IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1336 of 1973

BETWEEN CHARLES GIBBS MARTIN FOSTER PARTNERSHIP PLAINTIFFS

AND HUREL N. J. DEWAR DEFENDANT

Mr. Arthur Scholefield, Attorney-at-law, instructed my Messrs. Lake, Nunes and Scholefield for Plaintiffs

Mr. Bertram McCaulay, Q.C., instructed by Mrs. McCaulay for Defendant

Delivered: August 15, 1977

Chambers, J:

In this case, the Plaintiffs' claim is against the Defendant to recover the sum of $10,529.40, as being the amount due and owing for architectural services rendered by the Plaintiffs for and at the request of the Defendant, plus interest of $869.40.

The Particulars of Claim show how this claim of $10,529.40 was calculated:

Firstly: A Claim for $5,800 for preparing the Design for a proposed 4/6 storey building at 122 East Street, Kingston, based on 2% of the estimated construction cost of the building, estimated at $290,000, and a further claim for $4,350 based on doing 75% of the Working Drawings. The charge for such Drawings being 2% of the same estimated costs of construction, estimated at $290,000.

To this total amount of $10,150, an amount of $520 was taken off by the Plaintiffs as having been previously paid by the Defendant, and a further sum of $30 was added for printing expenses. To this amount of $9,660, a further amount of $869.40 was added for interest.

Now, before going into the question whether the Plaintiffs or the Defendant should succeed on this claim or if the Plaintiffs succeed at all, should they succeed as to the quantum claimed, I wish to state at this stage

that the witness Mr. John Martin of the Plaintiffs' firm, in his evidence before this Court has stated that the final drawing had reached about 50 or 75% when "we stopped working on them", and as a Plaintiff is required to prove his claim, including the quantum of his claim, the plaintiff firm would not be able to recover more than 50% for the working drawings. The total claim, therefore, should have been for $8,210 excluding interest, being $5,800 for the Design, $2,900 for the Drawings, $30 for printing, less $520 previously paid; and such claim and amount has to be proved by the Plaintiffs.

The Plaintiffs have given evidence and it is agreed by the Defendant that Plaintiffs' firm was engaged to prepare Architectural Drawings for a 4/6 storey office building at 122 East Street, Kingston. The Plaintiffs' witness, Mr. John Martin - a partner in the Plaintiffs' firm says that when he found out that the Defendant, Mr. Dewar was in difficulty in getting finances, that he Mr. Martin suggested to Mr. Dewar, that he Mr. Dewar should request the suspension of the preparation of the Architectural works or Designs at the stage that they had reached.

In other words the Plaintiffs are saying that the 75% of the work that his firm did, according to his bill, page 18 of the agreed bundle and his Statement of Claim, or the 50 to 75% of the work his firm had done - according to Mr. Martin's evidence on oath, ceased at that stage at the Defendant's request, after he Mr. Martin of the Plaintiffs' firm made the suggestion to him.

Mr. Bertram McCaulay, Q.C., for the Defendant cited Halsbury's Laws of England - 4th Edition, paragraph 1355, which paragraph states, that if the contract is one to perform an entire work, such as to prepare plans, drawings, and specifications, for a fixed sum, or for a percentage

on the whole cost of the work, then the right to payment does not arise until the whole work had been done.

The Plaintiffs are saying that even if this is so, the completion of the Contract was called off by the Defendant, all be it on a suggestion by the Plaintiffs. Further, that a substantial portion of the work was done when the Plaintiffs were told by the Defendant to cease the work, and that they then sent him their bill for the value of the work done to that stage, less a deduction of $520 previously paid, and as a result of not being paid this action is brought.

Now paragraph 1355 of the 4th Edition of Halsbury cited by Defence Counsel, refers to paragraph 1350 of the said work which latter paragraph refers to paragraph 1153 and paragraph 1153 states:

> "In the absence of a very clear stipulation that entire completion is a condition precedent to the contractor's right to payment, the contractor can claim the contract price, if he can show that he has substantially completed the work in question".

