[2022] JMCC COMM 32

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISON

CLAIM NO. SU2020CD00019

BETWEEN	**ROGER WILLIAMS**	**CLAIMANT**
AND	**EDGEHILL HOMES LIMITED**	**DEFENDANT**

Mr. Hugh Small Q.C., Mrs. Emily Shields and Ms. Marissa Wright instructed by Gifford, Thompson & Shields

Mr. Kwame Gordon and Ms. Monique James instructed by Samuda & Johnson

Dates Heard: September 20, 21, 22, 23 & 24, November 10 & 11, 2021, March 16 & 17, and November 10, 2022

Civil Practice & Procedure – **Breach of Contract – Fraud – Whether the purported agreement is fraudulent – Whether the purported agreement is therefore valid – Whether there exists sufficient acts of part performance in relation to the alleged oral agreement – Damages for breach of contract – Quantum Meruit basis**

PALMER HAMILTON, J

BACKGROUND

[1] This claim was initiated by way of a Claim Form and Particulars of Claim filed on the 12th day of September 2018. The Claimant (hereinafter referred to as Mr. Williams) sought the following orders against the Defendant (hereinafter referred to as Edgehill Homes):

> *(a) The sum of United States Dollars Three Hundred and Sixty-Six Thousand, Three Hundred and Eighty-Four Dollars and Ninety-Two Cents (US $366,384.92) being the amount due and owing for services*

rendered by the Claimant for and at the request of the Defendant under a contract for services; or

(b) Damages for breach of contract;

(c) Interest pursuant to Section 3 of the Law Reform (Miscellaneous Provisions) Act at such rate and for such period as the Court deems fit;

(d) Costs; and

(e) Such further and other relief as this Honourable Court may deem fit.

[2] The Particulars of Claim outlined the particulars of Mr. Bennett's loss and damage as follows:

1. Sums owed for pre-contractual services	*$312,784.43*
2. Sums owed for post contractual services	*$ 46,338.43*
	$359,122.86
3. GCT added thereon (16.5%)	*$ 59,255.27*
SUB TOTAL	***$418,378.13***
Less sums paid	*$ 51,993.21*
TOTAL SUMS DUE AND PAYABLE	***$366,348.92***

THE CLAIMANT'S CASE

[3] Mr. Williams alleges that he entered into an oral agreement in or around 2013 with Mr. Rollyn Bennett, who was at all material times the Managing Director of Edgehill Homes, for the provision of quantity surveying consultancy services. Edgehill Homes operates as an infrastructure and housing development organization and at the material time was involved in a construction project in the parish of St. Mary (hereinafter referred to as 'the Project'). The services were to be provided in relation to the Project. It was pursuant to this oral agreement that Mr. Williams commenced working on the Project. According to Mr. Williams work was to be completed in 2 stages: pre-contract services and post-contract services.

[4] Mr. Williams further alleges that this oral agreement between himself and Mr. Bennett was reduced to writing in a document titled *"CLIENT/QUANTITY SURVEYING CONSULTANT SERVICES AGREEMENT BETWEEN EDGEHILL*

HOMES LIMITED AND ROGER M. WILLIAMS IN RELATION TO THE INFRASTRUCTURE & HOUSING DEVELOPMENT AT HUDDERSFIELD, ST. MARY." This document was dated September 2014 and was arranged in the stages under which the oral agreement was based. Mr. Williams contends that he prepared this document, executed it and submitted a copy to Mr. Bennett for his perusal.

[5] Mr. Williams alleges that on a subsequent occasion he met with Mr. Bennet in the parking lot at a gas station in the parish of St. Ann and he gave to Mr. Bennett another copy of the document titled *"CLIENT/QUANTITY SURVEYING CONSULTANT SERVICES AGREEMENT BETWEEN EDGEHILL HOMES LIMITED AND ROGER M. WILLIAMS IN RELATION TO THE INFRASTRUCTURE & HOUSING DEVELOPMENT AT HUDDERSFIELD, ST. MARY."* This meeting took place on the 10th day of November, 2014. Mr. Williams in his evidence said that the he gave the document to Mr. Bennett who signed it in his presence and he witnessed Mr. Bennett's signature in his presence.

[6] The total value of the work under the contract was set at **FIVE HUNDRED AND TWENTY-ONE THOUSAND THREE HUNDRED AND SEVEN UNITED STATES DOLLARS AND THIRTY-EIGHT CENTS (USD$521,307.38)**. The payment for pre-contractual services was set under the November 2014 agreement to be 60% of the overall contract sum and the post contractual fee was the remaining 40% of the total contract price with General Consumption Tax (GCT) to be added. The pre-contractual sum amounted to **THREE HUNDRED AND TWELEVE THOUSAND SEVEN HUNDRED AND EIGHTY-FOUR UNITED STATES DOLLARS AND FORTY-THREE CENTS (USD$312,784.43)** plus GCT and the post-contractual sum amounted to **TWO HUNDRED AND EIGHT THOUSAND DOLLARS FIVE HUNDRED AND FIFTY-TWO UNITED STATES DOLLARS AND NINETY-FIVE CENTS (USD$208,552.95)** plus GCT.

[7] Mr. Williams stated that he completed the work for the pre-contractual stage, between September and early October of 2014, for the Project and prepared and

submitted to Edgehill Homes accurate and detailed bills of quantities, articles of agreement, conditions of contract specific to the Project, conducted evaluation of tenders, preparation of tender reports and negotiated with contractor when required. Pursuant to the November 2014 agreement, payment for these pre-contractual services were due upon completion of the said services. Mr. Williams alleges that at the end of October 2014 he was due the sum of **USD$312,784.43** plus GCT.

