

JUDGMENT

CLAIM NO. C.L.2002/P033

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

BETWEEN DELBERT PERRIER CLAIMANT
AND GLADSTONE BELL FIRST DEFENDANT
AND ALISON BELL SECOND DEFENDANT

Heard: 4th, 5th July 2006 and 15th February 2007.

Ms. Sheri- Ann McGregor instructed by Ms. Ayana Thomas of Nunes Scholefield De Leon and Co. for the Claimant.

Mrs. Sharon Usim and Ms. Karene Stanley instructed by Karene N. Stanley and Co. for the Defendants.

Mangatal J:

1. The evidence in this case was completed on the 4th and 5th July 2006. At that time by consent of the parties I ordered that both sides file and exchange written closing submissions by the 21st of July 2006.
2. This is a claim by Mr. Perrier against Mr. and Mrs. Bell for a balance allegedly due for services rendered and materials provided by Mr. Perrier as a contractor at the Bells' premises at 1 Tiarra Close, Queenhill, Saint Andrew.
3. Mr. Perrier claims that by an oral agreement made in or about May 2000, the Bells contracted his services to drill blast and remove debris from a building site at Tiarra Close. Mr. Perrier says that he fulfilled his obligations under the agreement and submitted a final bill for the sum of \$17,748,888.83. The Bells have paid \$10,975,600.00 in a number of tranches on different dates. The claim is that an amount of

\$6,773,288.83 is outstanding and interest is claimed at commercial rates.

4. In the particulars filed on his behalf, Mr. Perrier claims for material cost, removal of debris, compressor hireage, blasting operation, tractor hireage, labour cost, end of project cost (16% of \$6,235,768.00 as per Union/ Masterbuilder's Agreement) and contractor's overhead and profit at the rate of 35 percent.

5. The Bells deny that they are indebted to Mr. Perrier and say that the value of the work done by Mr. Perrier does not exceed \$7,293,071.00 and they counterclaim for the sum of \$3,682,529.00 being the difference between the value of the work done by the Claimant and the sum paid by the Bells.

6. Mr. Perrier gave evidence as did Ray Baugh, Albert Robinson, Adeil Parkinson and Neville Mills on behalf of Mr. Perrier. The Defendants relied upon the evidence of the Second Defendant Alison Bell and Maurice Stoppi.

7. Mr. Perrier has pleaded to a contract to drill, blast and remove debris and for associated costs. There is no reference to the construction of retaining walls. However, according to the oral evidence in chief of the Quantity Surveyor called on behalf of Mr. Perrier, i.e. Mr. Neville Mills, one of the major works that the Claimant did at the premises was the construction of the retaining boundary walls and he said that major materials would have been importation of rocks for the boundary walls. Although the Claimant said in evidence that he did other work, the pleadings made no reference to a number of the heads claimed. Mr. Perrier states that apart from the removal of debris, the blasting, drilling and the construction of the wall, he did plumbing work, electrical work, built steps and formed out a driveway, installed chainlink fence and did landscaping. He says that he also reduced the garage door entrance, completed a septic tank, installed windows and door frames, and did skirting work on the house. Mr. Perrier has not said how much is being claimed for each item and no documentary proof was put before the

court in support of these claims. Whilst it is true to say that Mrs. Bell gave evidence in relation to the other work that Mr. Perrier did, she said that everything that he did was paid for.

8. The Bells have maintained that the agreement is that as the work was done they would pay for the work. The Defendants' Attorneys submit that the payment schedule which was admitted in evidence as exhibit 2 also lends support to Mrs. Bells' evidence in this regard. Mrs. Bell in her witness statement claimed to recall that on more than one occasion she was told that these amounts which the Bells were called upon to pay for fortnightly was to cover blasting works, rental of compressor, purchase of materials, labour and other costs.

9. In her evidence Ray Baugh states that she is a businesswoman who manages properties owned by Mr. Perrier and his companies. In his evidence Mr. Perrier indicated that Ray Baugh is now his wife. Ms. Baugh stated that she also has responsibility for collecting monies owed to Mr. Perrier and his companies and one of her duties is to pay staff. She indicated that the Bells would pay sums every two weeks, and when the money was not enough either Mr. Bell or Mrs. Bell would come in the following week "to make it up". Ms. Baugh stated that the sum paid by the Bells every two weeks included labour and materials. However, she stated that at the end of the project there were still outstanding bills for material labour and equipment and she denied that amounts requested of the Bells every fortnight covered all the costs for the fortnight preceding each request.

