

ALLIED BUILDERS (SEYCHELLES) LTD v FREGATE ISLAND PRIVATE LTD

(2011) SLR 150

K Shah for the plaintiff
F Bonte for the defendant

Judgment delivered on 3 June 2011 by

BURHAN J: The plaintiff in this case filed plaint against the defendant seeking the following relief:

- a) An interlocutory injunction ordering the defendant to return to the plaintiff all the surplus building materials as particularized and confirmed by the defendant's representative in July 2008 and to prohibit the defendant from engaging and continuing to engage another building contractor to do Phase - III on Fregate Island.
- b) An order that the defendant pay the plaintiff the sum of US Dollars 808,374.02 as particularized in paragraph 22 of the plaint together with interest at the commercial rate from the respective due dates and costs.

Paragraph 22 of the plaint particularizes the claim of the plaintiff as follows:

a) ½ retention due as from 7 August 2008 as per certificate of architect no 11 dated 24 July 2008	<u>US Dollars</u> 42,313.24
b) The second portion of the ½ retention due as from 30 October 2008	42,313.24
c) Letter of credit charges and interest as per certificate of architect number 11 dated 17 August 2008	35,140.25
d) Variation for additional work at villa no 15, from work and concreting.	32,078.56
e) Plaintiff's building material on site unlawfully withheld by the defendant as particularized and confirmed by the defendant's representative in July 2008	39,251.73
f) Additional costs for disruption and idle labour	12,550.00
g) Loss and expenses and acceleration claim	604,727.00
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Total 808,374.02

It is further averred in the plaint that on 27 August 2007 the plaintiff entered into an agreement with the defendant to construct 16 new infinity age swimming pools for the defendant and related site works in consideration for the sum of US\$3,381,463.38. The agreement further stated that the works on the first eight swimming pools (Phase I) and related site should commence on 1 September 2001 and be completed by 15 December 2007 and the works for the remaining 8 swimming pools (Phase II) would commence on 15 January 2008 and be completed by 20 March 2008.

The plaintiff further avers in his plaint that he had completed Phase I on 15 December 2007 and Phase II on 30 April 2008. He further states that on completion of the work the practical completion certificate was issued by the architect for Phase I on 19 December 2007 and for Phase II on 20 March 2008 and therefore avers that he had completed the work in respect of Phase I and Phase II of the said project. It is to be noted that the plaintiff further includes in paragraph 22 of the plaint a breakdown of the sums due to him from the defendant in respect of the aforementioned completed work.

The defendant in his defence dated 16 January 2009 denied the claim of the plaintiff and made a counter claim for damages based on the following grounds:

- a) Loss of business due to lateness and lack of pool construction;
- b) Loss of business as a result of non collection of Christmas goods and construction materials for the Marina project;
- c) Loss as a result of substandard and bad workmanship

and counterclaims a sum of Euros 541,665 together with interest at the commercial rate and costs.

Thereafter after the filing of this counter-claim and with the consent of Court the defendant proceeded to rectify the defects in respect of the said swimming pools constructed by the plaintiff. The defendant thereafter proceeded to amend the original counterclaim filed by him and included in an amended counterclaim an additional claim for loss and damages arising from the following:

- d) Total remedial cost in the sum of US dollars 4,656.650.
- e) Total overtime hours works by project crew for November/December 2008 and January 2009 US dollars 2,264.76
- f) Loss of business and revenues due to pool construction Euros 521,665.
- g) Total loss damage/loss of revenue during renovations as per the architects report and as per the quantity surveyor's report US\$ 2,125,875.71

Counsel for the plaintiff objected to the amendments contained in the amended counterclaim dated 18 December 2009. I have considered the submissions made by both counsel in respect of this and proceed to rule as follows.

Civil litigation may be instituted by the filing of a plaint based on an existing cause of action. It follows that the cause of action should have arisen prior to the filing of the

plaint. If the facts of this case are considered the remedial repairs conducted by the defendant as set out in the amended counterclaim had not been effected at the time the counter-claim of the defendant (which in effect is a plaint in a cross-claim by the defendant) was filed on 16 January 2009. Therefore it appears that the defendant now seeks to incorporate as an amendment to the counter-claim a cause of action which was not in existence or non-existent at the time the original counter-claim was filed. The claim in the amended counter-claim made by the defendant against the plaintiff in this case arises subsequent to the filing of the counterclaim by the defendant and such a claim did not exist at the time the plaintiff filed this action or at the time the defendant filed the counterclaim. To permit the said amendment would be to permit the incorporation of a cause of action which was not in existence or non-existent at the time the counter-claim (plaint in the cross claim of the defendant) was filed. Further it is the contention of the plaintiff and it is apparent that the sum claimed in the amended counter-claim far exceeds the actual cost charged by the plaintiff from the defendant for the construction of the 16 swimming pools which in itself indicates that the counter-claim contains issues beyond those arising from the subject matter of this action and therefore does not fall within the ambit of section 80(1) of the Seychelles Code of Civil Procedure Cap 213.

For the aforementioned reasons this Court makes an order in the interests of justice that loss and damage claimed by the defendant in the amended counter claim in prayers (d), (f) and (g) be struck out. The defendant should bring such claims in a separate action. The amendment of the counterclaim is therefore limited to prayer (e) only.

Record: Civil Side No 326 of 2008