[8] Mr. Williams contends that he has only received 2 payments of **THIRTY-FOUR THOUSAND SEVEN HUNDRED AND NINETEEN UNITED STATES DOLLARS AND SEVEN CENTS (USD$34,719.07)** and **SEVENTEEN THOUSAND TWO HUNDRED AND SEVENTY-FOUR UNITED STATES DOLLARS AND FOURTEEN CENTS (USD$17,274.14)** on 10.11.2014 and 26.01.2015 respectively. No GCT was paid on these sums. A balance of **TWO HUNDRED AND SIXTY THOUSAND SEVEN HUNDRED AND NINETY-ONE UNITED STATES DOLLARS AND TWENTY-TWO CENTS (USD$260,791.22)** plus GCT remains outstanding.

[9] Mr. Williams further alleges that he has not been paid for work done in the post-contractual stage and is therefore owed the sum of **FORTY-SIX THOUSAND THREE HUNDRED AND THIRTY-EIGHT UNITED STATES DOLLARS AND FORTY-THREE CENTS (USD$46,338.43)** plus GCT. He claims that he worked over the period of eight (8) months as Edgehill Homes terminated the agreement and he was not able to complete work under this stage.

[10] This is the core of Mr. Williams' claim for breach of contract as he did work for the Project between October 2014 up to May 2015 and Edgehill Homes failed and/or refused to pay the sums due and owing to him pursuant to their agreement. Mr. Williams also stated that he made several attempts to recover the sums due to him.

[11] Mr. Brian Goldson was called as an Expert Witness. He is a Chartered Quantity Surveyor at Goldson, Barrett, Johnson and has worked as same since 1964 according to his Curriculum Vitae. He graduated from the South West Essex Technical College and School of Art in the United Kingdom in 1964. He is also the recipient of an Officer of the Order of Distinction Jamaica for services in the Construction Industry.

THE DEFENDANT'S CASE

[12] Edgehill Homes has refuted all the allegations made by Mr. Williams and is seeking a declaration that the alleged agreement is null and void and of no effect. Mr. Rollyn Bennett is the founder, former President and former Director of Edgehill Homes. He has been involved in the Project since its inception. Mr. Bennett stated that he has worked with Mr. Williams as a consultant on the Project since its inception. Mr. Williams provided to Edgehill Homes quantity surveying services up to 2015.

[13] Mr. Bennett contended that prior to April 2014, Mr. Bennett worked in an informal manner on the Project and he would pay him for his services rendered pursuant to invoices which Mr. William submitted. He stated that up to April 2015, when the Project was terminated, Mr. Williams only submitted 2 invoices for payment and neither of those invoices referred to or bore any similarities with the terms of the purported agreement. Edgehill homes averred in their Defence that the amounts paid to Mr. Williams are in full satisfaction of the services rendered. In any event, Mr. Williams' claim for fees is inconsistent with the stage that Project had reached when his services were no longer required as only 3%-4% of the overall Project was partially complete.

[14] He further contended that he had no signed agreement with Mr. Williams. Edgehill Homes denies that Mr. Bennett entered into a written or oral agreement with Mr. Williams for the sums being claimed or on the terms being alleged. It is Edgehill Homes' position that the November 2014 agreement being relied upon is a fraudulent document as it does not reflect the terms of any agreement between the

parties. Mr. Bennett denies having ever agreed to the purported terms contained in the said agreement and he denies having ever seen or signed a document containing the several pages which have now been presented to the Court as the agreement between the parties.

[15] In their Defence the Defendant contends that Mr. Williams acted fraudulently in:

> *(a) Affixing a pre-signed signature page to the alleged agreement without the knowledge or consent of the Defendant;*
>
> *(b) Affixing a pre-signed signature page to a document containing terms to which the Defendant did not agree;*
>
> *(c) Representing that the alleged agreement contained the terms of an oral agreement between the Claimant and the Defendant knowing same to be false and untrue;*
>
> *(d) Further, or alternatively, the Defendant will contend that the signature of Mr. Rollyn Bennett which appears on the signature page of the alleged agreement is a forgery.*

[16] The circumstances under which Mr. Williams contends that the purported agreement came to be executed and witnessed are dubious and questionable.

[17] They also contended that there were errors and deficiencies in the work produced by Mr. Williams and he failed to perform his duty which resulted in the demolition of the constructed model homes.

[18] It also a part of their claim that Mr. Williams only started to demand payment when he became aware of a new and viable Project being undertaken by Morrison Financial Mortgage Corporation (hereinafter referred to as Morrison Financial). Mr. Adrian Bennett, Director Business Development for Morrison Financial, was called as a witness by Edgehill Homes. His evidence is consistent with that of Mr. Bennett, as he states that when the Project was terminated it was only partially complete. Therefore, Mr. Williams had not yet provided majority of the services required for completing the entire Project.

SUBMISSIONS

[19] I wish to thank all Counsel involved in this matter for their very helpful written submissions which provided invaluable assistance to the Court in deciding the issues raised in this claim. I also wish to make it known that I carefully considered all the submissions and authorities before me whether they have been referred to or not.

ISSUES

[20] The following issues arise for my determination:

(a) Whether the purported agreement dated November 10, 2014 is fraudulent;

(b) Whether there existed an oral agreement between the Claimant and the Defendant in relation to the Project;

(c) Whether the Defendant breached the alleged contract with the Claimant;

(d) Whether the Claimant is entitled to the sums claimed for pre-contract and post-contract services on the basis of *quantum meruit* and/or damages for breach of contract; and

(e) Whether the court can give a judgment in equity where the specific relief has not been pleaded.

