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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L 1994/D087

BETWEEN	DESIGN MATRIX LIMITED ORVILLE DIXON	PLAINTIFFS
AND	L. PHILLIPS	DEFENDANT

Mr. Charles Piper instructed by Piper & Samuda for the Plaintiffs.

Mr. Thomas Ramsay instructed by Tenn Russell Chin Sang Hamilton & Ramsay for the Defendant.

Heard on 8th, 10th, 12th, 17th and 19th April, 2002

Campbell J.

The Plaintiffs have filed an Amended Specially Endorsed Statement of Claim seeking recovery of fees for Architectural Services rendered pursuant to a contract between themselves and the Defendant. The Plaintiffs claim the sum of $81,800 with interest thereon of 1.2 the Commercial Bank rate in accordance with the rules of the Jamaican Institute of Architects Scale of Professional Charges. The Plaintiffs are an Architectural firm, Matrix Design Ltd. and its founder, Mr. Orville Dixon.

The Defendant, Mrs. L. Phillips, a homeowner of Charlemont Drive in St. Andrew, in her Defence at paragraph 2, states;

> "The Architects' fees charged by the plaintiffs and mentioned and referred to in paragraph 1 of the Amended Statement of Claim and Particularised in paragraph 2 of the Amended Statement of Claim were exorbitant and are excessive and unreasonable for work which the Second-named Plaintiff failed to do in accordance with the said oral agreement.
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> In reply to paragraph 3 of the Amended Statement of Claim, the alleged work was done so negligently and inefficiently by the Second-named Plaintiff without skill or care and in an improper and unworkmanlike manner in breach of the said oral agreement between the Second-named Plaintiff and the Defendant, that it was worthless and of no value to the Defendant , or worth far less than the amount sought to be recovered by the Plaintiffs and less than the Twenty-nine Thousand Dollars ($29,000) which the Defendant has already paid in the manner set out hereunder;
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> PARTICULARS
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> To the Second-named Plaintiff in or about the month of June, 1991- $10,000.00
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> To the Accountant-General on the 10th day of August, 1994, (pursuant to an Order for payment into Court, dated the 2nd day of August, 1994) - $19,000.00."

Mr. Dixon, testified that he was a certified Architect and had pursued training at the then College of Arts Science and Technology and Howard University, from which latter institution, he graduated in 1988 with the degree of Bachelors of Architecture. He worked for three years in the National Housing Corporation, before starting his

private practice under a company that he founded, Design Matrix Ltd. He further testified that he met the Defendant at her home at 1 Charlemont Avenue after being taken there by mutual friends of the Defendant and himself. At that meeting he said he was instructed by the Defendant that she required the services of an architect to do changes to the existing dwelling-house. The changes were to partition the present home and add another building to the side. This would transform the dwelling-house into a five-unit structure.

He said he agreed to undertake the task and they had discussions pertaining to the fact he would be following the guidelines of terms of engagements of the Architectural Society. He testified that he gave her a copy of a booklet entitled 'Jamaica Institute of Architect – Conditions of Engagements and Scale of Professional Charges' (the scale). This booklet outlines the formula for the setting of fees. There was no challenge to this bit of evidence.

Mr. Dixon testified that he had prepared some four drawings in execution of the contract. The originals of these were submitted to the Town and Country Planning Department.

In determining the fees to be charged, the Construction Cost is the starting point. An estimate of the Construction Cost was arrived at using the market rate for that type of construction, i.e., remodelling of a dwelling-house. He testified that it

was not customary for a project of that type to obtain a Bill of Quantities prior to obtaining project approval from the local authority. He however consulted informally with a Quantity Surveyor. According to Mr. Dixon, the cost of construction is arrived at by the application of a stated sum to the square footage of the proposed project.

Mr. Dixon's testimony, which was unchallenged, was to the effect that the sum to be used depends upon a mix of factors – the locale (similar units constructed in Norbrook as against Vineyard Town, would attract different rates due to the superior "finishing" that would normally be required in the more up-scale Norbrook). The terrain, and the nature of the building would also be factors in determining the cost of construction. He said the construction cost per square foot was approximately $1,200 per square foot for the work that was being undertaken at 1 Charlemont Avenue in 1991.

