

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 376/2008

[2017] SCSC

Philip Rath Construction

Plaintiff

versus

ICANDO Ocean Centre

Defendant

Heard: 21 February 2013, 20 March 2013,

Counsel: Mr. Joel Camille for plaintiff

Ms. Karen Domingue for defendant

Delivered: 19 September 2017

JUDGMENT

M. TWOMEY, CJ

[1] The Plaintiff, a construction company, filed a plaint on 11 December 2008 in which it claimed that it had entered into an agreement with the Defendant on 29 March 2017 for renovation and extension works to the Defendant's house at Reef Estate, Mahé for the price of SR375, 000 of which SR 180,000 was to be paid in rupees and 23,000 in dollars and for which works sums of money remain unpaid to date.

[2] The Plaintiff also avers that the Defendant appointed one Vital Morel, since deceased, as project manager for the works and that it was further agreed that further amounts would be paid for additional works outside the contract.

- [3] It is the also Plaintiff's averment that the Defendant entered the house in October 2007 without the contracted works being completed and prevented it from continuing the same. Further, it claims that the Defendant has only paid it SR145, 000 to date. It therefore claims a total of SR 237,700.40 and USD13, 000 for the completed works under the contract and the costs of the extra works.
- [4] Ms. Victoria Glova (now Contoret) submitted in limine litis that she was not representing the Defendant. However that point was not pursued at trial or in closing submissions and I see no reason to address it further. In any case she later submitted in evidence that she was a director of the Defendant Company.
- [5] The Defendant further avers that it was to pay SR375, 000 for the works in the following manner: SR 75,000 in advance of the works and a further sum of USD11, 500 on 15 September 2007, that is at the completion of the works and the rest of the money by stage payments.
- [6] It added that no schedule of completed works was ever provided by the Plaintiff nor was there any agreement for additional works apart from discussions about the same.
- [7] The Defendant also averred that the works were meant to be completed by 15 September 2007 but were not. It stated that altogether it paid the Plaintiff the total sum of SR85, 000 and USD10, 000.
- [8] In a counterclaim, the Defendant further averred that the Plaintiff breached the agreement in that it did not complete the work on time and performed the work poorly which depreciated the value of the property. It claimed a total of SR 377,200 and USD 6,670 for the delay in completion, inconvenience, stress and anxiety, devaluation of the property and costs for finishing the works contracted for.
- [9] The director of the Plaintiff Company, Philip Rath, testified. He produced the agreement between the parties, confirming that the agreement for the works was for the sum of SR180, 000 and USD 23,000. A down payment of SR75, 000 was to be paid before the contract as advance payment and the rest of the contract price was to be paid pro rata the works competed from 15 April 2007 until September 2007 with a further sum of

USD11, 500 on the 15 September 2007 with SR25, 000 retained for payment three months after completion of the works. The works were to be completed within six months from the commencement date of the works (clause 8 of the Agreement).

[10] He testified that he entered the site to undertake the works and received a down payment of SR50, 000 on 29 March 2007 (Exhibit P3) and a further payment of SR75, 000 on 30 May 2007 totalling SR125, 000.

[11] Later during the undertaking of the works it transpired that extra work including retaining walls and steps had to be carried out and it was agreed by the parties that it would carry them out. This amounted to SR93, 150.40 for which he invoiced the Defendant but which remains unpaid.

[12] He also had to buy materials which the Defendant had agreed to pay for but didn't. There were other materials which were to be provided by the Defendant but which were not made available to him.

[13] He carried out further works amounting to SR89, 550 for which the Defendant was also invoiced but which also remains unpaid. Subsequently, the Defendant entered the house at the stage of near completion (80% of the agreed works) and refused to move out to permit the workers to complete the works.

[14] He stated that the project manager Mr. Vital Morel who was supposed to supervise the works was absent for long periods and this delayed works on the site.

[15] Subsequently after he was forced out of the site he entered into negotiations with the Defendant's lawyer and received a further payment of USD10, 000 for the works done.

