

NMLS.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. S.169 OF 1986

BETWEEN	WINSTON SENIOR	PLAINTIFF
A N D	WILLIAM JACOBS (JNR.)	FIRST DEFENDANT
A N D	JOAN JACOBS	SECOND DEFENDANT

Mr. Haughton Gayle & Mr. Norman Samuels for plaintiff.

Mrs. Angela Hudson-Phillips Q.C. and Dr. Lloyd Barnett for the Defendants.

Heard: June 6, 7, 8, 9, 10, 1994; September 29 & 30;
October 1, 7 & November 27, 1997.

LANGRIN, J.

By Writ of Summons the plaintiff claims against the defendant to recover the sum of \$175,644.24 as and for damages for breach of contract. The Writ is endorsed as follows:

Pursuant to an agreement in writing the defendant agreed that the plaintiff should construct a dwelling house and swimming pool at the defendant's property at Cardiff Hall, St. Ann at a total cost of \$231,860.00. The said agreement was varied to enable the plaintiff to extend the area of the said dwelling house and to make additional structures and other variations. Increased costs due to fluctuations in the price of materials were also incurred by the plaintiff.

The action from the outset was beset with procedural problems. In this context it is perhaps pertinent to refer to two significant deaths relating to this trial. When the trial began on Monday 6th June, 1994 the Court was informed that the Third Party had died and consequently the defendant discontinued the case against the Third Party.

On the Thursday 9th June, 1994 nearing the end of the plaintiff's case Mr. Gayle applied for an adjournment to secure the attendance of a witness. Mrs. Phillips Q.C. applied to the Court to interpose the defendant who came from abroad in order that his

evidence could be taken by the end of the week when the case would be adjourned partheard. This would save the Court's time and ensure that the defendant complete his evidence by Friday and so would not be required to return to the Island unless it was absolutely necessary. A further consideration was also the fact that the defendant was due to have a serious surgery out of which he might not recover. The application to interpose the witness was opposed by Mr. Gayle but the Court ruled that the evidence of the defendant would be taken and an opportunity would be given to counsel to cross-examine the defendant the following day and before the close of the plaintiff's case. However, Mr. Gayle sought leave to appeal my ruling on the basis that the Defence could not start then unless he concented. I refused his application. He left the Court along with his junior and the plaintiff and said he was not taking any further part in the proceedings. The defendant's evidence was taken and the proceedings was adjourned to the following day to allow for cross-examination. Mr. Gayle returned then and was given the opportunity to cross-examine the defendant but said he was not in a position to do so unless I gave him access to my notes. This I refused to do. As was predicted the defendant died in August, 1994.

There was a lapse of over three years during which time steps were taken to add Mrs. Joan Jacobs, the widow of the defendant and his personal representative as a second defendant in the action. A formal order was made on the 26th September, 1997 joining the second defendant to this action and the trial continued. It was then the Court was informed that Mr. Gayle was no longer representing the plaintiff.

Apart from Counsel's disrespect to the Court, by leaving the Court on the 9th June, 1994 without the Court's leave, Counsel was failing in his duty to his client since no one was left there to protect his client's interest. The practice by some Attorneys in leaving the Court to file appeals against the Judges ruling without the Court's leave has no basis in law and should be discontinued. The matter was reported to the General Legal Council.

The said agreement provided inter alia:

- "(b) That the contractor may make minor alterations
with materials of equal or superior quality not

affecting the size, shape and strength and soundness of construction of the house with the consent or approval of the Owner or Architect.

- (c) That the price shall be paid by instalments subject to a retention of 5%.
- (d) That the owner shall provide all fixtures and fittings.
- (e) That the contractor shall provide all other materials and labour.
- (f) That the estimated building area shall be 4708.80 Sq. ft. and the cost per square foot shall be \$45.00.
- (g) That the contract price shall be \$211,860.00 and a further J\$20,000 for a swimming pool.
- (h) That the "owner" shall have the right to appoint a Consultant Builder or Architect to monitor progress of the building and make decisions concerning the advances to be made to the contractor.
- (i) That the house will be erected in accordance with the plans and specifications.
- (j) Any structural defects in walls, roofs, floors or foundations which shall appear or arise within one hundred and eighty (180) days of the date of the issue of the Architects certificate shall be made good by the Contractor.
- (k) That the Contractor may make minor alterations with materials of equal or superior quality not affecting the size, shape and strength and soundness of the house.

