F & D Structural Consultants v
City Centre Development Co Pty Ltd
(2001) SLR 111

Antony DERJACQUES for the plaintiff
Phillippe BOULLE for the defendant

[Appeal by the defendant was dismissed though the amoun noney was reduced slightly on 19 April 2002 in CA 15/ 2001.]

Judgment delivered on 4 June 2001 by:

PERERA J: The plaintiff, a partnership of structural engine sues the defendant company for the recovery of R700,000 for an alleged breach ntract. The parties entered into a written agreement on 27 June 1997 whereby th intiff would provide consultancy services in structural engineering to the defenda connection with a building project named the "International Finance Centre Buil The plaintiff avers that it was a term in the contract that a sum equivalent to 2% final contract sum for the building project would be paid to them. It is further aver at after the plaintiff performed and carried out the services contracted for, the d lant unlawfully and unilaterally terminated the agreement. The plaintiff therefore s R500,000 as the 2% fee of the contract price, and R200,000 as moral damages.

The defendant admits that the agreement was terminated on ay 1998, but avers that it was done as -

(1) The plaintiff was in breach of the contract in failing bide by the instructions of the Defendant, and

(2) That in the alternative, it is an implied term of the con by virtue of fairness and practice, that it could be terminated by e party at any time.

The defendant further averred that all that was due to the plaint s been duly paid on the basis of the invoices received.

The terms of the engineering services contract with the plaintiff as follows-

2.1 The Customer hereby appoints the Engineer as the Contract Engineer for the works and the Engineer hereby accepts the appointment.

2.2 Upon receipt of architectural drawings, the Engineer shall prepare all relevant structural drawings and details for the work in accordance with the principles of the standard method of measurement of building works for East Africa.

2.3 The Engineer shall visit the site when required to supervise any reinforcement laying and to inspect concreting works and to ensure that all structural works are properly executed by the building contractor, in accordance with the structural drawings and documentations.

2.4 The Engineer shall be liable to any structural defects resulting from engineering miscalculation.

2.5 The Engineer shall provide 10 sets of copies of the structural drawings and schedules.

The agreement did not however contain a clause as regards recession.

Mr Felix Morel, a partner of the plaintiff partnership, testified th uctural drawings of the sub-structure were completed and approved by the Planni uthority. They were then given to the contractor to commence construction work explained that the "sub-structure" was the foundation up to the ground floor level, at the construction above that, would be termed "superstructure". He further sta hat his partnership completed 75%' of the work on the super-structure in advan en Mr R Merali, a director of the defendant company, sent a letter dated 17 July 1 exhibit P2) which is as follows –

Re-Contract Agreement Capital City

For the reason already specified to you, we are very re l to bring to your attention that we have decided to terminat ur Contract Agreement.
Please consider this to be a fifteen days notice from the of this letter.
We are confirming our verbal instruction to stop all for the said project
Please send immediately the drawings for the work acc shed to date.
We are also requesting you to send determination of ees, at your earliest convenience.

Mr Morel stated that the only reason specified to him was the est by Mr Merali to accept plans prepared by a structural engineer, Joe Pool Asso . He stated that by that time, the contractor had commenced work on the substru based on his plans which had been approved by the Planning Division. Mr Morel that his structural drawings for the foundation were based on the “Raft Princi also known as the "floating principle" or the conventional method. He explaine t he selected that method due to the nature of the site which was reclaimed land ct to subsidence on account of the tide and the presence of a river close by stated that "Raft Foundations" are often the choice for such sites having a "low b g capacity", as they gave less chances for "differential settlement". In non-technical he stated that that

method prevented or minimised the formation of cracks on the superstructure.

As regards the plans of Joe Pool Associates, he stated that the method used was the "finite method", which in his opinion was unsuitable to the ground conditions on site. He stated that the "finite method" was usually used on the superstructure, but not on foundations as its adaptability was unpredictable. Hence he disagreed to work on those plans as he was not prepared to accept the consequences. He further stated that his partnership used the "raft principle" in most of the projects including the extension of the Central Bank Building opposite the defendant's project. As regards the building site of the defendant's project, he stated that soil tests revealed soft spots and movements. That was the reason for deciding on the "raft method".

