[2022] JMCC Comm 27

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2018CD00639

BETWEEN	**NOEL EDMAN**	**1st CLAIMANT**
	LORNA HENRY	**2nd CLAIMANT**
AND	**ZUAR LIMITED**	**DEFENDANT**

Building Contract - Whether time for completion breached - Whether building constructed in accordance with agreed plans - Whether agreed price for construction paid - Whether contract varied to increase price and extend time.

Stephanie Stone instructed by JNW Taylor & Associates for Claimants

Martina Edwards Shelton and Keisha Williams instructed by Shelards for Defendant

Heard: 2nd ,3rd ,5th, 6th May and, 30th September 2022.

IN OPEN COURT

CORAM: BATTS, J.

[1] On the first morning of trial I asked whether an attempt had been made to agree documents. The response was in the negative notwithstanding the existence of an order, made on the 17th March 2022, for documents to be agreed if possible. I therefore rose to allow the parties to agree, if possible, a bundle of documents to be put in evidence. When we resumed at 11:15 am a Bundle of Documents filed on the 10th January 2022 was admitted, by consent, as exhibit 1.

[2] The claim concerns the construction of a dwelling house. The Claimants contend that the Defendant was contracted to construct it by a written agreement dated the 13th day of January 2016. Further, that the said agreement contains the dimensions of the building to be constructed. These were drawings which reduced the size of the building on previously made plans. The amount to be paid to the Defendant was fixed and agreed at $31 million with a further $7 million being paid for contingencies. Construction was to be completed by the end of August 2016. The Defendant it is alleged breached the contract by failing to complete by the agreed date or at all and, by constructing a building which was not in accordance with the agreed drawings.

[3] The Defendant denies it is in breach and says that, the dwelling house was redesigned to reduce construction costs to $38 million but that, by a signed agreement dated 13th February, 2018, the price was adjusted to $43 million. The building was not completed by the agreed date because (a) the Claimants were unable to provide the funding when needed (b) inclement weather and (c) cost increases for labour and material due primarily to the nature of the terrain.

[4] These being the central issues, as revealed by the pleadings, the evidence when lead contained a few surprises. The Claimants relied on the evidence of Mrs. Kemba Comrie. She is the 2nd Claimant's daughter. The 2nd Claimant, she tells us, is in a common law relationship with the 1st Claimant. The Defendant objected to this witness giving evidence. I overruled the objection because: (a) the pleadings and the witness statement had long been in the Defendant's possession and therefore such an objection ought to have been taken at pre-trial review. No objection having been taken then, the Claimants were entitled to come to trial on the assumption that, the witness statement would be the evidence in chief. Furthermore, her statement says she is authorised to give evidence on behalf of the Claimants. There is no rule of law or evidence which requires a party to proceedings to give evidence personally. In this case it is asserted that the witness, interfaced with the Defendant and, oversaw construction on the Claimants' behalf.

[5] The Claimants also called an expert. He is Mr. Shamar Ajonie Nicholson whose reports are found in exhibit 15. The Defendant for its part called Mr. Zuar Jarrett its chief executive officer as well as experts Charles Green and Kelvin Kerr. All witnesses were extensively cross-examined. In this judgment I will only detail the evidence to the extent necessary to explain my findings.

[6] Mrs. Kemba Comrie, in her evidence in chief, asserted that an oral agreement was ultimately reflected in a written contract signed on the 13th January 2016 for the construction of a house costing in total $38 million, see exhibit 4. The building was to be 3,200 square feet. She signed this agreement on behalf of the Claimants and paid $8 million to the Defendant. A total of $29 million was eventually paid to the Defendant in the period January 2016 to August 2016, see exhibit 7. She asserts that assurances by the Defendant's principals that the construction would be completed in August or September 2016 resulted in the Claimants selling their home in England, shipping their belongings to Jamaica and, arriving in Jamaica in September 2016. Their belongings had to be put in storage at great cost because the building was not in a habitable condition. The time to complete was extended to November 2016, see paragraph 29 of her witness statement.