The contractor received a floor plan from the owner indicating the type of house she desired. From this floor plan the contractor submitted ten sheets to the Parish Counsel Comprising plan for site, elevation, floor, foundation, swimming pool, roof, septic pit, windows and doors. The agreement made reference to plans and specifications however, no specifications or bills of quantities were prepared.

The work commenced on the 3rd March 1983 and concluded on November 23, 1983. The contractor took the measurement of the floor plan and got 4708. 8 square feet. According to the contractor he made an error in the addition. The correct figure is 6360 sq. ft. The plan he got from Mrs. Jacobs was no different from the approved plan.

The Owner despite repeated demands and requests has failed, refused or neglected to pay to the contractor a balance of \$28,000 outstanding on the contract price of \$211,860.00.

On the 29th October, 1983 when it was clear that the building would not be completed within the time agreed, the parties entered into a supplemental agreement which provided inter alia:

- (1) That the master bedrooms and the two corresponding bathrooms will be completed by October 31, 1983 so that the owner could move in on November 1, 1983.
- (2) The house would be completed by the 21st November 1983.
- (3) The drive way and the walkway would be made from square slabs with grass growing between the slabs. The driveway will constitute extra to be paid for by owner.
- (4) Should the contractor fail to complete and finish the entire job by the 21st November 1983 he shall pay to the owner as liquidated damages the costs incurred by the owners in coming to Jamaica from Indianapolis, U.S.A. and bringing their two friends and staying in Jamaica. Further, the contractor will be responsible for the costs of keeping housekeeper Doreen Ingram at \$30 per day after the 31st October, 1983 should he fail to keep his agreement.

On November 21, 1983 the contractor signed a list of defects he was going to remedy on the house.

Sometime after this the owner visited the premises and a significant number of defects were observed. The Attorney for the owner notified the contractor of the defects vide letter dated 12th December, 1983 and advised that unless these defects were remedied to the satisfaction of the owner by 18th December, 1983 another

person would be employed to complete the work at the expense of the contractor. There were some fifteen defects listed in the letter.

On the 18th December, 1983, the owner asked the contractor to leave the premises and never set foot on the premises again. The contract was accordingly terminated.

In the statement of Claim the contractor claims that in the course of construction of the said dwelling house with the direction and or approval of the owner or his agent he made the following variations or additions:- Particulars of the claim are:

(a)	Increase in the building area from 4708.80 square feet to 6,206 square feet at an additional cost of \$67,374.	
(b)	Construction of curb wall and paving of driveway at a cost of	\$6,936.00
(c)	Construction of downpipes of roof of covered Terrace round Courtyard at cost of	5,075.00
(d)	Provide and install Burglar Bars	3,806.00
(e)	Construct Cattle trap	1,806.00
(f)	Construct Flower Box at Patio	492.00
(g)	Extension of pool terrace	3,748.00
(h)	To erect boundary Fence	1,188.00
(i)	To tiling of Courtyard	5,740.00
(j)	To relocate Kitchen Counter	350.00
(k)	To construct roof over Entrance area	425.00
(l)	Relocation of wash Basin and door in House-keeper's room	392.00
(m)	Additional work to Verandah	4,828.67
(n)	Additional Electrical Work	7,192.05
(o)	Supplying Fixtures	5,351.50
(p)	Fluctuations in the prices of building materials.	12,940.02
		<u>\$127,644.24</u>

Some of these items of work were not specifically provided for in the written agreement but the contractor maintains that they were done at the request of the owner during the period of construction of the building by way of variation or addition to the written agreement.

