

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

SAINT LUCIA

CLAIM NO. SLUHCV 2005/0201

BETWEEN:

VICTORIA CLIFFORD

Claimant

and

PROTUS AUGUSTE

Defendant/
Ancillary Claimant

and

**JOSEPH ALEXANDER also
known as Andrew**

Ancillary Defendant

Appearances :

Mr. H. Fraser for Claimant

Mrs. V. Bernard for Defendant/Ancillary Claimant

Ancillary Defendant Unrepresented and not appearing

2006: October 24;
November 13.

JUDGMENT

INTRODUCTION

[1] **EDWARDS, J.:** This is an action for breach of a building contract. The facts give rise to the main issue as to whether or not Mr. Protus Auguste is liable in damages to Ms. Victoria Clifford for the misdeeds of Mr. Joseph Alexander under the law of Agency.

BACKGROUND FACTS

- [2] Ms. Clifford sold her 2 bedroom house at St. Jude's Highway to Dr. Surage in March 2002. She thereafter entered into a written agreement with Mr. Auguste a contractor and builder, to build her a 3 bedroom plywood house on land at Aupicon, Vieux Fort within 6 weeks.
- [3] She paid a deposit of \$6,000.00 to Mr. Auguste on the 27th March 2002 the date of the contract. Subsequently, she paid a total of approximately \$18,800.00 or \$19,000.00 to Mr. Alexander a general builder, who was Mr. Auguste's on site supervisor. Mr. Alexander absconded with the money, leaving only the concrete foundation on the site which Mr. Auguste had laid out, and which Mr. Auguste's team of workmen and Mr. Alexander had completed.
- [4] Ms. Clifford alleges that she paid the money to Mr. Alexander because Mr. Auguste came to her after 3 months had passed without having commenced the construction of the house, and introduced Mr. Alexander to her as the builder who would be building the house. She testified that Mr. Auguste told her then that anything Mr. Alexander wants, she is to give it to him. That Mr. Auguste instructed her then to give \$8000 to Mr. Alexander which she did. That within one week later, Mr. Alexander returned and told her that since it was a plywood house, he wanted to buy all the material one time, so she should give him the balance of the money.
- [5] Ms. Clifford contends that because she was a bit concerned about Mr. Alexander's request, she went in search of Mr. Auguste, accompanied by Mr. Alexander. She said that she met Mr. Auguste, who told her in the presence of Mr. Alexander that she could give Mr. Alexander the balance of the money.

- [6] Mr. Auguste's version of some of the events is diametrically opposed to Ms. Clifford's account. He admitted that there was a written agreement between them, but he contends that the house was to be built for \$26,000.00 and not \$25,000.00 as alleged by Ms. Clifford. According to him, the agreement called for payment in 4 phases. The first payment was to be \$6,000.00, the second payment \$8,000.00, the third payment \$6,000.00 after all walls and partitions were erected, and then the final payment of \$8,000.00 was to be made.
- [7] Mr. Auguste testified that within a few days after receiving the \$6,000.00 from Ms. Clifford, he completed setting out the foundation. However, he encountered hitches he said, because there was somebody else, next door actually claiming the land. Despite the threats from the neighbour, after informing Ms. Clifford almost daily about what was happening, he proceeded to complete the concrete slab about 3 weeks after digging.
- [8] Mr. Auguste has disputed the conversation he had with Ms. Clifford when he introduced her to Mr. Alexander. He testified that he told her that Mr. Alexander was his builder on the site who puts up blocks. He has denied telling her that Mr. Alexander was to build her house, or that Mr. Alexander was buying the materials and she should give him the money. He deposed that she paid \$18,800.00 to Mr. Alexander without his knowledge or consent.
- [9] According to Mr. Auguste, after he had completed building the slab Ms. Clifford could not come up with the balance of the money for him to continue building the house. After he had deliberated with her and questioned her about it, she told him that she had agreed with Mr. Alexander for him to build her a block house in a different area for the same money, and she had taken him to see the place already.
- [10] He testified under cross examination that he understood from what she told him, that she had already breached the contract and he was out of it. Since she was his

friend, and he had been involved with her in selling her house and had helped her price it, he tried to help her to find Mr. Alexander, who by then, had vanished in August 2002.

