[2020] JMSC Civ 160

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISON

CLAIM NO. 2009HCV02889

BETWEEN	**NICOLA LAUDER**	**1ST CLAIMANT**
AND	**LYDIA JONES**	**2ND CLAIMANT**
AND	**EVERETT BRADY**	**DEFENDANT**

IN OPEN COURT

Mr. Clifton Campbell instructed by Archer, Cummings & Co. for the Claimants

Mr. Ruel Woolcock instructed by Ruel Woolcock & Co. for the Defendant

Heard: November 20, 2019 & July 22, 2020

ASSESSMENT OF DAMAGES – Measure of damages – Damages for breach of contract – Breach of duty of care to erect and install roof in a workmanlike manner – Cost of cure approach to determining damages

WOLFE-REECE, J

[1] At the outset I would like to thank the Defendant for his written submissions which was filed in the matter on the 12th December, 2019 in compliance with orders made by this Court on November 20, 2019.

INTRODUCTION

[2] By Claim Form filed on the June 4, 2009 the Claimants, Ms. Nicola Lauder and her mother Ms. Lydia Jones, initiated a claim against the Defendant, Mr. Everett Brady, seeking to recover damages for breach of contract and/or breach of duty of care in respect of the installation and erection of a roof to a building jointly owned by the Claimants situated at premises known as Lot 14 Jamaica Beach in the parish of St. Mary.

[3] The Claimant alleges that there was an oral agreement between the parties for the Defendant to construct a multiple bedroom guesthouse, followed by a second oral agreement for the construction of the roof thereon. The contract price to be paid to the defendant for the construction of the roof was $2,100,000.00.

[4] The specifications and drawings for both the building and the roof were contained in a building plan prepared by Richard Griffiths, which was approved by the St Mary Parish Council. The plan stipulated that the roof should be built primarily of slab.

[5] The crux of the Claimants' case was that the Defendant failed to erect and install the roof according to the specifications contained in the building plan and also that the Defendant failed to carry out the work in a workmanlike manner thereby giving rise to the following defects:

1. The arches to the roof were not in alignment and were lean; and
2. The boards to the roof were uneven and not properly joined leaving spaces between the boards; and
3. Sunlight appeared through the roof at several places.

[6] The Claimant therefore claimed damages in the sum of $30,533,825.58 which they claimed would be the cost to remove the roof which was installed by the Defendant and erecting the originally intended roof. The matter was heard by the Honourable Justice Mr. Evan Brown and judgement was delivered by him on the April 17, 2015

when the Learned Judge determined the issue of liability in favour of the Claimants. At paragraph 149 of the judgment Brown J stated that:

> *"…the work that the Defendant did was not done in a workmanlike manner. The ultimate consequence of the defendant's less than professional workmanship is to render the building on which the roof sits unfit for human habitation. In my opinion, the defendant failed to use reasonable skill and care in the erection and installation of the roof."*

[7] After determining that the Defendant was in breach of the building contract, the Learned Judge went on to assess the measure of damages. Brown, J cited **Treitel, The Law of Contract** 12th ed. Para. 20-039 in observing that the method to be applied in calculating damages in matters of this nature is the "cost of cure" approach. Nevertheless, the he applied the case of **Applegate v Moss** [1971] 1 Q.B. 406, 414 in holding that the breach occasioned cannot be described as anything less than fundamental because to get the roof as designed everything had to be removed. He therefore awarded judgment to the Claimant in the sum of $30,533,825.58 with interest of 10% under the Law Reform (Miscellaneous Provisions) Act.

[8] The Defendant being aggrieved by the decision of the Brown J, filed an appeal in the Court of Appeal. The appeal came on for hearing before a panel comprised of Morrison, P, F. Williams, JA and P. Williams, JA on November 9, 2016 and December 20, 2016. The court found that the Learned Judge seemed to have erroneously conflated the issues of whether the defendant had failed to construct the roof in a workmanlike manner with whether the roof was fit for the purpose for which it was required. It was found that the correct approach ought to have been that which was expressed by the House of Lords in **Ruxley Electronics and Construction Ltd v Forsyth** [1996] AC 344. The board cited several passages from the judgment to include the dicta of Lord Mustill when His Lordship expressed at page 277j as follows:

> *"The test of reasonableness plays a central part in determining the basis for recovery, and will indeed be decisive in a case such as the*

present when the cost of reinstatement would be wholly disproportionate to the nonmonetary loss suffered by the employer."

