2008 No.1012-CD DEMERARA

IN THE HIGH COURT OF THE SUPREME COURT OF JUDICATURE

CIVIL JURISDICTION

COMMERCIAL DIVISION

BETWEEN:

DAVID ANTHONY PATTERSON trading under the name and style of **PATTERSON ASSOCIATES** whose registered office is at Lot 1 Thorne's Durban Backlands, Georgetown.

Plaintiff

-and-

NEW BUILDING SOCIETY LIMITED, a company duly registered under the Companies Act 1991 whose registered office is at 1 Avenue of the Republic of Guyana, Georgetown.

Defendant

2008 No.977-CD DEMERARA

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BETWEEN:

HARRY DEODHARRY trading under the name and style of **CIVIL ENGINEERING CONSULTANTS** whose registered office is at Lot 18 Delhi Street, Prashad Nagar, Georgetown.

Plaintiff

-and-

NEW BUILDING SOCIETY LIMITED, a company duly registered under the Companies Act 1991 whose registered office is at 1 Avenue of the Republic of Guyana, Georgetown.

Defendant

2008 No.969-CD DEMERARA

BETWEEN:

NEW BUILDING SOCIETY LIMITED, a company duly registered under the Companies Act 1991 whose registered office is at 1 Avenue of the Republic of Guyana, Georgetown.

Plaintiff

-and-

RODRIGUES ARCHITECTS LIMITED, a company incorporated under the Companies Act, Chapter 89:01 and continued under the Companies Act No. 29/1991 whose registered office is at A126 Robin's Place, Bel Air Park, Georgetown.

Defendant

APPEARANCES:

- Mr. T. Jonas for the Plaintiffs
- Mr. R. Ramkarran SC with Mr. N. Ramkarran and Mr. M. Mc Doom [Jnr.] for the Defendant

REASONS FOR DECISION

In these actions Rodrigues Architects Limited (Rodrigues), David Patterson ("Patterson") and Harry Deodharry ("Deodharry") are seeking to recover from the New Building Society Ltd ("NBS") the charges to which they allege that they were entitled to under independent contracts with NBS which retained their services for architectural and associated works at the Society's new head office in Georgetown.

A substantial matter which falls for determination at the outset is that of the contractual relationship, if any, between NBS and the individual plaintiffs at the material time.

NBS vehemently disputes the contention that Patterson and Deodharry were hired by them. They contend that only Rodrigues was hired by them and accordingly there was no contract between NBS on the one hand and

Patterson and Deodharry on the other. The assertions of NBS are that Patterson and Deodharry were in fact subcontractors of Rodrigues; that payments were made to them by NBS on the instruction of Rodrigues by the presentation of invoices which were approved by Rodrigues; that NBS exercised no control over them and that NBS had no knowledge of them prior to Rodrigues instructing NBS to pay them separately.

The attempt by NBS to distance itself from Patterson and Rodrigues cannot be sustained. I find that the services of these two persons were contracted by NBS on the recommendation of Rodrigues as provided for in the consultants proposal.

I do not find convincing the reasons advanced by NBS for seeking to distance itself from any contractual link with Patterson and Deodharry. NBS concedes that it was given power to nominate subcontractors but states that in actual practice Patterson and Deodharry was presented as a *fait accompli* by Rodrigues and that NBS had no choice in the matter.....its power to nominate contractors was merely nominal. This petulant complaint does not avail NBS. If the NBS deliberately and voluntarily chose not to exercise an option available to it any complaint about the consequence of such an election will have a hollow ring.

The reference by NBS to the stipulation at clause 2.5 of the Consultants proposal that Rodrigues' work incorporates the design work of other consultants and subcontractors does not advance the issue. It is a classic case of begging the question. The contractual terms of the parties are set out in Exh "A". Clause 2:09 thereof provides that the stages of work will include the involvement of other contractors/consultants and in this regard the services of all of the plaintiffs were proposed. Clause 2:01 expressly provides that the above services will be contracted by NBS on the recommendation of the Architect. The reality was that each plaintiff independently invoiced NBS for services rendered and the evidence revealed that NBS made payments directly to each plaintiff. Rodrigues merely certified that Patterson and Deodharry had indeed performed their invoiced services to facilitate payment to them. In this limited regard Rodrigues was the agent of NBS.