THE PLEADINGS

- [11] By a Claim filed on 22nd March 2005, and the Amended Statement of Claim filed on 27th May 2005, Ms. Clifford has averred among other things, the following. That she had fully satisfied her consideration under the contract, and Mr. Auguste in breach of the said contract, failed to build the said house as provided by the contract, having only constructed the concrete foundation for the building and no more. That in breach of the contract, Mr. Auguste has neglected, omitted or refused to complete the said building, in keeping with the contract, despite her repeated demands for him to complete the said building, or refund the sum had or received.
- [12] She pleaded and testified that she has mitigated her loss by selling the concrete foundation for \$8000.00. She has claimed special damages totaling \$7,653.11, a refund of consideration \$17,000.00, damages for breach of contract, expenses incurred and costs.
- [13] By his Amended Defence filed on 13th June, 2006 Mr. Auguste pleaded that Ms. Clifford told him **“that she had given the balance of the monies in full to Mr. Joseph Alexander (the carpenter on the job) because he had arrived at an agreement with her to construct a concrete block house for the balance of the money since she . . . had decided to opt for the construction of a concrete house for the same amount of money by the said Joseph Alexander instead of a plywood house by . . . [him].”**
- [14] Mr. Auguste has denied the disputed facts pleaded by Ms. Clifford, he has requested that the claim be dismissed with costs.

- [15] On 27th June 2005 the Master granted leave to Mr. Auguste to bring an ancillary relief claim against Mr. Alexander.
- [16] By the Ancillary Claimant's Statement of Case filed on 6th July 2005, Mr. Auguste pleaded his version of facts alleged in his amended defence. That Ms. Clifford paid the sum of \$18,000.00 to Joseph Alexander without his knowledge and consent. That in August 2002 Ms. Clifford accompanied by her boyfriend, Mr. Jacob who is an electrician, and himself caught up with Mr. Alexander at his house at Grace, Vieux Fort. That Mr. Alexander told Ms. Auguste then: **"that the deal between himself and the Claimant had nothing to do with the Defendant and he would refund the Claimant \$18,800.00 which was the sum she the Claimant had paid Mr. Alexander under their agreement."**
- [17] Mr. Auguste has claimed in this Ancillary Claimant's Statement of Claim, that he be indemnified by the Ancillary Defendant against all costs claims and demands made by the Claimant herein arising out of the claim. Further, that the Ancillary Defendant Mr. Alexander do pay the costs arising out of the Ancillary Claim.
- [18] Mr. Alexander was served with the Ancillary Claim and Statement of Claim on 28th October 2005. On 25th November 2005 the Master ordered that Judgment in default of defence be entered against the Ancillary Defendant and the said judgment shall await the outcome of the trial.

FINDINGS OF FACT

- [19] I make the following findings of fact from the testimony of Ms. Clifford her witness Mr. Charles Anthony, Mr. Auguste, the documentary exhibits, and submissions of Counsel.

- [20] Mr. Anthony is a Carpenter and the boyfriend of Ms. Clifford. In light of Mr. Anthony's evidence which confirmed that the contract called for 4 phased payments as disclosed in the unsigned agreement tendered by Mr. Auguste, I find that this document reflects the correct terms of the contract between Ms. Clifford and Mr. Auguste.
- [21] Ms. Clifford tendered a photocopy of her passbook for her Savings Account at the St. Lucia Co-operative Bank. It discloses that on 1st March 2002, \$7000.00 was deposited in the Account; and another sum of \$25,000.00 was deposited on 22nd March 2002. Among the 16 withdrawals that were made by Ms. Clifford between 1st March 2002 and 30th June 2002 were: \$7,700.00 on 27th March 2002, \$10,000.00 on 5th April 2002, and \$10,880.00 on 21st May 2002.
- [22] Learned Counsel Mr. Fraser submitted that this exhibit shows that Ms. Clifford was then a person of meager financial means. It would have been of no benefit to her to expend money building the concrete foundation for one house, and after having started the construction, try to build another house without completing the first one, he argued. Further, Counsel submitted, the fact that Ms. Clifford testified that she sold the foundation over 1 year after its construction, suggests that selling it just after its construction was not in her contemplation.
- [23] It is clear from this exhibit that towards the end of June – the time that Ms. Clifford testified she was introduced to Mr. Alexander – all she had in the account was \$83.59. Whether or not the withdrawals she made between 3rd April 2002 up to and on 21st May 2002 provided the source of funding for the \$18,800.00 she paid to Mr. Alexander, it is reasonable to infer from Ms. Clifford's testimony that she was a person of limited means proverbially counting her pennies.
- [24] I therefore agree with Counsel Mr. Fraser's submissions. I find it highly improbable that Ms. Clifford would be entering into a new agreement with Mr. Alexander, as