10. Further in cross-examination Ms. Baugh admitted that the sum charged every two weeks varied depending on the work done, and included labour, compressor work, blasting work, materials and payment of the compressor operators.

11. Mr. Perrier in his witness statement claims that the Defendants asked him for an estimate about ten months after the job had started. He said that no estimate could be done at this time as the job had already been done. Instead, he says that Neville Mills and Associates prepared a

tabulation of all material and labour expenses. In cross-examination, Mr. Perrier denied that Mrs. Bell had asked him for an estimate for the work from the outset and denied that she had asked for this estimate several times.

12. In cross-examination Mr. Perrier agreed that the agreement was that the Bells would pay every two weeks according to work done for a particular period. He also conceded that the monies requested were not a fixed sum each week and ranged from \$150,000.00 to \$900,000.00 each fortnight. Exhibit 2, which is a summary of the payments received supports the fact that the requests for, and payments made varied quite widely. Mr. Perrier says that he did not discuss with the Bells the 16% project bonus or 35% contractor's overhead and profit.

13. In re-examination Mr. Perrier said his understanding of the arrangement with the Bells was that they would make a payment every two weeks, bringing what they had. Then, at the end he would present back all the physical bills and that would be cost plus whatever overhead and profit were to be added at the time.

14. Mr. Parkinson of Parkinson Hardware gave evidence that between 2000 and 2001 Mr. Perrier was a client of his business which is no longer in operation, and that in fact Mr. Perrier had been a customer from before that period. He said that during the period goods were both collected on behalf of Mr. Perrier and delivered. Mr. Parkinson was unable to take the matter much further as he was not the person from Parkinson's Hardware who generated the bills and he did not personally deliver the goods for Mr. Perrier. In any event, it does not seem to me that Mr. Parkinson's evidence could assist with the question whether Mr. Perrier had already charged the Bells for goods provided and been paid by them.

15. Mr. Albert Robinson gave evidence that during the year 2000, he did blasting and compressor work and he rented equipment, compressor, jack hammer, hose and other accessories to Mr. Perrier. The operators came with the equipment and Mr. Robinson charged \$15,000.00 per day.

He rendered bills every week or fortnight and Mr. Perrier paid him promptly. Mr. Robinson is not owed any money.

16. Mr. Neville Mills gave evidence that he is a quantity surveyor with over 30 years experience. He has known Mr. Perrier for approximately 20 years and has provided quantity surveying services on a few projects for which Mr. Perrier was the builder/contractor.

17. In or about February 2001 Mr. Mills was approached by Mr. Perrier who asked him to put together his(Mr. Perrier's bills) in respect of a project which Mr. Perrier was handling at Queen Hill in Saint Andrew. Mr. Mills said that prior to that he had visited the site and observed preparation for blasting being undertaken. That is, the laying down of mesh, which is used for controlled blasting to prevent damage to an existing residence and neighbouring structures. He also saw evidence of rock excavation and construction of an already completed boundary wall.

18. Mr. Perrier also showed Mr. Mills evidence of other work done by him, for example work to create backyard facilities, yard space and the driveway at the front of the premises as well as internal work.

19. Mr. Mills went through Mr. Perrier's files and put the invoices and labour bills together. He produced this to Mr. Perrier by way of letter dated February 14 2001 and attached a Summary of Costs and a list of Payments Received(exhibits 3 and 2 respectively). The Claimant did not attempt to put all the bills which provided the foundation for Mr. Mills' Summary of Costs into evidence.

20. Mr. Mills included an end of project bonus of 16% charged as a percentage of the labour bill. He states that this is standard practice within the industry. He was instructed by Mr. Perrier to apply a contractor's overhead and profit of 35% against the overall cost of the project.

21. Mr. Mills said that the amount charged for contractor's overhead and profit bears reference to the degree of difficulty involved in executing the job. Based on his observation of the site, and his experience in the construction industry, it was Mr. Mills' view that a figure of 20%-25%

might have been more reasonable. However, since he was not present at the start of the project he accepted Mr. Perrier's instructions in respect of this matter.

22. Mr. Mills met with Mr. Stoppi on January 19 2004 and they agreed that the total cost for labour in respect of the wall construction was \$7,493,071.00 which included \$200,000.00 for wet works. This figure also included the cost of excavating in rock for the foundation of the retaining wall, and involved only minimal costs in respect of heavy equipment and blasting.

