

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. 84 of 2001
H.C.A. No. 1938 of 1997
No. T-38 of 1998

BETWEEN

Vincent Taylor

Appellant

AND

Eleanore Neuhaus Joseph
Karin Schaber

Respondents

**PANEL: Warner J.A.
Kangaloo J.A.
Mendonca J.A.**

APPEARANCES:

Dr. Seepersad for the Appellant
Mr. M. George for the Respondents

DATE DELIVERED: April 12, 2005.

I agree with the judgment of Mendonca J.A. and have nothing to add.

M. Warner
Justice of Appeal

I too agree.

W. N. Kangaloo
Justice of Appeal

JUDGMENT

Delivered by A. Mendonca, J.A.

1. This is an appeal from the judgment of the Trial Judge dismissing the Appellant's claim under a building contract and giving judgment in favour of the Respondents on their counterclaim. The issues raised on this appeal are whether the Judge was correct to refuse the Appellant's claim for extra works and whether the amount awarded to the Respondents on the counterclaim ought to have been awarded.

2. The material facts are as follows. In February 1996, the Respondents purchased a parcel of land in Tobago, with the intention of building a house thereon. They retained the services of one Mr. Ballah, an Engineering Technician, to design the house. He did so and prepared the necessary plans and obtained the required approvals from the relevant authorities.

3. On March 18, 1997 the Respondents entered into a written contract with the Appellant for the construction of the house. The contract was a fixed price contract, and the Appellant as the contractor, agreed to construct the house in accordance with the plans for the sum of \$577,790.00. According to the contract, the contract sum was to be paid in accordance with the schedule attached to it. That schedule identified six stages beginning with "Foundation up to Ground, Floor, Slab" and ending with "Final Payment". Payment under the contract was to be made in advance of each stage.

4. In advance of the first stage, the Appellant was paid the sum of \$100,000.00 as provided for in the contract. He entered upon the site to lay out the building. On doing so, he immediately discovered what he considered to be problems. The actual levels of the site were, he stated in evidence, different from those which were shown in the drawings. He therefore met with the first Respondent and subsequently wrote to her by letter dated March 26, 1997. In the letter, he informed her that there was a substantial variation between the plans and the site. He would need to excavate to deeper depths and

the foundation would require more block work and fill than he had anticipated, if it were to be built in accordance with the plans. He suggested to the first Respondent that he bring in a tractor and reduce the levels of the site by removing earth from certain portions, and he also suggested that the earth so removed be used to fill other areas of the site. He indicated that the savings in cost overruns would be substantial.

5. The first Respondent sought advice from Mr. Ballah, who advised her to terminate the contract. The first Respondent wrote to the Appellant and asked to be relieved from the contract, but he refused. The Respondents then retained attorneys who wrote to the Appellant stating that he was in breach of the contract and requested that he vacate the site, but the Appellant refused to do so. Instead he replied to the attorneys denying that he was in breach of contract. He explained that the fault lay with the plans and that he had “no responsibility with respect to the preparation and accuracy of the plans” and that he had “relied on the accuracy of same in quoting for the project”.

6. There then followed a meeting between the Appellant and the first Respondent on April 13, 1997. The parties agreed that the Appellant would continue with the project. The first Respondent wrote to the Appellant by letter dated April 14, 1997 confirming this, and stated, “I understand that certain changes in the foundation work have to be made which will ask for additional funds”. She requested that the Appellant notify her in writing of the extra costs at the earliest convenience. On that day the Respondents also hired as their consultant Joseph Miller. By another letter dated April 14, 1997, the first Respondent informed the Appellant that Mr. Miller was hired as her consultant to advise her and to work with the Appellant during the construction of the house.

7. On April 16, 1997, Mr. Miller wrote to the Appellant issuing a series of variations. The variations were designed to reposition the building on the site, change the foundation covers and sizes above ground and to modify internal divisions.

8. There is no real dispute that the contract works were also varied by the addition to the ground floor of the house of two additional bathrooms. There was also a change in

the description of one of the rooms, from the dining room to a bedroom and the repositioning of certain stairs. According to the Appellant, there were also changes in the plumbing. This essentially related to changes in the traps in the toilets from “P” to “S” traps and the provision of hot water piping to the building.