The owner in his statement of defence denies that he entered into any oral agreement in respect of some of the items and for other items contends that the agreement and plans provided for some of them but that the work carried out was defective. There was no direction or approval given by the owner or his agent for increasing the area of the building. Other defects were due to contractor's error and lack of verification.

The owner alleged that the builder failed to comply with certain terms in the written agreement which were stated as follows:

(1) That the house shall be of the size, shape and construction with the fixtures and fittings shown and set out in the plans and specifications thereof as provided by the contractor.

(2) The contractor impliedly undertook to prepare the plans and specifications for the said dwelling house in a workmanlike and efficient manner and to carry out the work with materials and workmanship of the highest quality or of the quality and kind appropriate to a resort villa in a residential area of good quality.

(3) That time shall be of the essence of the contract and on the failure of the contractor to obtain the practical completion certificate and to make delivery of the house completed to the aforesaid specifications by the date set for delivery and in the manner appearing in the foregoing or if the contractor fails punctually to do any act or thing by this agreement required to be done, the Owner shall be entitled to cancel this Agreement by notice in writing to the contractor and in any event to claim against the contractor damages for breach of this Agreement. And it is further agreed by the parties hereto that the sum which shall be paid by the contractor to the owner as liquidated damages for any and every breach shall be \$(J)100.00 per day for every work or part thereof that the breach continues in effect.

(4) Provided the owner shall have performed his obligations the contractor shall deliver possession of the house to the owner within 31 weeks from the date of commencement of the building.

In reliance on the above allegations the owner counterclaims for the contractor's breaches of contract for work not done or not done in accordance with the written agreement.

The particulars of the breaches are:

1.	Costs of reshingling defective roof:	\$111,500.00
2.	Costs of flashing to rear roof -	700.00
3.	Costs of retiling, S.E. bedroom, main bedroom, living room, dining room and bedroom beside S.E. bedroom.	17,500.00
4.	Bonding loose tiles under covered walkway and re-lay in parts	1,800.00
5.	Correction to fixed glazing	1,000.00
6.	Correction to decorative block panel	1,200.00
7.	Cost of replacing twisted louvre blades in areas	2,500.00
8.	Costs of general correction to joinery	2,500.00
9.	Cost of ramp to carport	1,500.00
10.	Cost of raising carport floor	1,200.00
11.	Cost of painting in parts after repairs	3,000.00
12.	Cost of disposing of debris	1,000.00
		<hr/>
		\$145,400.00

Counterclaim

- (1) The defendant is entitled to set off the sum of \$145,400 against the plaintiff's claim. \$145,400.00
- (2) Plaintiff to pay defendant the sum of \$100 per day by way of liquidated damages for everyday subsequent to the period of 31 weeks from the commencement of the building to 18/12/83 when the plaintiff was dismissed. = 4,200.00
- (3) Liquidated damages for cost of Air fares and accommodation due to delay in completion of house. US\$1,888.23

US\$1888.23 converted to Jamaican \$ = 67,926.00

I will now deal with the relevant principles of law which must be applied in deciding this case.

Since there was no specific provision in the written agreement for alterations, additions, or omissions from the contract the builder was under no obligation to make any of them. If he did he could only recover payment if he can show that the work was an extra, falling outside the contract and specifications, and was not expressly or

impliedly included in the work contracted for or necessary for its completion. Also that it was authorised or ratified by the owner and was not performed entirely voluntarily by the builder.

In relation to a claim by the owner for breach of contract and duty of care in that the plaintiff provided defective plans and did defective work the owner is liable to pay the contract sum but he may recover by way of set off or Counterclaim the cost of making good any defects or omissions which represent a departure from the contract. The law is clearly stated in Halsbury's Laws of England (3rd Edition) Vol.3 para. 956 at p.487.

"In the case of defective work done by the contractor the employer may defend an action for the price on the ground of breach of contract, and counterclaim for the damages which he has sustained. The reduced value of the work owing to its defective construction may be an element of such damages".

