



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. HCV 2488/2009

BETWEEN	STEVENSON SAMUELS	1 <sup>ST</sup> CLAIMANT
AND	LARENE SAMUELS	2 <sup>ND</sup> CLAIMANT
AND	LORRAINE CATO	DEFENDANT

Ms. Tameka Jordan for the claimants instructed by Jacqueline Samuels-Brown and Associates.

The defendant unrepresented and not appearing.

June 9 and August 9, 2011

**Damages for breach of contract – Cost of cure approach to determining damages – Loss of amenity flowing from breach of contract – Who can recover? – Damages for loss of amenity to be modest compensation**

**Fraser J.**

[1] I wish at the outset to thank counsel for her clearly structured submissions which provided the court with great assistance in composing this judgment.

## **INTRODUCTION**

- [2] The claimants in this matter Mr. Stevenson Samuels and his wife Mrs. Larene Samuels live at 14 Parl Road Belvedere in the parish of Saint Andrew.
- [3] In 2008, together they planned to refurbish their house. One main item in this refurbishment was the entire replacement of the roof. The roof, in place for almost fifteen years up to 2008, had for some years been leaking in parts. It had reached the end of its life span. Hence the decision to completely replace it.
- [4] On the recommendation of the general contractor PICAN Construction who had been engaged by the claimants to carry out renovations to the claimants' house, the defendant was contacted by the 2<sup>nd</sup> claimant concerning the roofing job. The 2<sup>nd</sup> claimant spoke to the defendant via telephone and the defendant represented to her that she had experience in roofing and that she had a qualified staff of men who could do the job.

## **THE CONTRACT AND ITS BREACH**

- [5] The 2<sup>nd</sup> claimant entered into a contract with the defendant dated March 17, 2008 for her to replace the existing roof with a new roof using metro tiles. The implications of the contract having been entered into by only one of the two claimants will be addressed later in the judgment.
- [6] The cost payable to the defendant under the contract was \$1,184,367.79. The original contract was deposited by the 2<sup>nd</sup> claimant with her employer, the Bank of Jamaica, in support of her application

for a staff loan to finance the renovations. The best available evidence, a copy of this contract dated 25<sup>th</sup> March 2008 was therefore received in evidence as exhibit 6. The contract stipulated that the Employer, (the 2<sup>nd</sup> claimant), should supply the Contractor, (the defendant), with all the materials required for carrying out the work.

[7] The claimants obtained the roofing material supplies from Spectrum Systems Limited. The 2<sup>nd</sup> claimant paid for the supplies using two cheques dated the 8<sup>th</sup> April 2008 and the 2<sup>nd</sup> July 2008 totaling \$991,585.65. These were received in evidence as exhibits 8A and 8B in date order.

[8] The contract also provided that the Employer should pay the Contractor the sum of \$296,000.00 plus GCT. Eighty percent (80%) on completion of the work and twenty percent (20%) on the expiration of the defects correction period of 3 months. The delay in payment of the 20% was to provide for the event of any defects in the work for which the Contractor was responsible by reason of breaching one or more of the express warranties given.

[9] Clauses 4, 7 and 10 of the contract are of particular significance.

4. The Contractor will make good by rework, rectification, repair or replacement parts, any defects in relation to the warranties given under clause 7, which appear in the roofing within the Defects Correction Period, and have been notified by the Employer to the Employer to the Contractor within thirty days of their appearance.

...

7. The Contractor agrees to carry out the work in a timely manner to ensure good workmanship and to

satisfactorily complete the works on or before the expiration of fourteen (14) days from the date of this Agreement.

...

10. The Contractor guarantees that all work supplied by it in performance of the works shall be supplied by personnel who are skilled, experienced and competent in their respective professions. The Contractor further guarantees to the Employer that the work shall conform with recognized professional standards and principles and further that this Guarantee shall remain for a period of ninety (90) days from the date hereof.

