IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. 2005 HCV 00059

BETWEEN	SEYMOUR EBANKS (Trading as Mountainside Hardware & Construction)	CLAIMANT
A N D	CHARLES EBANKS	1ST DEFENDANT
A N D	JOYCE EBANKS	2ND DEFENDANT

Mrs. Janet Taylor and Miss Kadian Wilson instructed by Taylor, Deacon and James for Claimant

Mr. Barrington Frankson instructed by Gaynair and Fraser for Defendants.

Contract – Construction of a house – Scope of the contract – Whether majority of the work comprised in one contract or two – Some aspects of the work undone – deductions to be made for work not done

24TH, 25th January, 7th and 28th February 2008

BROOKS, J.

"He said I must go ahead and do the work. Because of the relationship we had, I didn't know it would come to this". Mr. Seymour Ebanks' sentiments express the feelings of so many litigants who enter into agreements on the basis of their trust of the other party to the contract, only to discover that their trust was misplaced. It perhaps is even more disappointing when the other party is a family member. In Seymour's case it was his uncle, Mr. Charles Ebanks. In light of the common surnames, I shall refer to them by their first names. No slight is intended.

Background Facts

Charles and his wife Joyce were in the year 2000, in Jamaica on vacation from the United Kingdom, which was then their home. They wished to return to Jamaica and agreed with Seymour that he should construct a dwelling house on their land at Bell Pond in the parish of Clarendon. They provided him with the plans and he prepared a contract agreement. The agreement (exhibit 2) stated, in part, that they were "desirous of building one dwelling house as drawing(s) and specifications shown and describing work to be done". The agreed price was $7,800,000.00. They eventually returned to the United Kingdom while the work was as yet unfinished. Apparently, by agreement, no work was done after they left. Charles returned to this island some time in 2003, remained until the construction of the house was practically completed and left again in January 2004. The agreement giving rise to this claim is said to have been made during Charles' latter visit.

The Claimant's Case

Seymour testified that at Charles' request and based on his relationship with Charles, he carried out other work on the premises. This included the construction of a perimeter fence, demolition of an old house, carting away the rubble, paving the area around the house, laying topsoil,

installing a kerb wall and laying marl for a driveway. When, however, he tendered his bill, he was not paid. He has brought this claim to recover the monies he says are due to him. The sum claimed on the pleadings is $2,892,603.60. In his examination-in-chief Seymour reduced that figure by $570.630.60 representing a payment for which the pleadings did not account. The result was that he said that Charles owed him $2,321,973.00.

The Defendant's Case

Charles denies that he owes anything to Seymour. Charles' testimony is that the first contract between the parties was an all inclusive one: it included the preparation of the land, including the demolition of the old building, the construction of the new house, the construction of the perimeter fence, the establishment of a driveway and the laying of topsoil. He agrees that there was a second contract but that that was only for Seymour to upgrade and improve the perimeter fence. He says that he paid Seymour a total of $11,463,370.00 for all the work and that Seymour has breached the contract by firstly, producing sub-standard work and secondly, by leaving certain aspects of the work undone. There was a counterclaim for $254,870.00 but the figure was not particularized in either the pleadings or the evidence.

The Issue to be decided

The issue to be decided is a question of fact. The court must decide which account it should believe. Resolution will require an examination of the documentation and a review of the evidence of, particularly, Seymour and Charles.

Analysis

Neither man was shaken in cross-examination, though Seymour seemed a bit more candid than did Charles. When exhibit 2 is considered, however, I find that it assists the court in determining the scope of what was in the original contract and whether there was indeed a second agreement.

Under the heading "Conditions of Contract – General Clauses etc.", exhibit 2 repeats that the work contained in the contract comprised the construction of a dwelling house for Mr. and Mrs. Charles Ebanks. It does not mention any other work. In an appendix, after setting out the specifications for the finished surfaces, exhibit 2 goes on to say, "Note: no pavement or lawn". The document was signed by Mrs. Joyce Ebanks on behalf of Charles and herself.