Now it seems to the Court that from the nature of this contract and the type of work to be performed, that the contract was an entire contract, but that there was no very clear stipulation that the entire completion was a condition precendent to the contractor's right to payment for what work they had done to date in circumstances where the contract came to an end after a substantial portion of the work had been performed.

The case of Supter vs Hedges (1898) 1 Q.B.D. p. 673, cited by Mr. McCaulay is a case where a builder, who after doing a portion of the work which he had contracted to do, abondoned the contract, and it was held that he was unable to recover for the portion of the work he did, as there was no evidence of any fresh contract to pay for the same.

This cited case, supra, is to be contrasted with the

case of Lysaght vs Pearson referred to in the cited case, supra, where a fresh contract was inferred from the mere fact of the Plaintiff requesting payment for the portion of the work he had already done, before continuing any further work, and by this inferred contract, the Plaintiff was held to be entitled to be paid for the portion of the work he did, he not having abondoned the contract. The important word is "abondoned".

In the instant case there is evidence from Mr. John Martin of the Plaintiffs' firm, that from discussions that he had with the Defendant, that it became clear to him from the information given to him by the Defendant in November 1972, that Mr. Dewar, the Defendant was having serious problems in raising finance, and that he Mr. Miller advised Mr. Dewar that he Mr. Dewar probably should advise him Mr. Martin to stop work - and that Defendant did so advise us and we stopped work. This clearly, if Mr. Martin is to be believed, cannot be an abandonment of the contract by the Plaintiffs but by the Defendant.

Just as in the Lysaght vs Pearson case, where A. L. Smith, L.J. stated:

> "When he (the Plaintiff) had completed one of them, he does not seem to have said that he abondoned the contract, but merely that he would not go on unless the Defendant paid him for what he had already done".

In the instant case, the Plaintiffs did not say that they abondoned the contract, but merely that they advised the Defendant to advise them to stop, and that the Defendant so advised them and as in the Lysaght case there is something from which a new contract might be inferred to pay for the work already done by the Plaintiffs.

The Defendant, Mr. Dewar stated that any payment was conditioned on his obtaining a mortgage out of which he would pay the architectural fees. The existence of this

contingency is emphatically denied by the Plaintiffs. It is clear from page 19 of the agreed bundle Exhibit 1 - letter dated 1st March, 1973, that the Plaintiffs were not acting on the basis of any contingency, and of the letter dated 4th April, 1973 and marked 4 for identity - now in evidence exhibit 4, there is no very clear stipulation, if stipulation there be that the right to payment whether in whole or in part depended on and was contingent on the Defendant obtaining a mortgage.

Mr. John Martin of the Plaintiffs' firm stated that his recollection and his records do not indicate that they received a reply to the letter of the 1st March, 1973. Such reply being tendered by the Defendant as Exhibit 4, and refers to a possible contingency being fulfilled before payment, but Defendant agreed under cross-examination that he did say what is mentioned in paragraph 4 of the letter of Mr. Martin dated 1st March, 1973 at page 19 of the agreed bundle - namely, that he might soon be able to settle in full if he was successful with his negotiations for a loan.

The Court accepts this denial as made by the Plaintiffs about any contingency as to the right to payment existing, both on the evidence oral and written and on the balance of probabilities.

In the Bolton vs Mahadena case (1972) 2 All E.R. 1322, the question of whether a contract was substantially performed was raised, and it was held that a contract to install central heating in a house was not substantially performed, entitling the Plaintiffs to be paid anything, when several rooms in the house were, in varying degrees not being properly heated, and it was held that the Plaintiff was unable to recover his £560 charge less £174.50, although it would require only £174.50 to remedy the defects.

The question of "substantial", depends on the fact in each case and the type of work to be performed. In the instant case, I hold that the architects had substantially performed their side of the contract when the Defendant, Mr. Dewar, told them to stop.

The Court is of the opinion that the case of Strongman (1945) Limited vs Sincock (1955) 3 All E.R. p.90 does not apply to the facts of this case.

The case of Hoenig vs Issacs (1952) 2 All E.R. 176, 182 cited by Defence Attorney-at-Law is a case dealing with defects in workmanship in a contract for payment on completion.