learned Counsel Mrs. Barnard urged the Court to find, to build her a concrete house in another area for \$18,800.00. I accept Ms. Clifford's testimony that the money she had could not cater for a wall house, and she had no intentions of building a wall house, since she had planned to move into the plywood house as quickly as possible. She has denied having any discussions with Mr. Alexander for him to build a concrete house for her and I believe her.

[25] Mr. Auguste has admitted that he is a Calypsonian known as "**Mr. Educator**", and that March to July of each year is Calypso season in St. Lucia. Mr. Auguste testified that Mr. Alexander had worked for him and with him in the past and he trusted him. He described Mr. Alexander as multi skilled, able to do masonry, carpentry and joinery, fix blocks, supervise and read blue prints of drawings. He testified that Mr. Alexander also took contracts on his own as an individual contractor.

[26] It is obvious from the evidence therefore that Mr. Auguste permitted Mr. Alexander to act for him in the management and conduct of building Ms. Clifford's house, since he was distracted from building the house by his calypsonian activities.

[27] Mr. Auguste testified that Mr. Alexander was not only to supervise the construction of the concrete foundation for Ms. Clifford's house, but he was also to stay on the site as the general builder to do carpentry and other work on the building.

[28] Mr. Auguste testified that he intended to build the house himself, to get the cash from Ms. Clifford, purchase the material, while Mr. Alexander did work on the site as builder who puts up blocks. In such circumstances, there would be no need for him to introduce Ms. Clifford to Mr. Alexander. There is no evidence that he introduced other members of his work team to Ms. Clifford.

[29] I therefore find that the reason why he introduced Mr. Alexander to Ms. Clifford was because he needed to communicate to her that he was authorizing Mr.

Alexander to act on his behalf in building her house. I also find that Mr. Auguste did instruct Ms. Clifford to give Mr. Alexander the \$18,850.00 so that he could build the house.

[30] As for the testimony concerning Mr. Auguste's involvement in tracking down Mr. Alexander, with a view to the recovery of Ms. Clifford's \$18,850.00 from him; learned Counsel Mr. Fraser submitted that this tends to show that Mr. Auguste had accepted being responsible for Mr. Alexander's dishonest deed. I endorse this view.

[31] In my opinion this subsequent conduct of Mr. Alexander in assisting Ms. Clifford to find Mr. Alexander and recover her money, is overwhelming evidence that Mr. Auguste recognized that Mr. Alexander was accountable to him for Ms Clifford's \$18,800.00. The evidence is that at the confrontation where Ms. Clifford, Mr. Anthony, Mr. Auguste and Mr. Alexander were present at the home of Mr. Alexander, Mr. Auguste began crying, while asking Mr. Alexander **"why you have to do that to me?"** Apart from these words making a good line for **"Mr. Educator's"** future calypso composition, this in my view, is cogent evidence that Mr. Auguste was acknowledging that he was answerable for the wrong doing of Mr. Alexander.

[32] I turn now to consider the law of Agency and submissions of Counsel and apply the law to the facts found.

LAW AND SUBMISSIONS OF COUNSEL

[33] Learned Counsel Mr. Fraser, has correctly identified the applicable law to be agency. He has relied on 2 cases as authorities for his submissions that Mr. Auguste had actually authorized Mr. Alexander to act on his behalf in introducing

Ms. Clifford to Mr. Alexander, and should therefore be held accountable for Ms. Clifford's loss: **Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd** [1964] 2 QB 480; **Lloyd v Grace Smith [1912] A.C. 716.**

[34] Neither Counsel alluded to the provisions of the Civil Code of St. Lucia. Cap 242. Articles 1601 to 1661 comprehensively define the law of agency, while providing by Article 1608 A, for the law of England for the time being relating to the contract of agency, to extend to and be applied in St. Lucia, subject to local statutory provisions.