9. Following the letter which Mr. Miller wrote to the Appellant, he sent to the Appellant revised drawings relating to the room layout, plumbing and electrical works.

10. The Appellant proceeded with the works. On May 22, 1997, the Appellant, however, wrote to the Respondent submitting a bill for \$14,760.00, “being eighteen (18) days work” at \$850.00 per day. It is common ground that the bill for eighteen days work was really a claim for delay, as no work was done during the period of the eighteen days contemplated by the bill. The Appellant had stopped work during this period, having discovered what he regarded as problems with the plans and only recommenced work following his meeting with the first Respondent on April 13, 1997.

11. The Respondents, however, refused to pay the bill and the Appellant again stopped work. He wrote to the first Respondent on May 30, 1997 advising her of his intention to stop work that day as a consequence of the non-payment of his bill for delay.

12. The Respondents did not pay the bill. Instead the first Respondent sought the advice of her attorneys, and on their advice she retained the services of a quantity surveyor, Cleve Lennard, to determine the value the work completed by the Appellant up to that time. Mr. Lennard did so and submitted his report. The report was received in evidence and Mr. Lennard also gave evidence. According to the report and his evidence, he assessed the value of the work completed by the Appellant at \$76,100.00. The Respondents’ attorneys also wrote to the Appellant treating the contract as discharged by virtue of the Appellant’s breach by “asking for more money before the completion of ‘the foundation up to the ground floor’”. The Respondents’ attorneys also indicated to the Appellant that his licence to enter and remain on the site was terminated, and called upon the Appellant to vacate the site on or before 4:30 p.m. on June 28, 1997. The watchman

who was employed by the Appellant, however, remained on site, but he was shortly thereafter removed by the first Respondent's husband.

13. On July 30, 1997 the Appellant commenced these proceedings, claiming, inter alia, damages for breach of contract and "wrongful interference with the site office, tools and materials" which the Appellant left on the site after the termination of the contract. He also claimed, in addition to other relief which is not material to this appeal, compensation on a quantum meruit basis for extra work done at the Respondents' request. The Respondents defended the action and counterclaimed for damages for breach of contract. The particulars of special damage in the counterclaim comprise eight items or heads of damaging amounting to \$465,012.12.

14. The Appellant's claim consisted of four elements. First there was a claim for \$14,760.00 being the delay claim to which I have already referred. The second was for what the Respondent described as the cost of extra work of \$38,985.00 in addition to the cost of plumbing and electrical work amounting to \$23,500.00. The third was a claim for loss of profit and the fourth was the value of the site office, tools and materials and other chattels left on the site after the termination of the contract.

15. The Judge dismissed the Appellant's claim and gave judgment for the Respondent for the sum of \$38,272.12. This consisted of: (1) the sum of \$23,900.00. This was an overpayment by the Respondents for the work completed by the Appellant. The Judge accepted the value of the work completed to be \$76,100.00 in accordance with the valuation of Mr. Lennard. As the Appellant was paid the sum of \$100,000 the Judge found that the Appellant was overpaid by \$23 900; (2) surveyor's fees of \$1,725.00 and (3) the sum of \$12,647.12 being the cost to complete the foundation after the termination of the contract.

16. The Judge identified three issues for determination as follows:

- (i) whose responsibility was it to ensure that the house could be built as per the plans without further excavations/alterations to the site;
- (ii) was there a repudiatory breach by either of the Appellant or the Respondents; and
- (iii) if so, is the offending party liable in damages.

17. As is apparent from the narrative of the facts in this matter, the issues at (i) and (ii) were closely connected. The Appellant stopped work because of the non-payment of the delay claim. That claim in turn arose as a consequence of the Appellant's perception that the house could not be built in accordance with the plans without additional work for which he thought the Respondents were liable. The Judge held that there was no implied warranty on the part of the employer in a building contract as to the fitness of the site or that the plans and specifications are accurate. This was in fact conceded at the trial by the Respondents. In answer to the issue at (i) therefore the Judge held that the responsibility was that of the contractor or the Appellant. The Appellant unfortunately was labouring "under a serious misconception". He therefore could not maintain a claim against the Respondents for delay and accordingly there could be no question of stopping work for non-payment of such a claim. In the circumstances it was the Appellant and not the Respondents, who was in repudiatory breach and the Respondents accepted the breach and lawfully terminated the contract. The Judge therefore found against the Appellant on issue (ii). As is evident from the award of damages referred to earlier, the Judge found that the Appellant, as the offending party, was liable in damages and therefore also found against the Appellant on issue (iii).