Upon consideration of the documentary and oral evidence in this matter, I have no hesitation in finding that at all material times NBS had an

obvious and direct contractual relationship with Patterson and Deodharry. See Generally **Halsbury Laws of England 4th Edn. Vol. 4 Para 1267. See too Hampton v. Glamorgan CC [1917] AC 13 as per Bankes L.J at p. 17.**

Now, it is not in dispute that the terms of the agreement regulating the conduct of the parties is found in that agreement of the 28th June 2005 (Exh A).

In interpreting this contract reference is made to **Odgers Construction of Deeds and Statutes 1967 at p. 22** and I quote:

> **"'One must consider the meaning of the words used, not what one may guess to be the intention of the parties, 'said Jessel, M.R. *[Smith v. Lucas (1881) 18 Ch. D. 531]*, which plainly shows that however much one may suspect that the parties intended one thing, yet if their words plainly import another, the latter is the true construction, as the 'Court deals with a deed according to the clear intention of the parties appearing in the four corners of the deed itself. *'(per Romilly, M.R. in Beaumont v. Marquis of Salisbury (1854) 19 Beav. 198 at 206)"***

Again at **pages 29-30 of Odgers**:

> **"The *locus classicus* on this subject is the judgments in Shore v. Wilson (1842)....These insist that the primary (or ordinary) meaning is to be taken, unless excluded by the context or circumstances of the writer at the time, and that evidence of intention or of the writer's belief or declaration varying that primary meaning is inadmissible. The business of the Courts is to determine what a man has written, not what he may be supposed to have intended to write....**
>
> **When is extrinsic evidence admissible to translate the language? It is to be noticed that extrinsic evidence here does not mean evidence of the writer's intention but evidence for the court to interpret the language used. It is only admissible as so often with this subject construction, when there is some doubt as to what the words mean or how they are to be applied to the circumstances of the writer."**

The various stages of work is outlined and the architects involvement specified. 5.75% of the cost of building works was agreed to for architectural services. It is evidenced that the cost of building works is unknown at the outset and an estimate is done in accordance with the square footage of the building. This I find to be undisputed having regard to the evidence led. This court will not venture out of the four corners of the written terms of the agreement as it is seemingly being invited to do by the defendant. In this regard dispute arose in particular to the interpretation of the words "Construction costs as certified by the architect" as it appears in Exh 'A'.

This term was clearly explained by the plaintiff Rodrigues in his testimony. He explained and as stated earlier the final construction costs is not known until the construction is complete and the final accounting process is completed.

This process is succinctly stated in **Hudson's Building and Engineering Contracts 10th Edn. P. 492** and I quote:

> **"Provisions for interim or progress certificates are almost invariably inserted in building contracts for the benefit of the builder, to enable him to obtain payments on account during the progress of the work. As a rule, the payments contemplated by such provisions only represent the approximate value (or a proportion of it) of the work done... at the date of the payment, and in the absence of express provision, they are not conclusive or binding on the employer as an expression of satisfaction with the quality of the work or materials. It makes no difference that they are frequently expressed to represent the value of work properly done, since such a qualification is an obvious one in any provision for payment on account... In addition, the whole scheme of the contract... is obviously inconsistent with any such intention. Indeed most provisions for interim payment involve a revaluation of the whole work (not the work done since the last certificate) each time a new certificate is given. Such certificates, then, are usually to readjustment, not only in the final certificate but also in subsequent interim certificates."**

See too **The Tharsis Sulphur & Copper Co. v. M'Elroy [1878] App CAR 1040]** and **Halsburys' Laws of England 3rd Edn. Vol. 3 para. 883.**

It is clear from the evidence somewhat unchallenged, that the plaintiff Rodrigues was guided by and adopted the legal norms attributable to the performance of the type of contract engaged in. This undisputed evidence of previous dealings with the defendant over the past 20 years in relation to similar transactions is telling. The same methodology was applied without contention and he again reiterated that this was the accepted norm in the industry. In this context and regard it is also clear to my mind that the agreed cost for his services is precisely specified in the said agreement. Further the interim invoices submitted could not be treated as having a contractual effect but all formed part of the process in a single contract of which the final certified cost was yet to be determined.

