations between Mr. Burns and Mr. Sheehy (who was the Defendant's agent and

Director of Construction) for the identification, sourcing, supply and installation of marble, stone and other material in relation to 13 Estate Homes which were part of the Defendant's Resort and Golf course Project ("the Project"). The Claimant was subsequently incorporated for the purpose of performing the contract.

- [4] It was pleaded in the alternative¹, that the Defendant would pay the Claimant a reasonable fee for the work which it was agreed the Claimant would do for the Defendant. It is of tremendous significance that no agreed rate of remuneration was pleaded.
- [5] The Claimant, through the person of Mr. Burns, conducted a considerable amount of preparatory work between 2003 and 2004 to identify satisfactory marble and stone for the Project, in reliance on the representation and assurance that he would get the job. Included in that preparatory and advisory work was a good deal of travelling to source and select the materials and to make arrangements for purchase and storage. This resulted in the incurrence of expenses which amounted to US\$5,000.00.
- [6] The Defendant placed an order for the quantities of stone for installation in 52 bathrooms and other areas and made a deposit of 30% on the quoted cost of the materials. Despite the fact that the Defendant only paid a 30% deposit, 100% of the stone required was ordered because of its rarity.
- [7] The Claimant began manufacture of the bathtubs in January 2005 but after manufacturing 19 bathtubs, in June 2005 the contract was repudiated by the Defendant's directive to the Claimant to cease work. At that time, the Defendant at its request had only been supplied with 20% of the stone required for the Project. The remaining 80% was kept in storage by the supplier, Pisani Plc for over one year. Pisani Plc has made a claim of €40,050 against the Claimant for its loss and expenses incurred in relation to its role as supplier of the marble and stone.

¹ To what, is not certain.

- [8] The Defendant paid the Claimant the cost of all materials supplied but no compensation was paid for the wrongful termination of the contract and the consequential loss to the Claimant.
- [9] The Claimant sued for breach of contract claiming:
- (a) damages for breach of contract;
 - (b) alternatively the sum of US\$375,000 being reasonable remuneration on a quantum meruit basis;
 - (c) indemnification against any and all third party claims;
 - (d) loss and damage suffered and expenses reasonably incurred;
 - (e) interest and costs.
- [10] Judgment in default of acknowledgement of service was entered on 17th April 2009. The damages now fall to be assessed.

The Evidence

- [11] Let me say from the outset that although the Defendant has not taken any part in the proceedings, the Claimant is nevertheless required to prove its claim for damages even on an uncontested assessment and to satisfy the court on a balance of probabilities that the sums that it says are due to it by reason of the Defendant's breach and the termination of the contract. The Claimant is of course entitled to be compensated for the loss it has incurred by reason of the breach and the court should strive as far as possible to put the Claimant in the position it would have been in had it been allowed to perform its obligations under the contract to completion.
- [12] Having said that, I was distinctly unhappy with the evidence filed by the Claimant on this assessment of damages. I consider that it was inadequate in some important aspects and the court's concerns were brought to the Claimant's counsel's attention with an indication that the court would be prepared to accept further evidence from the Claimant. The Claimant did not file any additional evidence. An amended written submission was filed on 31 July 2009.

- [13] The evidence setting out the Claimant's damages claim is in witness statements sworn by Anthony Sheehy and Colin Burns. Mr. Sheehy's evidence is the same as Mr. Burns' evidence in all respects. The Claimant's case rested on an oral agreement negotiated by Mr. Sheehy and Mr. Burns. It is more than passing strange that given the nature of the Project and the contract of the magnitude that the Claimant describes, the terms were not reduced to writing of any form². Instead, I am left to with only the evidence of Mr. Sheehy (whose employment with the Defendant ended sometime in 2006) and Mr. Burns as to the terms of the agreement. It has caused me concern particularly because, as I have set out below, the evidence as to agreed remuneration differs significantly from the pleaded case.
- [14] Mr. Sheehy and Mr. Burns had a previous relationship working together on the Cap Juluca and the Temenos Long Bay development. In his witness statement Mr. Burns states that it was his work on the Temenos Long Bay development in 2001 that led to Mr. Burns' interest in retaining him to provide expert advice and services for the Defendant's Project.
- [15] Mr. Burns states that the contract price for the supply and installation of marble and stone work for 52 bathrooms in 13 estate homes was agreed at 15% of the cost of each bathroom which was averaged at US\$58,000³. The Claimant's fee was therefore US\$8,700 per bathroom. None of this, which is material to the claim, was pleaded. Moreover, no documentation in support has been produced in the evidence. In fact, what was pleaded was that the parties agreed that the Claimant would be paid reasonable remuneration: see paragraph 10 Statement of Claim. A letter before action dated 19th July 2007 was sent on behalf of the Claimant to the Defendant. Nowhere in that letter is it asserted that the parties had an agreement that the Claimant was to be compensated at the rate of 15% of the cost of the bathrooms. There is no evidence on when the Claimant was to be paid for the services provided.

