

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA NO. 3488 OF 1989

BETWEEN

JOSEPH CALLENDER

*Plaintiff*

AND

RUPERT THEOPHILUS

*Defendant*

**Before: The Hon. Justice Nolan Bereaux**

Appearances: L Thompson for Plaintiff  
S Singh for Defendant

### **JUDGMENT**

The plaintiff's claim is for the recovery of the sum of \$12,184.00 due under a contract dated the 9<sup>th</sup> day of June, 1987 made between the plaintiff and the defendant, together with interest thereon. In the alternative he claims the sum of \$12,184.00 as being the value of work done at the request of or on behalf of the defendant. The plaintiff contends that the sum of \$12,184.00 represents extra work performed by the plaintiff at the request of the defendant as a building contractor in the construction of the defendant's house pursuant to the contract.

The defendant in his defence denies that it was either an express or implied term that extra work desired by the defendant would be paid for separately or at all. The defendant also took issue with whether the plaintiff ever completed the contract in conformity with the terms and conditions of the contract and contended that it was an express term of the contract that the house would be

completed on 15<sup>th</sup> November, 1987. The defendant denied that the extra work cost the sum of \$41,634.00 as alleged in the plaintiff's statement of claim but contends that he paid a fair and reasonable price for such extra work which in any event was neither authorised by the contract nor done at his request.

The defendant counterclaims the following sums:

- (1) \$1,700.00 representing the cost to him of the quantity surveyor's report which he obtained for an independent assessment of the works claimed.
- (2) \$13,931.00 overpayment of moneys for work done as per the report of quantity surveyor Clark & Sheppard
- (3) \$17,800.00 representing liquidated damages
- (4) \$20,391.90 representing loss of earnings. This last item was not pursued by Mr Singh in his evidence.

The burden is on the plaintiff to show that the defendant owed him the sum of \$12,184.00 as claimed for extra work performed. In so doing, he must demonstrate on the evidence that he performed the works claimed. There is not in dispute that by the contract the construction of the defendant's house should have been completed by 12<sup>th</sup> October, 1987 or per 3<sup>rd</sup> December, 1987. It is also no in dispute that the house was completed in August, 1988. At issue, is whether the defendant granted extensions to the plaintiff up to August, 1988 and whether he requested and authorised the extra.

The burden in my judgment is for the plaintiff to prove that the defendant requested and authorised the extra work and the extensions of time to complete construction of the house. He is also required to prove their value. The relevant clauses of the contract are:

- (1) Clause 2-1 by which the project manager may issue written instructions to the contractor with respect to the

construction and which required that oral instructions by the project manager be confirmed by immediate reduction into writing.

- (2) Clause 2-2 by which the project manager may order additions to or omission from the works or the order for the period in which they are to be carried out. (There is no provision for this to be in writing.).
- (3) Clause 6-2 which provided extension, the completion date if they would not be completed for reasons beyond the control of the contractor. (This also does not provide written extensions.).
- (4) Clause 6-3 which provided for liquidation in the event the contractor did not complete on the appointed day or on the date extended by the project manager

The plaintiff called three witnesses, Cleveland Lennard, his son Cleave Lennard and the plaintiff himself. In my judgment, the evidence ultimately came down to that of the plaintiff against that of defendant since Mr Cleveland Lennard confessed that he had very little to do with the implementation of the project. In the case of Mr Cleave Lennard, he too indicated in his evidence that though he did have some connection with the works, much of it was done through functionaries. Those instances in which he was involved in the works he could not recall much of what transpired due to the lapse of time. The evidence thus came down to that of the plaintiff's evidence against that of the defendant's. The findings are entirely factual.

From the evidence which I have heard both orally and from the exhibits tendered into evidence, I find that in many respects Clause 2-1 of the contract was not always followed by either the plaintiff, the defendant or the project manager and that there were oral instructions given to the plaintiff by the defendant which were never reduced into writing. I accept the plaintiff's evidence in this regard that ad-hoc instructions were issued and alterations made to the works as the construction

progressed. But the question is, has the plaintiff discharged the burden of proof of showing that he performed extra works as claimed and has he proven the values of the works he claims in this action. In my judgment he has not.

Mr Callender testified that the extra works were requested by the project manager and the defendant. He testified that the requests came from the project manager and the defendant. His evidence was to the effect that Hart & Lennard, the quantity surveyors would issue payment certificates to the employer for payment to be made to him as builder as work progressed. He also said that payments were certified in respect of the extra works he executed on the defendant's instruction. However, no payment certificates in respect of the extra works were submitted in support of the plaintiff's claim, nor was the evidence of Cleave Lennard of any assistance to the court in this regard.