[16] He stated that he was still owed SR237, 700.40 and USD 13,000. He denied that he had not met the time schedule as contained in the contract. He admitted however that there had been an issue with a burst pipe but that this had been resolved. He denied that there were problems or issues of bad workmanship.

[17] Collin Rath also testified. He worked for Philip Rath Construction at the material time as secretary and liaison with the Defendant. He also took personal responsibility for the

flooring of the house. He stated that 85% to 90% of the work was completed when the Defendant moved in. Generally the Defendant was satisfied with the work although there were occasional queries which were cleared up.

[18] He also recalled that on some occasions there was a lack of building materials provided by the Defendant.

[19] Jeffrey Rosalie also testified on behalf of the Plaintiff. He did the plumbing works on the Defendant's house. There were extra works shown to him by Mr Vital Morel acting for the Defendant. An external shower had to be installed and a stand pipe connection. The contracted internal works were 95% complete but were incomplete as certain appliances were not provided, for example a pressure valve for a water heater on the roof and faucets for the bathroom.

[20] The Defendant called Victoria Contoret, née Glova. She was the director of Icando, a company provided training and consulting in personal development. The company bought a house at Reef Estate and engaged an architect, Vital Morel, to draft plans for the reconstruction to accommodate the business venture.

[21] After the plans were drawn up she travelled to Dubai and purchased the building materials which were shipped to Seychelles in two containers. She produced the bills of entry for the containers (Exhibits D 11 and D 12). The materials were stored in a rented building not far from the villa under renovation. A contract was then signed with the Plaintiff. The payments for the building work was to be done in phases after satisfactory reports of progress were received.

[22] She stated that she had made two payments to the Plaintiff, a down payment of SR75,000 and another of SR 50,000 and a payment of USD 10,000 after negotiations had been undertaken when the contract was terminated.

[23] In her estimation only 50-55% of the contracted works were completed. She terminated the contract in November 2007 as the works should have been completed in September 2007.

- [24] She had been told in August that the work was nearly ready but not completed and hence changed her travel plans from September to October. Mr. Philip Rath of the Plaintiff Company told her she could come as the work was nearly finished.
- [25] When she arrived, she discovered that the fitting of the windows and doors were not complete or inserted in a deficient manner. She discovered other defects: the glass in the windows had been scratched, damaged and some were broken, the water pipes were broken and there was water on the floor, there were loose angle frames inside the rooms, laminated flooring and skirting boards were not completed, tiling work not completed, plumbing was generally wanting with leaks and no hot water distribution working. A snag list of these defects was produced on 17 November 2007 after the contract was terminated. The snag list was signed by one Beddy Delcy, allegedly a representative of the Plaintiff (Exhibit D16).
- [26] Mr. Philip Rath for the Plaintiff did not attend meetings planned to discuss the shortcomings of its work, nor did he respond to letters sent to him where the defects had been pointed out.
- [27] On 13 November 2007, a letter terminating the contract was sent to the Plaintiff. Subsequently, in an effort to finalise matters and through the intervention of Mr. France Bonté, the Plaintiff's lawyer, she paid a further sum of USD10, 000 to the Plaintiff.
- [28] The Defendant had also brought a counterclaim. It had been put to a lot of inconvenience as it had business interests held up because the villa was not completed on time. These included the representation of Seychelles for trade and investment in Seychelles.
- [29] For the stress and inconvenience it claimed SR 100,000. Mrs. Contoret had not felt secure in the house and a friend had to sleep in the house with her. Further, the Plaintiff did not answer her phone calls or did not want to communicate with her in any way.
- [30] There was also a performance clause in the contract (clause 15) in which it had been agreed by the parties that if the works were not completed on time, the Plaintiff would be liable for the payment of 0.5% deducted from the contract price for each day of the delay.

She claimed on behalf of the Defendant the sum of SR52, 200 and USD6670 under this clause as the Plaintiff had been 58 days late by the time the contract was terminated.

[31] She had to pay other persons to complete the works including a separate contractor, Mr. Jonathan Ally. These labour costs amounted to SR100, 000 and she claimed a further SR50, 000 for other materials she had to purchase to complete the works as the ones she had provided were missing (Exhibit D24).