LAW & ANALYSIS

A. *Whether the purported agreement dated November 10, 2014 is fraudulent*

Fraud & Forgery

[21] Section 3 of the Forgery Act of Jamaica 1942 defines forgery as follows:

> *3. – (1) For the purposes of this Act, "forgery" is the making of a false document in order that it may be used as genuine, and, in the case*

of the seals and dies mentioned in this Act, the counterfeiting of a seal or die; and forgery with intent to defraud or deceive, as the case may be, is punishable as in this Act provided.

(2) A document is false within the meaning of this Act if the whole or any material part thereof purports to be made by, or on behalf or on account of a person who did not make it nor authorize its making; or if, though made by, or on behalf or on account of, the person by whom or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number or any distinguishing mark identifying the document, is falsely stated therein; and in particular a document is false –

(a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; or

(b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; or

(c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorized it:

Provided that a document may be a false document notwithstanding that it is not false in such a manner as in this subsection set out.

[22] Evan Brown J in the case of **Joan Matheson v Donovan Lennox and Marlene Lennox** [2016] JMSC Civ 188 stated that to prove the allegation of fraud the claimant was required to show either an element of dishonesty or moral turpitude on the part of the defendants; and the standard of proof is beyond a reasonable doubt. To establish fraudulent conduct, one must show conduct of a dishonest nature on the part of the defendant. He relied on the case of **Franklyn Grier v Tavares Ellis Bancroft** (1997), delivered 6th April, 2001.

[23] Evan Brown J in the said case also succinctly outlined the law in relation to forgery at paragraph 36. He stated that:

> *[36] …According to Blackburn, J., "forgery [at common law] is the falsely making or altering a document to the prejudice of another, by making it appear as the document of that person" (see Re Windsor (1865), 6 B.&S. 522). Under the Forgery Act, section 3 (1) "forgery is the making of a false document in order that it may be used as genuine". By virtue of section 3 (2) of the Forgery Act, "a document is false ... if the whole or any material part of it ... purports to be made by, or on account of a person who did not make it nor authorized its making".*

[24] In the case of **Elain Arem v Vivienne Ancilin Myrie** [2018 JMSC Civ 49, Lawrence-Beswick J had before her an expert witness who was a forensic document examiner and who had examined several signatures of the claimant. The expert witness came to the conclusion that the signature on the document in question was not that of the claimant. The Court accepted the scientific evidence of the expert witness and was satisfied on a balance of probabilities that the signature on the said document was not the signature of the claimant.

[25] Unfortunately, there is no scientific evidence before me regarding the signature that appears on the November 2014 agreement and as such I must assess the credibility of the witnesses in relation to the circumstances leading up the alleged execution of the November 2014 agreement.

[26] I found the cases of **Grace Shipping Inc and Another v C.F. Sharp & Co (Malaya) Pte Ltd** [1986] SGPC 5 and **Continental Petroleum Products Ltd v Scotia DBG Investments Ltd** [2016] JMSC Civ 129 relied on by Learned Counsel Mr. Gordon to be useful. Lord Goff of Chieveley at paragraph 53 stated that:

> *"…in the present case, the judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the judge to have regard to the contemporary documents and to the overall probabilities. In this connection, their Lordships wish to endorse a passage from a judgment of one of their number in The Ocean Frost; Armagas Ltd v Mundogas SA [1985] 1 Lloyd's Rep 1 when he said at 57:*

> *Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.*

[27] This approach has been adopted in this jurisdiction and can be seen in the case of **Continental Petroleum Products Ltd v Scotia DBG Investments Ltd** where Anderson J opined that:

> *"[57] In assessing credibility, as between two (2) witnesses, one of whom is telling the truth in important respects and the other witness, who is not doing so, as regards those same matters, it is always important for the court of first instance to consider contemporaneous documents, probabilities and possible motives, in a case involving disputed facts. The Privy Council made this clear, in the case: Villenueve and another v Gaillard and another – [2011] UK PC 1, per Ld. Walker, at paragraph 67. See also: Armagas v Mundogas SA (The Ocean Frost) – [1986] 1 AC 717, at page 757, per Dunn, L.J."*

[28] Thompson-James J in the case of **Paul Griffith v Claude Griffith** [2017] JMSC Civ 136 relied on the following authorities to show that where the allegation is serious, such as in the case of forgery, convincing evidence is required for that burden to be discharged. **Vacianna v Herod** [2005] EWHC 711 (Ch); **Fuller v Strom** [2000] All ER (D) 2392]. In **Vacianna v Herod**, the Court agreed with the learned authors of Williams, Mortimer and Sunnucks on Executors, Administrators and Probate (18th Edition, 2000), para 13.61, wherein it is stated that although Forgery is a criminal offence, since a probate action is a civil proceeding and not a criminal one, the standard of proof is not the same as in criminal proceedings. The Court added that the standard of proof "is on the balance of probabilities" but also added the caveat that:

> *"insofar as they appear to be suggesting that, notwithstanding that the civil standard of proof applies, something more than a mere balance of*

> *probabilities is required, it seems to me one has to tread very warily. The more serious the allegation…convincing evidence is required. However, insofar as that statement might be suggesting something akin to a criminal standard of proof is required, I respectfully do not agree with it" [paras 20-21].*

[29] Thompson-James J also stated that the Court in **Fuller v Strom** stated that:

> *"While I recognise that the standard of proof is the civil standard on the balance of probabilities, it is well recognised that where a serious allegation (like forgery) is made, the inherent improbability of the event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event has occurred: see In re Hand others [1996] AC 563 per Lord Nicholls of Birkenhead at page 56."*

[30] Further, in Halsbury Laws of England, Civil Procedure (Volume 11 (2009) 5th Edition, paras 1-1108; Volume 12 (2009) 5th Edition, paras 1109-1836, the learned authors explained the burden of proof as follows:

> *"…it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but that the gravity of the issue becomes part of the circumstances which the Court has to take into consideration in deciding whether or not the burden of proof has been discharged: the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it."*

[31] Learned Counsel Mrs. Shields submitted that none of the varied versions of fraud pleaded by Edgehill Homes has been proved and the evidence demonstrates that there was no document presented by Edgehill Homes to this Court from which a pre-signed signature could have been taken by her client and fraudulently affixed to the November 2014 agreement. She further submitted that there is no evidence that Mr. Williams or anyone forged any signature belonging to Mr. Bennett. She asked that the Court find that:

> *(a) her client is a witness of truth as to the creation/drafting of the September 2014 agreement;*
>
> *(b) her client is a witness of truth as regards the signing of and handing over of the September 2014 agreement to Mr. Bennett;*
>
> *(c) the inference is irresistible that the signature of Mr. Bennett ended up on the September 2014 agreement as Mr. Bennett signed it and*

supplied it to Mr. Kerry Thomas in or around October 2014 when Mr. Thomas sough written contract and documentation to support the fee account submitted by Mr. Williams in October 2014;

(d) Mr. Williams did meet with Mr. Bennett in a petrol station on November 10, 2014 at which time he received a cheque from M. Bennett and Mr. Bennett and Mr. Williams affixed their signatures on the November 2014 agreement; and

(e) Mr. Williams took the November 2014 agreement with him to his house in Kingston and asked his son Brandon Williams to witness his signature on the document.

[32] Learned Counsel Mr. Gordon submitted that the Court in relation to this issue is to take particular note of the relevant history between the signatories, the circumstances leading up to the alleged execution of the November 2014 agreement and their respective behaviour before and after the purported execution of the said agreement. He further submitted that this is not a case which involves a single grandiose act of dishonesty but rather several strands of an interwoven thread which unravel to reveal Mr. Williams' subterfuge and deceit. Mr. Gordon contended that Mr. Williams gave no evidence that the submission of the September 2014 agreement was as a result of the culmination or any discussions or meetings with Mr. Bennett or any other officer of Edgehill Homes. Mr. Gordon raised several questions in relation to the alleged agreement such as: why did Mr. Williams execute the September 2014 agreement if he anticipated possible amendments being made by Mr. Bennett?; why did Mr. Williams not request that this copy be executed and returned to him?; and why was the meeting at the gas station in St. Ann necessary when Mr. Bennett already had a signed agreement and would only need to affix his signature? It is Counsel's position that there are more questions than answers and all the possible answers point in the direction of a fabrication by Mr. Williams.

[33] Mrs. Shields pointed out that the September 2014 agreement was produced to this Court by Edgehill Homes and even though the signatures of the parties were not witnessed they were both present. This document, she submitted, is identical to the contents of the November 2014 agreement. Mr. Adrian Bennett testified that

he was in receipt of the September 2014 agreement and it was this agreement that was sent to Morrison Financial and appeared in Court during the trial. She argued that her client explained the reasons for him meeting with Mr. Bennett at the gas station to execute the November 2014 agreement. I note here that Mr. Williams, in cross-examination, admitted that it was not the norm for contracts to be executed in this manner.

[34] I find some merit in Learned Counsel Mr. Gordon's submission that the evidence of Mr. Brandon Williams is self-serving having regard to the fact that he is the son of Mr. Williams. His evidence is that his father showed him a document and he noted that the name and signature of Mr. Bennett and his father's signature as a witness was on that document. He also said that he saw that there was the name Roger Williams over which there was the signature of his father. It was that signature that he was asked to and did witness as he knows his father's signature very well. However, Mr. Brandon Williams did not in fact see his father sign the document and merely witnessed what his father told him to.

[35] Learned Counsel Mr. Gordon submitted that there is no evidence of Mr. Williams objecting to the budgets prepared for the Project in relation to the fees that were allocated to him. The evidence before me is that the Project was broken down into 3 phases. At the time when Mr. Williams as providing his services the Project was still at Phase 1A and that was not completed at the time when the Project was terminated. I accept that Mr. Williams was a part of the preparation of the budgets to obtain financing for the Project and was still involved after the Project had received financing. I also accept Mr. Williams' evidence that even though the sums earmarked for his services was not in accordance with the sums outlined in the November 2014 agreement, he took no issue with same as that budget was only in relation to Phase 1A of the Project.

[36] I find it less probable that the parties would meet at a gas station to conduct business, especially business which required the exchange of a cheque and the signing of documents. However, I must also give weight to the relationship of the

parties. It is not in dispute that the parties shared a close relationship and engaged in informal dealings. Nevertheless, if Mr. Williams has been involved in the Project since its inception why would he wait for more than 6 years to reduce the alleged oral agreement to writing? I find merit in Learned Counsel Mr. Gordon's submission that if Mr. Williams is to be believed why wouldn't Mr. Bennett simply reciprocate by witnessing his, Mr. Williams', signature when his evidence is that Mr. Bennett was next to him during the alleged execution of the November 2014 agreement. Another question which arises is why would Mr. Williams produce another agreement if he had already signed the September 2014 agreement and given a copy to the Defendant.

[37] I find that, on the evidence before the Court, I am unable to make a determination as to whether the signature on the November 2014 agreement is in fact a forged signature as claimed by Edgehill Homes. Learned Counsel Mrs. Shields submitted that the September 2014 agreement which is identical to the November 2014 agreement was produced by Edgehill Homes. Even though Mr. Bennet is alleging that he never saw the purported document, it was in the possession of Morrison Financial. I accept the evidence of Mr. Adrian Bennett in his examination-in-chief where he said that the document was forwarded to him by Mr. Bennett in October 2014. Respectfully, I therefore find no merit in the submissions put forward by Learned Counsel Mrs. Shields.

