

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV 2135 of 2007

BETWEEN

GLENVERE SCANTLEBURY

CLAIMANT

AND

IVOR JORDAN

DEFENDANT

**Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the
High Court**

2017: June 27, 30

2019: March 28

**Mr. Douglas Trotman and Mr. Decoursey Eversley, Attorneys-at-Law
for the Claimant.**

Mr. George Bennett, Attorney-at-Law for the Defendant.

DECISION

Introduction

- [1] This case is essentially a claim for damages consequent upon the failure of a contractor to complete a dwelling house.

[2] The Claimant filed his claim on 12 November 2007, some eleven plus years ago. It eventually reached this Court for the first time on 20 January 2015, and the trial covered two days having commenced on 27 June 2017. At the end of the trial it was agreed by both counsel that this Court would determine the matter after receipt of the written submissions. No further submissions were received from counsel for the Claimant.

The Claim

[3] The Claimant alleged in his statement of claim that he engaged the Defendant to construct a dwelling house on his land around 1996. Then in May 2005, the parties agreed that the Defendant would complete construction of the house for the sum of \$151,756.00. An additional sum of \$15,000.00 was required for the kitchen cupboards.

[4] The Claimant paid all the agreed sums to the Defendant, but the work was not completed. The Defendant asked for more money to complete the house. The Claimant refused to forward any additional money. Instead, in October 2006 he commissioned a valuation of this phase of the work. That valuation showed that the value of the completed work was \$112,836.00, some \$53,920.00 less than the amount paid to the Defendant.

- [5] By letter of 03 October 2006, the Defendant quoted a figure of \$49,331.75 as required by him to complete the house. The Defendant also asked for an additional \$10,500.00 for other work on the house. By correspondence dated 18 October 2006, the Claimant replied to the Defendant through his attorney-at-law. That correspondence stated what aspects of the Defendant's request for additional funds the Claimant was prepared to accept.
- [6] The Claimant heard nothing further from the Defendant. Therefore, his lawyer wrote to the Defendant on 04 December 2006 and terminated the contract between them. The Claimant engaged another person to complete the house. He is claiming \$82,967.48, as the difference between the agreed contract price and the cost incurred in completing the house. Another sum of \$864.00 is also claimed as storage fees for six months for his personal effects, together with interest and costs.

The Defence

- [7] The Defence was filed on 17 April 2008. The Defendant admitted that he received \$166,756.00 from the Claimant in accordance with the terms of their agreement. He alleged that the pace of the work was slow because the Claimant did not make payments in a timely manner.

The Defendant also contended that the valuation report commissioned by the Claimant was inaccurate, in that the report did not disclose all the work done by the Defendant. The value of the work completed at the time of the valuation was approximately \$163,000.00.

- [8] The Defendant says that he forwarded his estimate of \$49,331.75 for the completion of the house at the request of the Claimant. The additional \$10,500.00 that he required represented an outstanding balance for kitchen cupboards, a patio, and the repositioning of a roof.
- [9] The Defendant admits to receiving letters from the Claimant's lawyer dated 10 October 2006 and 04 December 2006. He also admitted that he did not respond to either letter. However, the Defendant denied that he breached any of his contractual obligations, or that he repudiated the contract. He contended that their agreement was not a fixed price contract; that the Claimant requested variations that were not covered by their agreement; that the estimate for kitchen cupboards was not part of the original estimate; and that the cost of materials increased during construction. This resulted in a "dramatic" increase in the cost of building the house.

The Evidence and Findings of Fact

- [10] The Defendant conceded that he became responsible for completing

the Claimant's house when he received the first installment of \$60,000.00 on 03 June 2005. He also confirmed that he sent an email to the Claimant on 29 May 2005, and the content of the email. (See Exhibit GS1 to the Claimant's Witness Statement filed on 02 September 2016).

[11] The Defendant's email of May 2005 states as follows:

"Hi Vince,

Let me first say this to you, the cost of material in this country has risen by as much as 100% in some [cases] over the last six months. You have delayed this process and any further delay would encounter higher charges since everything is getting more expensive here.

