[2015] JMSC Civ 210

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 00346

BETWEEN MICHEAL LEE CLAIMANT

AND SENIOR'S WOODWORK & CONSTRUCTION LIMITED DEFENDANT

Mr. Earle P. deLISSER for the claimant.

Mr. Debayo Adedipe for the defendant.

Heard: 13th and 14th July and 6th November, 2015

Breach of contract – Building contract – Contract varied before construction – Payments made in advance to builder whether deposit should be refunded.

EVAN BROWN, J

Background

[1] In April 2008 the claimant, a banker, and the defendant, through Mr. Beswick Senior, the defendant's managing director, contracted for the defendant to build a dwelling house at lot #6 Chudleigh, Christiana in the parish of Manchester. The claimant selected a design for the house and a plan was prepared by E.A. Jones for submission to the local planning authority. Following

on the preparation of the plan, a quantity surveyor's report was prepared. That report estimated the cost of building the house to be $13,625,330.80.

[2] The approved plan, for which the estimate had been prepared, was for the building of a bungalow (a cottage of one storey). The land on which the bungalow was to be built sloped to a drop of approximately 12 feet from the road. That posed a problem for the construction of the bungalow. Therefore, from the commencement of the construction, the defendant told the claimant that the house could not be built according to the plan because of the lay of the land.

[3] The solution to that topographical dilemma was to be found in the adoption of one of two options. The first option was to "dump" or fill the land to bring it up to the required level. This would involve significant additional expenses in the employment of heavy equipment and labour. The second option was to use stilts, which would not have led to any significant additional cost, especially since the claimant would have been providing the material. Further, the increase in labour cost, if any, would be insignificant. Upon the defendant's recommendation, the second option was chosen.

[4] So, stilts were used in the construction of a split level house, since the building of a bungalow was abandoned. There were two levels of flooring, with the stilts becoming part of the enclosed walls. A basement was constructed below what became the floor of the intended bungalow, or upper floor. The basement itself contained a washroom and a bathroom, accessible by steps inside the house. Below the upper level was a concrete water tank, measuring approximately five feet in height.

[5] No part of the construction that was done beneath the foundation of the upper level was captured by the estimate prepared by the quantity surveyor. That notwithstanding, the quantity surveyor's report provided the basis on which funding for the project was obtained. The claimant secured funding of

$10,500,000.00 from the financial sector and $4,000,000.00 from his own resources. In so far as the materials were concerned, all the required steel had been previously purchased by the claimant. He purchased the building blocks as the project proceeded.

[6] The sums to be paid to the defendant were not to be made on a lump sum basis. Payments were to be made in advance based on an estimate provided by the defendant. The proper utilization of the funds advanced in the project would be subject to a later verification by the production of invoices and bills. That was a stipulation of the lending institutions. To commence the construction, the sum of $2,000,000.00 was paid to the defendant.

[7] At various stages of the construction, the claimant made deposits to the defendant's account at the request of Mr. Beswick Senior. The last such deposit, $2,500,000.00, was made on the 8th June, 2009. Soon thereafter, on 16th July 2009, Mr. Beswick Senior died. After Mr. Senior's death, a dispute developed between the parties concerning outstanding obligations on the project. That led to the claimant continuing the construction to completion.

Claimant's case

[8] Following the death of Mr. Senior, the claimant was called to a meeting by Mrs. Denise Senior, Mr. Senior's widow and a director of the defendant company. In his evidence in chief, the claimant said Mrs. Senior told him she had taken over the running of the company and wished to discuss the completion of the house. That, however, was what was said when the invitation to the meeting was extended, according to the claimant under cross-examination. No such discussion took place at the meeting, according to the claimant.

[9] At the meeting, the claimant was told that he owed the defendant $8,000,000.00. He explained to Mrs. Senior that he had purchased all the blocks and steel used in the construction. He further "explained to her the arrangement

made," whereupon "she backed off." The claimant left the meeting with the understanding that the defendant would have sought verification of the details he supplied and get back to him.

[10] The claimant agreed with cross-examining counsel that there was a disagreement at the meeting between himself and Mrs. Senior. The subject of the disagreement was the claim and counterclaim of money owed. Whereas Mrs. Senior contended the claimant owed the defendant $8,000,000.00, the claimant asserted that the defendant owed him $2,500,000.00. Each was adamant that the one owed the other. That led to a stalemate.