[35] Article 1601 states that **“Agency is a contract by which a person, called the principal, commits a lawful business to the management of another, called the agent, who by his acceptance binds himself to perform it.**

The acceptance may be implied from the acts of the agent, and in some cases from his silence.”

[36] Article 1604 states that **“The Agent can do nothing beyond the authority given or implied by the agency. He may do all acts which are incidental to such authority and necessary for the execution of the agency.”**

[37] Articles 1609 and 1627 provide as follows:

“1609. The agent is obliged to execute the agency which he has accepted, and he is liable for damages resulting from his non-execution of it while his authority continues . . .

1627. The principal is bound in favour of third persons for all the acts of his agent, done in execution and within the powers of the agency, except in the case provided for in article 1638 [concerning the Agents under the Commercial Code Cap. 244], and the cases

wherein by agreement or the usage of trade, the latter alone is bound.”

- [38] In light of my findings at paragraphs 26, 29 to 31 above, and the law as stated, it is important for me to determine whether the acts of Mr. Alexander, by collecting the money from Ms. Clifford and dishonestly misappropriating it, was within the scope of his authority as the special agent of Mr. Auguste.
- [39] From as far back as 1877 it was held in Swire v Francis 3 App. Case 106, that a principal is liable for the fraud of his agent though it was committed for the benefit of the agent himself and not for the benefit of the principal.
- [40] The law is now well settled that an innocent principal may be liable for the fraud of his agent. It was held in Lloyd v Grace Smith & Co. supra that the firm of Solicitors were responsible for the fraud committed by their conveyancing manager/managing clerk in the course of his employment. He had induced Mrs. Lloyd to give him instructions to sell her cottages and call in her mortgage money. Having induced her to give him her deeds (for which he gave her receipt in the firm's name), he caused her to sign 2 documents which were neither read over to her nor explained to her. She had signed them, believing that she had to sign them in order to effect the sale of the cottages. These documents were in fact a conveyance to him of the cottages, and a transfer to him of the mortgage. He then dishonestly disposed of the property for his own benefit.
- [41] Lord Mc Naughten at pages 732 and 733 in Lloyd supra, confirmed the law to be as stated by Willes J in Barwick v English Joint Stock Bank L.R. 2 Ex. 259.

“The general rule is that the master is answerable for every such wrong of the servant or agent as is committed in the course of service and for the master's benefit, though no express command or privity of the master be proved.”

[42] Willes J, having enumerated instances where this principle had been applied, continued –

“In all these cases it may be said, as it was said here, that the master had not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing business which it was the act of his master to place him in.”

[43] In the instant case, I have found that Mr. Auguste authorized Mr. Alexander to collect the money from Ms. Clifford. Implicit in this finding, is my rejection of the pleading and testimony of Mr. Auguste, that Mr. Alexander said in the presence of the parties at the confrontation, the statement alleged at paragraph 16 of this judgment.

[44] Not only did Mr. Alexander authorize the collection of Ms. Clifford's money by Mr. Alexander, but he also put Mr. Alexander in his place to supervise and carry out the building of the house. In these circumstances therefore, this Court should not embark on any investigation as to the private motives of Mr. Alexander. It matters not that according to Mr. Auguste, Mr. Alexander had taken Ms. Clifford's money and used it to pay Scotia Bank for money owed on a warrant out for him. Ms. Clifford deposed this at paragraph 8 of her Witness Statement.

[45] The general rule is that the principal is liable to third persons in a civil suit for the fraud, deceit, dishonesty, malfeasance or misfeasance, and omissions of duty of his agent, in the course of his employment, or within the scope of his authority, although the principal did not authorize, or justify, or participate in, or indeed know of such conduct, or even if he forbade the acts or disapproved of them: **(Story on Agency**, section 452 applied by Lord Mac Naughten in **Lloyds** supra).

[46] I therefore hold that the acts of Mr. Alexander were within the scope of his authority as the agent of Mr. Auguste. Mr. Auguste is therefore bound by the acts of Mr. Alexander, and is liable in damages to Ms. Clifford for breach of contract.

[47] I now move on to consider the damages available to Ms. Clifford.