Now my total estimate came up to \$151,756.00 B'dos. This is for the completion of all the works requested by you so far and excludes the construction of the kitchen cupboards.

Things to be done are Guard wall, drive way, pavement around the house to the western side so that one can drive to the rear of the house, a three foot path to the eastern side, the extension of the small porch to the east, the relaying of the floor with hard wood (green heart), the completion of the electrical works, the completion of the plumbing including ware, the tiling of all bathrooms, the tiling of kitchen floor, the tiling of the open deck at first floor level and all remedial works needed to complete what one would call a turn key job.

Please note that labour and material cost will be

documented and any savings on this sum will be returned to you. Note this is an estimate and not an item for item breakdown of the labour and material costing.

I do hope that you find favour in the proposal and estimate, and [that you are] looking forward to seeing the COMPLETION OF YOUR HOME.

Regards Ivor”.

[12] The Defendant did not deny that he sent this email to the Claimant, or that the email reflects the terms of their agreement for the completion of the house. Although there was no executed contract between the parties, the Court finds that the email sent to the Claimant from the Defendant in May 2005, contains the essential terms of their agreement. There was indeed an offer, acceptance, consideration, and the intention of the parties to enter into a legal relationship. The terms of the agreement also included a scope of work and a contract price. Mr. Sydney Richards, the Claimant’s brother, acted as his agent during construction.

[13] The Claimant conceded in his witness statement that it was not a fixed priced contract, and that a supervision fee of ten percent was agreed. (Para.4). A perusal of the email reveals that the only additional work mentioned is the kitchen cupboards. However, the reasonable

inference is that items not specifically mentioned in the agreement would attract an additional cost to the Claimant if he requested additional work. Additional work would include variations requested by the Claimant that increased the estimated costs.

[14] There is one item of additional work indentified by the Court. It is the painting of interior walls instead of a trowel plastic finish. Mr. Grenville Barrow, the quantity surveyor, estimated the cost to slick, prime and apply two coats of emulsion paint to the interior wall surfaces at \$10,350.00. Unfortunately, nowhere in the Defendant's evidence is there an estimated cost for applying trowel plaster to the internal walls. Therefore, the Court is unable to say whether any difference in cost between these two finishes would have resulted in an additional cost payable to the Defendant, or a cost saving refundable to the Claimant under the terms of the agreement.

[15] The Defendant appears to have accepted that all the hardwood floors installed were part of the original agreement. In an email dated 02 May 2006, the Claimant made it clear that certain hardwood floors were agreed before the Defendant provided his final estimate in the 29 May 2005 email. The Claimant was adamant that he was "NOT

prepared to accept anything else”. There is no counterclaim from the Defendant in which he asks to be awarded any monies due to him from the Claimant for additional hardwood floors or otherwise.

[16] The Court accepts the expert evidence of the quantity surveyor. The Defendant alleged that there was work done by him which Mr. Barrow did not quantify. The unchallenged evidence is that Mr. Barrow began his assessment of the work done in the presence of the Claimant and the Defendant. The Defendant chose to remove himself from the scene, and Mr. Barrow cannot be held responsible for this. In any event, the Defendant did not challenge any of the items valued by Mr. Barrow, and he provided no alternative valuations for this Court to consider.

[17] Mr. Barrow valued the work done, inclusive of plant rental, profit and supervision, at \$112, 836.00. The Defendant received approximately \$151,756, and he has failed to account adequately for the difference of \$53,920.00 Under the terms of agreement the Plaintiff undertook to document the labour and material costs. These documents were never provided to either the Claimant or to this Court.

[18] Having received all the money estimated as the price of completing the dwelling house, the Plaintiff failed to do so. He has not adequately

explained or proved why the house was not completed as per his estimate. He undertook to complete the house as “a turn key job”; that is, the Claimant would be able to move in. The Defendant provided nothing to the Court to substantiate his allegation that there was a rise in prices during the last phase of the construction. And there was no provision in the contract for the Claimant to bear the financial responsibility for increases in the cost of materials or labour.