18. Before this Court there is no complaint about the Judge's findings on issues (i) and (ii). As a consequence, Counsel for the Appellant before this Court expressly abandoned the claim for delay. There has also been no complaint by the Appellant in relation to the rejection by the Judge of his claim for the wrongful interference with the

site office and tools left on the site and the claim for loss of profit. Counsel has however argued that the Judge in accepting Mr. Lennard's valuation of the value of the completed work in essence refused the Appellant's claim for extra work, as well as the cost of the electrical and plumbing works and he was wrong to do so. Counsel has also taken issue with the award made to the Respondents on the counterclaim.

19. Counsel submitted that the Appellant's claim for extra work should not have been refused. He argued firstly that there was an agreement for the extra work to be carried out as evidenced by the letter of April 14, 1997, when the first Respondent wrote to the Appellant saying that she understood that certain changes in the foundation work had to be done, and this will "ask for" or require additional funds.

20. I think there is no doubt that there was an agreement with respect to certain variations. There was the letter of April 14. This may be construed as an instruction to proceed with changes to the foundation and it may have been superseded by Mr. Miller's instructions of April 16. But that is of no materiality because the instructions of Mr. Miller as contained in the letter of April 16 were explicit and there were also the revised plans. These related to variations in the foundation work and other works and were acted on by the Appellant. The position, however, is that there was no agreement as to the price of the variations. There was clearly an agreement that the Respondents might have to pay more. As the Judge found the letter of April 14 was a "provisional acceptance" that the Respondents might have to pay more. Where, as here, there is agreement on the variations, but no agreement as to the price, a term may be implied to pay a reasonable price to give practical effect to the parties' intention. It is a true contractual situation and not a case of quasi-contract (see Hudson's Building and Engineering Contracts (11th edition) at para. 1-263).

21. It should be noted that the contract between the parties expressly provided for the contractor to be paid for the completed work in event of the termination of the contract. This is provided for at clause K 6 of the contract which is as follows:

“The Owner/s and contractor agree that should it become necessary to terminate the contract by the Owner, the Contractor shall be paid all outstanding balances for work done and materials on site. Such payment shall be subject to all other rights that the Contractor may have in this agreement or in accordance with the laws of Trinidad and Tobago, and any notice of termination must be delivered by hand to the contractor at the designated address.”

22. The question therefore becomes what is a reasonable price for the completed work.

23. The Judge found that the value of the work done was \$76,100.00. In doing so, he accepted the evidence of Mr. Lennard. Counsel submitted that the Judge was wrong to do so. He argued that Mr. Lennard’s valuation was not probative. He submitted that Mr. Lennard, in the preparation of his valuation, attended on the site on only one occasion. This was at a time when the foundation was practically completed, save for the casting of the floor slab. Counsel argued that the foundation was then covered with polythene and ready for casting. He stated that Mr. Lennard did not value the work in areas that were covered with the polythene or which otherwise were not visible to the eye. As a consequence, Counsel submitted that Mr. Lennard did not take into account any additional work which was required by the variations, such as additional block work and additional excavation, the plumbing of the houses for hot water, the addition of two bathrooms and the alteration with respect to the stairs and the change of one room from a living room to a bedroom.

24. Of course, it does not follow from the fact that there were variations that the cost of construction increased, or even that there was “extra work”. While some of the variations could be looked at as naturally incurring additional costs and creating extra work, such as the addition of two bathrooms and the provision of hot water plumbing where there was none before, not all can be. According to Mr. Miller, who gave evidence on behalf of the Appellant, the majority of the variations had either no impact on costs, or

resulted in costs savings. It therefore does not follow necessarily from the fact that there were variations that the costs increased. The question is what is a reasonable price for the work as varied. With that in mind, the question must be asked whether Mr. Lennard valued the work as varied. It seems to me on the evidence that he did, and that Counsel's objections to his valuation are not supported by the evidence.

