



[2014] JMSC Civ. 80

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2006HCV03555

BETWEEN	SYDNEY DUNN	1ST CLAIMANT
AND	GLORIA DUNN	2ND CLAIMANT
AND	RODERICK BISHOP	DEFENDANT

Mr Nigel Jones and Miss K. Moore instructed by Nigel Jones & Co. for the Claimant

Defendant absent and unrepresented

Assessment of Damages/Breach of contract

Heard: February 27, 2014 and March 13, 2014

Lindo J. (Acting)

[1] The claim in this matter arose out of an agreement between the 1st Claimant and the defendant for the construction of a house at Buckfield Estate in Ocho Rios St. Ann. He claimed damages and specific performance stemming from breach of contract dated October 8, 2004. The claim is brought by the claimants who are registered as joint owners of the property and who jointly paid monies to the defendant in furtherance of the agreement as well as incurred costs relating to the matter.

- [2] The defendant did not file an acknowledgement of service or a defence and on July 9, 2009 the claimant sought and obtained judgment in default with damages to be assessed, having elected to abandon the claim for specific performance.
- [3] On February 27, 2014 the matter came on for assessment of damages and the defendant was absent and unrepresented. The claimant provided proof of service of the notice of assessment, notices of adjourned hearings as well as notices of intention to tender in evidence hearsay statements made in documents.
- [4] The 1st Claimant was sworn and his witness statement given on June 29, 2012 was accepted as his evidence in chief after it was identified by him.
- [5] In amplification of the statement, Mr. Dunn gave evidence that the property is registered at Volume 752 Folio 41 in the joint names of himself and his wife. He spoke of payments made by him and his wife to the defendant in furtherance of the agreement. These were by 4 cheques totalling \$8,300,000.00. These were tendered in evidence as Exhibits 3a-d. He also gave evidence of an agreement for additional work to be done and that agreement was tendered in evidence as Ex.4.
- [6] Mr. Dunn gave evidence that he intends to engage someone to complete the work and had to engage the services of Quantity surveyors on two occasions to get certificates showing the stage of completion of the building. He tendered two certificates dated May 16, 2006 and February 20, 2012 respectively, from Goldson Barrett Johnson, Chartered Quantity Surveyors. The report dated May 16, 2006 indicates the estimated construction cost, estimated cost of extension and value of work done including extension, while the report dated February 20, 2012 also gives estimated construction cost, estimated cost of extension, value of work done including extension as well as replacement cost due to vandalism and estimated cost to complete. It is noted that as at May 16, 2006 it would have cost \$3,914,475.37, while in February 20, 2012 the cost is \$8,146,971.66.
- [7] The 1st claimant also provided proof of other expenses incurred. Exhibits 7-12 inclusive, show payments for travel, courier service and for getting out squatters

and fencing the property, which payments were made by both himself and his wife.

- [8] Mr. Nigel Jones submitted that the claimants who are retirees wished to return to Jamaica so the agreement was entered into on October 8, 2004, for the construction of a house for a total cost of \$8,800,000.00. He indicated that the claimants advanced the sum of \$8,300,000.00 between October 2004 and July 2005 but that in June 2005, the defendant gave the 1st claimant a letter outlining additional work for a total cost of \$1,246,200.00.
- [9] Counsel further submitted that during visits by the 1st Claimant to the construction site he pointed out certain faults to the defendant and the defendant discontinued the construction and although he (the claimant) sought to have discussion with the defendant with a view to having the construction completed, the defendant has refused to complete it.
- [10] He also submitted that it is established that the claimants suffered loss as a result of the builder's refusal to carry out the work, had taken all reasonable steps to minimize their loss after the breach and intended to cure, that is by engaging someone to complete the work. He expressed the view that the claimants were entitled to the cost of the cure as damages. He cited the English case of **Tito v Waddell (No.2) [1977] 1 Ch.106** as being of a similar nature to the instant case.
- [11] I have considered the submissions of counsel and perused the authority cited. In *Tito v Waddell*, a British company mining phosphate on Ocean Island, had contracted to restore the mined out land by planting trees. They failed to do so and were sued. One of the issues for determination was whether the claimants were entitled to the cost of the replacement of the trees as damages. In delivering the judgment Megarry VC stated at page 333:

“if the plaintiff establishes that the contractual work has or will be done, then in all normal circumstances, it seems to me that he has shown that

the cost of doing it is, or is part of, his loss and is recoverable as damages.”