[38] Nevertheless, I am prepared to make a finding that of the two accounts, I find Mr. Bennett's account to be more compelling and credible. The nature of this case is that the assertions on both sides are diametrically opposed and the allegations are serious. Credibility therefore plays a great role in my assessment of the evidence. Having regard to the documents, the motives of each party and the overall probabilities it is my view that the integrity of the agreements titled *"CLIENT/QUANTITY SURVEYING CONSULTANT SERVICES AGREEMENT BETWEEN EDGEHILL HOMES LIMITED AND ROGER M. WILLIAMS IN RELATION TO THE INFRASTRUCTURE & HOUSING DEVELOPMENT AT*

HUDDERSFIELD, ST. MARY," and dated September 2014 and November 2014 is severely compromised. As such, I am unable to rely on same.

B. *Whether the court can give a judgment in equity where the specific relief has not been pleaded.*

[39] Carr J in **Carmen Williams v Muriel Johnson (By her son and next friend Kevin Johnson)** [2022] JMSC Civ 96 was of the view that the Court has the jurisdiction to determine whether a Claimant can obtain a remedy in equity even if it is not specifically pleaded. Carr J relied on Phillips J.A. dicta in the case of **Medical and Immuniodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42.

[40] Phillips JA in the Court of Appeal decision of **Medical and Immuniodiagnositc Laboratory Ltd. v. O'Meally Johnson** stated that:

> *"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 Karsales Ltd v Wallis [1956] 2 All ER 866, Lord Denning said: "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."*

[41] Section 48 (g) of the **Judicature (Supreme Court) Act** vests the Court with the jurisdiction to determine matters and to grant remedies to a party once it appears to arise on their cause or matter. It states that:

> *"The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided."*

[42] It is settled law that a person who seeks equity must do equity. The authors of the 19th Edition of the text Modern Equity notes that equity in a wide sense means

that which is fair and just, moral and ethical. One of the maxims of equity posits that “he that cometh to equity must come with clean hands.” This maxim of equity looks at the previous conduct of the claimant. The claimant must show that his past record in the transaction is clean. Therefore, the equitable relief will only be debarred if the claimant’s blameworthy conduct has some connection with the relief sought.

[43] The authors in the 5th Edition of the Halsbury’s Laws of England stated that a court of equity refuses relief to a claimant whose conduct in regard to the subject matter of the litigation has been improper. This was formerly expressed by the maxim 'He who has committed iniquity shall not have equity'; and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation The maxim is not to be applied too rigorously. The maxim does not mean that equity strikes at depravity in a general way; the cleanliness required is to be judged in relation to the relief sought and the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal, as well as in a moral, sense.

[44] A person seeking equity must act in a fair and equitable manner. Mr. Williams has not, in my view, acted in a fair and equitable manner. He has put before this Court a document purported to be signed by Mr. Bennett in relation to an agreement between the parties regarding the provision of quantity surveying services in relation to the Project. However, I am of the view that this is one of the cases where the maxim is not to be applied too rigorously. The authors in the 29th Edition of Snell’s Equity made reference to the case of **Loughran v Loughran** 292 U.S. 216 at 229 (1934) where it was held that equity does not demand that its suitors shall have led blameless lives. Even though I have found that I am unable to rely on the written document as the integrity has been compromised, it does not, in my view have a direct impact on the relief being sought by Mr. Williams. This maxim ought not to operate to completely deny Mr. Williams of the remedies sought.

C. *Whether there existed a valid oral agreement between the Claimant and the Defendant in relation to the Project*

[45] Having found that I am unable to rely on the said agreement, I must now consider whether there existed a valid oral agreement between the parties. It is not in dispute that the Mr. Williams worked with Edgehill Homes informally on the Project. However, it is in dispute as to whether whatever contract existed between the parties is valid.

[46] Edwards JA in the case of **Carlton Williams v Veda Miller** [2016] JMCA Civ 58 provided guidance as to how the court is to assess whether a contract exists. She stated at paragraphs 31-33 that:

> *[31] How should a court approach the issue of considering whether there is a valid contract in existence? Firstly, if it is in writing, then it is normally not necessary to look beyond the four corners of the document to find the terms of the contract. In the absence of any written document, where the contract is alleged to be oral, the court must look for the intention of the parties in the words said at the time the contract was alleged to have been made, the conduct of the parties to the contract and any evidence of the negotiations at the time of the contract. What the court cannot do is create a contract where none existed. However, as in this case, where one party is asserting that there was an oral contract, it is the duty of the court to thoroughly examine all the circumstances and determine whether or not the parties, by their words, conduct and negotiations, intended their actions to have legal consequences.*
>
> *[32] Where the subject matter of the agreement is commercial rather than domestic, it is not necessary for the person asserting the agreement to prove that there was an intention to create legal relations and for the purpose of this principle, it is accepted that there can be commercial agreements between members of a family. There is a rebuttable presumption that the parties to a commercial agreement intended that agreement to have legal consequences and the onus is on the party asserting that there was no such intention for the agreement to have legal consequence, to prove it. See Edwards v Skyways Ltd [1964] 1 WLR 349 at 355-357 and Chitty on Contract twenty-fifth edition at paragraph 123.*
>
> *[33] In Garvey v Richards, Harris JA, in discussing when an agreement will be considered to have legal effect, stated at paragraph [10] that;*

> *"It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into the contractual relationship and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement, is in existence."*
>
> *In that case it was an employment contract and this court concluded that not all the essential terms of the contract had been agreed by the parties and therefore there was no binding and enforceable contract.*

[47] Learned Counsel Mrs. Shields submitted that from the evidence, her client was presented with architectural drawings and was instructed and did use the said drawings to generate Bills of Quantities, Articles of Agreements and Conditions of contract for the Project. She submitted that the incontrovertible evidence is there as her client shows that there existed an oral agreement between himself and Edgehill Homes. I find merit in her submissions. This is bolstered by the fact that Mr. Bennett describes the relationship with Mr. Williams as an informal one and that he gave evidence to the effect that all the verbal agreements were negated when he got financing from Morrison Financial.