25. According to Mr. Lennard, he visited the site and had in his possession certain documents. The documents which Mr. Lennard referred to were, inter alia, the construction drawings, the building agreement, and the client's instructions to the contractor. There is no evidence that he was not aware of the variations as per Mr. Miller's instructions. To the contrary, in his cross-examination Mr. Lennard indicated that he valued the work after hearing from Mr. Miller about variations including the variations with reference to the foundation. There is no evidence that he was not fully informed of all the variations by Mr. Miller. Indeed I think it is implicit in his evidence that he heard from Mr. Miller about the variations which included the variations to the foundation, and were not limited to those, that he was informed of all the variations.

26. Mr. Lennard was also not challenged on whether he had the revised plans in his possession. These are not mentioned specifically in his report as being among the documents that he reviewed. But it seems to me that the reasonable inference to be drawn from Mr. Lennard's evidence was that he had the revised plans prepared by Mr. Miller. In those plans, the addition of the two bedrooms, the change of the living room to a bedroom and the repositioning of the stairs are clearly shown. So too was the requirement that the house was to be supplied with hot and cold water. Apart from hearing from Mr. Miller about the variations, Mr. Lennard would therefore have been aware from the revised plans of the need for hot water plumbing and other variations. In the circumstances, it seems to me that Mr. Lennard's report cannot be attacked, as Counsel sought to do, on the basis that the work occasioned by the variations were not taken into account. On the contrary, the evidence establishes that Mr. Lennard was fully aware of the variations and there is nothing to suggest that he did not properly take them

into account and the work associated with them in arriving at his assessment of the price of the completed work as varied.

27. As against Mr. Lennard's evidence of what was the value of the completed work, there is really no other evidence of what that value is. In addition to the Appellant who gave evidence on his behalf, the other witness on behalf of the Appellant, as I have already mentioned, was Mr. Miller. He, however, spoke of the variations in terms of whether this saved or added to costs. Clearly he thought that the impact of the variations was to reduce costs. According to him, the reason he was retained as a consultant was to aid in the construction of the building "by advising the client on changes to effect cost savings". As far as he was concerned, the changes he made resulted in savings in costs. He, however, gave no evidence of what it would cost to build the foundation as varied, or what the value of the completed work was.

28. The Appellant in his evidence at one point in cross-examination stated that he would accept that he did \$72,000.00 worth of work. On another occasion he stated that he would not accept the value of the work he did was \$76,000.00. Counsel for the Appellant submitted that what the Appellant meant was that the work he did was worth more than \$72,000.00 or \$76,000.00. Assuming that to be so, there is no evidence by the Appellant of the value of the completed work. He gave evidence of incurring a cost of \$5,000.00 to get an excavator on site. He also stated that he did extra works in the amount of \$38,900.00 and plumbing and electrical work at \$23,500.00. None of this assists in assessing the value of the completed work as varied.

29. In the course of the hearing of the appeal, Counsel for the Appellant referred to a document marked 'VNT15' which he said, from his recollection, was in evidence before the Judge. That document purports to be a statement prepared by the Appellant on July 28, 1997. However, from the record of proceedings, there is no indication that the document was in fact tendered in evidence. In any event, even if it were, it does not assist the Appellant as what it purports to do is to add to the original estimate as found in the contract as it relates to foundation work, the sum of \$38,985.00, for what the

Appellant contends is extra work, \$23,500.00 for electrical and plumbing work and a value for preliminaries as well as a figure for materials on site to which I will return later in this judgment. This is an approach with which I cannot agree. It assumes that the “extra work” in fact all represented additional work and additions to the original cost. This is not supported by the evidence. Further, I can see no basis for adding what the Appellant says was the full value of the electrical and plumbing work completed to the original estimate of the foundation work. The original estimate of the foundation work must have included in it, electrical and plumbing work necessary for the foundation. It is therefore not correct to add to that figure the whole value of the electrical and plumbing work which the Appellant said he did.