23. Mr. Mills stated that as he understood it, no simple tool could have been used to break up the rocks in order to prepare the site. However, Mr. Stoppi and himself did not discuss the cost of material used on the project.

24. In cross-examination Mr. Mills said that whilst he does not agree that the claim for 16% bonus would have to be agreed between the contractor and the client, he does agree that the client should know from day one that this is a cost or charge that they are expected to pay and that an end of project cost will be applied.

25. He did not agree that it is usual in the industry for this end of project bonus to be paid incrementally over the life of the project.

He agreed that overhead and profit are usually paid incrementally and that the client ought to agree a percentage for overhead and profit from day one.

26. Mrs. Alison Bell gave evidence that sometime in early 2001 she and her husband wanted to get a contractor to complete a retaining wall at their premises at 1 Tiarra Close. They were introduced to Mr. Perrier by a mutual friend. At the point when the Bells met Mr. Perrier they had already had to deal with two contractors and a quantity surveyor who Mrs. Bell claims had left them stranded. They discussed with Mr. Perrier his completing a stonewall that was partially started and also erecting some structural walls around the structural framework of the house. Before work started and on a number of occasions thereafter the Bells

asked Mr. Perrier for the estimated cost of the entire work to be done and they requested that this be given to them in writing. However, each time Mr. Perrier would say "this is from a friend to a friend". By that Mrs. Bell claims that she and Mr. Bell understood Mr. Perrier to mean that there would be no written contract and he would charge them a reasonable price and the Bells would pay him as he worked.

27. It was agreed according to Mrs. Bell that after every two weeks of work Mr. Perrier would send them a bill and the Bells would pay the bill. On every occasion when Mr. Perrier generated a bill the Bells paid him in full in accordance with the bill. Since the Bells had experienced problems with previous contractors they made sure to settle the terms on which the work would be done and payment made. There was never any intimation from Mr. Perrier or Miss Baugh that the fortnightly payments did not cover the total cost for work done and that there were any costs for which the Bells would be liable on completion of the job. The Bells say that had this been brought to their attention they would not have paid in the way in which they did.

28. It was when the walls were nearly completed that Mr. Perrier started to drag out the work and to make claims that the Bells owed money for work done and to his workmen.

29. Eventually, three of Mr. Perrier's workmen agreed on their own to finish some work which Mr. Perrier had left unfinished. A price was agreed upon directly with them and they finished the work within one week.

30. Mrs. Bell states that it was after Mr. Perrier learnt that some of his workmen were working with the Bells that he sent a message that he was going to sue the Bells.

31. It is Mrs. Bell's evidence that all of the stone used to construct the wall was stone that was mined or dug from the Bells' land at Tiarra Close.

32. Any electrical or plumbing work done by Mr. Perrier was incidental to the construction of the retaining wall at the premises and this was paid for as it was done.

33. In cross-examination Mrs. Bell indicated that she did not tell Mr. Stoppi that Mr. Perrier had done any electrical or plumbing work on the site but that any such work was minimal. She also admitted that she did not tell Mr. Stoppi about Mr. Perrier erecting a chain-link fence. She conceded that she did not know that Mr. Stoppi's report did not include anything for materials and that in so far as he was not aware that other than the stones from the site, Mr. Perrier provided materials for the work done, her instructions to Mr. Stoppi would have been incomplete.

34. Mr. Maurice Stoppi indicates that in some instances persons engage quantity surveyors to assess the value of work done at a site after a job has been completed. They sometimes cannot provide photographs or detailed plans of the area before the work has begun or site data or site plans or drawings to assist the quantity surveyor. In such instances the Quantity Surveyor determines the terrain at the pre-construction state of the land by reference to surrounding terrain and the instructions of the client as to the scope and cost of the work that was carried out at the premises.

35. In or about June 2001 Mr. Stoppi was requested to quantify work done at the Bells premises. Mr. Stoppi was advised by the Bells' Attorneys-at-Law that Mr. Perrier was contracted to drill, blast and remove rocks and other debris from the site and construct a retaining wall. He was also advised that there was no contract or formal agreement between the parties for the work to be carried out nor, as is standard and usual in the trade, was there any document indicating that the parties had agreed either a contract price relative to a specific scope of work required to be done or agreed quantities with unit prices attributable to those quantities to be applied to actual work quantity completed.

36. Mr. Stoppi's evidence is that the industry recognizes two methods in the absence of any prior agreement between owner and contractor, which

a contractor can use to arrive at and charge an equitable price for the work done by him after the work is completed.