[48] Learned Counsel Mrs, Shields also submitted that the payment of the two cheques to her client by Edgehill Homes qualified as acts of part performance. She applied the principles of **Steadman v Steadman** [1976] AC 536 and contended that though the payment of money is by itself an unequivocal act, they should be properly seen as the payment of money to her client pursuant to the oral contract which was reduced to writing.

[49] The approach to be taken to determine whether actions of a party amount to sufficient acts of part performance was outlined in **Steadman v Steadman**. It was stated that:

> *"You must first look at the alleged acts of part performance and see whether they prove that there must have been a contract and it is only if they do so prove that you can bring in the oral contract. A thing is proved in civil litigation by shewing that it is more probably true than not; and I see no reason why there should be any different standard of proof here [56] At page 982 the court continued: In my view, unless the law is to be divorced from reason and principle, the rule must be that you take the whole circumstances, leaving aside evidence about the oral contract, and see whether it is proved that the acts relied on were done in reliance on a contract: that will be proved if it is shewn to be more probable than not…*

[50] Learned Counsel Mr. Gordon submitted that the evidence of Mr. Williams lacks credibility. Mr. Williams' evidence is that he entered into this oral agreement in or around 2007 and it was reduced to writing in 2013 and a copy shared with Mr. Bennett in 2014. There is no evidence that Mr. Williams attempted to have the written document executed prior to September 2014. These circumstances, Mr. Gordon contended, are questionable and goes towards credibility.

[51] I accept the evidence of Mr. Goldson where he stated in cross-examination that it is common for an oral contract to be given in relation to these types of contracts and then later reduced into writing. Mr. Goldson also stated in cross-examination that it cannot be denied that a pre-contract existed between both parties before July 2014 since drawings and design drawings and everything had been given to the consultant as it appeared the contract obviously existed to perform services. I also accept this part of his evidence. It is therefore my judgment that an oral contract existed between the parties for the provision of quantity surveying consultancy services in relation to the Project.

[52] One of the issues which arises for my determination now is whether it would be unjust if the defendant was to take advantage of the fact that the agreement was not in writing. In my view, the answer is yes. Mr. Williams acted in accordance with

the oral agreement that existed between himself and Edgehill Homes and commenced work on the Project.

D. *Whether the Defendant breached the oral agreement they had with the Claimant*

[53] Learned Counsel Mrs. Shields contended that Edgehill Homes has failed to pay her client the balance remaining on the pre-contract sum plus GCT on the whole and has failed to pay for post-contract work done. She further contended that her client completed the pre-contract work in July 2014 and then commenced post-contract work. It was after completing this pre-contract work that Mr. Williams submitted 2 invoices for payment for pre-contract work. The evidence shows that Mr. Williams has only received 2 cheques from Edgehill Homes representing payment for services.

[54] Learned Counsel Mr. Gordon has submitted that there was no breach of the terms of the agreement. He submitted that there was no certainty or clear terms with regard to the said oral agreement. Mr. Gordon's submissions mainly focused on the interpretation of the written agreement. He relied on numerous cases which would have provided assistance to the Court if the written agreement was found to be valid. In any event, Mr. Gordon also contended that Mr. Williams should be estopped from relying or enforcing on the agreement if it is valid. He further contended that Mr. Williams accepted the payments without demur and did not return until almost 2 years after the purported signing of the November 2014 agreement seeking to enforce its terms.

[55] Learned Counsel Mr. Gordon contended that the Claimant ought to be estopped from enforcing or relying on the agreement. He submitted that Mr. Bennett participated in the preparation of the budgets in relation to the Project and admitted that they are inconsistent with the terms of the purported written agreement. Counsel relied on the case of **Central London Property v High Trees House Limited** [1947] KB 130.

[56] I found Fraser J's judgment in the case of **Claudette White v Cyril Mullings and Eldred Mullings** [2017] JMSC Civ 111 to be of much use in relation to the point raised by Learned Counsel Mr. Gordon. He stated at paragraph 41 that:

> *"Lord Denning MR in the case of Crabb v Arun District Council [1975] 3 All ER 865, at p. 871 indicated that:-*
>
> > *The basis of this proprietary estoppel—as indeed of promissory estoppel—is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as 'estoppel'. They spoke of it as 'raising an equity'. If I may expand that, Lord Cairns said in (Hughes v Metropolitan Railway Co (1877) 2 App Cas 439 at 448, [1874–80] All ER Rep 187 at 191): '… it is the first principle upon which all Courts of Equity proceed …' that it will prevent a person from insisting on his strict legal rights—whether arising under a contract, or on his title deeds, or by statute—when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties. What then are the dealings which will preclude him from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights—even though that promise may be unenforceable in point of law for want of consideration or want of writing—and if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise: see Central London Property Trust v High Trees House, (Charles Rickards v Oppenheim [1950] 1 All ER 420 at 423, [1950] 1 KB 616 at 623). Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights—knowing or intending that the other will act on that belief—and he does so act, that again will raise an equity in favour of the other, and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct. In (Ramsden v Dyson (1866) LR 1 HL 129 at 170) Lord Kingsdown spoke of a verbal agreement 'or what amounts to the same thing, an expectation, created or encouraged.*

[57] This doctrine essentially prevents a party from insisting upon his strict legal rights where it would be unjust to allow him to enforce them, having regard to the dealings which took place between the parties.