30. In the circumstances, I think the Judge was entitled as he did, to accept the evidence of Mr. Lennard as to the value of the completed work. According to Mr. Lennard’s evidence the value of the work, as I have mentioned, was \$76,100. It was not in dispute that the Appellant was paid \$100,000 prior to the termination of the contract. The Appellant was therefore overpaid and the Judge was correct to reject the Appellant’s claim for extra work.

31. As I mentioned, the Judge awarded to the Respondents on the counterclaim the sum, inter alia, of \$23,900.00 representing the amount by which the Appellant was overpaid, that is to say the sum of \$100,000.00 less the work actually completed. Counsel contended that the Judge was wrong to do so. As I understand Counsel’s argument, the Respondents were not entitled to any amount or alternatively all that they were entitled to was the sum of \$14,147.12.

32. Counsel’s argument that the Respondents were not entitled to recover anything was because there was no claim for restitution so that even if the Respondents were overpaid they could not recover. I do not agree. First of all the Respondents would be entitled to the overpayment as damages for breach of contract. Secondly, while the word “restitution” does not appear in the counterclaim, there is a claim for “overpayment”. The obligation of the Respondents is to pay to the Appellant the costs of the completed

work. If at the time of termination of the contract, the Appellant was overpaid, as he was, the Respondents are entitled to recover this overpayment and can do so within their pleadings.

33. As regards the Respondents entitlement to no more than \$14,147.12, Counsel drew attention to the fact that this was what it cost to complete the foundation and this was what the Respondents should recover as it represented the true value of the overpayment. Of course implied in Counsel's argument is that the valuation of Mr. Lennard was to be faulted. It was another attack on Mr. Lennard's valuation. As Mr. Lennard assessed the value of the foundation if built according to the variations to be \$100,000, that meant that the true value of the completed work was greater than \$76,100.00; in other words the value of the work done was \$85,852.88 (\$100,000 less the sum of \$14,147.12). But that does not follow.

34. Built into the figure of \$100,000.00 in Mr. Lennard's assessment were elements of the contractor's profit, overheads and preliminaries. When the first Respondent undertook to complete the foundation on her own, and hired labourers and paid the supplier directly for the concrete, those elements of profit, overheads and preliminaries would not be included in the cost to the Respondents. The fact therefore that it cost the Respondents \$14,172.12 to complete the foundation is not a sufficient basis on which to attack Mr. Lennard's valuation.

35. It is however apparent from clause K 6 of the contract, set out earlier in this judgment, that the Appellant is to be paid not only the outstanding balances for the completed work but also for the materials on site. With respect to the costs of materials on site, the Judge did not consider the value sufficiently established on the evidence. He said that the Appellant produced no documentary evidence to support the claim for materials. It is certainly not difficult to understand the position taken by the Judge. The evidence as to the value of the materials was not what one would have expected it to be. The Appellant indicated baldly that the value of the material was around \$10,000.00, but that he could not recall exactly. He gave no evidence of what he was referring to as

materials and their quantities or a breakdown of the cost. However, the fact of the matter is that there were materials left on site, and it is not an issue that these would have been purchased by the Appellant. The materials also do not appear to be *de minimis* as according to the evidence of the first Respondent, she used some of the material and gave away some of it. While the Appellant's evidence is not sufficient to establish that the value of the materials was \$10,000 and it would not be appropriate to allow that sum, I think that a nominal amount should have been allowed in respect of the materials, and I think an appropriate figure is \$1,500.00. I would therefore reduce the amount allowed by the Judge by way of overpayment to \$22,400.00.