[10] The work commenced shortly after the signing of the contract and was completed by the defendant's workmen in approximately four months. The defendant was paid the sum of \$191,433.01 as proceeds flowing from the contract. The payment of this amount was proven through four cleared cheques paid by the 2<sup>nd</sup> claimant to the defendant dated the 2<sup>nd</sup>, 7<sup>th</sup>, 18<sup>th</sup> and 30<sup>th</sup> July 2008, received in evidence as exhibits 7A – 7D in date order.

[11] The defendant assured the 2<sup>nd</sup> claimant that the roof was sound. Rains on Sunday August 24 and between Thursday, August 28 and Saturday August 30, 2008, however proved that the roof was anything but watertight. Several rooms suffered severe leaking — the helper's room, their daughter's room, living room, computer room, master bedroom, walk in closet and study. Furniture and books suffered water damage and the newly replaced flooring in the living room was soaked.

[12] Having initially contacted the defendant on August 25, 2008 concerning the problems, on the 29<sup>th</sup> August 2008 the 2<sup>nd</sup> complainant contacted the defendant again concerning the defects. Workmen attended on the 3<sup>rd</sup> September 2008 and reportedly applied an adhesive. All to no avail. On the 4<sup>th</sup> September 2008 it again rained heavily causing severe leaking in the living room. The 1<sup>st</sup> claimant had to be wiping up water during the rain to minimize damage to the flooring. The 1<sup>st</sup> claimant also had to relocate furniture away from leaking areas of the roof to protect them.

[13] On the following day, the 5<sup>th</sup> September 2008, the 2<sup>nd</sup> claimant called the defendant by telephone to further discuss the situation. The defendant indicated that her team had visited, failed to identify any problem and that she had not had any problems with any of her other jobs. This stance was maintained by the defendant despite indications from the 2<sup>nd</sup> claimant that the roof was leaking worse than when the old roof was on and that the defendant needed to get a second opinion on the roof. The conversation was then terminated by the defendant and thereafter efforts by the 2<sup>nd</sup> claimant to contact the defendant proved futile.

#### **THE CLAIMANTS' REMEDIAL ACTION AND THE INCONVENIENCE SUFFERED**

[14] In October 2008 the 2<sup>nd</sup> Claimant contacted Coverall Roofing Limited to do an assessment of what was wrong with the replaced roof. This assessment was done on October 22, 2008 and the report of the Managing Director Mr. George Elliot dated November 5, 2008 was received in evidence as exhibit 9.

[15] The report outlined the following defects:

- a. Seams of the individual tiles were not staggered in some areas
- b. Side-laps were not fitted as required by the particular profile.
- c. In one area, the flat valley gutter does not adequately drain wastewater.
- d. There was evidence of multiple leaks as evidenced by water marks along walls as well as timber sarking.

[16] Mr. Elliott concluded the report by stating the professional opinion that the leaks were caused by faulty installation and not from the usage of defective material.

[17] The recommendation of Mr. Elliott was that the roof be replaced. This recommendation was accepted by the claimants as the new roof was leaking worse than the old one and it was estimated that the cost to repair it would amount to the cost of a new roof.

[18] The claimants decided to use Mr. Elliott to do the replacement. They did not however have the money to immediately engage his services, having just completed their renovation and being in the process of repaying the loan they had secured for that purpose.

[19] The claimants were unable to employ Mr. Elliott until July 2010 at which point he replaced the leaking roof put on by the defendant with another roof which was watertight. The agreement between the 1<sup>st</sup> claimant and Mr. Elliot was contained in a signed undated contract. The original Contract not being available, a copy was received in evidence as exhibit 5. The cost of Mr. Elliot's services as outlined in the Contract and an Estimate dated June 22, 2010, received in evidence

as exhibit 1, was \$522,106.00. Two cheques totaling \$476,219.20 dated the 14<sup>th</sup> and 21<sup>st</sup> July 2010 , both paid to George Elliott, one by the 1<sup>st</sup> and the other by the 2<sup>nd</sup> claimant, were received in evidence as exhibits 4 and 10 respectively.