- [12] The court held that the claimants had failed to prove that the cost of replanting the trees represented their loss, for reasons which included the fact that the Islanders had removed to another island and awarded minimal damages.
- [13] I am guided by the principles that the purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do it, as if his rights had been observed and that a claimant is entitled to general damages for the defendant’s failure to carry out the works in a workmanlike manner, being the extent of the diminution in value of the work which the defendant was contracted to do and is also entitled to recover loss incurred by him by virtue of the defendant’s delay in completing the work.
- [14] Additionally, I note that there is authority that where there is a breach of contract, the damages for such breach should be such as may fairly and reasonably be considered either arising naturally or such as may reasonably be supposed to have been contemplated by the parties at the time they made the contract as a probable result of the breach of it.
- [15] An award of damages as compensation for a breach of contract is qualified by a principle “which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps:” **British Westinghouse v Underground Railways [1912] AC 673 at 689.**
- [16] The issue of mitigation has been raised in the evidence of the 1st claimant. He stated that he had to pay to remove squatters and to fence the property after the defendant had stopped the work.
- [17] It has been established on the evidence before me that the Claimants have suffered loss as a result of the defendant’s refusal to complete the work, that they

have taken reasonable steps to minimize their loss after the breach and that they intend to engage the services of someone to complete the house.

[18] In coming to a determination as to the quantum of damages to which the claimants are entitled, I need to consider what percentage of the work was completed at the time of the breach of the contract, what amount of work was left to be done and what is the sum required for the completion and what was the cost to the claimants to minimize their loss.

[19] Mr. Dunn in his evidence stated that he and his wife obtained the services of a Quantity surveyor and by two reports dated May 16, 2006 and February 20, 2012, respectively, which have been admitted in evidence, the Quantity Surveyors detailed the value of the building at the stage it is and the cost of completion . According to the reports, the building was compared with the original drawings and additional work not shown on the drawings which include “an extension of the carport and a new helper’s quarters”, was observed. The 2006 report gives the estimated construction cost as per drawings as \$9,889,515.37 and the estimated cost of extension (physical measure) as \$871,675.00 and placed a value on the work done, including the extension, at \$6,846,715.00.

[20] The further report dated February 20, 2012 shows a summary of updated costs as follows: Estimated construction cost (as per drawings) \$18,740,631.62;

Estimated cost of extension (physical reassurance) \$1,238,862.62;

Value of work done including extension \$12,974,526.74;

Replacement cost due to vandalism \$\$1,142,004.16; and

Estimated cost to complete \$8,146,971.66

[21] It has been noted that the report indicates that no further physical work has been effected since the report of 2006, and the update of the estimates include fluctuation in the cost of labour and material to the date of the site visit.

- [22] I am satisfied that the reports of the Quantity Surveyors should be accepted and that they are qualified to carry out the analysis of the current status of the project and an appraisal of the work required to bring it to a satisfactory level of completion. Further, the reports stand unchallenged as they were served on the defendant and he chose not to respond. I therefore accept that the estimated sum required for completing the house as at February 2012 was \$8,146,971.66.
- [23] The claimants have specifically claimed \$1,546,485.00 which includes the cost of \$93,200.00 for the Quantity Surveyor's report of May 2006. It is noted that the claim was filed on October 6, 2006. Subsequent to the filing of the claim, a further report had to be obtained from the Quantity surveyors and this was at a cost of \$70,500.00. They also claimed for expense in travelling to Jamaica in furtherance of the claim and further expense "resulting from the unreasonable delay in the completion of the dwelling." The following were tendered in evidence: Receipts from Goldson Barrett Johnson totalling \$163,700.00 evidencing payments for work done by the Quantity Surveyors; cheques for \$82,500.00 showing payments to Mr. Richard Forrester for removing squatters and fencing property; receipts showing payments totalling 2518.50 pounds to Newmont Travel Ltd; receipt showing payment to G.A. Lewis, Notary Public in relation to documents they were required to prepare and receipts showing payments to FedEx.
- [24] Considering the authority of **Tito v Waddell**, I am satisfied that the "cost of cure" approach is appropriate in this matter and that the claimants are entitled to compensation for their loss, and, having established that the loss includes the cost of completing the work which the defendant failed to do, should recover a sum which is equivalent to that cost.
- [25] Additionally, having seen the 1st claimant and heard his evidence, I accept him as a credible witness and I am satisfied that they have a genuine interest in having the house completed as they sought specific performance of the contract and as a result of the default by the defendant in acknowledging service or filing a

defence to the claim, had to abandon that part of the claim. I therefore assess the cost of completion at \$8,600,000.00 and make an award in that sum.

[26] The claimants are therefore awarded damages for breach of contract in the sum of \$8,600,000.00 with interest at 3% from the date of service of the claim form to March 13, 2014.

Special damages in the sum of Ja. \$330,085.00 and 2,502.78 pounds with interest at 3% from the 16th day of May, 2006 to March 13, 2014.

Costs to the claimants to be taxed if not otherwise agreed.