The plaintiff was also quite short as to the dates and times when the instructions were issued and payment certificates made. The plaintiff must prove his case albeit on a balance of probability. The document "C L 1" relied on by the plaintiff in support of his claim and put into evidence through Mr Cleave Lennard, reflected an agreement between the plaintiff and the quantity surveyor, of the variations to the project. But, it did not reflect any agreement or instruction from the defendant and was inconclusive to proving the amounts claimed. Much of the values claimed in "C L 1" was disputed by the defendant in his letter to Hayden Franco of P M Consultants dated 13<sup>th</sup> October, 1988, which was put into evidence as "RT3". "C L 1" and "R T 3" were the genesis of the dispute which led to the litigation before me. In short, the amounts relied on by the plaintiff in "C L 1" were the very amounts disputed by the defendant in this case.

In the circumstances therefore, and on the evidence before me, while I am prepared to draw inferences from the conduct of the parties that oral instructions were given to the plaintiff to perform extra works and that extensions were given by the defendant to the plaintiff, the plaintiff on his evidence has failed to prove

the extent and value of those extra works claimed and therefore has not discharged his burden of proof.

**The Defendant's counterclaim**

The defendant counterclaims:

- (1) The sum of \$1,700.00 representing the cost to him of obtaining an assessment for independent quantity surveyors, Clarke & Sheppard.
- (2) The sum of \$13,931.00 representing overpayment of moneys for work due. This amount being assessed by Clarke & Sheppard.
- (3) Liquidated damages

With respect to the sum of \$13,931.00 and the sum of \$1,700.00, the defendant relied essentially on the letter dated 21<sup>st</sup> July, 1989, ("R T 2") from Messrs Clarke & Sheppard Quantity Surveyors, by which they assessed the value of the extra works at \$26,973.00 as opposed to the claim by the plaintiff in the amount of \$41,634.00 which was claimed by Clarke & Sheppard to be unsubstantiated. "R T 2" in my judgment was inconclusive because it represented both the position of the plaintiff as contractor and the claims of the defendant which Clarke & Sheppard purported to verify. It left unresolved the issue of whose claim is to be accepted, that is to say, it left the dispute essentially for me to decide. Moreover, notwithstanding the notice of the defendant dated 23<sup>rd</sup> November, 1988, the letter of Clarke & Sheppard carried little weight in the absence of the actual evidence by the maker of the document, Mr Ramon L Sheppard. I would thus disallow the defendant's claim on items (i) and (ii) of its counterclaim.

As to the claim of liquidated damages, in my judgment this too must fail. It is true that the house was not completed before August, 1988 and that on the evidence there was only one approved extension of 50 days, but as I have stated earlier, I have no doubt that as between the plaintiff, the defendant and the project manager, that extensions were granted orally to the plaintiff by the defendant and

by the project manager. Having heard the defendant's testimony, I am satisfied that he agreed to extensions of the actual completion date either orally or impliedly and that by his conduct he waived his right to claim liquidated damages. I do so from the following facts in particular:

- (1) It appears that on those occasions when the defendant visited the site, much of the instructions passing between the defendant and the plaintiff were oral, and that they were not reduced to writing. Indeed, the defendant in his evidence conceded that he once paid the plaintiff pursuant to an oral request for funds without consulting the project manager.
- (2) There were several meetings between the plaintiff, the defendant and project manager to find out why completion of the house was delayed. These meetings did not resolve the issue, but at no time, whether by written communication or orally, did the defendant seek to assert his right to claim damages under the contract. In my judgment, this was so because he implicitly by his conduct agreed to extend the contract date for completion.
- (3) The defendant admitted in his evidence before this court that he was primarily concerned with getting into his house.
- (4) He admitted in his evidence that after the initial 50 day extension, he did not seek to terminate the contract or exercise his rights thereunder.

I find it significant that nowhere in his evidence or correspondence or at any of the meetings between the plaintiff and the defendant did the defendant seek to assert his rights under the contract after the first extension date was exceeded. In my judgment, the only inference I can draw therefore is:

- (1) That he implicitly agreed with the plaintiff to extend the contract to the actual date of completion, and
- (2) He tacitly waived his rights under the contract to claim liquidated damages.

The claim for liquidated damages must also fail.

In the result, the plaintiff's statement of claim is dismissed. The defendant's counterclaim is also dismissed. Each party shall bear their own costs

Dated this 28<sup>th</sup> day of June, 1999

Nolan Beraux  
Judge