[2019] **JMSC Civ 82**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011HCV04865

BETWEEN	**LANCELOT DANVILLE**	**CLAIMANT**
AND	**BERRIS ANDERSON**	**1ST DEFENDANT**
AND	**SHARON ANDERSON**	**2ND DEFENDANT**

IN OPEN COURT

Miss Gail English instructed by Richards, Edwards, Theoc and Company for the Claimant

Mr Ronald Young and Mrs Natalia Cassado-Desulme instructed by Williams, Young, Parker for the Defendant

June 27, 28 and 29 2017 and April 15 2019

Building contract – quantum meruit – question of compliance with sound building practices – claim of defects in construction

PUSEY J

[1] The Andersons were Jamaicans who have lived overseas for some years. In 2009 while on a visit to Jamaica they made plans to build a house here for their own occupation. They were put in touch with the Claimant, who was a contractor who had built houses in the area of Glencoe Meadows in Spauldings Manchester where the Andersons had purchased land.

[2] Mr. Danville sent preliminary drawings to the Andersons. He was then instructed to contract the services of an architect who did final drawings for the property and submitted them to the Manchester Parish Council for approval. After some adjustments the drawings were approved by the Parish Council.

[3] After the approval of the plan the parties signed a contract for the construction of the house. From the evidence, Mr. Danville started work on the house about February or March of 2010 and it was halted by Mr. Anderson on or around the end of September 2010.

[4] Mr. Danville claims the outstanding balance on the construction work done and interest on that sum.

[5] The Andersons have rejected this claim and counter claimed against Mr. Danville. The Defendants claim that the contract was terminated due to defective work and that they have had to expend 'substantial sums" to remedy the Claimant's defective work.

[6] In their pleading the Andersons state that Mr. Danville failed to

1. *Carry out the construction in a professional and workmanlike manner.*
2. *Comply with accepted and sound building practices.*
3. *Build according to building plans and the Defendants' instructions.*
4. *Comply with Manchester Parish Council and Government Regulations.*

The defendants also stated that Mr. Danville "caused" a *Parish Council Inspector to issue stop work order for violation of Government Building Code.*

[7] The issues joined in the pleadings as set out may simply be stated as whether the work done by the Claimant was defective and whether the Defendants are

liable to pay the Claimant for the work done and if so what amount should be paid.

Remedy

[8] The Defendant in his address raised the issue of the pleadings and the remedy sought by the Claimant. Counsel for the Defendants, Mr. Young, points out that in the pleadings the Claimant sought "outstanding balance" for the work done and had not pleaded damages for breach of contract or *quantum meruit*.

[9] Mr. Young points out that outstanding balance implies a demand for a specified sum which the Defendant failed or refused to satisfy. The evidence in the case indicates that there was no such demand before suit and therefore a claim for outstanding balance would fail. The failure to expressly seek damages for breach of the construction contract would close that avenue of remedy sought by the Claimant.

[10] The Defendant also argues that a claim for *quantum meruit* as a remedy is also fraught with difficulties. He states that *quantum meruit* cannot arise where there is a claim between the parties for an agreed sum.

[11] While the Court accepts that the Claimant's pleading was not as pointed as it should be, I am of the view that the Court can give remedy for any loss that the claimant suffered which is identified and particularised in the pleadings.

[12] This is because, firstly, the pleadings clearly set out that the claim is for work done by way of a contract and not paid for by the Defendants. Secondly, the Defendants admit the existence and validity of the contract and that the work was done, although the Defendant states that the work was faulty and was not according to their instructions.

[13] Thirdly, the Defendants never took issue with the default in pleading a cause of action before closing arguments. They in fact joined issue and counter claimed against the Claimant. The Claimant on the other hand set out in his Pre-Trial

Memorandum (filed in April 2016 and served in May 2016) that the legal issues were whether he was entitled to claim for *quantum meruit* on the basis of work completed or whether he was entitled to claim for damages for breach of contract.

[14] Consequently, when the matter came for trial on 28 June 2017 it was clear that the issue between the parties was for money to be paid for work done and that *quantum meruit* and breach of contract were raised. The Defendants did not seek to strike out the Claimant's claim in interlocutory proceedings or at trial as a point *in limine*.

[15] In my view the Defendants are estopped from relying on the imprecise nature of the pleadings because they failed to rely on that the point earlier. Additionally, it is clear from the pleadings and the evidence which issues are joined. The Defendants have relied on Civil Procedure Rules 8.7 (1)b which indicates that a Claimant must set out the remedy that he claims, however the proviso of that section allows the court to provide any remedy that arises in the case. The CPR therefore, specifically allows the Court to provide any remedy to which the claimant is entitled is, clearly disclosed on the pleadings, is supported by the evidence before the court and derives from the issues contested before the court.

[16] The beast called *quantum meruit* exists as both a remedy in contract matters and a claim in its own right. It is clear that the claim is for *quantum meruit* either as a separate cause of action or as a remedy for breach of contract.