[11] That stalemate was not the context in which he took over the project, the claimant disagreed, during cross-examination. It was subsequent to the meeting that he was advised by Mrs. Senior, in a telephone call, to take control of the construction. In that telephone conversation, he was also told that the last deposit of $2,500,000.00 would not be refunded. Lastly, he was advised to assume responsibility to pay the watchman who had been employed to provide security for the construction site. Consequently, he had to pay the watchman $30,000.00 for three weeks unpaid wages. It appeared that prior to that the house had been left unsecured, resulting in the theft of electrical items and windows.

[12] Questioned about the taking over of the project, the claimant said he expected the defendant to complete the construction of the house without receiving any further payments from him. He denied that he took over the site because he was not prepared to make anymore payments to the defendant. The defendant required him either to settle the balance, or any part of it, before the construction could continue.

[13] The claimant, however, told Mrs. Senior that he was not prepared to pay anymore than was reflected on the estimate, that is, the quantity surveyor's

report. He, however, accepted that work, over and above what was reflected on the plan, was done. That extra work was done at an off-set cost, the claimant said, repeatedly. Mr. Senior, on behalf of the defendant, therefore, did not require him to pay for the extra work, the claimant insisted.

[14] In respect of the extra work, the claimant was asked if he accepted that an item such as providing, fabricating and installing steel work to the floor, slab, columns, beams and footing would have required substantially more effort in the finished product, than what had been anticipated. To that he answered that he could not speak to that as he was not a contractor. Pressed by defence counsel, he said he did not know what it would require; he did not know the process.

[15] Counsel then directed the claimant to consider a number of items in exhibit two, the quantity surveyor's report. The claimant was first directed to item two. Item two estimated that 2800 square feet of batter board was needed for lining out the proposed structure at a total cost of $167,804.00. Asked if he was prepared to accept that the amount of batter board actually used was 4,429 square feet, the claimant's reply was that he could not speak to that as he did not know.

[16] The claimant's answer was similar when he was directed to item five. At item five it had been estimated that to "provide, fabricate and install steelwork to floor slab, columns, beams and footing," required 5.5 tons. It was put to the claimant that what was actually done consumed 8.6 tons. The claimant agreed with learned counsel for the defence that he really did not know how much more was required, if anything. Even though he did not know, he was adamant that he did not owe, as that was what he was told, he maintained.

[17] At this point it was suggested to the claimant that Mr. Senior told him no such thing. He responded that Mr. Senior told him that because he had paid close to $4,000,000.00 extra on the project. Asked why he considered that extra,

he said because he bought all the steel and blocks before the commencement of the work. Therefore, he considered that a down payment. He continued, “I offset some of those, I had those, he did not have to find those out of the funds I gave him.”

[18] The claimant admitted that he did not take any steps to ascertain the value of the work that was actually done. He intimated the reason for that failure was because of what Mr. Senior told him. In any event, his claim was for the return of money paid in advance of work to be done. After paying the last $2,500,000.00 no work was done on the project by the defendant.

Case for the defence

[19] In its statement of case, the defendant averred that the claimant made payments amounting to $8,200,000.00. Further, windows were installed on the day Mr. Senior died. Although the claimant was required to make direct payments for security, it was the company that made those payments, it was averred. After the death of Mr. Senior, unilaterally and without notice, the claimant took over control of the site and proceeded with the works on his own.

[20] At the time the claimant assumed control of the site, the value of the work done was $12,451,641.77. A copy of an estimate, prepared by the defendant, was annexed to the statement of case but was never put into evidence. The averments continued, the value of the work done by the claimant and the sum paid by him was $6,483,311.77. The value of the additional work was asserted to be $3,340,160.97. The value of items on the estimate that were either done for less, or not done at all, was given as $5,063,850.00. The difference in value, between the extra work and items done for less or not done at all, was given as $1,173,689.03.

[21] The defendant’s further contention was, therefore, that it was entitled to receive the difference between the work actually done and the estimate.

Subtracting the sum paid by the claimant from the value of the work actually done, the defendant asserted it was owed $4,251,641.77 by the claimant. The defendant, therefore, counterclaimed for $4,251,641.77 with interest at the commercial bank rate, or at a rate which the court considered just.

[22] Consistent with his claim, the defence to the counterclaim alleged that Mr. Senior told the claimant there would have been no additional charges for labour, provided the material was supplied by the claimant. Therefore, all the charges itemized by the defendant in the counterclaim were without foundation, the claimant counter-averred.

