IN THE SUPREME COURT OF BELIZE 2005

CLAIM: No. 418 of 2005

BETWEEN:	ANTHONY SOBERANIS	CLAIMANT
	AND	
	NEW MILLENIUM ENTERPRISES LIMITED	DEFENDANT

Mrs. M. Balderamos Mahler for the claimant.
Mrs. A. McSweeney McKoy for the defendant.

AWICH J.

11.3.2009 J U D G M E N T

1. *Notes: Contract, bulding contract; assessment of damages when the building (a dwelling house) has not been completed; the measure of damages is the cost to the owner- employer of the builder of completing the building in a reasonable manner and at the earliest time, and in addition the loss of the value of use of the house during the time taken to complete the house. Rental value as evidence of the cost of not having the use of the house. The duty of the builder to exercise due diligence, care and skill, and to carry out the building work in a workmanlike manner, and to build according to plan. Dishonest estimate of cost is not an excuse.*

2. On 15.1.2009, after the claimant had closed its case, and the defendant failed to adduce evidence, the court entered judgment for the claimant,

Mr. Anthony Soberanis, against the defendant, New Millenium Enterprises Limited, in this claim for breach of a building contract. There had been several adjournments at the request of the defendant before the trial commenced, on 19.12.2008. The adjournments were granted so that the only intended witness, Mr. Victor Lizarraga Jr., for the defendant, would attend court. He was said to be a medical student in Jamaica. Appropriate orders for wasted costs were imposed. The trial dates were purposely requsted and fixed in the Christmas holiday. Mr. Lizarraga Jr. attended the first two days of hearing when the claimant presented witnesses. He did not attend on the third day when the defendant was to present him as its only witness.

3. The judgment entered was that the defendant was liable on the building contract dated 1.10.2002, for breach of the contract, in that the defendant failed to complete building a dwelling house for the claimant as agreed. This judgment is an assessment of damages consequent.

4. The contract of 1.10.2002, and its terms were admitted. The defendant was to build a dwelling house for the claimant according to specifications in a plan. The building was to be completed in 15 weeks from 2.10.2002. The completion date would be 15.1.2003. The contract price for the building, payable by the claimant, was $111,626.41.

5. ***The assessment exercise.***

The defendant admitted in its defence that it did not complete building the house. It averred, but did not prove that, the claimant cancelled the contract in September 2003. It further averred, but did not prove that, the defendant requested additional features and works to be carried out, estimated at $18,916.15, and which would take 22 additional weeks to complete. It admitted receipt of $106,000.00 from the claimant in payment on the contract.

6. I accept the evidence for the claimant that the defendant informed him that, it was unable to complete the house and that, the claimant was to get someone else to complete it, and further that, the defendant would give over to the claimant materials already purchased, and refund

$21,000.00. The materials were given back, but the money was not refunded.

7. The claimants claimed general damages for the failure of the defendant to complete the building work and for poor work. In addition he claimed special damages. Given the evidence in this case, the difference between general and special damages is not that clear cut. It does not matter for the purposes of assessing the damages herein. In money terms, the claimant claimed $51,356.23 that he paid for materials and labour for completing the house; and ambiguously $32,400.00 representing total rental for 18 months until the house was completed, and a further $12,600.00 total actual rental he paid for alternative accommodations during the period from the contract date of completing the building, 15.1.2003, to July 2004, when the house was completed by Mr. Marvin Cardona, another builder subsequently employed by the claimant.

8. It is important to bear in mind always when deciding damages in breach of contract cases that the purpose of awarding damages is, as far as money can do, to put the aggrieved party in the position he

would have been in had the contract been performed. The case of ***Addis v Gramophone Co. Ltd [1919] A.C. 488*** is still authority for the rule. In the case, the claimant was wrongfully and harshly dismissed. The Court of Appeal (England and Wales) awarded damages for the six months notice required, but not for hurt feeling. The measure of damages differs in different kinds of contract cases according to what have been accepted as the best way in the kinds of cases to put the claimant in the position he would have been in had the contract been performed. The cases of: ***Bailey v Bullock [1950] 2 All ER 1167,*** and ***Hobbs v London and South Western Railway Company (1875) 10QB 111,*** are good examples.