[9] This led the Jamaican Court of Appeal to the following conclusion which was expressed at paragraph 62 of the judgment:

> *[62] At the end of the day, although there did not appear to be enough by way of error on the part of the court to disturb the finding on liability (as the ultimate issue was one of a question of fact), there was enough to warrant the setting aside of the award of damages. This was mainly because the court below failed to consider the question of reasonableness in arriving at what it considered to be the appropriate measure of damages. In the result, there was no alternative but to remit the matter to the court below for damages to be assessed,* ***using the measure of damages stated in McGregor on Damages, which is, first, "the cost of remedying the defect." The assessment should, therefore, seek to focus on the cost of making the adjustments that are necessary to correct the defects in order to make the existing roof functional, bearing in mind at all times the consideration of reasonableness.*** *If that cost is disproportionate to the end to be obtained, then the measure should be: "the value of the building had it been built as required by the contract less its value as it stands." (emphasis mine)*

[10] Based on the foregoing conclusion the following orders were made:

1. *Appeal as to quantum allowed.*
2. *Award of damages of $30,533,825.88 set aside.*
3. *Matter remitted to the Supreme Court for assessment of damages before another judge.*
4. *Half costs of the appeal and in the court below to the appellant to be agreed or taxed.*

CLAIMANT'S EVIDENCE

[11] Mr. David Abrikian, Civil Structural Engineer gave evidence at the assessment of damages at the instance the Claimant. On page 2 of his expert report which was tendered and admitted into evidence, he outlined his conclusions on the matter as follows:

Brief Outline of Conclusions

In brief I found that:

The roof had been constructed significantly different from the original design, in that most of the roof was constructed as a hip-type, metal-sheeted arrangement, whereas in the original design most of the roof was to have been from concrete slab.

The construction carried out so far, although being different from the original design was, in its own right, essentially sound. Howeve,r there were a number of sections where corrective work was needed, and it was also incomplete in a number of sections.

[12] Mr. Abrikian noted on pages 4-5 of his report the differences in design, that is a comparison of the building as it now stands, with what was provided in the drawing of Richard Griffiths. For the purpose of this assessment, attention shall be drawn to the differences in the roof only. Mr. Abrikian noted as follows:

4. *A fourth difference related to the roof. Whereas in the original design the major section of the roofs was to have been from concrete slab with a smaller section being from a hip-type, metal-sheeted roof, in the building as it now stood almost the opposite was achieved. That is, the greater portion was metal-sheeted with the smaller area, comprising three distinct irregularly shaped sections, being of concrete slab.*

These concrete sections, located at the N-E, N-W and S-E corners of the buildings respectively, have approximate surface areas given as follows:
N-E corner: 750 ft^2 N-W corner: 450 ft^2 S-E corner: 1000ft^2
Approximate total concrete slab area: 2200 ft^2

These slab areas were examined from the underneath only, as access to the top was not available, but based on the observations, they appeared to be in acceptable condition, although sections the soffits (bottoms) of slabs would need to be rendered to achieve an acceptable finish.

In passing it should be mentioned that, for optimal preservation, it should be ensured that there is enough of a (slight) slope on the upper surface of the slabs to ensure that all water drains from the roof. Any ponding that is allowed to remain can, over time, cause

water seepage into the concrete resulting in rusting reinforcement, which in turn will cause the concrete to spall (flake).

[13] Mr. Abrikian went further to explain that the building will not be as strong as if it were made according to the specifications in the design due to metal-sheeted slabs being in sections that were intended to have the original concrete slabs. He noted that the beams and slabs which were originally proposed would have added "rigidity and connectedness that would have provided added lateral and longitudinal strength to the building." However, he explained that the way the concrete aspects of this section of the roof have been constructed, while not as strong as the original design, is still as sturdy to be considered acceptable in terms of robustness and stability.

[14] Mr. Abrikian listed the following remedial work in his report which he considered in his export opinion to be the corrective work necessary to complete the roof:

Completion of standard belt beams	*15'*
Removal of framework from belt beams	*320' @ 2 sides=640*
Retrofitting of slanted "belt beam"	*120'*
Retrofitting of slanted wall plate or wooden runner	*120'*
Retrofitting of slanted "flat" wall plate	*120'*
Fitting of standard "flat" wall plate	*200'*
Fitting of standard fascia board	*100'*
Seating existing wall plate flush on top of belt beams	*350'*
Sealing of joints of fascia to wall plate	*300'*
Installation of hurricane straps	*150'(equivalent to 40 straps)*

B

Throughout the entire roof one hole was seen in the metal sheeting. There was also some corrosion of the metal sheets in the roof section above the bay window on the 2nd floor, as well as some apparent watermarks on the underneath of the sheeting in the same roof section.

