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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1989/P-075

BETWEEN	PARISH COUNCIL OF ST. CATHERINE	PLAINTIFF
A N D	WINSTON HENRY	DEFENDANT

Messrs. C.D. Morrison and Patrick Foster instructed by Messrs. Dunn, Cox and Orrett for plaintiff.

Mr. Arthur Kitchin, instructed by Mr. B.E. Frankson for defendant.

HEARD: MARCH 20, MAY 22, 24, 27, AND SEPTEMBER 30, 1991.

PANTON, J.

In 1988, the defendant purchased Lot 2, Old Harbour Road, Sydenham, St. Catherine from the Ministry of Construction (Housing) which approved the construction of a commercial building thereon. The plaintiff was notified, and provided with copies of the plans for the proposed building. Apparently, the plaintiff's approval was also sought - although the defendant's attorney-at-law, in his opening of the case, stated that the plans were submitted to the plaintiff "as a courtesy". There was no early response from the plaintiff. That, I daresay, is not unusual in Jamaica.

The defendant commenced construction of a commercial building in August, 1988. The scheduled time for completion was December, 1989. The estimated cost of construction was One Million, Two Hundred and Twenty-three Thousand, Seven Hundred and Ninety-eight Dollars and Ten Cents ($1,223,798.10). In January, 1989, that is, five months after work on the site had commenced, the plaintiff suddenly sprang to life and served on the defendant a notice to cease building. Up to then, the plaintiff had not responded to the defendant's application. The defendant boldly, and - as it turned out - correctly ignored this notice from the plaintiff.

The defendant could have been forgiven for thinking how ironic it was that in this country where shacks are allowed to be built un-molested on public as well as private property, his commercial project consisting of 5,618 square feet which had had the blessing of the Ministry of Construction should have been treated thus by the plaintiff.

As stated earlier, the defendant ignored the notice that had been served on him. Between August, 1988 and July 31, 1989, the value of the work that was completed amounted to Two Hundred and One Thousand, Two Hundred and Sixty-seven Dollars and Seventy Cents ($201,267.70).

On June 30, 1989, the plaintiff filed a writ of summons with an endorsement that the plaintiff was seeking an order to restrain the defendant from continuing to erect the building, without having previously obtained the plaintiff's approval. This, the plaintiff claimed in the endorsement, was in breach of Section 4 of the "Parish Councils Building (St. Catherine) By-Law 1950". The plaintiff also sought an order for the defendant to take down the said building.

On July 31, 1989, the plaintiff obtained from the Supreme Court an injunction against the defendant, preventing any construction pending the hearing of the action. This injunction remained in force until September 18, 1990. At the time of the granting of the injunction, the plaintiff had undertaken to "abide by any Order which the Court may make as to damages".

The injunction was discharged apparently after both the plaintiff and the defendant had agreed that the plaintiff had no legal authority for interfering with the defendant's activities at Lot 2, Old Harbour Road, Sydenham.

On December 5, 1990, the defendant filed a defence and counterclaim. In the defence, he stated that the plaintiff had no authority to regulate his building activity; and he counter-claimed that the plaintiff had unlawfully, maliciously and falsely obtained the order of injunction.

The counter-claim also alleged that on October 8, 1990, the plaintiff admitted its lack of authority before the Full Court to which the defendant had gone to seek an order of certiorari.

The defendant claimed damages as follows -

" PARTICULARS OF SPECIAL DAMAGES

(a)	additional building costs	$ 2,052,000.00
(b)	additional interest costs	$ 3,441,260.68
(c)	professional fees	$ 339,400.00
(d)	additional furniture and equipment costs including storage	$ 833,526.20
(e)	loss of profits and/or income for 420 days @$10,000 per day and continuing	$ 4,200,000.00
(f)	additional security costs for 420 days @$8.00 per hour	$ 80,640.00
		$10,946,826.88"

From this total, the defendant has deducted the sum of Two Hundred and One Thousand, Two Hundred and Sixty-seven Dollars and Seventy Cents ($201,267.70) referred to earlier as the value of the work done between August, 1988 and July, 1989. He has therefore claimed the sum of Ten Million, Seven Hundred and Forty-five Thousand, Five Hundred and Fifty-nine Dollars and Eighteen Cents ($10,745,559.18) as the amount that he suffered in damages. He has also claimed "damages on the footing of aggravated damages", along with interest and costs.