9. In a building contract claim where the building has not been completed, the court takes as a measure of damages, the cost to the claimant-owner, conveniently referred to as the employer, of completing the building in a reasonable manner and at the earliest time, less the contract price, or that part of the contract price, if any, remaining unpaid; and in addition, the value of the use of the building lost to the claimant because of the delay. The leading case that established the first part of the rule is the Court of Appeal (England

and Wales) case cited by both learned counsel, the case of ***Mertens v Home Freeholds Co [1921] 2KB. 526 CA.*** In the case, the builder purposely slowed down building work in expectation of eventual refusal of licence under a government defence moratorium; and the moratorium intervened. The building was completed only about three years later when the costs had risen considerably. The builder was not allowed to take advantage of the moratorium. The Court of Appeal held that, the measure of damages was the cost to the claimant of completing the building in a reasonable manner at the earliest moment, less the amount the claimant would have paid to the defendant had the defendant completed the building in time. The cost was the considerably higher cost after the delay of three years. The court also observed that the defendant-respondent could not rely on the fact that the cost of building a house of that plan was considerably higher than what was quoted because, the respondent fraudulently-under quoted so as to get the contract it never intended to perform to completion.

10. About the defence that the claimant requested additional features and works which took 22 weeks and cost $18,149.14, I find that the

claimant has proved that he did not ask the defendant to do alteration works; he simply asked the defendant to make corrections to works not done according to the plan. One item of the works was breaking a portion of the front wall so that a second window would be created. The plan showed two windows in the front, but the defendant provided for only one window. Another item was building concrete counters in the bathrooms and kitchen as shown in the plan. The defendant had a duty under the contract to build according to the plan.

11. Had it been proved that the claimant asked for additional works outside the plan, the defendant would have been entitled to claim extension of time and payment for the additional work. The evidence has proved, however, that the defendant failed to complete the building work within the time stipulated in the contract. It gave up its duty under the contract and asked the claimant to find another builder to complete the remaining work. If those items of work could take 22 weeks and cost $18,149.14, then the evidence as a whole proved that the defendant intentionally under-quoted the cost of building the house, and the time it would take to build it. He would not be allowed to take advantage of his dishonesty.

12. The first item in the quantification of the damages for not completing the work is the additional cost to the claimant of completion. I have set out in words the computation at paragraph 9. The claimant paid $51,356.23 to Mr. Cardona to complete the house. The claimant had paid $106,000.00 of the contract price, $111,626.41, to the defendant. He would have paid another $5,626.41 to the defendant had it completed the work. So the additional cost to the claimant is $45,729.82, (that is $51,356.26 minus $5,626.41). That sum included a charge for an additional work which was not in the plan. The work was to extend a part of the exterior wall to provide for a walk-in closet. I shall allow $3,000.00 for that. The net cost of completing the house is $42,729.82.

13. I deny the separate claim for work done poorly. I accept that a builder has a duty: to supply building materials of good quality, and where specified or implied, materials that are fit for the particular purpose; and a duty to carry out the building work with due care and deligence and in a good and workmanlike manner – see ***Hancock v BW Brazier (Anerley) Ltd [1966] 2 All ER 90.*** There has been no complaint about the materials used in the building work. The only complaint as to the

work was that a wall in the living room was poorly plastered. Mr. Cardona subsequently did the correction work. He included the cost of the correction work in his estimate of $51,356.23. So it has been included in my assessment of $42,729.82.

14. I also deny the claim for $18,149.14 for, "additional work", undertaken by Mr. Cardona. The first reason for denying that item of the claim is that it was never made an item of claim in the statement of claim; it was simply introduced as a claim by submission by learned counsel Mrs. M. Balderamos-Mahler, for the claimant. With due respect to counsel who is usually careful even about minor details, evidence was wrongly adduced about the item not pleaded. The second reason is that, the evidence proved that the only additional work done was demolishing an external wall and building an extended walk-in closet outward. That had not been specified in the plan, and so was not part of the work that the defendant was required under the contract to do. The sum of $18,149.14 said to be for additional work would be for that small additional work. Damages cannot be awarded for additional work that was not in the plan and the defendant was not obliged to carry out under the contract.