The measure of damages for failure by the contractor to complete a building contract will include the difference between the price of the work as agreed upon in the contract and the cost the owner is actually put to in its completion.

Mr. Norman Samuels, Counsel for the plaintiff submitted that the owner in dismissing the contractor from the contract absolved the contractor from his obligation to give him the letter of possession. Since the letter of possession must be contemporaneous with the certificate from the Architect it follows that it also absolved the contractor of his duty under the contract in getting a completion certificate. He cited authorities in support of his submissions. My failure to deal with them is largely due to their irrelevance in dealing with the situations in the suit before the Court. This matter has to be decided on a true construction of a contract of which time was of the essence and in which the contractor was dismissed after the lapse of a specified time and after extensions of time were exhausted.

The contract had its own peculiar provisions and was different from the normal contract in which the Architect was in control. The Architect was not involved in the original design and had therefore the limited powers referred to in the contract. When the contract expired in order for the owner to mitigate his loss he must

be entitled to dismiss the contractor from the site and terminate the contract particularly when time was made of the essence.

I now proceed to an examination of the evidence and my findings of fact in the present case.

The list of defects which were signed by the plaintiff as well as those set out in Mr. Lindo's letter were not remedied. The Architect appointed by the owner did not have the normal authority of an architect in the usual building contracts but was more a consultant and advisor to monitor the progress of the building and make decisions in relation to advances to be made to the contractor. Mr. Sharpe, the architect had no authority to change the design of the building as stated in Clause 4B of the agreement.

The contractor undertook to prepare the plans and specifications for the dwelling house and he had those plans approved by the relevant authorities.

There were various lists of defects which had been brought to the contractor's attention. One of these lists of defects was done by the contractor himself. The contractor testified that he had been dismissed on the 12th November, 1983. Mr. Jacobs said it was on the 18th December. This is supported by the documentary evidence indicating that he had been given up to December 18, 1983 to remedy defects.

Mrs. Jacobs said she spent in excess of \$250,000 in addition to some US dollars since 1983 to remedy defects and complete the work. She testified of the numerous leaks in the house when rain fell and described it like 'taking a shower'. The water from the Court Yard travelled down the slope to the south east bedroom. The tiles were stained. Further, there were leaking pipes and plumbing underneath the floor resulting in the floor having to be broken in order to repair joints and leaks of pipe. There was evidence of loose tiles. All this evidence has not been contradicted.

The contractor himself acknowledged that Mr. Jacobs moved into two rooms because he felt his presence might have facilitated proper and timely completion of the house.

Mr. Mattis, a Consulting Engineering testified that the drawings were poorly done and there were many variations from the

drawings which include change in shape, slope and construction of the roof. He said his examination of the premises revealed defects on the roof, floors and joinery due to defective shingles, stained chipped and loose floor tiles and rough joinery.

He recommended that some areas of tiling be redone and loose tiles be rebonded. Further he recommended the following inter alia:

Decorative Panels be bonded to the masonry.

Defective louvre blades be replaced.

Defective joinery be made good.

Ramps and approach to Carport be corrected.

Corrective work to be done to roof and floor.

Mr. Davidson, a Chartered Quantity Surveyor visited the premises early 1984 on behalf of the contractor and identified many of the same defects referred to by Mr. Mattis.

I find that no certificate was issued by the Architect to the contractor as to the practical completion of the house in accordance with the agreement.

I accept Mrs. Hudson-Phillips Q.C. submission, that in light of the major defects referred to in the reports of both Messrs Mattis and Davidson, in respect to conditions of roof, floor, joinery and tiling, which still existed two years after Mr. Davidson Report and in light of Mrs. Jacobs evidence, it cannot be said that the building was completed in keeping with the plans and specifications and that the materials and workmanship had attained the required standard within the meaning of the principal agreement.

I find as a fact that the house contained substantial and far reaching defects and was incomplete.

I turn now to a consideration of the items in the claim and counterclaim which in the light of the above principles and my findings of fact I should allow or disallow. Wherever the cost in the evidence varies from the cost stated in the pleadings I will allow the smaller figure.