Mr Morel further testified that Mr Merali had approached a second engineer, Mr Joe Pool, without his knowledge. He admitted that the "finite" method was cheaper as it involved smaller dimensions for the beams as well as for the reinforcement, but in his professional opinion, it was not suitable on a long term basis.

As regards the disagreement with the defendant, he stated that Mr Merali wanted him to work with Mr Joe Pool. He did not find that feasible, as both of them held different opinions on the structural construction aspects of the project.

In reply to the letter dated 17 July 1998 (exhibit P2), the plaintiff sent a letter dated 22 July 1998 (exhibit P3) through his lawyer stating inter alia that the plans of Mr Joe Pool had not been approved by the Planning Authority, and hence he could not agree to work on them and secondly, in his opinion they were not sufficiently professional.

The initial question to be decided is whether the defendant unilaterally terminated the contract or whether it was the plaintiff who "self-terminated". The relationship between the architect and the employer is purely contractual. On the basis of articles 1787 to 1799 of the Civil Code, it was held in the case of *Firma S.A.I International Finance and Trading Company and Another v Hotel des Seychelles Ltd* (1979) SLR 59 that unlike a contractor, an architect is a professional whose work must be remunerated, the distinction being that in the case of a contractor, any preliminary work done to obtain the contract will not be remunerated if the contract is not concluded or does not eventuate. Where an employer contracts with a professional to carry out a piece of work by supplying his labour and skill, he would be contractually bound to rely on the expertise. Further, the parties would be bound by the contract, which in Seychelles would be interpreted under the provisions of the Civil Code.

Mr Merali was examined on his personal answers by counsel for the plaintiff. The unsworn evidence he gave was subsequently adopted as evidence in the case by him under oath. This evidence did not contain any reference to the dispute with the Plaintiff which culminated with the letter of termination (exhibit P2).

Article 1134 of the Civil Code provides that -

> Agreements lawfully concluded shall have the force of law for those who have entered into them.
> They shall not be revoked except by mutual consent or for causes which the law authorizes.
> They shall be performed in good faith.

Admittedly, there was no mutual consent for the termination. Hence, was there a legal justification for the termination conveyed by the letter dated 17 July 1998? The plaintiff gave three reasons for disagreeing with the request of the defendant to work on the plans prepared by Mr Joe Pool. Firstly, it was his professional opinion that the "finite method" was not suitable to the sub-structure due to the nature of the soil at building site. Secondly, the plans of Mr Pool had not been approved by the Planning Authority at that time. Although Mr Merali stated in evidence that they were approved, there is no documentary proof as to when that was done or even whether Mr Pool's "finite" method was used subsequently. Thirdly, it was not feasible to work with a Civil Engineer who was following a different method which if followed, according to his opinion would cause defects in the long run. On the other hand, Mr Merali claimed that Mr Pool's method reduced the costs of construction by R2 million. There is neither the evidence of Mr Joe Pool, nor any documentary proof to substantiate this assertion.

In the letter dated 17 July 1998 (exhibit P2) the defendant confirmed the verbal instructions given to the plaintiff to stop all works for the project. Mr Boulle sought to draw a distinction between the words "stop all works" in exhibit P2 and "stop the contract". He submitted that the defendant asked the plaintiff to stop the works but not the contract, and hence it was the plaintiff who "self-terminated". This contention is untenable as stoppage of work necessarily involved stoppage of the service contracted. Hence it was the defendant who initially stopped the work verbally. That was followed by the formal letter of termination of contract. In these circumstances it is not open to the defendant to claim that the plaintiff "self-terminated" the contract. All that the plaintiff did was to preserve his rights under the contract and to refuse to compromise his professional opinion. That cannot be faulted. It was up to the defendant to agree with the plaintiff, or disagree and terminate the contract unilaterally, and be liable in damages. Mr Boulle submitted that the defendant had a right to decide upon the opinion of another engineer that it would be more economical for the building to stand on a foundation constructed on a different principle. *Halsbury* (Vol 4, para 1330), dealing with the "duties of care and skill" of architects states that the relationship between the architect and the employer is contractual. It is further stated that "it is not sufficient to establish a breach of duty to show that another architect of greater experience and ability might have used a greater degree or skill and care". Similarly, it would not be a legally accepted reason for an employer to terminate an agreement with one professional merely on an unproven opinion of another professional in the same field.