37. The first method is by reference to the actual cost, where specific records are kept relative to the tasks to be undertaken. These records are then normally submitted at pre-determined agreed intervals, certified and/or agreed upon between the contractor and the client as the work is completed from time to time and on completion. The Certification by the client or his agent establishes that the receipts presented represent the work done at the client's premises in keeping with their initial agreement.

38. The second and preferred method is by measurement and agreement of actual work performed at the time of doing the work, after which the work is priced by reference to then current rates in the industry for similar work. In this way, the contractor is compensated for all work done by him and the client only pays for that work which has actually been carried out.

39. Mr. Stoppi indicates that he has seen no evidence to suggest that either of these recognized methods was used by Mr. Perrier who Mr. Stoppi says is a well-known Contractor and who he knew personally prior to this assignment. Mr. Stoppi so states because he has seen no receipts specific to 1 Tierra Close certified by a quantity surveyor or the Bells nor any report from any Quantity Surveyor measuring the work from time to time as it progressed.

40. In the absence of certified receipts or measurements by a quantity surveyor as the work progressed, Mr. Stoppi visited the site along with one of his colleagues and brought his experience to bear on valuing the work done. They examined and took measurements of the retaining walls bearing in mind the topography of Queen Hill and the state of unimproved lots adjoining 1 Tierra Close. From the examination and measurements taken, Mr. Stoppi applied current rates used in the trade for similar work in or about late 2000 to early 2001 for the work which the contractor would have had to carry out on the site in completing the

constructed retaining wall which he had seen at the premises, including drilling, blasting and removal of rocks and other debris thereafter.

41. Mr. Stoppi then prepared a Bill of Quantities for the scope of the work carried out at the premises. A Bill of Quantities he indicated is a calculated compendium of the various components of a completed structure expressed in industry standard unit measurements. Individual current market rates are then applied to those quantities to arrive at a total cost. Mr. Stoppi indicates that the Bill of Quantities prepared by him does not include materials but included contractor's overhead and reasonable costs including profit.

42. Mr. Stoppi indicates that he and Mr. Mills met to see whether they could arrive at a combined final report. Mr. Stoppi says that Mr. Mills accepted his report save that the sum of \$200,000.00 was added to the Bill of Quantities representing wet work, concrete work left out of Mr. Stoppi's assessment for lack of information.

43. The discussions between Mr. Mills and Mr. Stoppi could not advance because Mr. Stoppi says that there was nothing on the face of most of the receipts (apart from 2 or 3 of them) used by Mr. Mills in his calculation to prove that the items purchased were relevant to 1 Tara Close and to work done there by the Contractor. Also Mr. Mills indicated that Mr. Perrier had instructed him that other work was done in respect of which Mr. Stoppi had not been instructed.

44. It is important to note that whilst Mr. Mills visited the site on various occasions he told Mr. Stoppi that he never did any measurements of the work done and his Summary of Cost represents a compilation of documents obtained by Mr. Perrier.

45. Mr. Stoppi's evidence is that where the agreement between the parties is to pay for work done and material supplied, in the absence of agreement regarding overheads, it is normal to pay it in proportion to the value of the work done. In other words, for each interim payment one would add the commensurate payment re contractor's profit and overheads and it would be paid incrementally over the life of the project.

46. Mr. Stoppi said that his assessment was on the basis of labour only and when it was drawn to his attention by Mr. Mills that the contractor provided certain materials, these materials were mainly for making concrete and mortar and he included them.

47. An important aspect of the Bells' case in answer to Mr. Perrier's claim for other and extra work done is Mr. Stoppi's evidence at paragraphs 45 and 46 of his witness statement as follows:

45. From my experience in the industry it is not usual in valuing work to compile unverified or uncertified receipts from a Contractor and thereafter present the value of the work as the aggregate of the receipts thus presented without any reference whatsoever to the person who contracted the contractor.

46. This is not usually done as it leaves the Contractor and the Client exposed. The Contractor is exposed to a claim that the items on the receipts were not used for the job in question and the Client to a claim on him the particulars of which he cannot verify as no receipts were ever certified or approved by him.

48. In cross-examination Mr. Stoppi agreed that Mrs. Bell did not tell him about certain matters dealt with by Mr. Perrier, for example construction of chain-link fence or steps, or plumbing or electrical work.

49. I have examined the evidence and the case presented for both sides and it is clear to me that the absence of any written agreement in relation to the scope of work to be done and the costs and method of payment have shrouded this matter in difficulty and confusion.