[17] In arriving at this these conclusions the Court accepts the reasoning of the Claimant and their reliance on the following authorities.

[18] In **Medical And Immuniodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42 at paragraph 4 Harrison JA cited with approval **Read v Brown** [1888] 22 QBD 128, 131:

> *"A cause of action" has been defined as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court"*

[19] In Medical And Immuniodiagnostic Laboratory Limited at paragraph 53 Phillips JA:

> *I also do not think the appellant is precluded from pursuing the claim in negligence because its ancillary claim as pleaded seemed to rely on the Sale of Goods Act only and did not explicitly refer to negligence as an alternative cause of action. Once the facts establishing the cause of action have been pleaded, it is not fatal that the claimant has not identified the cause of action. (In* ***Kersales Ltd v Wallis*** *[1956] 2 All ER 866, Lord Denning said:*
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> *"I have always understood in modern times that it is sufficient for a pleader to plead the material facts. He need not plead the legal consequences which flow from them. Even although he has stated the legal consequences inaccurately or incompletely, that does not shut him out from arguing points of law which arise on the facts pleaded."*
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> *Indeed, the principle has been endorsed by Lord Wolfe MR in* ***McPhilemy v Times Newspaper Ltd*** *[1999] 3 All ER 775, 792 where he set out the functions of statements of case, stating specifically that "the need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged". So, the authors of the leading text Bullen & Leake & Jacob's Precedents of Pleadings 15 edn Vol 1state:*
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> *"…the statement of case defines the ambit of the dispute… must state facts which if correct give rise to a valid legal claim or defense. If it does not do so, it is liable to be struck out."*
>
> *However, the reliance as existed under the old regime on every possible material fact being pleaded is no longer so under the CPR." (Emphasis supplied)*

[20] The Claimant relied on the following authorities in rebuttal to the Defendants' argument that he would not be entitled to a *quantum meruit* claim. In **Chandler Bros., Ltd v. Boswell** [1936] 3 All E. R. 179 where Greer L.J. asserted at 186:

> *I think he was entitled, at the time he brought his action, either to claim damages for breach of contract or to claim on a quantum meruit basis. That question has led to some discussion in some cases, especially in commission cases, but it has long been well settled that* ***<u>the Plaintiff whose contract is broken is entitled, if he so choose, to claim damages or claim on a quantum meruit basis</u>***

[21] Considering a contract with fixed prices the Claimant submitted the following at page 6 of the Claimant's Response to Defendant's Submissions filed December 7th 2017:

> *"As it relates to the issue of a quantum meruit claim where a contract has fixed prices(s)* (sic), *we direct the Court to the Privy Council case of Lodder v. Slowey [1904] A.C. 442; [1904] UKPC 39 (22 June 1904) and Emden's Building Contracts and Practice, 8th Edition In the latter at page 124, it is stated:-*
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> *"There are instances in which liability of the employer to pay a reasonable price will arise expressly or impliedly in the contract. In other instances, however there are exceptions to the rule that an action upon a quantum meruit payment will not lie where there already exists a contract which has fixed the price for example-*
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> *(a) where the contract has been frustrated under s 1(2) of the Law Reform (Frustrated Contracts) Act 1943;*
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> *(b)* ***where completion has been prevented by the employer in breach of contract***
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> *(c) where works have been done under a contract which was void as soon as they were commenced*
>
> *(d) where works have been done under an unenforceable contract."*
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> *McGregor on Damages, 18th Edition contained a chapter on Building Contracts. At page 996 thereof it was explained:-*
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> *"Another, perhaps simpler, approach open to a claimant who is unable to complete except at a loss is to treat the contract as discharged by the breach and sue in restitution on a quantum meruit for the cost of the work done,* ***an action which does not depend upon the contract and therefore will not be trammelled or limited by the contract rate****………… This conclusion has the support of the decision of Lodder v. Slowey"*
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> *In Lodder v. Slowey, the Appellants entered into a bond with the Borough Council in the sum of £500 for the due carrying out by McWilliams of his contract. In September 1898 McWilliams abandoned the works. The Borough Council then called upon the Appellants under their guarantee which resulted in a contract being made between the Appellants and the Respondent in March,*
>
> *1899 to execute the work undertaken by McWilliams within a specified time. By August, 1899, Officers of the Borough Council entered upon the land and took possession of the works.*

The Privy Council upheld the decisions of the New Zealand of Appeal and for brevity we mention below:-

(1) "That where a contractor after part performance of his contract is wrongfully excluded from the land on which the works were to be executed, and is thereby prevented from completing his contract, he is entitled to treat the contract as rescinded and to sue on a quantum meruit for the work and labour done and material supplied previous to the recission.