[19] The Claimant also complained about the delay in the completion of the work as agreed in the contract. There was no term in the agreement that made time of the essence for the completion of the project. By an email dated 06 December 2005, the Claimant complained to the Defendant that the Defendant had not kept his promise to deliver the completed house by Christmas of that year. (See Exhibit GS3 attached to the Claimant’s affidavit).

[20] The Defendant sent a lengthy email response on the same day. He apologized for the delay and gave as the reason the fact that his skilled workmen were engaged on other jobs. The Defendant proposed to close off

“...all major works until the beginning of the year when my main guys would be available, with that it is my proposal to

complete the works by 28th of February, this would give me adequate time to have all things in place and up to standard". (Exhibit GS 3).

[21] The Claimant's agent advanced two sums of money totaling \$31,755.71, subsequent to the exchange of these emails. These were the last payments to the Defendant. The receipts are dated 07 June 2006 and 06 July 2006 respectively. Therefore, by the latter date, the Claimant had paid the full contract price of \$151,756.00, and \$14,999.71 towards the kitchen cupboards.

[22] By mid October 2006, the work on the house was still not completed. The Defendant was now more than seven months over his own proposed completion date of 28 February 2006. And there was nothing in his emails complaining about late payments from the Claimant. Late payments were not offered as a reason for the delay in completing the work.

Breach of Contract

[23] In **Chitty On Contracts**, the learned authors write that:

“Where the contractor fails to build at all or in part, then the normal measure of damages is the cost to the employer of completing the building works in a reasonable manner less the contract price....The employer may alsorecover in respect of increased costs

arising through delay in completion following the contractor's failure to build". (31st ed., Vol.2, para.37-214; and see also **Mertens v. Home Freeholds [1921] 2KB 526, 535** and **Dodd Properties v. Canterbury CC [1980] 1WLR 433**).

[24] The Defendant was in breach of his agreement with the Claimant when he received the full contract price and did not complete the work. He was only prepared to fulfill his part of the bargain if he received more money. The Claimant did not accept this proposal, but instead accepted his repudiation of the contract. According to **Chitty**:

“In relation to acts or default of the contractor, a refusal to carry out work is likely to evince the appropriate intention no longer to be bound....Unless time is of the essence, delay may amount to a repudiation only where the delay gives rise to the inference that the defaulting party does not intend to be bound by the terms of the contract”. (**Chitty**, supra para. [23] at para. 37-221. See also John Uff, “**Construction Law**”, 11th ed. at pp 207-208).

Disposal

[25] The Claimant is entitled to a refund of \$53,930.00 from the Defendant in so far as this figure represents work that should have been completed. This is the difference between the amount paid to the Defendant and the value of the work actually done. The Claimant has

provided no documentary evidence to show that the monies expended to complete the house involved work detailed in his agreement with the Defendant for which the Claimant had to pay a higher price. In addition, the Defendant is not responsible for any work that went beyond the terms of his agreement with the Claimant.

[26] The Claimant also says that the Defendant caused him to incur fees for the storage of his personal effects while awaiting the completion of the house. He alleges that the Defendant was aware that he wished to return to Barbados to live in the house. Again, no receipts were submitted to substantiate either the fee or the period of time for storage. The Court notes that in his letter of 03 October 2006 to the Claimant, the Defendant estimated a completion time of four weeks, subject to his receipt of additional funds. However, there is no evidence from the Claimant showing when the storage period began or when it ended. In these circumstances, there is insufficient evidence before the Court on which to award storage fees to the Claimant.

[27] Judgment is entered for the Claimant in the sum of \$53,930.00 with interest at six (6) percent from 12 November 2007 to 28 March 2019 and four (4) percent from 29 March 2019 until paid in full.

[28] Costs are also awarded to the Claimant to be agreed or determined by the Court.

Sonia L. Richards
Judge of the High Court