[23] In support of the several averments in the defence and counterclaim, the defendant called Mrs. Denise Senior. In her evidence in chief, she said the claimant paid only $8,200,000.00 to the defendant. That was gleaned from the records of the company. The payment of $2,500,000.00 was admitted but, she went on to say, work on the project had been ongoing and windows were installed on the very day her husband died.

[24] After the death of her husband the claimant took over control of the construction site, thereby terminating the defendant's services, she said. From all the information available to the defendant, it was clear to her that the claimant had not paid for all the work done by the defendant. She ended by saying that the claimant owed the sum set out in the counterclaim.

[25] When she was cross-examined, her evidence was that she did not know if her late husband and the claimant were friends although their close friendship was averred in the defendant's statement of case. She further disclosed that she took no part in the day-to-day running of the company. The company was closed following the death of her husband.

[26] A letter written to the defendant after the death of its managing director by the claimant's lawyer was showed to her, along with a response to it, written by the defendant's lawyer. In that letter the claimant gave the defendant the option of either refunding the $2,500,000.00 or giving a guarantee for completion within a stipulated time. Asked if notwithstanding the letter she was maintaining that the claimant repudiated the contract and decided to finish the work at his expense, she gave an answer in the affirmative. That was in fact a part of the defendant's response.

Factual issues for resolution

[27] At the beginning of the case, the claimant's counsel submitted that the issues are, one, whether Mr. Beswick Senior told the claimant that the money he had was sufficient to complete the project? Secondly, whether or not the deposit of $2.5m should be refunded since the claimant took over the project? Lastly, whether the system was that the claimant would pay in advance?

[28] For his part, Mr Adedipe for defendant said the defendant's case is that there were substantial variations between the quantity surveyor's report and the plan for the bungalow. He contended that the contract, as varied, required construction of a different house from the one on the plan, at greater cost. Issue was therefore joined as to how much money was paid to the defendant. While the claimant believed he overpaid for the work actually done, the defendant contended otherwise. The defendant contended that consequent upon the disagreement as to payment, the claimant unilaterally took over the construction site and thereby repudiated the contract, wrongfully.

[29] In my view, the dispute between the parties comes down to this, what were the terms of the new agreement between the parties when it was discovered that the contract to build the bungalow was impossible of performance?

Findings and analysis

[30] The claimant's evidence was to the effect that the agreement for the construction of the house was contained in the quantity surveyor's report prepared by E&A Jones and Associates Ltd. Therefore, the parties entered, what may conveniently be called, a bills of quantities contract. According to ***Keating on Building Contracts***, 6th edition, at page 83, the contract is so described "where the bills of quantities form part of the contract and describe the work to be carried out for which a lump sum is payable." Although their agreement stipulated a lump sum, the payments under the contract were by instalments.

[31] The parties' bills of quantities contract, in its original form was, as is set out at paragraph three of the particulars of claim. There it says the parties agreed that the estimated cost would be $13,625,330.80 in keeping with the approved plan and report prepared by E.A. Jones & Associates Ltd. dated 22nd May, 2008. While the plan for the house was varied, a fact agreed on both sides, in that what was constructed appears to have been substantially more than was first contemplated, no new bills of quantities were drawn up. *En passant*, neither was any new plan drawn.

[32] The first point worthy of note is that no evidence was led by either side showing the new cost arising from the variation. While the defendant in its counterclaim itemized the additional work done, along with the alleged associated cost, it called no evidence to support the averment. I do not know how the defendant came by the figures it claimed represented the work actually done. There was no evidence that the work was measured and valued whether by it or its agents.

[33] Secondly, the only evidence of the oral part of the parties' agreement, which concerned the labour cost, came from the claimant. In fact, there was no evidence of what the parties discussed only that certain assurances were given.

Although the parties' business relationship was characterised by an element of informality, there had to have been a basis upon which they proceeded.

The Agreement

[34] The first question for me is, therefore, what was the arrangement between the parties, in so far as the payment for the work was concerned? The claimant said the agreement was for payment to be made in advance. That system contemplated the defendant first providing the claimant with an estimate, the payment was then made based on the estimate and the expenditure was afterwards verified by the invoices the defendant provided in support of the disbursements from the money advanced.

[35] No document was tendered into evidence to demonstrate that system of payment in advance, subject to later verification by the production of invoices. Therefore, that there was such a system stands only on the word of the claimant. However, the defendant provided no response to that evidence. None was led through the sole witness called for the defence and, as learned counsel for the claimant submitted, it was never suggested to the claimant that that was not the arrangement. Notwithstanding the absence of documentary support, accepting the claimant as a witness of truth, I find that that was the agreement between the parties.