(2) That the measure of damage in such an action is the actual value of the work done, labour and materials and it is immaterial whether the contractor, if he had been allowed to complete the contract, would have made a profit or loss…"

Defects

A. *Architect or draughtsman*

[22] The Defendants claim that the Claimant should have hired an architect rather than a draughtsman to do the drawings for the building. Mr. Danville, the Claimant in his evidence uses the two words interchangeably. Counsel for the Defendants was somewhat concerned that the Court did not consider this a significant misstep. The Court considered that the Claimant although an experienced builder was not a man of great sophistication. The practise of using draughtsmen to design houses is well known in Jamaica, under the supervision of architects. The Defendants contention that a draughtsman by law and practise needs to work under the supervision of an architect is also well established.

[23] To establish that the use of a draughtsman, instead of an architect caused loss, the Defendants need to indicate more than the legal requirement for architects to be registered. There was no evidence to substantiate that this choice made by the Claimant caused some loss to the Defndants. No architect was called to say that the drawings were below the acceptable standard for a house in Jamaica. The fact that the plans were approved by the parish council would raise a presumption that the plans for the property were of an acceptable standard. The

Building contract speaks to an agreed plan and does not stipulate that the plan should be done by an architect.

B. *Sub basement*

[24] Mr. Anderson claims that the Claimant built a sub basement against his instructions. I found the Claimant, Mr. Danville to be a witness of truth. As previously stated, he was an unsophisticated man but an experienced builder. The Claimant stated that he did not build a subbasement. The expert witness indicated that in the absence of filling to create the level below the house which was built on a slope, the builder constructed walls around the foundation of the house along the slope. Mr Campbell, the Quantity Surveyor indicated that this methodology was the cheapest way to solve the problem of the slope.

[25] Again, no evidence has been brought to show that this methodology was substandard or in anyway diminished the character or integrity of the building. In fact, it can be inferred that it gave the Defendants additional square footage, even if it could only be used as storage space.

C. *Pit and back verandah*

[26] Mr. Danville's credibility was bolstered by the fact that he forthrightly admitted that he had not built the pit to the required level and conceded the sum of $70,000 for that deficiency. In relation to the back verandah, I accept his narrative that the request for the verandah came after the plans were complete. I accept that he indicated that it would mean that the study would have to be removed to create this verandah.

D. *Staircase*

[27] I also accept that Mr. Danville did lay out the staircase as indicated by him but did not build the staircase. Mr Anderson was not able to say that Mr. Danville actually built the staircase that he complained about.

[28] Finally, it is clear that the Defendant although indicating that there are defects and that the Claimant must pay for the costs of putting the defects right, has not placed any evidence before the court that specifies these defects or purports to outline the cost of remedying the defects. On an evidential basis this Court would not have been able to ascertain the measure of damages that would have been awarded, had the court found for the Defendant on the counter claim.

E. *Stop Order*

[29] It is convenient to deal with the issue of the “stop order” here. This issue was ventilated at trial. It was alleged that faulty construction caused a “stop order” to be issued in December 2010 for the construction site, causing the Defendant financial loss because of the delay, having to travel to Jamaica and having to pay money to remove the “stop order”. The “stop order” was not exhibited in court and the lifting of the “stop order” did not seem to follow any legally established procedure. The court is left questioning whether there was a legally issued “stop order” or a mere fiction, which was told to the Defendant.

[30] The court could determine whether any action by the Claimant initiated the “stop order”. The court could not determine on a balance of probabilities that a “stop order” was actually filed.

Outstanding balance

[31] The Claimant admits that an agreement was reached for him to accept $1,297,144.43 in what would amount to be full and final settlement of the claim. He indicates that this was money he would have accepted without going to court. Mr. Anderson rejected this compromise and indicated that he should go to court.

[32] Counsel for Mr. Anderson said that the sum of $1,297,144.43 is the only outstanding balance that could be claimed as it is the only sum for which a bill has been issued. It is clear to me that the Claimant proffered this sum as a settlement offer to avoid litigation. The offer having been rejected, and litigation

having ensued, it is fair and just that the Claimant recovers the value of work done by him for which he was not paid.

[33] The court accepts that the sum of $6,147,000.00 in Jamaican dollars was paid by the Defendants to the claimant. This figure was submitted in the document filed in court on June 30 2017. The court also accepts that the estimated cost of work done as by the report of Mr. Richard Campbell the quantity surveyor is $12,862,443.24. This means that the value of the work done by the Claimant and not paid for is $6,715,443.24.

Summary

[34] The Claimant has established that he has done work under an agreement with the Defendant that he has not been paid for. The Defendant has failed to establish any loss for defects as he has pleaded in his counterclaim. The Defendant has failed to prove that the workmanship was below the required standard or that the Claimant had “caused” a building inspector to issue a stop work order.

[35] In the circumstances, the court awards damages to the Claimant on a quantum meruit basis for work done by him and not compensated by the Defendants in the sum of $6,715,443.24. Interest on this sum at the rate of 3% per annum from the service of the claim to today’s date. Costs of this matter to be taxed if not agreed.