[32] In cross examination she admitted not making further monthly payments after the first payment but stated that this was pursuant to clause 12 of the contract which provided that a statement for phase completion had to be made beforehand and that this had not been done.

[33] She stated that although only 50% of the works had been completed the Defendant had paid 60% of the contract price in total. She disagreed that the Defendant's project managers had failed to supply the materials to the Plaintiff which had occasioned the delay in the completion of the works.

[34] Mr. Theodore Edmond, an electrician testified for the Defendant confirming that he had wired and installed electricity at her house. He stated that Philip Rath had done 75% of the 'chasing' necessary for the wiring. He charged the Defendant SR50, 000 for the rest of the work.

[35] Mr. Emmanuel Beddy Delcy, a building contractor, also testified. He had been asked by the Plaintiff to help out occasionally on site. He was a pensioner but did come on site as an adviser and sometimes to do some practical work. He stated that Philip Rath was a past student of his as he had previously worked as an Instructor. He stated that there was lack of supervision of the site works and the works progressed slowly. The Plaintiff pulled the workers off the site after the Defendant returned to Seychelles. In his view about 65% of the works had been completed.

[36] He then took over the tasks to be completed and was paid directly by the Defendant. He did not state how much he was paid in total. He also saw other people being brought in to complete the works.

- [37] Mr. Bernard Denis, a clearing agent also testified. He had been asked to keep an eye on the works. Some days fewer workers than were necessary were dropped at the site. At any one time there was a minimum of one person and a maximum of ten persons working on the site.
- [38] This case was tried by Karunakaran J who heard the evidence but did not complete the case. The parties have unanimously agreed to my adopting the evidence adduced and to proceed to write a decision. I did not have the benefit of observing the witnesses' demeanour when they testified but there is copious documentary evidence produced which I have examined in great detail.
- [39] The issues that remain to be decided is (1) whether an agreement was concluded, (2) whether it was breached by either party and (3) what remedies are available for the breaches.
- [40] Issue 1 is easily resolved by observing the signatures of the Plaintiff and the Defendant on the Agreement (Exhibit P1). The Agreement dated 29 March 2007, infelicitously worded contains the following relevant clauses:

Schedule Part One

Construction works started on the 15 day of March 2007.

Before signing this contract document, the client shall do a down payment of the quoted sum for mobilisation. It will amount to Seychelles Rupees Seventy Five Thousand (SR 75,000). This sum is advance payment of all the required (see p. (sic) 16 of the agreement).

The rest will be on a pro rata base (sic) every month (14.4.2007. 15.5 2007. 15.7. 2007, 15.7.2007, 15.8.2007. 15.9.2007). However the sum of 115.00 USD will be paid on the 15.9/2007 and a retention sum of SR25, 000 will be paid there months after the completion of all works on site.

Part Two.

1. *The contractor shall as far as possible carry out the said works in a workmanlike, efficient and complete manner...*

5. *In the event of the client changing, altering or amending the approved plans, the parties shall by mutual agreement in writing agree upon a price for the said changes, alterations or amendments before they are undertaken...*

6. *Failure on the part of the client to pay the extra works (sic) s approved by him/hr in writing shall entitle the Contractor to cease all further works until such time as Contractor shall be paid for the same.*

7. *The Project Manager shall supervise the construction and give necessary instruction which shall be in writing to the Contractor as concerns the construction. All in. (sic).*

8. *The contractor shall complete the said works within 6 months from the date of commencement of work (before 19.9.2007).*

9. *The Contractor shall be fully responsible for any damages caused to the building during its construction caused by the Client, his servants or agents and if the Contractor has to remedy such damages, the Client shall pay extra for the same to be agreed in writing by the parties. The Contractor shall ensure that the site be guarded by a watchman at the Contractors expense to ensure that no stranger shall damage or trespass on the construction site.*

10. *The Contractor shall at his own expense rectify any defects in the works. In the event of the Contractor's failure to rectify any such defects. The Client may retain the services of an alternative Contractor to rectify the said defects and the contractor shall be liable to pay to the Client any sums paid to rectify such defects, or the client may use money retained under PART ONE of this agreement, the schedule to affect the said defects.*

11. Breach of any of the above clauses and conditions by the Client shall result in the termination of this agreement and any moneys paid by the Client to the Contractor shall be forfeited by the Contractor.