[7] Mrs. Comrie further outlined that negotiations with a bank, to obtain the 10% needed to complete the financing of the project, commenced in April 2016. The Defendant's progress report dated 28 July 2016 and its project review of May 2016 were shown to the bank in the course of the negotiations. The bank's loan officer pointed to discrepancies between the progress report and the $29 million already paid. The Defendant provided her with a valuation report by Easton Douglas Consultants Ltd. which stated a market value of $19 million as at the 19th September 2016, see exhibit 1 pages 33-46. On the 7th November 2016 a Quantity Surveyor's report, by Davidson & Hanna Assoc. dated 25th October 2016, was sent to her by the Defendant which said the value of works to date was $21,297,988.26. This is evidenced by her email dated 7th November 2016, see exhibit 6. However, the exhibited report, from Davidson & Hanna, is the one dated the 20th November

2016, see exhibit 1 page 47 and exhibit 19 page 1. This showed the value of works as at the 25th October 2016 as being $18,542,426.19. The discrepancy, between money paid and value on ground, was she said explained by Mr Zuar Ard Jarrett on the basis that the Defendant had built a larger house than agreed upon. He also said that the contract amount would need to be increased to $43 million in order to complete the building. By December 2016 work had completely stopped on the site.

[8] Mrs Comrie stated that after many meetings and discussions, on the 3rd February, 2017, the Defendant agreed to restart work and bring the project up to 75% completion (as the Claimants had paid 75% of the contract price). They did not however do so. A further promise to restart, made in July 2017, was also broken because the building was not taken up to 75% completion. In January 2018 the Claimants obtained a loan from Jamaica National for $12.5 million. The 1st Claimant returned to Jamaica and has been living in the incomplete house since 2018. On the 17th June 2018 Shamar Ajunie Nicholas, a Quantity Surveyor, opined that the cost of the existing building was $19,199,791.00 and that the cost to complete construction was $36,199,791.00.

[9] When cross examined Mrs. Comrie made the following significant admissions. There were she said interim progress reports from the Defendant. One appears at page 19 of exhibit 1 and is dated the 28th July 2016. That document references work on "revised basement" and references "delays" due to among other things "necessary design changes". It also makes reference to the "breaking up and clearing of large rocks." The witness admitted being advised of adjusted costs and delays. She admitted that no payments were made, to the Defendant, after the 3rd November 2016. She admitted that the Claimants always intended to borrow money to help pay for the construction. $10 million was the amount to be borrowed which would take the total amount of money available to $38 million. The loan was not obtained up to the 3rd November 2016 when the last payment was made. Then there was the following exchange:

"Q: Do you agree original contract sum was adjusted from 38 million to 43.5 million.

A: No

Q: Do you agree original, is it true an adjusted contract signed

A: Based on guidance from Mr. Kerr who said based on property size. The document first brought to my attention after Noel had some discussions. Based on signature on it is when Mr. Kerr could not, according to him could not support that value at $38 million. To support the Q/S report Noel signed. Kerr Jarrett assured us that …. still in place.

Q: Adjusted contract price signed reflecting $43.5 million

A: Yes"

The adjusted contract to which reference is made is dated 13th February, 2018 and is signed by both Claimants, see exhibit 17. Neither Claimant was called to give evidence as to the circumstances under which this variation was agreed upon. It is however clear that the new contract price for completion was $43.5 million.

[10] The witness went on to confirm, during cross-examination, that the failure to obtain the loan from the bank prevented them making further payments to the Defendant. Her explanation for the failure to obtain the loan was that the structure completed was not 75% percent completed as it should have been. In her words:

Q: Up to December 2016 not able to get loan

A: Zuar agreed he would, we paid $1.4 million to redesign. I had $29 million cash in account. I would be taking loan of $10 million. Required that Zuar bring property up to 70-75% complete. It would be a construction loan. This was not done. Not disputing $43 million, disputing where construction was when he abandoned. No floor, no ceiling no windows, not even staircase."

[11] In re-examination there was an effort to clarify:

"Q: you were asked – not in dispute total $29 million, last payment 3rd November. You said yes until completion.

A: yes, got loan for 10 million to pay difference. So Zuar said they would build habitable house. $10 million was for fixtures and fittings. So, I went on site and valuations not fair to give him more money and he not honouring his reports. So on those grounds I decide not to give him any more money."

The witness, curiously, admitted that her parents moved out of their house in England, and commenced paying rent, although the July report advised of a November date for completion.

[12] The Claimants' next witness was Mr. Shamar Ajonie Nicholas. He is a quantity surveyor whose evidence really did not advance the Claimants' case. His reports were admitted as exhibit 15. When cross-examined it emerged that he had given reports with conflicting estimates of the value of the work done for the same period. He also admitted that the terrain was rocky and slanted. He admitted that, whereas he estimated $8,500 for the Defendant to do site clearance, he estimated $100,000 for site clearance in July 2019. The exchange is instructive:

"Q: So after house constructed and construction stopped you say $100,000 for site clearance.