On December 20, 1990, the following order was made by Langrin, J.:-

> "1. the plaintiff be granted leave to file and deliver Reply and Defence to Counterclaim by the 14th day of January, 1991.
>
> 2. thereafter the defendant have leave to proceed to Assessment of Damages on the Plaintiff's usual undertaking as to Damages.
>
> 3. costs to be costs in the cause."

The records do not show the filing of a Reply and Defence to Counterclaim. In keeping with Langrin, J's order, the matter was set down for the defendant's damages to be assessed.

THE WITNESSES

I heard evidence on March 20, May 22, 24 and 27, 1991, from the defendant and two quantity surveyors. One of the latter witnesses, Mr. Leroy Westcarr, had been employed by the defendant on the project. The other, Mr. Thomas Barrett, was called by the plaintiff. He testified on the basis of his experience, and his assessment of the report that had been prepared by Leroy G. Westcarr Associates.

GENERAL COMMENT

I am puzzled as to the basis for the huge figures that appear in the defendant's particulars of special damages. This is so because the evidence presented fell woefully short of those figures. It would perhaps be appropriate to remind litigants that the Court cannot make awards in vaccuo; the Court cannot pluck huge sums out of the air and award them as damages. Evidence has to be presented to substantiate all claims for damages. This is particularly so in cases such as the instant one where the losses can be quantified and supported by documents.

Items (b) and (e) of the particulars of special damages which amount to nearly Eight Million Dollars ($8,000,000.00) are clear examples of claims without evidence.

THE DAMAGES

1. Additional building costs

The defendant has alleged in his pleadings that he has suffered loss amounting to more than Two Million Dollars ($2,000,000.00) in additional building costs. The evidence that he has presented has fallen far short of this sum.

The additional building costs have been in the area of materials, labour, and what the language of the building trade refers to as "preliminaries".

(i) Preliminaries

Both Messrs. Westcarr and Barrett agree that the additional cost of preliminaries was Twenty-five Thousand, Eight Hundred and Ninety-seven Dollars and Eighty Cents ($25,897.80). There being such agreement, and the amount being reasonable, I have no hesitation in allowing this sum as claimed.

(ii) Labour

Mr. Westcarr testified that his estimate of the additional cost of labour was One Hundred and Fifty-seven Thousand, One Hundred and Eighty-one Dollars and Eighty-two Cents ($157,181.82). This figure includes Twenty-one Thousand, Six Hundred and Eighty Dollars and Twenty-four Cents ($21,680.24) for end of project bonus. Mr. Barrett's evidence was that the end of project bonus was already in the 25% that was estimated for labour in the main contract and had therefore been already calculated.

Mr. Westcarr, in cross-examination, admitted that there was duplication of Fourteen Thousand Dollars ($14,000.00) in the figures for the end of project bonus.

I find the evidence of Mr. Barrett on the point to be the evidence that I should accept. "There is", as he said, "either a duplication or there is not". I'll therefore deduct the amount of Twenty-one Thousand, Six Hundred and Eighty Dollars and Twenty-four Cents ($21,680.24) and find that the additional cost for labour would be One Hundred and Thirty-five Thousand, Five Hundred and One Dollars and Fifty-eight Cents ($135,501.58).

(iii) Materials

So far as the cost of materials is concerned, the difference between the two experts was great. I preferred Mr. Westcarr's evidence.

Initially, he had estimated an additional sum of Six Hundred and Eight Thousand, Nine Hundred and Fifty Dollars and Fifty-eight Cents ($608,950.58). However, with, as he describes it, "the benefit of history", at the time of his evidence he was actually able to state, instead of merely estimate, the cost of the materials. He revised the figures for the cost of additional labour to Four Hundred and Fifty-nine Thousand, Seventy-five Dollars and Eighty-three Cents ($459,075.83). I had no difficulty in accepting his evidence that the prices of materials had doubled during the period of the injunction. The Court cannot close its eyes to the fact that the Jamaican currency has been falling dramatically while prices generally have been rising astronomically. Clearly, Mr. Westcarr's evidence had to be preferred.