12. The payment of the various stages of works done shall be effected monthly based on their actual volume within 5 calendar days from the signing of the statements by both representatives of the Contractor and the Client.

13. All additions and amendments of the volume and types of works shall be entered into the statement of work completed signed by the Client and the Contractor.

14. The Contractor shall make available the schedule of the construction works to be carried out with the break-down into stages in accordance with the various types of work. See attached Documents.

15. Should the Contractor fail to adhere to the schedule of the construction works, he shall be liable to the payment of 0.5% from the sum of the contractor for each day of the delay. All amendments to and delays of the works being carried out shall be agreed upon with the client with a compulsory corresponding entry into the statement of the work completed.

16. Lack of construction materials as well as work force shall not be deemed as the groups for violating the schedule of construction works if advance payment of all the required materials has been effected by the Client.

17. All the decoration works not mentioned in the list of schedule works as well as low electrical current wiring and electrical appliances installation shall be carried out upon the signing of an additional agreement.

[41] The renovation works were clearly detailed as was the work schedule for each and every month contracted.

[42] The flurry of communication between the parties do not indicate that the Defendant had any issue with the works being carried out by the Plaintiff. Indeed in her e-mail of 24 September she states:

“From my information, u rally work now in my hause very fast and quality of ur work is very good. Thank u very much...” (sic)

[43] There is also documentary evidence that additional works were contracted for and these were detailed in a letter sent by the Plaintiff to the Defendant on 29 September and included excavation and the construction of two stone walls amounting to SR 93,150.40 (Exhibit P8).

[44] Further in November 2007 an invoice was sent by the Plaintiff for extra works to the interior and exterior of the house amounting to SR89, 550.

[45] There is no response produced in terms of these letters from the Plaintiff to the Defendant. It would appear that the project manager, Vital Morel was unwell and eventually passed away and his replacement, Mr. Dingwall also never testified. They were therefore not available to throw a light on these issues and the court is none the wiser after the event.

[46] Article 1134 of the Civil Code of Seychelles provides that legally formed agreements between the parties have the force of law – therefore contracts must be given effect and adhered to (*pacta sunt servanda*). It is this principle that promotes legal certainty for the co contractors. Hence a party can expect the contract to be performed to the letter (See in this respect Civ (3) 11 May 2005, RDC 2005.323 note D Mazeaud).

[47] I have no reason to disbelieve the Defendant that the works were late and that in some respects defective. Mrs. Contoret produced photographs and other documentary evidence to this effect. However, I also believe the Plaintiff that payments for the different stages were not effected as per the agreement. In this regard the Defendant has stated that the stage payments were not made as statements signed by both parties were not effected pursuant to clause 12 (*supra*) of the contract.

[48] I note that the representative of the Defendant was absent for a long period of time (at least from June to August) and that the Plaintiff did write to him with no response as to the stage of the works reached (see Exhibit P 5). It was the Defendant's representative and agent (Vital Morel)'s responsibility to ensure that the renovation and extension works were going as planned. The Plaintiff's evidence about his non availability and his lack of supervision and that of his witnesses on this issue remains unrebutted by the Defendant.

[49] Both parties accuse each other of non-performance. Insofar as to the second issue is concerned, I find, having examined the documents produced that there were breaches on the part of both parties.

[50] The contract signed on 29 March 2007 set out the work to be done and the time period for them to be completed.

[51] Given the Defendant's email of 24 September 2014 I am not of the view that the work was delayed solely as a result of the Plaintiff's *laches*. The Defendant was satisfied both with the speed of the work and the quality of the work. This cannot be reconciled with her later testimony and that of her witnesses.

[52] Insofar as issue 3 is concerned, Article 1147 of the Civil Code of Seychelles provides that:

“The debtor shall be ordered to pay damages, if any, either by reason of his failure to perform the obligation or by reason of his delay in the performance, provided that he is unable to prove that his failure to perform is due to a cause which cannot be imputed to him and that in this respect he was not in bad faith.”