[20] The cost of material sourced from Spectrum Systems Limited was \$877,829.81. In proof of payment of these sums an Invoice dated July 12, 2010 and printed March 17, 2011 endorsed "Paid Partially" which indicated that \$733,533.55 had been received and \$144,296.26 was the balance due, was received in evidence as exhibit 2. Also received in evidence in proof of payments to Spectrum was one paid cheque signed by the 1<sup>st</sup> claimant dated July 14, 2010 (exhibit 3) and two paid cheques signed by the 2<sup>nd</sup> claimant dated August 17, 2010 and February 7, 2011 (exhibits 11A and 11B). Together these cheques total \$588,914.90.

[21] From the completion of the replacement of the roof in August 2008 until July 2010 when Mr. Elliott was contracted to put on a new roof to replace the replacement, the claimants were greatly inconvenienced anytime it rained. The evidence of both claimants is that during such rains the 2<sup>nd</sup> claimant had to line their wooden floors with old shower curtains and newspapers to protect it. The flooring in their bedroom was laminate and that suffered damage.

[22] The 2<sup>nd</sup> claimant in her evidence indicated that they could not bear to live in that condition anymore. They therefore had to re-do the entire roof as it was not known which sections were good and they were advised that all the roofing had to be replaced.

[23] The 1<sup>st</sup> claimant in his evidence went into greater detail. Paragraph 14 and a part of paragraph 15 of his evidence in chief read as follows:

14. I was greatly distressed and disappointed. This was not what I expected when my wife and I decided to renovate our home. I expected to be more comfortably [sic] and was looking forward to enjoying my new space. Instead, my family and I had to undergo tremendous inconvenience and for this I was most disappointed.

15. My wife and I could not bear to live in these conditions anymore and finally in 2010 I contracted Mr. Elliot to replace the roof...

#### **THE CLAIMANTS' ACTION TO RECOVER THEIR LOSS**

[24] The claimants commenced this action against the defendant seeking damages for breach of contract/negligence on May 12, 2009.

[25] The defendant could not be located and by virtue of court order dated April 26, 2009 was served with the Claim Form and Particulars of Claim by substituted service in the form of two publications in the Daily Gleaner Newspaper on May 4 and 11, 2010. Pursuant to the order for substituted service, the effective date of service was 42 days after the second publication being June 22, 2010.

[26] The defendant not having filed or served an Acknowledgment of Service or Defence, judgment in default was obtained by the claimants dated July 22, 2010 and entered in Judgment Binder no. 750 Folio 254 on October 27, 2010.

[27] After amendments at the hearing of the matter, the Claim sought general damages of \$1,399,935.81, damages for loss of amenities of

\$1,000,000, interest on those sums pursuant to the Law Reform (Miscellaneous Provisions) Act and attorney-at-law's fixed costs.

#### **WHAT METHOD SHOULD BE USED TO CALCULATE THE DAMAGES DUE?**

[28] The golden thread running through the law of damages is that the claimant should be compensated for the loss sustained. The principle has long been established that the aim of compensation for breach of contract which results in basic pecuniary loss, is to seek to return a claimant as closely as possible to the position he or she would have been in, had the breach not occurred. A clear statement of this principle is found in ***British Westinghouse Electric and Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Ltd.*** [1912] A.C. 673 at 688 where Viscount Haldane L.C. said:

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.

[29] In situations such as the present case, the issue is not whether or not damages should be recovered, but the way in which such damages should be calculated. A choice has to be made between the "difference in value" and the "cost of cure" approaches. In the former the claimant is awarded the pecuniary advantage lost as a result of the partial or complete deprivation of the contractual benefit. In the latter the

measure is the additional financial outlay the claimant has to undertake in order to put him or herself in as good a position as if the contractual benefit had been received.

[30] Counsel for the claimants cited Andrew Burrows, the learned author of ***Remedies for Torts and Breach of Contract***, 3<sup>rd</sup> Edition at page 209 – 210 where he points to three factors which influence courts in making the choice:

First, the claimant's duty to mitigate means that it will recover the cost of cure where it has, or ought to have, incurred that cost in reasonably seeking to minimize its losses. Secondly, the fact that the claimant has cured or intends to cure may be a decisive factor favouring the cost of cure. Thirdly, the claimant's purpose for wanting performance may be relevant; so if the claimant wanted performance primarily to reap economic gain, the difference in value will fully compensate the claimant; that is, it will obtain the intended profits. But if performance was wanted for other reasons (eg for pleasure), difference in value will not, or not as fully, compensate the claimant.