[58] Mr. Goldson in his report, in answering questions put to him by Learned Counsel Mr. Gordon, said that a different construction methodology was used in relation to

the Project after it had resumed construction after the termination. Therefore, the documents as prepared by Mr. Williams would be inapplicable to the Project.

[59] Notwithstanding that, Mr. Williams did in fact complete his pre-contract work in relation to the preparation of the required documents. This is supported by the Articles of Agreement, Conditions of Contract, Bills of Quantities and Specifications document dated July 2014 which was prepared by Mr. Williams. This document shows that work was done in relation to the entire project and not just phase 1Ai.

E. *Whether the Claimant is entitled to the sums claimed for pre-contract and post-contract services on the basis of quantum meruit and/or damages for breach of contract*

[60] The author in the 16th edition of **McGregor on Damages** gave the following guidance when assessing damages:

> *"The starting point in resolving a problem as to the measure of damages for breach of contract is the rule that the Plaintiff is entitled to be placed so far as money can do it, in the same position as he would have been in had the contract been performed. The rule is limited first, but not substantially, by the principles as to causation; the second and much more far reaching limit is that the scope of protection is marked out why what was in the contemplation of the Parties. When damages is said to be too remote in contract it is generally this latter factor that is in issue."*

[61] The expression *quantum meruit*, means "as much as he earned". Phillips JA in the Court of Appeal case of **Sandals Resorts International Limited v Neville L Daley & Company Limited** [2018] JMCA App 24 in dealing with quantum meruit relied on the following texts:

> *"53" Halsbury's Laws of England, Volume 88, 2012, paragraph 408 states:*
>
> > *"The term 'quantum meruit' is used in different senses at common law. For example, in some cases quantum meruit is used to express the measure of recovery in a contractual claim. In other cases it is used to denote a restitutionary claim. The claim is clearly contractual in nature where it is one to recover a reasonable price or remuneration in a contract where no price or remuneration has been fixed for*

goods sold or work done. Where, however, no contract is ever concluded between the parties or the contract is void or otherwise unenforceable, the claim cannot be contractual in nature and is likely to be restitutionary. In other cases it can be difficult to discern whether the claim is contractual in nature or restitutionary. Where the implication of an obligation to pay a reasonable sum is a genuine one on the facts, reflecting the intention of the parties, the claim is contractual, but where the obligation is imposed as a matter of law, the claim is more likely to be restitutionary."

[54] In Emden's Construction Law by Crown Office Chambers, at paragraph 6.18 it states:

"Quantum meruit is the right to be paid reasonable remuneration. A quantum meruit claim may be based either on contract or on restitution. In principle, the conceptual distinction between contract and restitution is clear: contract is based on agreement between the parties; restitution is imposed by law, being the legal response to unjust enrichment of one party at the expense of another. In practice, the concepts are often blurred together in the cases, whether because of muddled analysis or because the distinction makes no practical difference in the particular circumstances."

[55] Finally, a very clear statement made in respect of payment under the contract by way of quantum meruit has been stated in the Stair Memorial Encyclopaedia, paragraph 64. It reads:

"When the price cannot be fixed by reference to the building contract, the contractor is entitled to payment quantum meruit for work done under contract. Examples include preparatory work for which the employer has agreed to pay, and cases where no price has been fixed in the contract (even when an estimate has been given) or where the pricing arrangements of the contract are not applicable (for example, because they were stated to apply only to a particular date which has passed). Likewise, where 'extras' have been ordered, but the parties have not agreed on the amount to be paid for them, payment is quantum meruit. If the contract in which the price is stipulated fails for some reason, and a new contract is implied, which ex hypothesi contains no term regarding payment, payment is quantum meruit..."

[62] Learned Counsel Mrs. Shields submitted that Mr. Bennett is to be paid the sums as laid out in the contract for the pre-contract stage. She relied on *quantum meruit* principles for payment to Mr. Bennett for work done in the post-contract phase, that is, work done by her client during construction of the model units and for infra-structural work. She relied on the cases of **Sandals Resorts International Limited v Neville Daley & Company** (supra) and **National Recovery Limited v Attorney General for Jamaica** [2020] JMSC Civ 125.

[63] Learned Counsel Mr. Gordon submitted that there was no breach of the terms of the agreement, if this Court finds same to be valid. Learned Counsel's submissions mainly focused on the written document. He further submitted that Mr. Bennett's entitlement to fees would only arise if he had performed the services required of the said agreement and the evidence before the Court is that Mr. Bennett did not perform the services required of him. He contended that Mr. Bennett participated in valuing his own services for the work to be performed pursuant to Phase 1Ai of the Project, which took place before the commencement of construction. A budget was prepared prior to the commencement of construction and this budget Mr. Bennett's services was estimated at $4,000,000.00. Counsel contended that Mr. Bennett was in fact paid for the services he rendered to the Project in respect of Phase 1Ai after the commencement date as it is not in dispute that Mr. Bennett received 2 payments.

[64] Learned Counsel Mr. Gordon contended that there were several issues with Mr. Bennett's work during his tenure on the Project, more specifically during the purported post contract period. This Learned Counsel further contended, must be taken into account in any assessment of the value of the work for the purposes of a quantum meruit claim.