Crossed examined by Mr. Ramsay, he said he had passed the Schematic stage of the project and was in the Design Development Stage. He said of the Design Development stage, "that is where I get into the hard lines – set the definite footprints of the building." He also produced a floor plan that bear relationship to the land on which the house is being built. He said that he would indicate furniture layout to indicate what would hold in the space. Elevations were prepared at this stage. He

said he would indicate in the application for planning permission from KSAC, land coverage, habitable rooms per acre, height of buildings, available parking, and sewerage disposal. He further submitted a location plan and a site plan along with indications of lot size and a copy of the title to the KSAC in order to get planning permission. Mr. Dixon claimed to have submitted three different sets of plan representing three different stages of the development of the work to Mrs. Phillips. These were reduced drawings of the (1) measured drawings, (2) layout drawings, (3a) elevation outline stage, (3b) further elevation stage.

On the question of the Quantity Surveyors' input into the determination of the construction cost, Mr. Dixon testified that "I told her we would use the going market rate.....I explained the ramifications and she said that would only be incurring additional cost." The gist of that evidence being that she consented to an informal estimate by the Quantity Surveyor in order to minimize cost.

He said that having received outline permission, he submitted his invoice to Mrs. Phillips and have not heard from her since. Mr. Dixon was challenged in two main areas, that his Bill lacked specificity, and to the integrity and efficacy of the drawings submitted to Mrs. Phillips. Questions were asked to ferret out whether the reduced drawings given to Mrs. Phillips were similar to those submitted to the local planning authority. The inference the Court was being asked to draw was that the

cost of producing the reduced drawings shown to witness could not reasonably have been assessed at the sum claimed in the invoice.

The plaintiffs witness, Mr. Leonard Francis, a Physical Planner employed to N.E.P.A., however, brought the original drawings submitted to the Town and Country Planning Department. Of these drawings, no questions were raised about their integrity. At the minimum, they were done with sufficient skill and care to achieve the purpose for which they were created that of obtaining the planning authority's approval. Mr. Francis testified that plans and blueprints were submitted along with the application by Design Matrix Ltd. These included an information sheet, which gives a description of the development, a Location Plan, a Site Plan, a Floor Plan, and an Elevation of the Development.

No challenges were raised as to their efficacy in achieving Mrs. Phillips' objective. No evidence was adduced to support the allegations in the pleadings that the work of the plaintiffs was "done so negligently and inefficiently and without skill and care."

It was clear that the defence had proceeded on the assumption that the reduced drawings submitted to the defendant were facsimiles of those submitted to the planning authority. They clearly were not; the latter were annotated, titled, and produced on paper of different texture with professionally designed borders. They

also evidenced a scale plan. It was for those reasons that Counsel for the Defendant, quite properly, did not challenge their integrity.

The further question raised by learned Counsel for the Defendant was whether the fees charged were reasonable in the circumstances. I find that they were for the following reasons:

The Fees were calculated on a formula expressed in the Conditions of Engagement & Scale of Professional Charges (The Scale) that I have found was handed to the defendant prior to the institution of the contract. The Scale at page 19 is titled Section 111 – Basis of Compensation, and states; inter alia:

Construction Cost;

"That the Construction Cost to be used as the basis for determining the Architect's compensation for normal services shall be the total cost or the estimated cost to the client of all work designed and/or specified by the Architect, which shall be determined as follows, with precedence in the order listed;

and at paragraph b.....For work where no such tender or proposal is received;

(i) The latest detailed Estimate of Construction Cost, if one is available, or

(ii) The latest Statement of Probable Construction Cost." The detailed estimate of Construction Cost, not being available, resort was made to Probable Construction Cost.

The mechanism for determination of the Probable Cost was arrived at after consultation between the Plaintiffs and the Defendant. After consultation with the Quantity Surveyor, the Probable Construction Cost was fixed at $3,400,000. for the completed works.

The work had progressed to the Design Development Stage. In respect of this stage, the scale prescribes that a cumulative payment representing 30% of construction cost should be paid (30% of $3.4m).

Schedule D of the scale prescribes the fees chargeable based on a percentage of the cost of the completed works. This Schedule deals with buildings of normal complexity in design and detailing. It is accepted that the work at Charlemont Drive falls in this category in the range of $1,200,000 – $3,000,000. The percentage to be applied is therefore 6%. Where the work consist of an alteration to an existing structure, as in the present case, the Scale specifies at page 21, Section 111. Basis of Compensation states at E (5) that;

"In case of works or alterations to existing buildings, the charge shall be 1½ times the appropriate Schedule charges for new works." The applicable percentage is therefore 9% of (30% of $3.4) = $91,800.00.