15. The second item that the court is required to include in the assessment of damages is the value of the use of the house, had it been completed on time. The claimant was denied the use of the house for the period after the date of completion stipulated in the contract as 15.1.2003, until the house was completed in July 2004. The measure of additional damages is the loss to the claimant of the use of the value of the house during the additional time taken to complete the house at the earliest time.

16. In determining the earliest time for completing the house, the first relevant fact that I have to consider is whether the three extensions to the period of completion granted by the claimant entitled the defendant to a reduction of the period of default based on the extensions. The answer is that the defendant was not entitled to any reduction of the period of default. The defendant did not offer any considerations for the extensions of the period; the extensions were mere waivers which did not result into variations of the contract of 1.10.2002.

17. The gratuitous extensions aside, it is reasonable to estimate the value of the use of the house by the rental value of the house, had it been completed according to plan. The claimant did not rent his house when it was completed, and did not adduce expert evidence of what its rental value would have been in January 2003, when it was to have been completed. Those would have been the best evidence of the rental value of the house. However, the defendant testified that the house as completed would fetch at the time, July of 2004, rent of $1,800.00 per month, and $2,500.00 as at the date of trial, 22.12.2008. That evidence is second best, but that is all the court has. It must be borne in mind however, that the claimant made an addition to the house which was not on the plan; he extended the living room outward and provided for a walk-in closet. On that basis I do reduce the rental value from $1,800.00 to $1,500.00 per month as at July 2004. I have to admit that one cannot be exactly accurate, the figure is simply a reasonable estimate.

18. The relevant period in which the claimant suffered loss of use of the house is from January 2003, to July 2004. Of that period, the evidence is that the defendant continued to work on the house up to

August 2003, that is, for seven months. Then Mr. Cardona took over the site in December 2003, and completed work in July 2004. But Mr. Cardona testified that from December 2003, to March 2004, when he started full work, he had an electrician carry out electrical work on the building, and that the electrician did not work for the full three months. It is reasonable to allow one month for the electrical work. So the actual period taken by Mr. Cardona to carry out completion work was six months. That is from March to July 2004, plus one month for electrical work.

19. From August 2003, to November 2003 inclusive, a period of three months, there was no work on the site. The claimant did not explain why the period may be included in the additional period it took to complete the house. It might have been the period it took him to get another builder. He did not say. I am prepared to allow two months as a reasonable period for obtaining another builder.

20. So for the reasons I have given, the period that I accept for the completion of the house is a total of 15 months. The value of the use of the house lost to the claimant as the result of the failure of the

defendant to complete the house on 15.1.2003 is $22,500.00 (that is $1,500.00 x 15 months).

21. I have not disregarded the evidence that the claimant paid a total of $12, 600.00 as rent for alternative accommodations he rented from January 2003, to July 2004. I accept that the total rent was an expense incurred as the result of failure to complete the house, and that it was *"a probable consequence*". However, I have decided not to include it in the assessment of damages for two reasons. First, it is already included in the sum of $22,500.00 assessed for the value of the use of the house over the 15 months allowed for completion of the house. Secondly, it is my respectful view that there has been no evidence that the two houses rented at different times were similar in capacity, amenities and location, so that their rental value would be about the same as the rental value of the house to be built. I accept that in an appropriate case, especially where there has been no evidence as to the rental value of the house to be built, the rent paid for alternative accommodation would be taken as an item in the assessment of damages. The case of, ***Calabar Properties Ltd v Stitcher [1983] 3 All ER 759***, is an example.

22. For the reasons I have given, the total damages that I award to the claimant, against the defendant is $65, 229.82. It is comprised of: (1) the cost of completing the house less unpaid part of the contract price, $42, 729.82; and (2) the value of the use of the house $22,500.00, lost to the claimant for the period from the completion date given in the contract to the date of actual completion. Interest at 6% per annum is chargeable on the total award from 16.11.2005, when the claim was filed in court until payment in full.

23. Prescribed costs of claim in the sum of $15,645.96, are awarded to the claimant, in addition to wasted costs ordered during the proceedings.

24. Delivered this Wednesday the 11th day of March 2009
At the Supreme Court
Belize

Sam L. Awich
Judge
Supreme Court