Considering that the pavement and the provision and spreading of topsoil comprise part of that for which Seymour now claims payment, I accept his account that there was indeed a second contract. I accept that the

second contract did include all the items listed in the document headed "Addition (sic) Work Complete (sic) for Mr. and Mrs. Charles Ebanks at Osburn (sic) Store". The document, which itemizes the additional work, was admitted in evidence as exhibit 1. It is noted that the original contract mentioned Bell Pond while exhibit 1 mentions Osbourne Store. Nothing turns on the distinction for these purposes.

There was an issue as to whether exhibit 1 was prepared during or after the work described therein was done. Seymour testified in his witness statement that he prepared an invoice while the work, which was commenced in October 2003, was being done. He says that Charles paid him $1,100,000.00 in January 2004. (Both men agree that of that figure $100,000.00 of that sum was returned to Charles at his request.) Exhibit 1 mentions a figure of $1,100,000.00 as being a payment made by Charles and Mrs. Ebanks towards the total bill. The work according to Seymour was completed in February, 2004. I accept that the document was presented to Charles, after the payment was made and before the money was returned to Charles. This was also before he left the island in January 2004.

Work billed for but not done

There was one item of work on exhibit 1 which was not executed by Seymour. The work described in item 8 is, "Asphalt roadway and do carve

[kerb] wall and walkway". The work is priced at $420,000.00. Seymour accepts that he did not do the asphalting, as that would have had to have been done by someone else, and there was some dispute with Charles over this aspect. Seymour asserts however that he did put in the kerb wall for the driveway and spread the marl for the foundation of the driveway. He also accepted that he had left two items undone on the house. He agreed that he had not tiled the kitchen walls or installed two closet doors in one of the bedrooms.

Charles said, in cross-examination, that he thought that he had paid $140,000.00 to have the asphalting done, but he was not sure. He also did not remember how much he had paid to tile the kitchen walls. The closet doors were also installed on his initiative. One other reason for my accepting Seymour's account of the events is that Charles did not tell Seymour when he moved into the house. He also did not seek out Seymour to require him to complete the work left undone or to correct work, Charles says, was badly done. Charles' explanation for this was that he did not know where to find Seymour, but I reject that explanation as untrue. These men were relatives and Seymour had an established business place. I find that Charles did not approach Seymour because of the unpaid debt.

Consulting Civil Engineer Mr. Garth Lampart gave evidence on behalf of Charles. He prepared a bill of quantities to price the work that he had seen on the premises. He did so, on Charles' instructions. I did not find Mr. Lampart's evidence of any assistance in resolving this matter. This was not a case requiring a general calculation on the basis of *quantum meruit.* Mr. Lampart's bill of quantities clearly could not be used to adjust the agreement between the parties and it specifically did not price the work left undone by Seymour. Mr. Lampart said that he saw no closet doors installed and he deliberately excluded the cost of the tiling of the kitchen walls and the driveway. Finally, in respect of perimeter fencing, Mr. Lampart only priced that for the front and sides, which he valued at $2,452,500.00. The rear was included in his general estimates. The court was not provided with information which allowed a comparison with exhibit 1, to determine the reasonableness or otherwise of the prices quoted therein.

I shall make a deduction of $140,000.00 for the sum Charles says that he paid for the asphalting but shall make no other deduction as Charles has not provided the figures.

Conclusion

I find that the documentation supports Seymour's account of the events giving rise to these two contracts. I also accept that the second

contract covered the items which he has specified rather than that which Charles stated. As a result I find that the sum due to Seymour is as follows:

Contract price of 2nd contract		$3,992,603.60
Less:		
Amount initially received	$ 570,630.60	
Payment on account	1,000,000.00	
Cost of asphalting	140,000.00	
		1,710,630.60
Balance Due		$2,281,973.00

The order therefore is as follows:

1. Judgment for the Claimant on the claim in the sum of $2,281,973.00.

2. Judgment for the Claimant on the counterclaim

3. Costs to the Claimant to be taxed if not agreed