[65] I accept the evidence of the budget that was prepared in relation to the Project dated July 2014 in which Mr. Williams has admitted that he participated in. In that budget $4,000,000.00 was earmarked for the services of Mr. Williams in respect of Phase 1Ai. The evidence of the expert evidence does show that Mr. Williams

completed pre-contractual work in respect of the entire project and not just in relation to Phase 1Ai. Mr. Williams therefore ought to be properly compensated for the pre-contractual services he performed in relation to the Project. However, I am unable to rely on the figures being relied on by Mr. Williams in the agreement.

[66] I agree with Learned Counsel Mr. Gordon in that there are no clear terms with regard to the said oral agreement. There is no evidence before me of any specific terms upon which I could make a finding as sums due and owing to Mr. Williams. It is therefore my view that the oral contract cannot be enforced as a court cannot enforce an agreement where the terms are not particularly particularized.

[67] In the case of **Alex Duffy Realty Ltd v Eaglecrest Holdings Ltd** (1983) 44 A.R. 67 the Honourable Chief Justice McGillivray stated at paragraph 45 that the Court does not make contracts for the parties. The Court is not to impose its idea of fairness and interpret the plain wording of a contract to give it a meaning other than that which the language can bear because a Court thinks that this would be a fair method of handling this matter. The agents in that case introduced a purchaser who signed an agreement prepared by the agents to buy the property. The terms were satisfactory to the owner but before it was accepted by him, the prospective purchaser withdrew his offer and the agents claimed to be entitled to their commission as having introduced a person ready, able and willing to purchase.

[68] Mr. Williams has only indicated in the Particulars of Claim that he is owed the sum of $46,338.43 for post-contractual services rendered to Edgehill Homes. It is not in dispute that post-contractual work commenced on the Project while Mr. Williams was still a part of it. Mr. Williams' evidence is that after he completed the pre-contractual services he commenced the post contractual services in or about October 2014. There is no evidence before me providing a reasonable basis to assist in making a determination in relation to the calculation of damages on a quantum meruit basis. I am therefore unable to make a finding in this regard.

[69] In relation to the pre-contractual works, Mr. Williams sent a letter regarding fee account in the sum of **ONE HUNDRED AND FIFTEEN THOUSAND SEVEN HUNDRED AND THIRTY UNITED STATES DOLLARS AND TWENTY-FOUR CENTS (US$115,730.24)** to Edgehill Homes. The letter was dated October 16, 2014. Edgehill Homes made a notation on that letter to pay 30% of the amount which they did. This is represented in the cheque Mr. Williams received in the sum of **THIRTY-FOUR THOUSAND SEVEN HUNDRED AND NINETEEN UNITED STATES DOLLARS AND SEVEN CENTS (USD$34,719.07).** A further payment of **TWO MILLION JAMAICAN DOLLARS (JMD$2,000,000.00)** was paid to Mr. Williams. I accept the conversion of the money to United States Dollars as stated by Mr. Williams in the sum of **SEVENTEEN THOUSAND TWO HUNDRED AND SEVENTY-FOUR UNITED STATES DOLLARS AND FOURTEEN CENTS (USD$17,274.14).**

[70] Therefore, in accordance with the payments made by Edgehill Homes, Mr. Williams would be owed the sum of **SIXTY-THREE THOUSAND SEVEN HUNDRED AND THIRTY-SEVEN UNITED STATES DOLLARS AND THREE CENTS (USD$63,737.03)** This represents the remainder of the sum outlined in the fee account. It is therefore my judgment that Mr. Williams ought to be entitled to the sums for work carried out in the pre-contractual period.

F. *Costs*

[71] Section 47 of the Judicature (Supreme Court) Act, which states *"In the absence of express provisions to the contrary, the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court".* However, it is well recognized that the exercise of this discretion should be pursued in a judicial manner. The aim in relation to costs is to make an order that reflects on the overall justice of the case.

[72] The general rule relating to costs is contained in Part 64 of the Civil Procedure Rule 2002, as amended (the CPR). Rule 64.6(1) states: *"If the Court decides to*

make an order about the cost of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party". Rule 64.6 (2) goes on to say that the Court may order a successful party to pay all or part of the costs of an unsuccessful party.

[73] However, in doing so the court must have regard to all the circumstances which include:

> *(a) the conduct of the parties both before and during the proceedings;*
>
> *(b) whether a party has succeeded on particular issues, even if that party has not been successful on the whole of the proceedings;*
>
> *(c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 or 36;*
>
> *(d) whether it was reasonable for a party:*
>
> *(i) to pursue a particular allegation and/or*
>
> *(ii) raise a particular issue*
>
> *(e) the manner in which a party has pursued:*
>
> *(i) that party's case;*
>
> *(ii) a particular allegation or*
>
> *(iii) a particular issue.*

[74] Mr. Williams has not been successful in his entire claim. However, he has succeeded on particular issues. Mr. Williams was successful in getting his pre-contractual sums but not the post-contractual sums. I also took into account the fact that the document presented to this Court by Mr. Williams is severely compromised and the circumstances surrounding that. I therefore find that this is one of the circumstances which the Court ought to depart from the general rule relating to costs.

[75] It is therefore my judgment that costs should be apportioned as between the parties. This would, in my view, reflect the overall justice of this case

ORDERS & DISPOSITION

[76] Having regard to the forgoing these are my Orders:

(1) Judgment is entered in favour of the Claimant in the sum of **SIXTY-THREE THOUSAND SEVEN HUNDRED AND THIRTY-SEVEN UNITED STATES DOLLARS AND THREE CENTS (USD$63,737.03)** at a rate of 6% per annum from September 12, 2018 to November 10, 2022.

(2) Costs to be apportioned 70% to be paid by the Defendant and 30% of the costs to be paid by the Claimant.

(3) Stay of execution granted to December 22, 2022.

(4) Claimant's Attorneys-at-Law to prepare, file and serve Orders made herein.