50. It is for the Claimant Mr. Perrier to prove his claim on a balance of probabilities and I find that he has not met this standard of proof. Firstly, the Claim has expanded from that which was originally pleaded, and although I allowed the Claimant to lead evidence of this other work, because the scope of the work appeared nebulous based on the pleadings and witness statements exchanged, after the completion of the trial no attempt was ever made to amend the pleadings. In any event, this attempt to claim for other works, where no documentary proof of many

items claimed was presented, for example most of the receipts which Mr. Mills referred to and used in his summary of costs were never put in evidence, throws some doubt on the veracity and reliability of the claim. Mr. Perrier's case became one where he was claiming for work other than that pleaded, on a sort of sliding scale, yet the figure being claimed remained the same figure originally claimed i.e. \$6,773,288.83. It is difficult to see how the first set of heads under which Mr. Perrier claimed could genuinely be due, yet when additional items are added to the claim, the sum allegedly due does not increase, but instead remains the same.

51. I accept that in the absence of any estimate from the contractor initially or at all that on a balance of probabilities it is more likely that the agreement entered into was that payments would be kept current with the work done rather than that it could be understood that the Bells would be faced with an unknown (and relatively large) claim at the end of the work. I find it somewhat hard to comprehend why the fortnightly payments which the Bells were required to pay would have varied so widely if they were not related to, and did not cover the work performed from time to time. I found Mrs. Bell's evidence more credible than that of Mr. Perrier and Ms. Baugh and I accept Mrs. Bell's evidence that she was told on several occasions that the fortnightly sums charged covered blasting works, rental of compressor, purchase of material, labour and other items. I reject the claim that the agreement between Mr. Perrier and the Bells was that Mr. Perrier would be compensated on a cost plus basis at the end of the project. Mr. Robinson, who says he was paid in full, did both blasting and compressor work. Although Mr. Perrier gave evidence that he hired compressor from a man down the boulevard named Aiken, and from Robinson, no evidence or any documentation in relation to Aiken was submitted. There were separate claims for compressor hireage of \$2.9 Million and for Blasting Operation at \$1,913,417.00. However, the Invoices from Mr. Robinson's company (exhibits 4A-G) cover both blasting and compressor work and therefore I

accept the Defendants' Attorneys submissions that this figure claimed covered both blasting and compressor work. The Claimant has not therefore satisfied me that there was any separate sum of \$2.9 Million due for compressor hireage. The evidence of Mr. Perrier and Ms Baugh is that this is the only construction project that Mr. Perrier had doing at the time, and thus Ms Baugh's admission that the sums charged every two weeks included compressor and blasting work and materials accords with common sense.

52. Whilst it is true that there were a number of important items of information which Mr. Stoppi was not provided with in preparing his Bill of Quantities, I accept his evidence that it is not usual in the industry for unverified and uncertified receipts from a contractor to be thereafter presented as the aggregate of the receipts for the reasons set out in paragraphs 45 and 46 of his witness statement.

53. I accept Mr. Stoppi's methodology, as being a more forensic and accurate methodology of examining the work done over Mr. Mills' Summary of Costs which was based on receipts presented by and instructions obtained from Mr. Perrier. I find that there was no agreement that the Bells were to pay end of project bonus, overheads or project, and I am not satisfied that Mr. Perrier would be entitled to tack these on at the end of the project. However I take into account in my overall assessment of the Claim the fact that Mr. Stoppi included in his Bill of Quantities sums for Contractor's overhead, reasonable costs and profit.

54. I am satisfied that the value of the work done by Mr. Perrier is more than the sum of \$7,293,071.00, but the Claimant Mr. Perrier has failed to prove the value of the work done, or to prove that the value is in excess of the sum which the Bells have already paid to him, i.e.\$10,975,600.00. Mr. Stoppi's analysis of the difficulties presented when one tries to value work by using unverified and non-specific receipts at the end of a project, precisely identifies major pitfalls that have ultimately stumped the Contractor's Claim in this case.

55. On the other side of the equation, the Bells, who would have the burden of proving their Counterclaim on a balance of probabilities have not satisfied me that the figure of \$3,482,529.00 is due to them as an overpayment, having regard to the evidence in relation to other work performed.

56. In my judgment both the Claim and the Counterclaim fail. There will therefore be Judgment for the Defendants on the Claim with costs to be taxed if not agreed and Judgment for the Claimant on the Counterclaim with costs to be taxed if not agreed.