DAMAGES

[48] Ms. Clifford in her Amended Statement of Claim pleaded that **“As a result of the defendant's breach of the said agreement the Claimant was put to considerable expense; (a) being forced to rent a house for the sum of \$300.00 per month after the lapse of 6 weeks and after the said house was not built, and (b) to have a water meter installed in relation to the unbuilt house and preparatory in relation to outfitting the said would-be-building with potable water.”**

[49] Her Particulars of Damage are pleaded as follows:

“Refund of consideration	=	- \$17,000.00
Expenses: Rent	=	\$6,900.00
Water Installation	=	\$ 753.11
Total Expense	=	\$7,653.11”

[50] Mr. Fraser submitted that Mr. Auguste is liable to replace the sum of money appropriated by Mr. Alexander.

[51] On the other hand, Learned Counsel Mrs. Barnard has submitted that the expenditures claimed by Ms. Clifford have not been proven by her.

[52] Mrs. Barnard quite rightly focused on the absence of documentary proof that she purchased the water meter and paid the installation fee, she has not disclosed the

landlord to whom she paid rent, or produced any receipts or other documentary evidence.

[53] Mrs. Barnard further submitted, that since under the initial contract the house was to be completed within 6 weeks, that Ms. Clifford ought to have mitigated her loss by hiring another builder. My findings do not accord with Counsel Mrs. Barnard's contention that Ms. Clifford did in fact mitigate her loss by hiring Mr. Alexander as builder.

[54] The rule relating to awards for general and special damages was stated by Lord Mac Naughten in Stroms Bruks Aktie Bolag v Hutchinson [1905] A.C. 515 at pages 525-526:

“General damages’ . . . are such as the law will presume to be the direct natural or probable consequence of the action complained of ‘Special damages’ on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and therefore, they must be claimed specially and proved strictly” (My emphasis).

[55] The law on mitigation required Ms. Clifford to take all reasonable steps to lessen the damage resulting from the wrongful acts of Mr. Auguste. She was not entitled to sit back and suffer loss which could have been avoided by her reasonable efforts. She cannot recover for avoided loss, and Mr. Auguste is entitled to the benefits accruing from Ms. Clifford's act of mitigation. Since she sold the concrete foundation for \$8,000.00 Mr. Auguste's liability in damages is lessened by \$8,000.00.

[56] Since Ms. Clifford has provided no documentary proof or other testimony that she paid a landlord \$300.00 monthly totaling \$6,900.00, she will not be allowed to recover this sum. Similar considerations obtain for the water meter.

[57] The general principle to be applied is that the party injured by the breach should be put into as good a position as far as money can do it, as she would have been if there had been no breach.

[58] In my opinion therefore, justice will be best served if Ms. Clifford is awarded the amount of \$24,800.00 being the total sums she paid towards building the house under the contract, less the sum of \$8000.00 she recovered by selling the concrete slab.

[59] I therefore will enter judgment for the Claimant against the Defendant in the sum of \$16,800.00. Pursuant to Article 1009A of the Civil Code, I order that there be added to the \$16,800.00, interest at the rate of 6% per annum for the period between August 2002 to August 2006. This interest amounts to \$4,032.00.

[60] The prescribed costs awarded on \$20,832.00 pursuant to PART 65.5 (2) (a) and Appendix B is \$6,249.60.

[61] Judgment will be entered for the Ancillary Claimant against the Ancillary Defendant in terms of paragraph 59 above with prescribed costs pursuant to PART 65.5 and Appendix C (6) being \$4,874.58.

[62] There will be 6% interest per annum on the Judgment debt from 13th November 2000 until full and final payment.

CONCLUSION

[63] Judgment is hereby entered for the Claimant against the Defendant on the Claim, in the sum of \$20,832.00 plus costs \$6,249.60 with interest at 6% per annum on the judgment debt from 13th November 2006 until full and final payment.

[64] Judgment is hereby entered for the Ancillary Claimant against the Ancillary Defendant on the Ancillary Claim, in the sum of \$27,081.60 plus costs \$4,874.58 with interest at 6% per annum on the judgment debt from 13th November 2006 until full and final payment.

DATED THIS 8TH DAY OF NOVEMBER, 2006

**OLA MAE EDWARDS
HIGH COURT JUDGE**