Mr Boulle submitted that the defendant sought a reasonable variation of the way the foundation was to be built so that it would be more cost effective and also permitted the addition of an extra floor. It was therefore contended that as the plaintiff refused to comply with those instructions, he should forfeit any fees due on the contract. As I

stated before, there is no proof of a saving or even that the finite method was ultimately adopted to construct the foundation. Even if that method was used, only time will tell whether Mr Morel was right or Mr Pool was right. A professional who stands by his convictions cannot be penalised just because a client who had entered into a lawful contract enlisting his services to do structural works decides to give instructions on a substantive issue like the constructing of the foundation. Mr Boulle referred to the "variations" permitted under paragraph 3.2 of the contract. But those variations refer to those necessary for the "proper completion and use of the building". Such variations cannot in any event include instructions to the architect to change his professional opinion on a fundamental issue based on the opinion of another architect, which may, or may not, be correct. Hence the averment in paragraph 3 (a) of the defence that "the plaintiff was in breach of the contract in failing to abide by the instructions of the defendant" is untenable in law.

As regards the alternative averment contained in sub-paragraph (b) that it is an implied term of the contract that by virtue of fairness and practice that it could be terminated by either party at any time, Mr Boulle produced a document entitled "Architect's appointment" containing the recommendations of the Royal Institute of British Architects (RIBA). Both counsel had no objections to the Court using it as a reference source. Paragraph 3.23 thereof states that "the architect's appointment may be terminated by either party on the expiry of reasonable notice given in writing". Such a practice would be contrary to the contractual law of Seychelles. Further, if those conditions were applicable, para 3.19 thereof provides that "neither the qrchitect nor the client may assign the whole or any part of his duties without the other's consent". That appears to be the recommended practice for British architects. The contract in the present case provides that drawings and details of work should be prepared in accordance with the principles of the standard of measurement of building works for East Africa. What is pertinent here is not the "measurement of works" but the contractual obligations between the client and the architect, which is solely governed by the Civil Code. However, the contract between the parties contain some of the RIBA recommendations. There would a justification to consider them insofar as they are not inconsistent with the laws of Seychelles.

Hence the alternative defence averred in paragraph 3(b), that it is an implied condition by way of fairness and practice that it could be terminated by either party at any time, is contrary to the law of contract in Seychelles, and is therefore not a valid reason for the termination. The defendant is therefore liable in damages.

Article 1149 of the Civil Code is as follows -

1. The damages which are due to the creditor cover in general the loss that he has sustained and the profit of which he has been deprived, except as provided hereafter.

2. Damages shall also be recoverable for any injury to or loss of rights of personality. These include rights which cannot be measured in money

such as pain and suffering, and aesthetic loss of any of the amenities of life.

Sub-article 3 provides that these principles apply to a breach in contract as well as the commission of a delict.

Article 1135 however provides that –

> Agreements shall be binding not only in respect of what is expressed therein but also in respect of all the consequences which fairness, practice or the law imply into the obligation in accordance with its nature.

The terms of fees, and the terms of payment as agreed upon by the parties in the contract are as follows -

3.0 TERMS OF FEES

3.1 The Customer will pay the Engineer the sum equal to 2% of the final Contract sum and in the manner specified in the said conditions. This fee shall include Government Trades Tax and disbursements.

3.2 All variations involved necessary for the proper completion and use of the building shall be considered as part of the scope of works. Variations which shall provide additional facilities or significant extension over the proposed works will be reflected in the final construction cost.

4.0 TERMS OF PAYMENT

4.1 Pre-Contract:
The Customer shall pay to the Engineer 60% of the fees upon submission of the completed drawings and documentations subject to a 10% retention by the Customer which will be released as follows:-

5% upon issue of practical completion certificate,
5% upon final reception of building,

Or if the Customer abandons the projects, then released at the time when the Customer makes such a decision:

4.2 Post – Contract:
12% after completion of 25% of the works.
12% after completion of 50% of the works.
12% after completion of 75% of the works.
2% upon issue of practical completion certificate.