36. The Judge also awarded the Respondents on the counterclaim the sum of \$12,647.12, being the cost of the concrete to complete the foundation. It is, however, not clear to me the basis on which the Judge awarded this sum. It is unfortunately not explained in the judgment. I, however, am of the opinion that this sum should not have been awarded. The fact is that the Appellant was paid for the work that he completed up to the termination of the contract. Not all the foundation work was completed, and had the Appellant completed it, then according to Mr. Lennard, a not unreasonable price for the foundation was \$100,000.00. If therefore the Appellant had completed the foundation when all his costs were computed, namely his overhead and preliminary costs and a profit element added, the Respondent would have had to pay a further \$23,900.00. On the evidence, what it actually cost the Respondents to complete the foundation, including the price of the concrete and labour, was \$14,147.12. Where a contract is lawfully terminated, that relieves the party in breach from his obligation to complete and in its place is substituted an obligation to compensate the innocent party for the loss sustained. If there was evidence that the cost to the Respondents to complete was increased, that might have formed some basis for the award. That is not the evidence. On the contrary, at least to complete the foundation as varied, the cost to the Respondents was less than if it had been completed by the Appellant. I think it appropriate to set aside that award.

37. The final submission of Counsel for the Appellant was that the Judge ought not to have ordered that the Appellant pay the full costs in the Court below. Counsel submitted

that the counterclaim was for the total sum of \$465,012.12, but the Respondents only succeeded before the Judge in obtaining judgment for a sum under \$40,000, less than one tenth of the amount claimed. Counsel submitted that the Appellant should have been ordered to pay a portion only of the costs.

38. In this jurisdiction the award of costs is of course in the discretion of the Court. The general rule is that costs follow the event. While the general rule is not immutable, it should be observed unless there is sufficient reason to the contrary. The general rule does not cease to apply simply because the successful party has, in part, raised an issue or made an allegation that failed (see *Re Elgindata* (No. 2) [1993] 1 ALL E.R. 232). Where, however, the consideration of the issue or allegation occupied a material amount of hearing time or otherwise led to the incurring of significant expense, the Court may in the exercise of its discretion order a reduction of the costs, either by a separate assessment of costs attributable to the issue or allegation or by making a percentage reduction in the award of costs (see *Elgindata*, supra, and Privy Council Appeal 86 of 2002, *Persad v Persad and Capital Insurance Ltd*). For this purpose the investigation of the issue or allegation must be something so distinct and separate in itself, that the decision of it constitutes an “event”.

39. Here the Respondents succeeded on their counterclaim before the Trial Judge. Counsel says that the award was a fraction of what was claimed, but it cannot be said that the consideration of each of the separate heads or items of special damage claimed constituted events. Two of the items of special damage amounted to \$420,000.00. These were for (a) losses sustained by reason of delays, loss of time and inconvenience, namely four months at \$50,000.00 per month and (b) loss sustained by the first Respondent’s husband, who had to remain in Tobago to assist and supervise – resulting in the loss of a lucrative contract in Kuwait. The claim here amounted to \$220,000.00. In the case of both of these items, no evidence was led. The Judge’s rejection of these claims occupies four lines in his judgment, and this is a great deal more than appears in the Appellant’s written submissions on those issues, which were literally in respect to (a) “no evidence” and (b) “too remote”. There is therefore nothing to suggest that the consideration of these

issues occupied any significant time. In fact all indications are to the contrary, that they occupied very little time. The same is true of the other items of special damage in the counterclaim which were refused. It cannot be said that the investigation of any of them was something so distinct and separate that the decision constitutes an event. In the circumstances I see no basis to disturb the exercise of the Judge's discretion in making the order as to costs that he did.

40. In all the circumstances, I will allow the appeal and vary the damages awarded on the counterclaim to \$24,125.00.

41. As regards the costs of this appeal, the Appellant in general terms argued that he was entitled to succeed on his claim for the costs of extra work including the plumbing and electrical costs, and that the award on the counterclaim was too high. The Appellant failed to persuade the Court that the Judge was wrong to reject the claim for extra work. He has, however, succeeded in having the award to the Respondents on the counterclaim reduced. It is, however, fair to say that by far the majority of the Court's time was spent in considering the claim for extra work. With respect to the award on the counterclaim, Counsel's main thrust failed. In fact, by far the majority of the time was spent investigating issues where the Appellant failed. But as he is successful, I ought not to order costs against him unless the issues were raised improperly or unreasonably, which I am not prepared to say is the case here. In all the circumstances I think that in this appeal, the parties should bear their own costs and accordingly I make no order as to costs.

Allan Mendonca
Justice of Appeal