[31] Counsel for the claimants also cited the cases of ***Tito et al v. Waddell (No. 2)***; ***Tito et al v. Attorney General*** [1977] Ch 106 (generally cited as ***Tito v Waddell (No. 2)*** [1977] Ch 106) and ***Radford v. De Froberville*** [1977] 1 WLR 1262 in urging the court to adopt the "cost of cure" approach. In ***Tito v. Waddell (No. 2)*** a British Company mining for phosphate on Ocean Island, a small island in the Pacific, had promised by contract to restore the mined out land by replanting trees. They however failed to do so and were sued for their breach of contract. One of the issues for determination by the court was whether

the claimants, (a landowner and the Council of Leaders an incorporated body that received royalties from the mining operations), were entitled to the cost of the replacement of the trees as damages, i.e. the cost of cure. Megarry VC in delivering the judgment of the court stated at page 333:

...if the plaintiff establishes that the contractual work has been or will be done, then in all normal circumstances, it seems to me that he has shown that the cost of doing it is, or is part of, his loss and is recoverable as damages.

[32] The court however held that the claimants had failed to prove that the cost of replanting represented their loss, for reasons including that the Islanders had removed to another Island. The court therefore awarded minimal damages.

[33] Oliver J. in ***Radford v. De Froberville*** cited ***Tito v. Waddell (No. 2)*** with approval and applied the cost of cure approach. In ***Radford's*** case as a term of the contract for sale of land, the defendant agreed to build a dividing wall between himself and the claimant's land. He failed to do so. In holding that the claimant was entitled to the cost of cure, i.e. the cost of building the wall, Oliver J. at page 1270 letter E said:

If he contracts for the supply of that which he thinks serves his interests — be they commercial, aesthetic or merely eccentric — then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.

[34] His analysis of the application of the “cost of cure principle” concluded at page 1284 letter E as follows:

In the instant case, I am entirely satisfied that the plaintiff genuinely wants this work done and that he intends to expend any damages awarded on carrying it out. In my judgment, therefore, the damages ought to be measured by the cost of the work, unless there are some other considerations that point to a different measure.

[35] Considering the three factors which the learned author Burrows indicated inform courts’ decisions in cases of this type, along with the cases of *Tito v. Waddell (No. 2)* and *Radford*, it is manifest that the “cost of cure” approach is the appropriate measure of damages in this claim. The purpose of the replacement of the roof was to afford the claimants’ the pleasure of enhancing their living conditions and experience. Upon discovering the defendant’s breach and her refusal to address it, the claimants acted as quickly as they could in mitigation of damage given their financial constraints. The mitigation cured the defect. Therefore in the words of Oliver J. in *Radford’s* case, “...*the damages ought to be measured by the cost of the work...*”

[36] The cost of the work includes cost of labour and materials. The cost of labour as outlined in the Contract with Mr. Elliott (exhibit 5), the Estimate he provided (exhibit 1) and the evidence of the 1<sup>st</sup> claimant was \$522,106.00. The two cheques paid to Mr. Elliott received in evidence as exhibits 4 and 10 however only total \$476,219.20, a shortfall of \$45,886.80. I however accept on all the evidence that the labour cost is as stated and that the sum of \$45,886.80 has also either

been paid or is owing. The full sum of \$522,106.00 for the cost of labour is therefore recoverable.

[37] The cost of material was \$877,829.81. The cheques paid to Spectrum (exhibits 3, 11A and 11B) only total \$588,914.90. However the Invoice in the sum of \$877,829.81 endorsed "Paid Partially" (exhibit 2) indicated that \$733,533.55 had been received and \$144,296.26 was the balance due. Also the evidence of the 1<sup>st</sup> claimant is that they spent \$877,829.81 on materials. As in the case of the labour cost, on the evidence presented, I accept that the material cost is as stated and that the sum of \$144,296.26 has also either been paid or is owing. The full sum of \$877,829.81 for the cost of material is therefore recoverable.