² By contrast, in June 2005 the Claimant took part in a bid for an extended Project and was awarded a part of the works, which was made subject to formalization: see Exhibit 11.

³ See paragraph 31 Colin Burns Witness Statement

[16] In his witness statement, Mr. Burns says that after supplying 19 bathrooms, in June 2005 the Claimant was ordered not to supply any more bathrooms⁴.

[17] There is nothing before me to establish what the cost of the 19 bathrooms was, which is important, given that Mr. Burns' evidence is that remuneration was to be 15% of the cost and that the US\$58,000 was said to be an average of the cost of 52 bathrooms. Though he stated that the Claimant was "*eventually paid at cost price for the 19 bathrooms supplied*", Mr. Burns does not produce any proof that would have assisted the court in assessing what loss of profit was sustained by the Claimant on the 19 bathrooms completed. I shall set out the relevant paragraph in Mr. Burns' witness statement as to the agreement on remuneration in order to illustrate the difficulty that the court was placed in to assess the damages:

"Flag (by Sheehy) agreed with Cyma (by Burns) that the costs for all consultancy services and for the supply and installation of stone marble into each bathroom would have been on average US\$58,000. Of this sum Cyma would have received 15% for all of the services it provided to Flag in relation to each bathroom." Paragraph 31

[18] Not even the sum that the Defendant paid the Claimant for the 19 bathrooms is pleaded or expressed in the affidavit. With no documentation before the court and the lack of clear evidence, I am unable to say whether the payments that the Claimant received did not include the 15% profit costs due to it. It also bears noting that no claim was made for a sum certain due on the performance of the contract before it was terminated, which would be 15% of the cost of the 19 bathrooms.

[19] The Claimant made an alternative claim for damages to be assessed on a quantum meruit basis and in his witness statement, Mr. Burns said "*if the Court does not find that the contract price for the services agreed to be supplied by Cyma to Flag was fixed by*

⁴ I note that in paragraph 19 of the Statement of Claim, what is pleaded is that manufacture of 19 bathtubs in relation to the bathrooms had been completed. This may be a minor discrepancy however the possible significance of this is that from the drawings exhibited to Mr. Burns' affidavit, the bathrooms were to also to include marble toilets, showers, countertops and shelves.

agreement.....I claim, on the reasonable expectation of payment, on a quantum meruit basis...” This could be interpreted as an acknowledgment that on the evidence it may be impossible to find that the price for the service had been agreed.

[20] In amended submissions filed on 31st July 2009, the Claimant elected to seek damages for breach of contract over the alternative claim for damages on a quantum meruit basis.

[21] Insofar as the 19 completed bathrooms are concerned, I accept that the Claimant did perform the services it agreed to do and were ready, willing and able to do so but it was prevented from completing the contract after June 2005. I am prepared to make a declaration that the Claimant is entitled to reasonable remuneration at the rate of 15% of the cost price of the 19 bathrooms and that the Defendant shall, if it has not done so, pay the Claimant that sum.

Damages for breach of contract – loss of future profits

[22] It was submitted on behalf of the Claimant that the agreement between the Claimant and the Defendant was a fixed price contract for which the entire sum may be claimed in compensation for the Defendant’s breach. Reliance was placed on **Workman, Clark & Co. Limited v Lloyd Brazilleno**⁵ to seek an award of damages of US\$452,400 being the Claimant’s profit of US\$8,700 for each bathroom.

[23] The basic principle that governs the main issue raised in this case is that where a party has performed work in pursuance of a contract and the contract is then repudiated by the other party, with the innocent party electing to terminate the contract, the innocent party is entitled to damages for breach of contract. In a breach of a supply contract case, such as the one in the case at bar, the damages are the loss of profit in respect of the remaining contract works plus the value of the work done at contract rates: See **Halsbury’s Laws of England, 4th ed., (reissue), Vol. 4(2) para. 465.**

⁵ [1908] 1 K.B. 968

[24] Details as to the time for payment under the contract are relevant to a determination of whether the Claimant is entitled to the full sum it would have earned on the contract as this is an illustrative feature of the type of contract in question. A lump sum contract is one under which the contractor will receive on completion of the whole works payment of a single sum. An entire contract is one where complete performance by a party is a condition precedent to the liability of the other party See **Halsbury's Laws of England, 4th ed., (reissue), Vol. 4(2) para. 308**. There is no evidence before the court to support a finding of fact that the parties had an entire contract.

[25] I find that it is unlikely that the Claimant was to have been paid at the end of the work, that is after supplying and installing all 52 bathrooms, especially given the time frame that was estimated for the Project.

[26] I conclude from the evidence before me that the intention of the parties was that the Claimant was to deliver on its end of the contract by working on the bathrooms in the estate homes as they were built or being built and the Claimant would have been entitled to demand payment as it completed its work, the price being fixed per installment of the contract. I do not accept that there was a fixed price contract that would have entitled the Claimant to demand the entire sum that would have been earned had the works been completed. No price had been agreed; if anything, what was agreed was a rate of pay.

