



[2014] JMSC Civ 226

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2009 HCV 00874**

**BETWEEN ERROL BARRETT CLAIMANT
AND VERLEY BROWN DEFENDANT**

Contract – Building Contract – Whether Claimant proved breach of contract and sums owed- point in limine- whether counsel was alerted.

Danielle Archer and Debbie Ann Livingston instructed by Kinghorn and Kinghorn for the Claimant.

George Clue for the Defendant

Heard: 16th and 26th September 2014

COR: Batts J

- [1] This Judgment was orally delivered on the 26th day of September 2014. On the first morning of hearing the Claimant applied for judgment against the Defendant on the basis that there had been non-compliance with a Case Management Order. Upon enquiry I was informed that Defendant's counsel had not been alerted about this point in limine. Defendant's counsel asked for and obtained time to consider his position.
- [2] On the resumption the Defendant's counsel produced proof that a List of Documents had been filed and served and hence that there had been compliance. I therefore dismissed the Claimant's application. I wish to reiterate that the courtesies of the profession often times have a practical purpose. Informing one's opponent beforehand of the preliminary point one intends to take, can save time and avoid embarrassment.

[3] This Claim concerns a contract to do certain works of construction. The Claimant alleges that he was contracted by the Defendant to do certain work and has not been paid the sum agreed for such work.

[4] The Claimant gave evidence to the effect that he is a mason, now 66 years old. His witness statements dated 12th September 2011 stood as his evidence in chief. In that statement he explained how he met the Defendant and that he was contracted to do rough casting. Importantly he said the rate agreed for the lower walls was \$100.00 per yard. Importantly also he said the Defendant explained he would be paid as money came in from the National Housing Trust (NHT). The Claimant detailed the work he said he was contracted to do as well as the various rates. He states the total price for work done is \$618,340.00 and that the Defendant has only paid him \$296,000.00. According to the Claimant the Defendant and himself decided to measure the work. The Claimant whilst doing so wrote in red ink in the Claimant's book. The Claimant states:

“Suddenly the Defendant claimed that he was suffering from some ailment and said that I was to give him a break. I allowed him to take a break. But since that time to this day, the Defendant had not returned to complete the measurement that he started.”

[5] The Claimant states that he went and measured the premises for himself so he would have an accurate measurement. He asserts that eventually the Defendant did resume the measurement but accused him of being a thief. The Defendant denies owing the Claimant anything. By consent a document entitled 'Notes from Book detailing Measurements written by Defendant' was put in evidence as Exhibit 1.

[6] In a very effective session of cross-examination Mr. Clue for the Defendant demonstrated that the Claimant was somewhat out of his depth. The Claimant was unable to explain Exhibit 1 even though admitting it was a document he and not the Defendant had written. He was unable to explain the appropriate way to compute cubic yards. Although given time and a calculator he seemed at a loss to explain

the total arrived at or the detailed breakdown in his written statement. Indeed he admitted several errors in computation and measurement.

[7] It is fair to say that having seen and heard the Claimant give evidence I cannot on a balance of probabilities find in his favour. His evidence was not such that one could rely on it to determine either the amount of work done or the method of computing its price.

[8] The Claimant called no other witness. No expert Quantity Surveyor or Architect or Engineer or other expert in the construction industry. Nor was the book he mentioned put in evidence. Its absence was not explained.

[9] The Defendant did not call expert evidence. He however stated that in addition to being a Teacher and Guidance Counsellor he was also a Builder. Not only had he trained as such in Cuba, but he had supervised construction at the Garvey Maceo High School and had built his father's house. He explained clearly and confidently the appropriate methods of measurement and how for example square yards were arrived at. I am satisfied he was competent in the field. He disputed the Claimant on almost every issue of fact. The work that was done, the part of the house worked on, the measurements taken, even the source of disagreement between the two was challenged. His witness statement dated 8th June 2013 stood as his evidence in chief. He was allowed to amplify by way of comment on the evidence of the Claimant. The Defendant maintained that a rate of \$100.00 per yard was agreed and this was never varied. He said that it was the NHT which was funding the construction. He however advanced money to the Claimant. The NHT only made payments after its technical team inspected and approved the work that was done.

[10] The Defendant impressed me as a witness of truth. He stood up well in cross-examination. I accept as he said that the Claimant received more than the value of the work actually done. I accept as truthful the following:

“Q: You said disagreement and relationship broke down at measurement stage?

A: Yes, when we were measuring and I began to take out the light, Mr. Barrett was very upset. Also 4 labourers who I paid. When

he realized those would come out he got upset and cursing and as a Minister of Religion I ask him to leave.”

- [11] The Defendant was sober and earnest whilst giving evidence. The Claimant was on the other hand rather casual and displayed a wry smile from time to time while giving evidence. I was not impressed with him. The Defendant impressed therefore in his candour as well as his technical knowhow.
- [12] The Defendant called one witness, one of the workmen. His evidence did not provide much evidential assistance.
- [13] The Defendant filed a Counterclaim for \$89,000.00 allegedly overpaid. The witness statement did not support it and there was no documentary evidence in support of the Counterclaim. I am not on a balance of probabilities satisfied as to the amount of overpayment and will make no award.
- [14] In the result however and for the reasons stated above the Claim is dismissed. Costs will go to the Defendant to be taxed if not agreed.

David Batts
Puisne Judge