[53] If the statement of works as stipulated in clause 12 of the contract (supra) was not signed by the laches of the Defendant or its representative and there is indeed evidence to that effect – Mr. Morel was unavailable for long periods of time from illness- the Defendant cannot penalise the Plaintiff for this. I find therefore that stage payments should have been made as agreed.

[54] I also accept that the Plaintiff failed to complete the works on time and I accept the Defendant's evidence which has not been seriously contested that the completion of the works was 58 days overdue by the time the contract was terminated.

[55] I also find that the additional works by the Plaintiff were performed in good faith. It is hard to believe that such extensive works were carried out without the agreement of the Defendant or her agent or representative. I believe the Plaintiff on this issue.

[56] The Defendant has submitted that clause 5 of the contract comes into play. I repeat the terms of clause 5 for clarification purposes:

“In the event of the client changing, altering or amending the approved plans, the parties shall by mutual agreement in writing agree upon a price for the said changes, alterations or amendments before they are undertaken” (emphasis mine)

[57] The evidence of the Plaintiff is that the works he carried out were additional to the ones agreed - they were neither changes, alterations nor amendments to the plans. There was in effect no need for the agreement to be put in writing. In the circumstances I allow the Plaintiff's claims as prayed for in this regard.

[58] However, I am also persuaded by the overwhelming evidence of the Defendant that the works were late and not completed. The Plaintiff and his witnesses put the completion of the works as between 80% to 90% whilst the Defendant and its witness put it at 50% to 65%. No expert quantity surveying was done nor such an expert witness called by either party. I therefore have taken an average of 70% as the amount of work completed. This will adjust the figure owed to the Plaintiff.

[59] The Defendant has also claimed devaluation and damage to its property. I am not convinced that the evidence adduced is sufficient to prove how this claim is quantified in the absence of expert witnesses and I therefore dismiss it. She has claimed SR150, 000 for finishing the works. To support this claim she has produced receipts of items ranging from pvc pipes to varnish and a labour receipt for cleaning gutters but no effort has been made to explain to the court how these relate to the contract. There is insufficient evidence to show whether they were for the works contracted or for further works. It is

however entitled to money for finishing the work over and above the rate I have set for non-completion. Mr. Edmond testified that he was paid SR50, 000. I have no reason to disbelieve him. In the absence of any clear evidence I find that an additional sum of SR25, 000 would be reasonable under this head making a total of SR75, 000 for the completion of the works.

[60] Although I accept that the Defendant suffered inconvenience, a company or non-physical entity cannot suffer stress and anxiety and cannot claim for the same. The French *Cour de Cassation* has differentiated between moral damages for a *personne physique* and a *personne morale*. The latter can only recover for prejudice to its image and reputation (Cassation commerciale, 15 mai 2012, n° 11-10278). I allow SR35, 000 under this head.

[61] In the circumstances I find that the Plaintiff is entitled to (SR55, 000 less 30%) SR38, 500 and (USD 13,000 - 30%) USD 9,100 for the renovation works. These are further reduced by the non-performance clause: (SR38, 500 – SR55, 000) = SR-16,500 and (USD9, 100 – USD6670) = USD 2430. It is also owed SR237, 700.40 for additional works. Offsetting the contract sum against the additional works this comes to a total of SR 221,200.40 (SR237, 700.40 – 16500) and USD 2430.

[62] The Defendant's debt under the contract price is reflected in the sums above. It is also as I have said entitled to SR 75,000 for having to contract new labour costs to finish the uncompleted works and a further SR35, 000 for moral prejudice, altogether SR110, 000.

[63] In total the Defendant is ordered to pay the sum of **SR111, 200.40** (221,200.40-110,000) and **USD2430** together with interest to the Plaintiff. The Defendant had indicated that for taxation purposes the rate of the US dollar at SR13 is used and I order that the same rate be used for that part of the judgment debt in dollars.

[64] I make no order as to costs.

Signed, dated and delivered at Ile du Port on 19 September 2017.

M. TWOMEY
Chief Justice