I was surprised that Mr. Barrett, although agreeing that there were many individual items that had doubled in price, was unable to see that Mr. Westcarr's figures were nearer to reality.

It should be noted that so far as the bay is concerned, I am making no deductions from Westcarr's estimates. I've arrived at that position by giving serious thought to Mr. Barrett's statement that the bay can be done at any time in the future.

2. Professional fees

The sum of Three Hundred and Thirty-nine Thousand, Four Hundred Dollars ($339,400.00) was claimed for additional professional fees. I have been presented with evidence to support only Five Thousand, Four Hundred and Seventy-six Dollars and Fifty-two Cents ($5,476.52) which represents the additional amount paid to Westcarr Associates. That sum is accordingly allowed.

3. Storage

The building should have been completed by December 31, 1989. It was not; due to the injunction. Storage of furniture becomes relevant thereafter. The plaintiff's actions delayed completion until March, 1991.

Storage of furniture for that period is therefore the plaintiff's responsibility. The evidence indicates storage costs at Eight Hundred Dollars ($800.00) per month. For fifteen months, that is, January 1, 1990 to March 31, 1991, the cost would therefore be Twelve Thousand Dollars ($12,000.00). I was not presented with any evidence which indicated, or confirmed the purchase of any

additional furniture and equipment as a result of the injunction.

4. Rental

The only evidence as to rental was a statement from the defendant that he intended to rent the premises at Forty Thousand Dollars ($40,000.00) per month per floor, and had had two proposals for rental - one in January, 1989, the other in May, 1989.

Apparently, up to the time of the trial, there had been no other proposal. There was nothing to indicate that any contract for rental had fallen through or had not been entered into as a result of the non-completion of the building due to the injunction.

Making an award for lost rental would, in my judgment, be sheer speculation.

5. Security

The evidence has disclosed that the injunction caused the defendant to expend more on security than he would normally have done. This is due to the fact that -

(a) he had to provide for security of the site and items thereon while no work was taking place;

(b) he had to provide for security beyond the date scheduled for completion.

Between August 1 and December 31, 1989 (the original completion date) had there been no injunction in force, the defendant would have had to pay for security at nights - as usual. During the days the presence of workmen would have been sufficient security, so no special arrangements had to be made for daytime security.

The plaintiff is therefore liable for security for such period when workmen would have been present - but were not there, due to the injunction.

There was no evidence as to the number of hours workmen would have been on the site. I think it is reasonable to say that workmen would have been on the site for about nine hours each day (including the lunch break) during the week, that is Monday to Friday; and, being a construction site, for about five hours on a Saturday making a total of 50 hours per week.

The cost for security each week arising from the injunction would be about Four Hundred Dollars ($400.00) - at $8.00 per hour.

Between August 1, and December 31, 1989, a period of approximately 22 weeks, the cost would be Eight Thousand, Eight Hundred Dollars ($8,800.00).

The period January 1, 1990 to March 31, 1991, was a period for which the plaintiff would be wholly responsible as the building had been scheduled for completion by December 31, 1989.

That period covered 455 days. The cost for security would be 455 x 24 x 8 = $87,360.00.

The total cost of security as a result of the injunction would be $87,360.00 + $8,800.00 = $96,160.00.

The plaintiff's claim however is for Eighty Thousand, Six Hundred and Forty Dollars ($80,640.00). I am surprised at the absence of receipts to substantiate payments being made for security for this period. Maybe, I should not be surprised considering how things are done informally in this country. However, it would have been incredible for the site not to have been protected while no work was in progress considering the high level of thievery and vandalism in this country. The claim for security is in my view reasonable and is accordingly allowed.

6. Aggravated damages

In his counterclaim, the defendant has sought "damages on the footing of aggravated damages". However, the submissions of his attorney-at-law, Mr. Kitchin, indicate that he is really seeking exemplary damages on the basis of one of Lord Devlin's categorization in Rookes v. Barnard (1964) A.C. 1129 - that is, that there has been "oppressive, arbitrary or unconstitutional action by the servants of the government". Mr. Kitchin urged me to award at least Two Million Dollars ($2,000,000.00) under this "head" of damages.