[36] Since that was the parties' agreement, putting that together with the admitted fact of the payment of the sum of $2,500,000.00, the next question for my determination is whether the claimant obtained from the defendant an equal value in work done on the house. Having accepted the system alleged by the claimant to have been the one in fact in place, there would be an evidentiary burden on the defendant to negative the claimant's contention that no work was done.

[37] What the defendant sought to do, through cross-examination, was to demonstrate that windows were installed on the very day Mr. Beswick Senior died. Even if that were to be accepted, it seems more likely than not, as the claimant contended, that that was work to be accounted for out of a previous payment. That is based on the fact that the windows were made by a third party and would, most likely, have had to be paid for before their installation. However, applying the same logic of the system of advance payment and subsequent invoice verification, it was not outside of the reach of the claimant to demonstrate that the windows were in fact already accounted for.

[38] In addition to its effort to show that work was done subsequent to the payment in question, the defendant endeavoured to show that the claimant in fact received more in labour than he paid for. Although the claimant accepted that more labour was involved than contemplated by the quantity surveyor's report, he countered that this was achieved on an off-set basis. I accept this contention which I find compelling.

[39] Its compulsion lies in the very circumstances surrounding the agreement. It is clear that the necessity for the modifications to the proposed building were known before the foundations of the building were laid. To the officious bystander, those changes may well have merited a new quantity surveyor's report. The officious bystander would have so concluded if it was first accepted that the modifications inaugurated a substantial departure from the quantity surveyor's report already in hand.

[40] From the evidence before me, it is clear that the parties directed their minds to the changed circumstances. Options were considered and the more cost effective of the two was chosen. In all of that discussion it is unrealistic to think that their minds were not drawn to the increase in the cost of both material and labour. That was not something they could have wished away. Money was

being borrowed to construct the house and both the bank and the homeowner would have needed a basis on which to disburse funds.

[41] It is highly unlikely that Mr. Beswick Senior, although a friend of the claimant, would have been prepared to absorb substantial additional cost on a handshake. Equally, although the claimant was the layman in the bargain, the claimant would have appreciated the new circumstances and, being a financier, would have wanted to know how much, if any, additional cost was involved. I rather doubt that he would have proceeded without first receiving certain assurances from the defendant.

[42] That the parties decided to proceed with the quantity surveyor's report in hand is a clear indication that it was still of use to them. And since it was, it must be equally clear that they did not contemplate any substantial additional cost to the claimant. Such additional cost as may have been considered had to be resolved. I accept that that resolution expressed itself in an off-set in the manner described by the claimant.

[43] So, while I agree with learned counsel for the defendant that the work done on the house below the upper level was extra work, the question of remuneration for it was also a matter for the parties. The agreement the parties struck was the off-set described by the claimant. In any event, no evidence was led showing what the measurement of this extra work was and its attendant cost.

Repudiation

[44] That takes me to the question of repudiation. Learned counsel for the defendant submitted that it was significant that the claimant did not plead that he had been instructed to take over the building of the house. What was pleaded was that the claimant had to make alternate arrangement when the defendant withdrew the security service. In doing so, the submission continued, the claimant prevented completion of the contract. In fact, that was an implied term of

the contract. ***Keating on Building Contracts*** sixth edition, at page 55, was relied on.

[45] I accept as a correct statement of the law the proposition that neither party is to prevent the other from completing the contract. However, I find as a fact that the claimant was instructed to assume responsibility for the construction of the house. The clearest evidence of this is the requirement for him to pay the arrears of wages for the security of the site, something he had not been hitherto required to do.

[46] Additionally, while it is true that the instruction to assume responsibility was not pleaded, the claimant pleaded that he was forced to make alternate arrangements for completion. In my opinion the difference is really one of semantics, arising from differing styles of drafting the pleadings. I found the claimant to be a truthful witness and accept his evidence that he was so instructed. Indeed, since it was, and remained up to the trial, the claimant's position that the last deposit was sufficient to complete the project, he would not have had any good reason for taking over the building of the house.

[47] Returning to the counterclaim, no evidence was led to support the averments. Accordingly, it fails for want of evidentiary support. I find the claim proved, on a balance of probabilities. I therefore give judgment for the claimant on both the claim and counterclaim. Costs are awarded to the claimant on both, to be agreed or taxed.