[38] Accordingly, the total amount recoverable as general damages for breach of the contract is the cost of the second replacement of the roof (the "cost of cure") in the sum claimed and proved **\$1,399,935.81**.

**LOSS OF AMENITY – CAN DAMAGES BE AWARDED UNDER THIS HEAD AND IF SO WHO CAN RECOVER?**

[39] Damages for the "cost of cure" constitute only a part of the Claim. The claimants also seek compensation for the distress, loss of enjoyment and inconvenience they suffered having to endure the effects of a leaking roof — a roof that was new but which leaked worse than the old roof — for the period from August 2008 to July 2010 when they were finally able to engage Mr. Elliott to redo the roof.

[40] In the case of *Ruxley Electronics and Construction Ltd. v. Forsyth* [1996] A.C. 344 the House of Lords awarded the plaintiff compensation for loss of amenity where the plaintiff's enjoyment of his swimming pool

was diminished as the pool, though perfectly usable, had not been constructed by the defendant to the depth agreed under the contract.

[41] Lord Lloyd of Berwick having earlier on page 374 referred to **Addis v. Gramophone Co. Ltd.** [1909] A.C. 488 later on the same page noted:

Addis v. Gramophone Co. Ltd. established the general rule that in claims for breach of contract, the plaintiff cannot recover damages for his injured feelings. But the rule, like most rules, is subject to exceptions. One of the well established exceptions is when the object of the contract is to afford pleasure, as, for example, where the plaintiff has booked a holiday with a tour operator. If the tour operator is in breach of contract by failing to provide what the contract called for, the plaintiff may recover damages for his disappointment: see Jarvis v. Swan Tours Ltd. [1973] Q.B. 233 and Jackson v. Horizon Holidays Ltd. [1975] 1 W.L.R. 1468.

[42] Their Lordships did not believe it reasonable to award the full costs of rebuilding the pool as that course would have caused the defendant builders to incur a cost out of proportion to the benefit the landowner would derive. The sum of £2,500 initially awarded by the learned trial judge for the plaintiff's disappointed expectations was reinstated by their Lordships, though Lord Lloyd of Berwick thought the plaintiff fortunate to obtain an award in that amount.

[43] In the local case of **Magerine McWilliams et al v. Magil Construction Ja. Ltd.** Claim no. 2007HCV01945 (November 12, 2009) the issue of damages for loss of amenity caused by a breach of contract also had to be addressed. There the defendant, in breach of contract, built part of the house for the adjoining lot on the premises of

the claimants. To reinstate the parties to their respective positions prior to the breach, would have involved the demolition of a part of or that entire house. This would not have been reasonable as the cost of that re-instatement would have far outweighed the benefit to be gained by the claimants. Lawrence-Beswick J. found the plans given in evidence by the claimants for the use of the land appropriated and no longer available somewhat exaggerated. These were suggested to be the construction of a swimming pool, deck and two door garage. The learned judge instead found that before the discovery of the encroachment the claimants had constructed back and front walls a driveway and a verandah, and that there were only some minor improvements which the claimants would no longer be able to make due to the changes in the size and shape of the land. In the circumstances, and bearing in mind the principle stated in ***Perry v. Sidney Phillips & Son*** [1982] 1 W.L.R 1297, that damages for anxiety, worry and distress should be modest, an award of \$500,000 was made to cover this head of damage.

[44] The ***Ruxley*** and ***McWilliams***' cases both addressed situations where the damages for loss of amenity essentially compensated for loss of expectations, which though relatively minor, were permanent. In the present Claim the loss of amenity is not permanent. However in the submission of counsel, the serious leaking whenever it rained was a significant source of distress, anxiety and inconvenience to the claimants for the approximately two years during which the situation had to be endured. For this reason the case of ***Jackson v. Horizon***

**Holidays** [1975] 1 W. L. R. 1468 that deals with breach of a promise to provide a temporary benefit, lends an important perspective to the considerations concerning this head of damage.