In that case it was held that the Defendant was liable to pay the amount agreed less an amount for making good the defects or omissions proved, the contract having been substantially performed. The Defendant was not allowed in that case to repudiate liability.

In the instant case as mentioned earlier there is a substantial performance of the contract and the Defendant cannot repudiate liability as the Court finds that there was no proved contingency agreement, and from the evidence on a whole, the balance of probabilities is against there being such an agreement with one of the partners of the Plaintiffs firm unknown to the other partners.

Secondly, there is, in a way, or rather there has been a novation or new contract which came into being when the Defendant advised the Plaintiffs to stop work. The Defendant would, therefore, be required to pay to the Plaintiffs an amount to satisfy the Plaintiffs for the amount of work performed by them to the date of such advice on their presenting their bill.

Further the course of conduct between the parties, that is, between the Plaintiffs firm and the Defendant,

envisaged variations and novations. Such variations always came from suggestions by the Defendant, all be it the last variation was in fact a novation which was influenced by the Plaintiffs because of an anticipatory breach resulting in an invitation to a novation.

In addition, the letter dated 1st March, 1973 at page 19 of the agreed bundle shows a suggestion to the Defendant by the Plaintiffs as to a method of payment by instalment. Exhibit 4, the reply to this letter is not accepted as proof of any contingency, and at that, binding on the Plaintiffs' firm.

Defendant was found to be an unreliable and confused witness and actually said, when certain questions were asked of him that he was confused.

Another case cited by defence counsel was Cutter v Powell 5 Esp 6: 1 B. and P. 637. That case was a written contract the terms of which spoke for themselves. In that case the deceased, Cutter, was by the terms of the contract to perform a given duty before he could call upon the Defendant to pay him anything. It was a condition precedent, without performing which the Defendant was not liable, and as Ashhurst J has said at page 577 of the English Reports, Volume 101 and quote:

> " ..... the parties themselves understood that if the whole duty were performed, the mate was to receive the whole sum, and that he was not to receive anything unless he did continue on board during the whole voyage".

Again, in the instant case, whether or not the contract was in writing it was varied and as stated earlier in this judgment, a new contract arose which involved the payment for the work that had been done at that stage.

Referring to Hall vs Barker (1878) 9 Chancery p.538 cited by Mr. McCaulay, that case is distinguishable from the instant case.

In Hall vs Barker, the contract was held not to be entire and quite rightly so, while in the instant case there were a few alterations or variations in the contract, until what was finally decided on was stopped at the request of the Defendant - resulting in a novation or a new contract for which an agreement by the Defendant to pay for the work done to-date could be implied.

In requesting a stoppage, there is an implied request by the Defendant to the Plaintiff to deliver the unfinished work, and for him to pay for the work done so far, if it was substantially performed - put another way, if the Defendant requested the Architects not to continue with the drawings, the Defendant undertaking to pay may be inferred, and construed as an agreement to pay the reasonable value for the Flaintiffs' services, even if the original contract was not completed or even substantially performed. However, the new contract involved a stoppage, and on stoppage that new contract was completed for which payment became due.

What the Defendant is actually saying by way of defence, is that he is not required to pay anything to the Architects for what work they did, unless he the Defendant was able to secure a loan by way of mortgage - the Court does not accept that such was the agreement.

The Court finds that the Defendant, Mr. Dewar, had freely accepted the Plaintiffs' services, in the sense that he had accepted or retained them with an opportunity of rejecting them, and with the actual or presumed knowledge that such services were to be paid for. The Defendant is asking the Plaintiffs to stop the work had his own choice unhampered by the Plaintiffs, and it is irrelevant to inquire whether or not the Defendant has obtained any real benefit.

The Defendant moreover gained some benefit from the drawings and estimates prepared by the Plaintiffs' firm between the various changes and alterations from one height of building to another which enabled him to decide finally which size building would be more feasible financially.

Judgment is therefore given to the Plaintiffs on their claim for $8,210. No allowance is made for the interest claimed, as it does not seem to the Court to form part of the contract. Cost to the Plaintiffs to be taxed or agreed.

Execution stayed for six weeks.

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