There was also a fairly congested joint of wooden members on the 2nd floor, at which the state of the metal sheeting appeared to be questionable. This area will need further checks followed by repairs needed.

No indication of any leaking was seen, and verbal evidence was given with regards to same by Mr. Amore who had visited the building frequently. Raindrops however would be expected to enter through both the hole and the corroding section mentioned above.

C

With regards to the finished interior roof, if the concrete roof slab roof had been installed of the roof as it now stands, the soffit (underside) of the slab would have instantly formed the ceiling. In the present situation, the metal sheeted roof rises above the tops of the walls, and there being no sarking, the underside of the metal sheeting is visible.

As such, it will be necessary to install a "false" ceiling, possibly in the form of the standard 2' gypsum ceiling panels, or the use of 'dry wall' panels. A necessary part of this installation will be the connections between the rafters above and the framework that supports the ceiling tiles and drywall panels.

Hence it appears to be the case that for the substitute roof to be considered complete this "false ceiling" should be installed, as with the originally designed slab roofs, the soffit of the slab would immediately provide the ceiling, one that will be missing under the previous arrangement, unless the "false" ceiling is installed…

[15] During cross examination Learned Counsel, Mr. Woolcock asked the question of whether the roof was functional for the purpose for which it was built, Mr. Abrikian responded by stating that *"functional is an absolute word. It was not functional in the complete sense. It was partly functional."*

[16] Based on the report produced by Mr. Abrikian, Mr. Clifton G Logan of Clifton G. Logan Associates Ltd., Quantity Surveyors & Construction Cost Consultants, produced a report estimated the costs associated with remedying the defects to roof. Mr. Logan, who was called as a witness, prepared two reports, which were admitted into evidence as exhibits 1a and 1b.

[17] Mr. Logan produced two separate estimates. On the one hand, he estimated the cost to complete the roof on the building, which was estimated by him to be Four Million Four Hundred and Thirty-Three Thousand Five Hundred and Fifty-Two Dollars ($4,433,552.00). He also estimated the cost to re-do the roof according to the specifications in the drawings, this he estimated to be Twenty-Six Million One Hundred and Eighty-Two Thousand Seven Hundred and Forty-Seven Dollars and Ninety-Seven Cents ($26,182,747.97).

[18] The issue of whether it would be reasonable to demolish the existing roof and replace it with a roof which is in accordance with the specifications outlined in the original plan was already addressed by the Court of Appeal as outlined above. Therefore, it is important for this court to gear its focus on the cost of curing the defect so as to render the building habitable. In order to assess the cost of curing the defect, the Court was assisted by the report of both Mr. Logan and Mr. Abrikian.

DEFENDANT'S SUBMISSIONS

[19] Counsel for the defendant submitted that the focus of the court should be the cost of remedying the defects to make the roof functional. The bone of counsel's argument is that the roof itself was functional and what the Claimant is seeking to recover is damages in relation to the ceiling which he argued was a different part of the building altogether. He therefore asked the court to find that the Claimant failed to prove any measurable damages for which an aware could rightfully be made.

LAW AND ANALYSIS

[20] It has been a rule of law since time immemorial that damages for breach of contract is compensatory in nature. That is, to put the innocent party, as far as money can do, in the position he/she would have been in had the contract been performed

(see ***British Westinghouse Electric and Manufacturing Co. Ltd. V. Underground Electric Railways Co. of London Ltd.*** [1912] A.C. 673 per Viscount Haldane L.C. at page 688). This principle was expressed by Parke B in the oft cited case of ***Robinson v Harman*** [1843-60] All ER Rep 383, where His Lordship expressed at page 385 as follows:

> *"The rule in common law is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."*

[21] In the instant case, it is clear that there has been a breach of the Claimants' right, in that, they contracted for the roof to be built in accordance to the building plan, yet the end result of the Defendant's work is that the Claimants received a roof other than that which was promised. In cases of this nature, involving a breach of a building contract, the court is faced with determining whether to grant damages based on the "cost of cure principle" or the difference in the value of the roof had it been built as required less the value of the roof as it now stands. The authors of **The Law of Damages (Common Law Series)** quiet succinctly outline the dichotomy with which the court is faced at paragraph 19.93 of the text when the outlined the guiding principles as follows:

> *There is long-standing authority in tort that the cost of repairs to property may be denied to the claimant if in the circumstances it is unreasonable to incur it.* ***A similar principle applies in contract: if the cost of obtaining the promised benefit is disproportionate, or if it is wholly unreasonable to incur it, then the claimant is limited to such sum as will reasonably compensate him for any loss suffered.*** *An old illustration is James v Hutton and J Cook & Sons Ltd, where the tenant of a shop changed the front and, in breach of contract, failed to restore the old front at the end of the lease. In the absence of evidence that the premises would be any better if they were restored, Lord Goddard CJ in the Court of Appeal said it would be a 'sheer waste of money' to do so and awarded nominal damages. Megarry V-C in Tito v Waddell (No 2) reached a similar conclusion. Land was strip-mined by the defendants and, in breach of contract, never restored to its original sylvan state. His Lordship refused to give the cost of restoration, which was out of all proportion to any value that would be added by it. (Emphasis Mine)*

[22] The same principle was applied in the case of ***Ruxley Electronics and Construction Ltd v Forsyth*** [1996] AC 344 and ***GW Atkins v Scott*** (1980) 46 Con LR 14, CA both of which were applied by the Court of Appeal on the hearing of ***Everett Brady v Nicola Lauder and Lydia Jones*** [2017] JMCA Civ 18.

[23] In ***Ruxley Electronics and Construction Ltd v Forsyth***, supra, the appellants were contracted to build a pool on the Respondent's premises. The contract specified that the pool should have a diving area 7 feet 6 inches deep, however, the appellants constructed the pool with a diving area which was only 6 feet deep. The pool was suitable for diving and did not have adverse effect on the value of the property. The respondent claimed for the cost of demolishing the pool and rebuilding according to the specifications. The House of Lords held that to order reinstatement in such a case would be wholly unreasonable. Lord Bridge of Harwich expressed on page 354 as follows:

> *"… to hold in a case such as this that the measure of the building owner's loss is the cost of reinstatement, however unreasonable it would be to incur that cost, seems to me to fly in the face of common sense."*

[24] I am of the view that the case at bar involves a similar breach to that occasioned in **Ruxley Electronics and Construction Ltd v Forsyth** (supra), to the extent that the relevant parties received a finished product which was different from that which they bargained for. In the instant case, Learned Counsel, Mr. Woolcock argues that the roof is functional and therefore fit for the purpose intended. He pointed the court to page 7 of the report of Mr. Abrikian where the following was expressed:

> *" in general, although being different from which was originally designed, the roof as built appears to be acceptably substantial, though incomplete and in need of corrective measures in some areas."*

[25] During cross examination both Mr. Abrikian and Mr. Logan gave evidence that the roof is different from the ceiling. When asked about the installation of the false ceiling which was estimated to cost $3,735,164.00, Mr Arikian noted that the structure would not form part of the roof. The line of questioning was a follows:

Q. Is it not true that the installation of ceiling is not necessary component of the roof.

A. It is not a part of the roof. It is necessary to complete the building. Metal sheeted roof at an angle the underside of the roof can be finished with boards that are immediately underside the roof

That is what is called a sharking

In that situation, the ceiling follows configuration of the roof itself. In this case that has not been installed and hence. The ceiling would not take the form of sharking. A false ceiling below the level of the roof itself and would be required to bring the complete building to satisfactory level.

Q. The installation of a ceiling is not the job of the roofer?

A. It is the job of the person constructing the building

[26] Similarly, Mr. Logan gave evidence that extra false ceiling and the gypsum ceiling were not part of the roof but became necessary because of the roofing change in order to ward off the heat coming from the metal sheeting. During cross-examination Mr. Logan gave the following evidence:

Q. the belt beam is required to tie the walls together

A. Yes

Q. in your report 1B item b. The form work is not a part of the timber roof

A. No it is a part of the incomplete belt beam

Q. When you speak of the retrofitting of the slanted belt beam is in respect of building wall and not a part of the timber roof

A. It is a part of the wall and not the timber roof

Q. The reference to the ceiling frame exhibit 1 B, a cost of 655200.00 the ceiling frame is not a part of the roof

A. It is not classified as part of the roof. It refers to extra false ceiling as a result of the roofing change

Q. if the ceiling frame is not a part of the roof. The gypsum ceiling would not be a part of roof

A. yes. It becomes necessary to ward off the heat coming from the metal sheeting

Q. Moulding am I correct that the moulding is not a part of the roof

A. No it's apart of the ceiling

[27] Mr. Woolcock insists that the Claimant has demonstrated no measurable damages, in that, the remedial work which they seek to be compensated for is in relation to the construction of a 'false ceiling' and not the roof. I must reject this line of reasoning because but for the Defendant's failure to erect the roof according to the agreed specifications, the 'false ceiling' would not be required. Mr. Abrikian indicated on page 7 of his report under section C that the original design was intended for the ceiling to form part of the roof. He expressed the following:

> *"[w]ith regards to the finished interior roof, if the concrete slab roof had been installed instead of the roof as it now stands, the soffit (underside) of the slab would have instantly formed the ceiling. In the present situation, the metal sheeted roof rises above the tops pf the walls, and there being no sarking, the underside of the metal sheeting is visible."*

[28] Counsel for the Defendant has submitted that the report of Mr. Abrikian is that the roof as it now stands is functional therefore the Claimants should not be compensated as they have shown no measurable damage to the roof itself. Counsel's submission in this regard is misleading. Mr. Abrikian made it clear in his expert report and during cross-examination that while the roof is adequately strong it is incomplete. Therefore, while I must commend learned Counsel for his brilliant submission, I find that the Defendant should bear the cost of placing the Claimants as far as money can do, in a position as if the contract had been performed according to specifications.

[29] To my mind, the idea that the Defendant has the right to deliver to the Claimants an incomplete structure, which is of a lesser quality than that which was agreed is an affront to common sense. Rather, the doctrine of 'pacta sunt servanda' (agreements must be kept) applies. The case **Radford V. De Froberville Lange Third Party** - [1977] 1 WLR 1262 is instructive on this point, in particular the dicta of Oliver, J at page 1270 where he expressed as follows:

Now, it may be that, viewed objectively, it is not to the plaintiff's financial advantage to be supplied with the article or service which he has stipulated. It may be that another person might say that what the plaintiff has stipulated for will not serve his commercial interests so well as some other scheme or course of action. And that may be quite right. But that, surely, must be for the plaintiff to judge. Pacta sunt servanda. If he contracts for the supply of that which he thinks serves his interests — be they commercial, aesthetic or merely eccentric — then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.

[30] Based on the report Mr. Abrikian and the estimate of Mr. Logan the total sum of $4,433,552.00 would be the cost of completing the roof. The sum of $3,735,154.00 represents the costs of the false ceiling only and the balance of $698,388.00 is the represents the costs of carrying the following remedial jobs, that is:

A.	*Completion of standard belt beam* *Reinforced concrete belt beam consisting of 3000 psi concrete and 13mm diameter steel reinforcement with timber formwork to both sides average 150 mm x 300mm deep*	*38,500*
B.	*Removal of Formwork* *Carefully remove existing formwork from belt beam, hack and apply 13mm thick rendering to same area and finish with two coats emulsion paint*	*187,620.00*
C.	*Retrofitting slanted belt beam* *Reinforced concrete belt beam consisting of 3000 psi concrete and 13mm diameter steel reinforcement with timber formwork to both sides average 150mm x 300mm deep*	*284,900.00*
D.	*Retrofitting slanted wall plate* *Install the following in wolmanised pitch pine 50 mm x 100 mm wall plate including anchors cast into slanted belt beam*	*34,262.00*
E.	*Retrofitting of slanted fascia board* *25mm x 200mm fascia board*	*32,190.00*
F.	*Fitting of standard wall plate* *Install the following in wolmanised pitch pine 50mm x 100mm wall plate including*	*61,116.00*

	anchors cast into slanted belt beams (m/s)	
G.	*Fitting of standard fascia board* *25mm x 200mm fascia board*	*34,800.00*
H.	*Seating existing wall plate flush* *Allow for adjusting existing wall plate to flush on top of existing belt beam*	*15,000.00*
J. [sic]	*Sealing of joints of fascia* *Allow for sealing joints of fascia to wall plate*	*10,000.00*
	Carried to Collection	*698,388.00*

[31] I have checked all the items listed in the estimate of Mr. Logan against the report of Mr. Abrikian and find that they all fall within what Mr. Abrikian described on pages 6-7 of his report as '*aspects to be addressed for satisfactory completion of the roof*' (**see page 6 above)**.

[32] I have accepted the evidence of Mr. Abrikian and Mr. Logan I find that the that the suggested remedial work and the estimates thereto forms the reasonable costs necessary to complete the existing make and make it fully functional for the purpose for which it was built.

1. Damages for breach of contract awarded to the Claimant in the sum of $4,433,552.00 with interest at a rate of 10% under the Law Reform (Miscellaneous Provisions) Act

2. Costs to the Claimant to be taxed if not agreed.

……..
Hon. S. Wolfe-Reece, J