2% upon final reception of building.
…….
40% Total post contract fees.

Mr Morel testified that the "pre-contract" fees related to the work done during the designing stages and "post-contract" the supervision of the construction work after it had been awarded to a contractor. He stated that that the substructure was estimated at R3 million, and hence he was paid 60% of 2% of R3 million, that is R36,000 less 10% retention, R.32,400 (exhibit D2). He was earlier paid R20,000 for the sub-structure drawings (exhibit D1). Mr Morel also testified that 75% of the drawing work on the super-structure had been done when the defendant terminated the contract. He produced the relevant drawings as exhibit P4. He stated that he was given time till 15 August 1998 to complete all the superstructure works, but when the termination letter dated 17 July 1998 was received, he was two days short of one month to complete the works.

The sum of R500,000 claimed is based on 2% of the final contract price of R25 million, as provided in clause 3.1 of the contract. The plaintiff had already received 60% of 2% of R3 million which was the estimated cost of the substructure. The payment of such percentage fees is a practice in contracts with architects. The plaintiff now claims the percentage fees under article 1149(1), on the basis of a breach of contract and as the loss sustained and the amount which he has been deprived of under the contract. He however agreed that from that sum of R500,000, a sum of R32,400 already paid to him as 60% of 2% of R3 million should be deducted. He stated that the contract was for payment of 2% of the total contract price estimated by the quantity surveyor at R25 million. He disagreed with the suggestion of Mr Boulle that the first phase constituted a separate contract and that was why he was duly paid 2% of the amount for that stage. The plaintiff produced the drawings done for the super-structure, which was for the entire building, consisting of 3 floors. He however stated that only 75% - 80% of work had been completed at the time the contract was terminated on 17 July 1998, but he had not been paid for such work. Although payment for such work and the percentage fees are two different payments, the plaintiff claims the percentage fees as damages which include both. Para 4.3, of the RIBA recommendations which is consistent with article 1149 (1) of the Civil Code provides that –

> Where the architect's appointment is terminated by the client the architect will be reimbursed by the client for all expenses and disbursements necessarily incurred in connection with work then in progress and arising as a result of the termination.

This is consistent with the provisions of article 1149 of the Civil Code.

The plaintiff was prepared to discharge his obligations under the contract as agreed upon by the parties on 27 June 1997 (exhibit P1). Article 1150 of the Civil Code provides that:

> the debtor shall only be liable for damages with regard to damage which could have been reasonably foreseen or which was in the contemplation of the parties when the contract was made, provided that the damage was not due to any fraud on his part.

It was a condition in that agreement that he would be entitled to 2% of the final contract sum. That was in contemplation of both parties. This condition was breached by the unilateral and unlawful termination of the contract by the defendant. Mr Boulle contended that the granting of percentage fees to the plaintiff would mean that each succeeding architect would also be eligible to the same amount if their contracts are similarly terminated. That would not be a reason to deprive the Plaintiff of his entitlement under the contract. Each contract has to be interpreted according to its own terms and the circumstances of the termination. Fairness, practice and the law involved in agreements with architects imply that an architect whose agreement is unlawfully terminated should be fully compensated in terms agreed upon in the agreement. The plaintiff is therefore entitled to claim the percentage fees as agreed. The plaintiff admitted that the sum of R32,400 paid to him as the 2% fee for the substructure should be deducted. Hence the Plaintiff will be entitled to a sum of R467,600 under item 1 of paragraph 6 of the plaint.

The plaintiff also claims R200,000 as moral damages for humiliation, stress and anguish. This claim is based on the removal of the name of the firm from the display board at the construction site, and the substitution of another. That necessarily arose as a result of the unlawful termination of the contract. However taking into consideration that the building is being constructed in the heart of the town of Victoria, it is acceptable that many people would have noticed the change. Undoubtedly such a situation affects a professional body. Taking all the circumstances into consideration including the mental anguish and stress suffered by Mr Morel, one of the partners of the plaintiff partnership, I award a sum of R25,000 as moral damages.

Judgment is accordingly entered for the plaintiff in a sum of R492,600 together with interest and costs.

Record: Civil Side No 267 of 1998