[45] In **Jackson's** case the plaintiff booked a 28 day holiday for himself, his wife and twin sons. The promised accommodation was not ready and the replacement accommodation, food, services, amenities and general standard of the substituted hotel caused the family to suffer great disappointment and distress. After 2 weeks they were able to move to another hotel where things were somewhat better. They however went home sorely disappointed. The cost of the holiday was £1200. The Court of Appeal in England upheld the learned trial judge's award of £1,100, holding the family had received only about half the value of the holiday. The sum awarded was therefore divided into £600 for the diminution in value of the holiday and £500 for their mental distress.

[46] Importantly **Jackson's** case also shows that the established principle of privity of contract whereby only a party to a contract can sue for a breach of that contract, does not in all circumstances limit recovery of damages only to that suffered by a party to the contract. It was therefore held that, where a contract is made for the benefit of others, the party to the contract who suffers the breach may recover damages not only for his own mental distress and inconvenience but also for that of the others for whose benefit the contract was made. From such damages those third parties can be recompensed.

[47] This principle is directly applicable to the present Claim. The contract with the defendant for the replacement of the roof was entered into only by the 2<sup>nd</sup> claimant. The 1<sup>st</sup> claimant was however severely affected as well. No doubt if there were other inhabitants of the household they would also have been inconvenienced as there is mention of the leaking in the helper's and also the daughter's room. No evidence was however received concerning whether they were living at the house between August 2008 and July 2010 and I will therefore only take the 1<sup>st</sup> claimant into account in addition to the 2<sup>nd</sup> claimant in computing the award of damages under this head.

[48] *En passant*, I note that the Claim also sounds in negligence. It could be maintained that there was a duty of care owed by the defendant to the occupiers of the household which was breached as a result of the roof not being properly fixed. Further that this breach directly led to both claimants suffering loss of amenities. On that analysis both claimants could alternatively recover under this head on the basis of tort rather than contract law. The point was however not fully argued and need not be pursued, given the adequate redress achievable under contract law.

[49] What then should the appropriate award under this head be in the circumstances? The award in **Ruxley's** case when updated amounts to £13,760.94 or Jamaican \$1,916,432.06. As decided in **Jamaica Public Service v Barr et al** (1988) 25 JLR 326, this should be discounted by 30% for contingencies bearing in mind the difference in the English and Jamaican economies. The figure then amounts to \$1,341,502.44. The

sum of \$500,000 awarded in the *McWilliams*' case when updated amounts to \$570,611.97. *Jackson's* case is of too great a vintage to provide assistance by way of monetary comparison.

[50] The following are the factors that guide the court in determining the award. The distress and inconvenience being compensated for is in respect of both claimants. It was severe and lasted intermittently for approximately two years, but no longer persists as the roof has now been fixed. The authorities maintain that damages awarded under this head should be modest compensation. Accordingly in the circumstances I hold that the sum of **\$700,000** is an appropriate award under this head.

[51] The court therefore makes the following order, awarding general damages, interest and attorney-at-law's costs:

- a. Damages for breach of contract in the sum of **\$1,399,935.81**;
- b. Damages for loss of amenities in respect of both claimants in the sum of **\$700,000**;
- c. Interest on both sums at the rate of 3% per annum from June 22, 2010 to August 9, 2011;
- d. Attorney-at-law's fixed costs of **\$78,000** under Part 65 of the Civil Procedure Rules 2002 as amended in 2006, to the claimants, comprised as follows:
  - i. Application for substituted service - \$8,000 (Appendix B, Table 2);
  - ii. Service by post - \$8,000 (Appendix A, Table 1);
  - iii. Judgment in default - \$12,000 (Appendix A, Table 2);

iv. Uncontested Assessment of Damages - \$40,000.00

(Appendix B, Table 1);

v. Copies - \$10,000 (Appendix B, Table 2).