A: Yes

Q: Do you agree $100,000 is overstatement

A: (Pause) I would not say. I don't agree

Q: term brown field site

A: familiar with it

Q: after construction started it is brown field site, do you agree it will cost more to clear a green field than a brown field site.

A: Depends on what is there yes."

[13] This expert did not cover himself in glory. I will not go through the details of other areas of discrepancy, inconsistency and confusion uncovered in his cross examination. This had a lot do with the fact, as he admitted, he had no dialogue with the Defendant's servants or agents before doing his report. He seems also to have relied on 3D images provided by the Claimants' agent and on drawings. He did not, for example, have the benefit of the Defendant's Bills of Quantities which showed the intended finishes so he made certain assumptions some, as he admitted, were expensive. Re-examination did not do much to improve my view of this witness's evidence.

[14] Upon the Claimant closing its case the Defendant's witness Zuar Jarrett gave evidence. He was very impressive and displayed a familiarity, as might be expected, with the relevant details. His evidence in chief, as supported by amplification, can be easily summarised notwithstanding the length of his witness statement. He had agreed, on behalf of his company, to redesign and resize an earlier design prepared by someone else for the construction of a house. The intention being to reduce the construction cost to meet the budget of the Claimants. The resized budget came to under $31 million plus $7 million by way of a "*contingency*" payment. The total was therefore agreed at $38 million. This budget proved to be unrealistic once construction started mainly due to the under surface terrain. This was not obvious to the naked eye. The terrain was rocky and the sloping surface contributed to the additional costs involved. These difficulties were all outlined in progress reports which the Claimants received. An engineer, Charles Green, was consulted and he advised on how to treat with the difficult substrate rocky conditions. The additional costing amounted to some $7,500,000. This was explained to the Claimants and a go ahead given by them. The work was delayed

due to the additional work required. The Claimants paid only $29 million but were unable to borrow the additional amount required. The Defendant did all it could to help in that regard even facilitating certain reports to the bank and/or financial institution. The Claimants were however unable to secure the necessary financing and therefore construction had to stop. In November 2016, and due to increased construction rates applicable to 2017, the Quantity Surveyor Mr Kelvin Kerr estimated that $43.5 million would be the new total construction price, see exhibit 19 page 1. This adjusted figure was reduced to writing and agreed to by the Claimants, see exhibit 17.

[15] Cross-examination did not tarnish his testimony. There were however interesting revelations. So, when challenged as to why he had not verified or enquired into the Claimants' ability to pay the full amount, the following occurred:

> "*Q: To know if proceed you would need to know how much cash available.*
>
> *A: my judgment. Client was introduced to me on a friendly basis. Her ex-husband was a client of many years so based on comfort I had with the introducing party I did not need to know details of the finances.*
>
> *Q: On that friendly basis you were made aware of fact they had $28 million in cash.*
>
> *A: No."*

As regards Exhibit 17, the "*variation agreement*", the following exchange occurred:

> *"Q: It was after the Claimants' agent became disgruntled in 2017-2018 when the building remained incomplete that the short form agreement was signed between yourself and Noel Edman*
>
> *A: No, disgruntlement had nothing to do with signing of the agreement.*
>
> *Q: Reason shortfall agreement has 2-year date variance is because Zuar Ltd. covering its tracks and obtained*

the signature of Noel Edman who was not present throughout construction.

A: Disagree

Q: Construction was halted in 2016

A: Stopped in December 2016 and restarted summer 2017

Q: In restarting summer is June to August

A: No started before that may have been early May."

[16] The witness also impressed me with his explanation of certain aspects of the evidence. So in answer to the court:

"J: Reference to Exhibit 13, were you required to do more.

A: The bank needed construction ratios. Because I realised cash crunch I advised stock piled material. Davidson & Hanna registered on site material. Bank did not take that into account. My style of management did not fit bank's format.

J: Foundation problems, why not … and clear

A: We saw it sloping. The engineer deduced soil was firm enough to hold. However, when we started digging we realise it was pure rock, too stable. Needed heavy equipment and more man power. Could not anticipate it as it was underneath the surface.

J: $31 million Project with $15 million mobilization.

A: We had to advance pay for materials to lock in escalation prices. So we stockpiled materials.