First I must deal with the claim. In relation to (a) which is an increase on the building area from 4708.80 square feet to 6206 square feet at an additional cost of \$67,374. The agreement states categorically that the size could not be varied. Mr. Senior testified that in arriving at figure of 4708 square feet he made

a mathematical error in the calculation and he only discovered the error when he had laid out the house. He said he did not inform the Jacobs' of the error but informed the architect. There was no written authority given to the contractor to change anything on those building plans. There is no direct evidence before the Court that the floor plan amounts to 6206 square feet. Mr. Mattis said it was not possible for him to calculate the total square footage by looking at the plan because all the relevant numbers were not specified on the plan. While it is not denied that the area on the ground is in excess of 4708 square feet in light of the clear words stated in the agreement the plaintiff is not entitled to the additional sum of \$67,374 caused by increasing the size of the area and so I disallow this claim. In view of the fact that Mrs. Jacobs on 29th October, 1983 had abandoned the idea of the circular driveway the construction of the kerb wall and paving of the driveway is allowed as a variation at cost of \$6936.00. Items (b) (e) (f) (h) (i) of the claim were subsequent variations made at the request of the owner and are allowed. These items are allowed in the sum of \$492.00, \$6936.00, \$1806.00, \$1188.00 and \$5740.00 respectively. In addition I allow the cost of \$20,000.00 for constructing the swimming pool.

Items (d) (g) (j) (k) (l) (m) (n) (o) (p) are all disallowed. I find that all these were remedial work caused by negligent workmanship and faulty design of plan. The items at (o) was previously paid for by Mrs. Jacobs vide document No.15. The claim at item (p) is disallowed because a proper claim had not been presented. There was no evidence regarding the bill of quantities with prices attached. Hence the actual effect of the increase on the total price cannot be ascertained. The balance of \$28,000.00 on the contract price is allowed.

I accept the testimony of Mr. Mattis, the Consulting Engineer instead of Mr. Davidson in relation to the cost of remedying the defects referred to in the set off. The total cost is \$145,400.00. There was no major difference in defects found by these two witnesses. Mr. Davidson said the roof defect was a design defect while Mr. Mattis said the problem arose from a change of roof as appearing in the plan. Since the change was not authorised, the contractor would

be responsible for the cost of remedying this defect.

I accept the unchallenged evidence of the defendant in respect of the liquidated damages.

In summary the plaintiff's claim which is allowed is made up as follows:

Construction of Swimming Pool	\$20000.00
Balance of Contract Price	28000.00
Item (b) as stated in the claim	6936.00
(e) " " " " "	1806.00
(f) " " " " "	492.00
(h) " " " " "	1188.00
(i) " " " " "	5740.00
TOTAL	<u>\$64,162.00</u>

The defendant succeeds in setting off the cost for remedying the defects - \$145,400.00 made up as follows:

Item (1) as stated in defence	\$111500.00
" (2) " " " "	700.00
" (3) " " " "	17500.00
" (4) " " " "	1800.00
" (5) " " " "	1000.00
" (6) " " " "	1200.00
" (7) " " " "	2500.00
" (8) " " " "	2500.00
" (9) " " " "	1500.00
" (10) " " " "	1200.00
" (11) " " " "	3000.00
" (12) " " " "	1000.00
TOTAL -	<u>\$145,400.00</u>

The claim of \$64,162 when set off by \$145,400 extinguishes the claim and leaves a negative balance of \$81,238.

In respect of the defendant's Counterclaim I make an award as follows:

(1) Sum remaining after deducting claim	- \$81238.00
(2) Liquidated damages at rate of \$100 per day for 42 days.	4200.00
(3) Cost of air fares and accommodation US\$1888.23 converted to J\$	67926.00
TOTAL	<u>\$153,364.00</u>

Accordingly, Judgment is entered for the defendant with costs on the claim and for the balance of the amount of the Counterclaim in the sum of \$153,364.00 with costs. Both costs to be agreed or taxed.