To my mind, the most serious bone of contention in this matter relates to whether or not the defendant was in breach of the said contract. It is noted

that the contract contains no clauses stipulating time limits. This apparently motivates the shocking contention by the defendant that the contract can be terminated at any time. This is rejected out of hand.

As is stated in **Halsbury (supra) at para 852.**

> **"It is self-evident that the building owner must permit the contractor to carry out the whole of the work, and that if he prevents the contractor from so doing, the contractor will have a remedy either on a quantum meruit for what he has done or by way of damages" (Hudson's at p. 339.)**
>
> **"As in the case of other classes of contracts, a building contract can, as general rule, only be rescinded by mutual consent, but if either party repudiates or abandons the contract, the other party can at once elect to treat such repudiation or abandonment as a rescission of the contract and sue for the breach."**

It is clear and somewhat trite that the parties are bound by their contract and the unilateral termination of this 5 stage contract is impermissible. In addition and despite the Defendants contention this issue specifically arises on the Plaintiff's pleadings. One only needs to peruse same.

Again, the evidence clearly establishes that the Defendant unilaterally retained a third party to complete the construction. A clear repudiation of the agreement.

As stated in Hudson's supra at page 685;

> **"Omission of work and its transfer to another contractor, if done deliberately and with eyes open has been held to amount to repudiation by the employer."**

Further, the argument by the Defendant of a loss of confidence in the services of the plaintiff at "a natural break" in the obligations of the parties is to my mind again without merit.

As it relates to a loss of confidence, a perusal of the pleadings reveals no such plea. This seems to be an afterthought by the defendant and is again rejected. The evidence certainly does not remotely suggest the existence of such a state of affairs. The reference to a "Natural Break" in the contract by the defendant is mind boggling. As stated earlier this contract is a singular contract albeit involving various and distinct processes.

See **Halsburys supra para 822 and 827** "when a contract is entire"

PRICE INCREASE

Again it is clear from the evidence that the increase of prices was beyond the control of the plaintiffs and were due primarily to consumption taxes, the implementation of Value Added Tax (V.A.T) in Guyana and the dramatic increase in world prices for infrastructural material.

It is also clear from the evidence that the Defendants accepted the reasons for and the increase in those prices. In the circumstances this could not justify the obvious unilateral termination of the contract by the Defendant with the plaintiffs which is without a lawful justification or basis.

Having found with little difficulty, a clear breach of agreement by the Defendant, the thorny issue of Damages remains to be considered.

In this regard assistance was sought and found in Hudson's above cit at p. 596 and I quote **"in the more usual case where the work is partly carried out at the time the contract is repudiated, the builder will normally be entitled to the value of the work done assessed at the contract rates, plus his profit on the remaining work"**.

It must be noted again that the agreement at hand does not provide for the method or mode of calculation of damages, in the event of a breach. Of course damages are theoretically based on placing a Plaintiff in a position as if there had been no breach.

It is clear from the agreement that the Plaintiff would but for the breach, be entitled to 5.75% of the final invoice based on the actual certified construction cost.

During the course of his evidence the Defendant's witness Mr. Mohamed tendered into evidence Exhibit "CC" with which schedules of payment certificates issued by the new contractor BK International totaling $827,000,776 excluding VAT. In addition he acknowledged several payments in addition to the value of $90,325,000 for air conditioning and a vault.

I prefer to base the award of damages on the actual payment certificates and evidence of additional payments presented to the Court by the Defendants, rather than the Plaintiff assessed construction costs. To my mind this avoids an engagement in speculation.

The mathematical calculations of damages based on the Defendants evidence are as follows:

Rodrigues:

5.75% x 75% x $917,325,776 less $23, 662, 048 (already paid) = $15,897,625

Patterson:

2% x 75% x $917,325,776 less $8,230,726 (already paid) = $5,529,161

Deodharry:

2.25% x 75% x $917,325,776 less $9,259,061 (already paid) = $6,220,811

Thus, damages awarded are as follows:

1. Rodrigues - $15,897,625
2. Patterson - $5,529,161
3. Deodharry - $6,220,811

Costs in the sum of $100,000 to each plaintiff.

Stay 6 weeks.

Dated this 26th day of October, 2015

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R. PERSAUD
(Judge)