The plaintiffs in a note to the Defendant dated December 4th, 1991 (Ex.5) to which was attached his invoice, advised inter alia;

> "Due to the change in magnitude of the development discussed, the approximate development cost will be $3.4M. This attracts an architectural fee of Three Hundred and Six Thousand Dollars (306,000.00) (calculated on the basis of the scale of fee set out by the Jamaica Institute of Architects) of which Ninety-one Thousand Eight Hundred Dollars is now due ($91,800.00)."

The attached Invoice details as follows:

Architectural fees to date	$91,800.00	
Less amount previously received	$10,000.00	
Amount now due	$81,800.00	$81,800.00

The Plaintiffs have scrupulously followed the formula prescribed in the Scale.

In ***Building Contracts, Architects and Engineers Vol. 3*** Para 1089 states;

> "In the case of architects, the usual professional charge for designing and super tending the construction of buildings is based on a percentage of the total cost of the works. Such charge has been sanctioned by the Royal Institute of British Architects, in a scale of professional charges issued by them. The commission is by the same scale, made payable in certain installments. Attempts have been made to induce Courts to accept these charges as customary, but without success. On the other hand, it is right to take into consideration the practice adopted by a large proportion of the profession."

The formula for determination of the plaintiffs' fees was brought to the Client's attention, and enjoys widescale acceptance amongst the Jamaican

practitioners. I find that there is no merit in the Defendants' contention that the fees are unreasonable.

The plaintiffs' claim was for interest of 1.2 times the commercial bank rate pursuant to section 111 part B(5) of the scale commencing from the 4th of January, 1992 to the date of payment or Judgment. The claim for 1.2 times the commercial rate was withdrawn and substituted in its place was a claim for the commercial rate. The plaintiff has been kept out of these payments that have been due to him since 4th December, 1991. He ought properly to be put, as best as the circumstances will allow, in the same position, as if the payment had been promptly made. In British Caribbean Insurance Company Limited v Delbert Perrier SCCA #114/94 at page 16, Carey JA. said;

> "The question which I posed is, 'On what basis should a judge award interest in a commercial case?' I do not think it can be doubted that where a person has been found to have failed to pay money which he should have, it is only right that he should pay interest to cover the period the money has been withheld. See the observations of Lord Wilberforce in *General Tyre & Rubber Co. v Firestone Tyre Rubber Co.* (1975) 2 ALL ER 173 at p 188. Our attention was directed to two cases. First, *Tate & LYLE Food & Distribution Ltd v Greater London Council & ANOR.* (19810 3 ALL 716). In that case Forbes J. made an important point as to the basis for awarding interest. He said this at p. 722;
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> 'Despite the way in which Lord Herschell LC in London, *Chatham and Dover Railway Co. v South*

> *Eastern Railway Co.* (1893) A.C 429 at 437 stated the principle governing the award of interest on damages. I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the principle now recognised is that it is all part of the attempt to achieve restitution in integrum.....I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow money to supply the place of that which was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been one should disregard for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which plaintiffs in general could borrow money.'
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> If restitution in integrum is the rationale for the award of interest, then the rate at which a plaintiff can borrow money must be the rate to be set by the Judge in his award."

We were referred to data produced by The Bank of Jamaica in the form of Statistical Digest. In particular the Commercial Banks Weighted Loan Rates for Commercial Credit for the period commencing 1989 to November, 2001. Based on these figures, Mr. Piper, for the Plaintiff submitted that an interest rate of 35.14% per annum be applied to the award from the 4th January 1992 to the date of Judgment. Mr. Ramsay submitted that, to include a mix of rates would introduce a punitive element into the equation, because some Commercial Banks were then charging

excessive rates. He was unable to obtain the rates chargeable for the Mutual Security Bank, where the plaintiff held an account. He however referred the Court to rates applicable to the National Commercial bank, for a period from January 1992 to 15th March 2002. The percentage band for the period averaged 46.87% to 49.41%.

In British Caribbean Insurance Company Ltd. v Delpert Perrier (Supra) Carey J., in summarising his comments on the rate which a Judge should award in what may be described as commercial cases, said, "the position stand thus;

(1) Awards should include an order for the defendant to pay interest.

(2) The rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant; and

(3) The plaintiff is entitled to adduce evidence as to the rate at which such money could be borrowed."

Judgment is entered for the plaintiff in the sum of $81,800.00 with interest at the rate of 35.14% per annum thereon from the 4th January, 1992 to the 19th April, 2002. Cost awarded to the Plaintiff to be agreed or taxed.