

NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. C.L. 1994/Q-001

BETWEEN	QUALICON ENGINEER CO. LTD.	CLAIMANT
A N D	ALEXANDER STEPHENSON	DEFENDANT

Arthur Williams instructed by Arthur Williams and Company for the Claimant.

John G. Graham instructed by John G. Graham and Company for the Defendant

Heard: April 21, May 1 & 4, 2006 & February 14, 2008

Daye, J.

At the end of February 1993 Qualicon Engineer Co. Ltd. a construction company complained that it was not paid for work done and did not received funding to continue work on land at 5B Montgomery Way, Stony Hill, St. Andrew. This was within ten (10) weeks of preparing the foundation of this land to build a residence for husband and wife Mrs. Alexander Stephenson and Mrs. Gloria Stephenson.

Qualicon Engineer Co. Ltd. demanded payment of \$150,000.00 from Mrs. Gloria Stephenson in a series of letters commencing the 2nd March, 1993 and ending May 21, 1993. As the company demands bore no fruits it then sued Mr. Alexander Stephenson on the 21st February, 1994 for \$150,000.00 for work done.

Mr. Barrington Gardner the Managing Director of the company claimed that at the end of February 1993 his company had complete site preparation and excavation of the foundation. Advance preparation was not complete due to lack of funding from

owners Mr. and Mrs. Alexander Stephenson. At that point his company issued a certificate of payment demanding payment of \$150,000.00 from Mrs. Gloria Stephenson. This sum he said accounted for deductions of 10% mobilization payment of contract sum and discounts to the owners.

Mr. Alexander Stephenson contend that it was his wife Mrs. Gloria Stephenson who entered into any contract with this company and not him. Further, he claims his wife paid excess money to complete the foundation of the building. He says the cost for the foundation of the building was \$350,000.00 and \$200,000.00 advance was paid to the company which only dugged the foundation and ceased working.

The issues for consideration are:

- (a) Who are the parties to the construction contract?
- (b) Was the work done on the land measured, quantified and valued by an independent professional?
- (c) Is there any term in the contract about mobilization payment?
- (d) Is there any term in the contract about supply of material for work by owners of land and payment of labour cost by owners.

Parties to contract

The answer to the question who is or who are the parties to the contract is fundamental to liability under such a contract. Therefore it is necessary to determine this issue from the beginning.

Mr. Alexander Stephenson in his Defence and Counter Claim accept that he entered into an agreement with the company to construct the foundation for a building on his land at Stony Hill, St. Andrew. However, Mr. Alexander Stephenson insist in

evidence that he was not the person who made the contract. He acknowledged nonetheless the existence of such a contract, which he signed.

Contract Documents

The parties agree that the documents admitted as exhibits embody the building agreement. They are:-

- (i) Articles of Agreement dated 8th December, 1992 [Exhibit 1)
- (ii) Estimate of cost or Bill of Quantities dated November, 1992 by Roger Williams [Exhibit 2]
- (iii) Addendum to Estimate of Cost dated December 7, 1992 {Exhibit 3]

The Articles of Agreement

It was dated 8th December, 1992. It recited it was made between Mrs. Gloria Stephenson and Qualicon Engineer Co. Ltd. It was for the construction of a residence at 5B Montgomery Way, Stony Hill, St. Andrew for the sum of \$3, 477,065.00

Effect of Signature/Agreement/Bill of Quantities

Mr. Barrington Graham signed the Article of Agreement on behalf of Qualicon Engineer Co. Ltd. Mrs. Gloria Stephenson as a name party did not. A secretary for the company signed the agreement as a witness for contractor. Mr. Alexander Stephenson signed as witness but there was no signature of his wife in the section titled employer.

The Bill of Quantities dated November 1992 and the Addendum dated December 7, 1992 were both addressed only to Mrs. Gloria Stephenson. None of the named parties to the Article of Agreement signed these documents. They were only signed by the quantity surveyor who prepared them. Nonetheless, it is not contested that these

documents attached to Articles of Agreement are incorporated into the agreement by reference.

The signature of Mr. Alexander Stephenson affixed to the Article of Agreement of the 8th December, 1992 as witness does not elevate him to the status of a joint party with his wife to the contract with Qualicon Engineer Co.Ltd. The absence of his wife signature does not exclude her as a party to the contract with Qualicon Engineer Co. Ltd. On the principle governing formation of contract Mr. Alexander Stephenson by his conduct and recited as a party.

There is no clause or condition in this contract, as is the current practice in Agreement of sale of land, that the parties must sign the Articles of Agreement for it to be binding. So Mr. Alexander Stephenson's failure to sign does not inviolate this construction contract.

The pre contract documents, viz the Bill of Quantities, which later formed part of the contract and post contract letters were all address to Mrs. Alexander Stephenson. This lends support to Mr. Alexander Stephenson testimony that this contract was made with his wife. It adds credence to his evidence that it was his wife who was the business woman and was head of affairs. Unfortunately, Mrs. Gloria Alexander died on June 2, 1994. Her husband does not on that ground become substituted as a party to the contract she made. The four (4) letters, Exhibits 4 -7, written to Mrs. Gloria Alexander by Qualicon Engineer Co. Ltd. demanding payment on this contract lead me to reasonable infer that the company intended and did contract solely with Mrs. Gloria Stephenson to build the house in question. I hold that Mr. Alexander Stephenson is not a party to the Articles of Agreement. He is not liable under this contract. It is the representative of the

estate of Mrs. Gloria Stephenson that is responsible for any contract she may have entered into and may have breached. That person is the proper party to sue.