It is appropriate at this time, I think, for us to be reminded that aggravated damages are compensatory in nature whereas exemplary damages are punitive. Generally speaking, in the former case, the aim is to compensate for injured feelings whereas in the latter case, the intention is to punish for oppressive, arbitrary and unconstitutional conduct.

The defendant is resting this area of his claim on a question posed to him by an employee of the Council, and a report made to him by another such employee as to statements allegedly made in Council.

In the case of the question, the Superintendent of Roads and Works, a Mr. Lovemore, had asked the defendant why he had submitted plans for approval at a time when none of "his people" were in the Council.

In the case of the report, a Mr. Brown - a works overseer - had told the defendant that it was being said "in Council" that he (the defendant) had been sold the property because he was "a Bruce Golding man" - a reference to the former Minister of Construction who is a member of the opposition party. I am being asked to say that the question asked by Lovemore and the report made by Brown show "oppressive, arbitrary or unconstitutional action" by the Council.

Lovemore's question seems to be based on his perception of how the official business of the Council is conducted. It is sad that the Superintendent of Roads and Works should be in a position to have such a perception. However, his perception as relayed by the defendant is not evidence on which I can act as requested by the defendant.

The statement reported to the defendant by Mr. Brown indicates an observation that was apparently made at a meeting of the Council or by a Councillor - it is not clear - as to his understanding of how the defendant came by the land. Taken separately or together, these words from Messrs. Lovemore and Brown do not in my judgment put the Council's treatment of the defendant's application in the category that Lord Devlin had in mind.

I should have thought that if the defendant had really seriously thought that these words were indicating that the Council was bringing wrong principles to bear on its consideration of his application, he would have at least brought the information he had to the attention of the Secretary of the Council. He did not. He remained silent on the matter.

In all this, it must not be forgotten that the Council sought, obtained, and acted on, legal advice in dealing with the application. Furthermore, one must assume that meetings of the Council and its various committees are properly conducted, in that minutes are taken - so if any improper motives were involved on the Council's part, the minutes would so indicate.

One may of course fault the Council's reasoning and its decision. The decision may even be thought foolish and indicative of incompetence as the Council based its refusal on its apparent inability to institute proper measures to control traffic, reduce accidents and promote proper road use. However, I see no evidence of oppressive or arbitrary conduct. That being so, there is no basis for an award of exemplary damages.

In closing this aspect of the matter, I should say also that the feelings of humiliation and depression complained of by the defendant do not in my judgment amount to the injured or wounded feelings that attract aggravated damages. I have not been able to see the relationship between the behaviour of the Council and the feeling of humiliation complained of by the defendant. In relation to his feelings of depression, I should think that the nature of the project with its attendant headaches, and the high interest rate of which he testified, would probably be more responsible for the defendant's feelings of depression. It should not be overlooked that quite apart from the injunction, the project was not on schedule. Indeed, when this action was last adjourned, the indication was that the building was still being constructed, and would be under construction for some time to come. In any event, as I said earlier, the plaintiff's conduct was obviously influenced by the legal advice it had received, and not by any improper motive.

The award of damages is therefore as follows:

(A)	additional building costs	$620,475.21
(B)	additional interest costs	$Nil
(C)	professional fees	$ 5,476.52
(D)	additional furniture and equipment costs including storage	$ 12,000.00
(E)	loss of profits and/or income	$Nil
(F)	additional security	$ 80,640.00
	TOTAL	$718,591.73

The damages are accordingly assessed at Seven Hundred and Eighteen Thousand, Five Hundred and Ninety-one Dollars and Seventy-three Cents ($718,591.73).

In accordance with section 3 of the Law Reform (Miscellaneous Provisions) Act, I award interest at the rate of 15% from January 1, 1990, to September 30, 1991. I have decided on January 1, 1990, as the commencement date for the payment of interest as the building was scheduled for completion on the previous day and the injunction was a substantial reason for its non-completion.

In addition, costs are awarded to the defendant; such costs to be agreed or taxed.