[17] Mr. Charles Green, an engineer, was the Defendant's second witness. He impressed me as a witness of truth who was very comfortable with the subject matter. His witness statement of 4th January 2022 spoke to the facts of which he was aware and his opinion. In cross-examination he was not challenged on the opinion he rendered. That opinion was in short that, due to the

sloping nature of the terrain and, the number of stones which were rolling down and endangering people during construction, he recommended a stone retaining wall.

[18] Mr. Kelvin Kerr a Quantity Surveyor was the Defendant's final witness. His reports were admitted into evidence as Exhibit 19. He was the representative of Davidson & Hanna and had been called in sometime in the "*latter part of 2016*," to assist in the Claimants' submission for financing. They had no knowledge of the project before then. In cross examination it was suggested to him that in the absence of architectural drawings a quantity surveyor can use an "*estimate.*" His response:

> "*He can but it would be in discussion with designer and client and clarification can be sought to ensure fairly accurate."*

When challenged on his report he said the following:

> *"Q: Earlier you said site clearance up of rock, you said BQ3 did include breaking up of rock*
>
> *A: I can explain. From evidence I saw when site was being stripped there is evidence of flat rock that had to be removed when the site was being stripped meaning cleared.*
>
> *Q: The information in BQ1 about excavation and breaking up of rock was information provided to you by construction team*
>
> *A: yes, and photos and notes. We went from data*
>
> *Q: Do you agree evidence of flat rock can be covered up by growth of shrubs or grass*
>
> *A: yes"*

[19] Upon the Defendant's case being closed I adjourned to the following day, 6th May, 2002, and allowed each side 1.5 hours to make submissions. These I will not repeat but counsel should rest assured that I am grateful for the insight they

provided. I bear in mind also the written submissions filed on the 6th May, 2022 by both parties.

[20] It is important, at this juncture, to remind myself of the cause of action and the issues raised by the respective statements of case filed. The claim is one for breach of contract in that it is alleged the Defendant failed to complete construction and/or failed to ensure that the partly constructed building was in conformity with the dimensions agreed in the contract dated the 13th January 2016. The Particulars of Claim, filed on the 26th November 2018, do not change that claim. Importantly, in paragraph 12, the Claimants acknowledge that retaining walls would be constructed to "*finish the basement*." There is no allegation of negligence related to the preparation of an estimate of costs or in relation to the construction of the building. These do not arise as issues for my determination. The Defence denies any breach of contract and asserts that the agreement was varied to increase the size of the building and its cost, see paragraphs 15,17 and 18. The Defendant pleaded also that it was, inter alia, the Claimants' inability to fund the project which resulted in its inability to complete construction on time or at all.

[21] The issues therefore are primarily factual. Having seen and heard the witnesses, and considered the documentation, their resolution can be shortly stated. I find as a fact that the Claimants agreed to the increased construction cost of $43.5 million. Further that this was, in part, consequent on factors communicated to them since in or about July of 2016. These involved primarily the substratum rocky nature of the terrain which, combined with its slope, necessitated considerable and unanticipated expenditure. The finding of an agreement to vary the contract is supported by the monthly reports presented to the Claimants, email communications and, the fact that the variation was reduced to writing and signed by the Claimants in February 2018. The authenticity of that document was not challenged. It is not a new contract but the same contract in which the price to complete and the date for completion were varied.

[22] I find also that it was the Claimants' inability, or unwillingness, to pay the Defendant further sums which resulted in construction ceasing in December 2016. The bank refused to loan them $10 million. I accept the evidence, of the Defendant's witness, that he had pre-purchased raw material as a hedge against price escalation. The bank appeared only to consider the value of the building in the ground when estimating the amount spent to date. The failure of the Quantity Surveyor, who gave evidence for the Claimants, to consult with the Defendant before preparing his report certainly affected the accuracy of his findings. It seems to me that the Defendant's explanation, the engineers evidence about the terrain, as well as the Davidson & Hanna's estimates, support the Defendant's case in this regard. I find that the Defendant did apply the $29 million, paid by the Claimants, to the project. However, the need for retaining walls, and excavation to facilitate the creation of a basement, necessitated more funding. This the Claimants did not provide. In the result there has been no breach of contract by the Defendant.

[23] There will therefore be judgment for the Defendant against the Claimants. Costs will go, to the Defendant to be taxed if not agreed.

David Batts
Puisne Judge.