Mr. Arthur Williams submitted Mr. Stephenson did accept he was a party to contract. In the event that there is a finding otherwise that Mr. Alexander Stephenson is a party to contract with his wife and Oualicon Engineer Co. Ltd, matters arise as to what are the terms of the contract. There is difference about a ten per cent mobilization payment and deduction of this cost from advancement payment made by the owner of the land that caused the company to believe it was not paid for work and the owners to believe they had paid excess money for work not completed.

Implied Term of Contract

The Articles of Agreement and the Appendix to the Bill of Quantities which is blank are the standard form of contract supplied by the Incorporated Master Builders Association for Employers and Contractors in the building industry. While it may be a practice in the building industry for or a contractor to receive a ten percent mobilization payment there is no such clause in the contract document exhibited. Therefore such a term could only be implied in the contract either by the word or conduct of the parties. The pre contract documents i.e. Bill of Quantities does not assist the claimant in respect of such a term. The letters written claiming this payment was not accepted. No certificate of Payment was admitted as exhibit. The Quantity Surveyor was not called as a witness. Hence there is no proof that such a term was agreed upon by the parties.

The evidence or lack of evidence in relation to this alleged implied term is dissimilar to the term that the owner/employer would supply the material for the work and pay all labour cost. This in the building industry is described as a labour contract

only. No express term is in the contract documents on this claim. However, in its letter of the 2nd March 1993 to Mrs. Gloria Stephenson the company accepts that there was an arrangement that the owners would provide the material for the work. Though the company claimed it did order and pay for material to do that aspect of the work. In any event there was evidential foundation to establish a labour only implied term of the contract. There is no such foundation to establish or implied mobilization payment term. The company therefore has not established this term as a balance of probability.

Certificate of Payment

Mr. John Graham for Mr. Alexander Stephenson stressed in his submission the effect or the absence of any Certificate of Payment in relation to the issue of amount due and or owing in the case. He pointed out that without the benefit of a certificate the claimant has no evidence to oppose the defendant's claim that he had not done work to the value he demanded. He relied on the learned authors of **Hudson's Building and Engineering Contracts (10th edition 1970 at page 476-479, 492-494)**. This submission accords with the evidential deficiency I adverted to in the claimant's case in relation to the implied term of mobilization payment. It is also applicable to the payment certificate and ultimately to the claimant's case.

I find useful the learned author's reference to certificates in building contracts (ibid – 478, section 6). It is as follows:

“.....certificate under building and engineering contracts are of various kinds.

The commonest are as follows:-

- (a) Interim or Progress Certificates, upon which periodic payments or advances to the contractor on account are made.

(b) Final certificates, which frequently are certificates both of satisfaction with the work and of the sum due to the contractor upon his final discharge of his obligation under the contract.....

(c) Various other certificate (e.g. of practical or substantial completion upon which the provisions as to payment of retention moneys, maintenance of the work or liquidated damages for delay may depend; or that the contractor is not proceeding with the work, upon which a special contractual right of determination by the employee may depend)

Then the learned Authors specifically address Interim Certificates in these terms (ibid 492. paragraph 2):

“Provisions for interim or progress certificates are almost invariably inserted in building contracts for the benefit of the builder, to enable him to obtain payments on account during the progress of the work. As a general rule, the payment contemplated by such provisions only represent the approximate value (or a portion of it) of the work done, and possible also of material delivered to the site, at the date of payment, and, in the absence of express provision, they are not conclusive or binding on the employer as an expression of satisfaction with the quality of work or material.....”

I accept that the above passage contain correct statements of principle applicable to building contract and which are relevant to contracts in issue at trial.

Further I accept the principle of law that “interim certificate will generally be a condition precedent to the builder’s right to sue for payment during the currency of the

work”. (ibid. 494, paragraph 2). I also adopt the opinion of the learned Author,

Hudson’s, Building and Engineering Contracts, hereunder:

“....the employer will generally be entitled to set up defective work or any other breach of contract as a defence when sued upon them.....though no doubt he would be bound by the certificate to the extent that he will not be able to dispute the valuation element in it. In many cases this may need to be proved in evidence outside the certificate itself, since interim certificates do not usually disclose the various reasons for arriving at the sum in question”.

The initial document governing contracts is the Article of Agreement (Exhibit 1). Whoever is the employer in this contract, and the court found Mrs. Alexander Stephenson was the person, it is blank in relation to Interim Certificates. Therefore I hold that the claimant/builder cannot unilaterally send and demand payment on account of work done in a letter based on his computation. An interim or progress certificate is the product of an architect, engineer or quantity surveyor. No such person sent any certificate to Mrs. Alexander. There was no express or implied term for such a certificate in this contract.

As the quality and value of work was disputed by the employer then, if there was a certificate, the claimant/builder would have to prove in evidence the value of work done by calling in this contract the quantity surveyor. Mr. Roger Williams was the quantity surveyor. One of the claimant’s letter of demand suggested the claim of \$950,000.00 could be verified by the quantity surveyor. This only emphasizes that the surveyor did not issue an Interim Certificate. The surveyor was not called or a witness at trial and I hold the claimant/builder has not proved the value of work done where the defendant has

challenged its accuracy. The claimant in evidence has sought wrongfully to corroborate himself about a claim he has calculated.

This does not mean if the claimant/builder has done work under a contract he is not entitled to be compensated. Counsel Mr. John Graham in his written submission relies on the principle that a person is entitled to be compensated a reasonable sum (quantum meruit) for work done. Work was done, i.e. site preparation on the employer's land. Therefore Mr. Johnson Graham concedes the employer/defendant is unable to prove his claim and counter-claim of loss and damage of \$200,000.00.

On the totality of the evidence presented the court's decision is:-

Judgment for the Defendant on the claim.

Judgment for the Claimant on the counter-claim.

No order as to cost.