Mitigation of Loss

[27] What then is the loss that has been suffered by the Claimant as a consequence of the breach of contract for which the Defendant should pay? The classic statement is from Haldane L.C. in **British Westinghouse Electric and Manufacturing Co. Ltd. v Underground Electric Railways Co. of London Ltd.**⁶ :

"I think that there are certain broad principles which are quite well settled. The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The

⁶ [1912] A.C. 673, at 689

fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.”

...

This second principle does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. But when in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act.”

- [28] Sir John Donaldson MR famously said in **Sotiros Shipping Inc. and Aeeco Maritime S.A. v Samelet Soholt, (The Soholt)**⁷:

“A plaintiff is under no duty to mitigate his loss despite the habitual use by the lawyers of the phrase “duty to mitigate”. He is completely free to act as he judges to be in his best interests. On the other hand, a defendant is not liable for all loss suffered by a plaintiff in consequence of his so acting. A defendant is only liable for such part of the plaintiff’s loss as is properly to be regarded as caused by the defendant’s breach of duty.”

- [29] As distilled from these two statements, the principle of the legal principles is that the doctrine of mitigation of loss is a rule as to avoidable loss; a defendant is liable to pay for such unavoidable losses as flow from the breach. If there are steps that a claimant may reasonably be expected to take to minimize his loss and thereby avoid some of the damage, the court will take that into account when ordering a defendant to compensate the claimant. The test is: did the innocent party act reasonably in mitigating his loss.

⁷ [1983] 1 Lloyd’s Rep. 605

The Quantification of the Loss

- [30] I have to consider whether the material before me enables me to make a reasonable assessment of what figure would properly compensate the Claimant for the loss of the benefit of the contract to supply and install the marble and stone works for the Project. I will be guided by the fact that even though the evidence is wanting, I am not precluded from making an award in proper circumstances. I cannot pretend that there is any actuarial science to quantifying what I surmise would be fair compensation to the Claimant.
- [31] The Claimant seeks compensation for the full amount on the contract it would have earned had it been performed to completion. On the evidence it was expected that the entire project was estimated to last for 8 years. It is revolting to common sense to award the Claimant the full sum of US\$452,400 for work that he would have performed over the course of a number of years ignoring the fact that since the contract is at an end, he is now free and likely will find alternate employment. The object of an award is to compensate an innocent party, not to reward them unduly for losses that are avoidable. The premise is that the contract having been terminated, the Claimant would be free to seek alternate work.
- [32] There is no evidence from the Claimant of what steps, if any, it has taken to mitigate its loss. I might have assessed the damages payable to the Claimant to be the full loss of profits on the remaining work under the contract if I had been satisfied that this was a fixed price contract.
- [33] In the end, I am prepared to award the Claimant a sum of money to compensate him for the loss of profits for a reasonable period. This nature of the claim has some similarity to an employment case. It is a principle recognized by our courts that the onus is on an unfairly dismissed employee to prove the probability of loss and its duration: **Antigua Village Condo Corp. v Jennifer Watt**⁸

⁸ Unreported, ECCA, Antigua Civil Appeal No. 6 of 1992

[34] I note that the Claimant was incorporated for a special purpose. The Claimant is Mr. Burns' alter ego and was essentially his corporate vehicle for providing his services. I accept that the contract was awarded on the basis of Mr. Burns' special skill and expertise in stone work, however, I am far from satisfied that the Claimant would not be able to find alternative employment or source of income for an extended period. In his witness statement Mr. Burns claimed that he would ordinarily charge out at US\$15,625 per month plus expenses. Because of the specialist nature of the skills and service offered by the Claimant, I am prepared to assess the damages in the sum of \$187,500 which would cover the period of one year by which time I would expect that the Claimant would probably find other work.

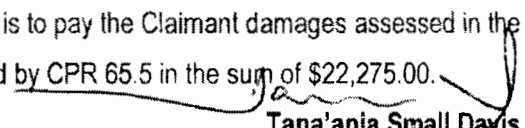
[35] I reject the Claimant's claim for reimbursement of the US\$5,000 spent in preparatory work for the contract. I find as a fact that that sum was incurred in Mr. Burns' pursuit of a contract to supply and install the marble and stone works for the Project. That is the cost of doing business.

Claim for Indemnification

[36] The Claimant also seeks indemnification against Pisani plc claim for €40,500 which is €18,000 for material storage for 12 months, €9,000 for meetings and quarry visits in speculation of contract, €2,000 for sample books, €4,800 for laboratory testing of stones and €6,250 for locating and delivering samples, sourcing of stone etc. I am reluctant to make any order in relation to this claim since I do not consider that any of them has been proved to my satisfaction. Certainly as it relates to the laboratory testing, sourcing of stone and delivering samples, these are matters that are in the ordinary course of its business. I decline to make any order for indemnification as sought by the Claimant.

Conclusion

[37] In conclusion, the order is the Defendant is to pay the Claimant damages assessed in the sum of \$187,500 plus costs as prescribed by CPR 65.5 in the sum of \$22,275.00.


Tana'ania Small Davis

High Court Judge (Ag)