ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO. 264 OF 1996

BETWEEN:

CARLTON CONSTRUCTION LTD

Plaintiff

and

LENNOX TAYLOR
NOELINA TAYLOR

Defendants

Appearances:

Mr Samuel Commissiong for the Plaintiff
Ms Paula David for the Defendants

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2000: April 6, 7
May 24, 31

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JUDGMENT

[1] MITCHELL, J: This is a building contract case. The dispute was over extras. By a Statement of Claim endorsed on a writ issued on 4 July 1996 the Plaintiff Company claimed under a contract of 5 February 1995 for agreed extras. It is alleged that the additional work that was requested by the Defendants was as follows:

1	Retaining walls	$13,247.90
2	Front yard slab	$4,927.50
3	Kitchen tiles	$17.80
4	Bathroom tiles	$2,019.60
5	Kitchen cupboards	$1,552.80
6	Extra water tank	$16,090.70
	Total:	$38,356.20

The Plaintiff Company also claims interest at the rate of 12½ %. By a Defence filed on 9 October 1996 the Defendants claimed that the contract was for $359,100.00. The Defence further claimed that the Plaintiff Company, through one of its principal officers, Mr Glenford Stewart, had stated to the Defendants before the works commenced that the drawings encompassed everything that was necessary. The Defendants denied requesting any extra works. They claimed they did not agree to any extra works. The Defendants agreed that the water tank was an extra. However, they claim that they were never informed that they would have to pay extra for the tank other than the cost of the extra materials for the tank, which under the contract they were responsible for and had paid for and supplied. The Request for Hearing was filed on 21 January 1997.

[2] Giving evidence for the Plaintiff Company was Carlton Stewart, a director of the company. He holds a certificate in building construction. He was supported by his brother, Hugh Stewart. Giving evidence for the Defendants were the two Defendants themselves. No other witnesses testified. During the course of the trial, a number of exhibits were put in. These were principally the Agreement, correspondence between the parties, the construction plans, and a number of payment certificates. The Plaintiff Company relied on a letter from Stewart Engineering to the Defendants of 30 November 1995 in which the Defendants were invited to discuss, inter alia, variations on the project. That meeting took place on 2 December and the Defendants rejected any notion of being liable for extras. The Plaintiff Company placed great reliance on the Final Payment

Certificate, No. 33 issued by Stewart Engineering to the Defendants and which Certificate authorised payment of the sum in dispute to cover the extras. The Plaintiff's position is that Stewart Engineering was the agent of the Defendants and not of the Plaintiff. This Certificate from the Defendants' engineer, the Plaintiff Company urges, is binding on the Defendants. The evidence is that the principal of Stewart Engineering is one Glenford Stewart, a qualified engineer, and the brother of the two witnesses for the Plaintiff company. He did not come to give evidence for either of the parties. I can see his difficulty. The Plaintiff's witnesses denied that Glenford Stewart is an officer in their company, and there is no reason to doubt them. I find that while he is their brother, he has his own separate engineering company, and he is not an officer of their construction company. Counsel for the Defendants asks the Court to place little reliance on this Certificate from Stewart Engineering because of Glenford Stewart's relationship with the two witnesses of the Plaintiff Company. Counsel for the Defendants pointed out that extras are mentioned nowhere in any of the earlier certificates, they appear for the first time in this final payment certificate after the Defendants had repudiated the notion of extra work having been done at their request. It is to be noted, however, that this is one of 33 certificates in this project, all the others of which have been accepted and paid by the Defendants.

[3] The building contract was doubly unsatisfactory. First, it was a standard form contract, for labour and materials. The evidence was that this contract given to the Plaintiff Company by the Defendants was a labour-only contract. The standard form as used contained deletions in an attempt to make it a labour-only contract. Secondly, the contract contained 3 pages, one page of details of the parties, one page of text, and one page of signatures. From the reference in paragraph 1 of the contract to "the conditions annexed hereto" it is evident that there were conditions meant to be incorporated in the contract that were never shown to the parties. As paragraph 3 of the contract refers to "clause 35 of the said conditions" it is evident that these conditions were intended by the draughtsman of the standard form contract to be quite numerous. No doubt, one reason why the

conditions were not produced to the parties and made a part of the contract was that these conditions would have applied to a labour and material contract. This being a labour-only contract, some of the conditions normally attached to this form would have been inappropriate. The form of contract was provided to the parties by Mr Glenford Stewart, the brother of the Plaintiff's witnesses and the engineer employed by the Defendants to be their architect and supervisor of the contract. It would have helped if he had selected the correct form in the first place, and attached the appropriate standard form of conditions to it. One or more of these conditions would have set out the procedure to be followed by the owner, the builder, and the supervisor of the contract, when any variation of the contract was required. If any of these variations amounted to an extra, one would expect to see in the conditions attached to the contract the appropriate procedure for valuing and certifying the extra. Mr Glenford Stewart provided engineering services for the project through his company Stewart Engineering Ltd. Stewart Engineering are not architects. However, they purported to prepare the architectural drawings, and obtained the necessary Building Board approval for the project. The drawings were completely inadequate for the purpose of setting out and encompassing all of the specifications for the project down to the final finishes. There were few specifications incorporated into the drawings, and no lists of specifications appear to have been annexed to the drawings. None of this is surprising given that Stewart Engineering are engineers and not architects. The consequence, however, is that an enormous burden is placed on an adjudicator attempting to sift through conflicting evidence to determine what the intentions of the parties at the time of the making of the contract was as regards extras.

[4] The facts as I find them are as follows. This was a particularly large building project for these parties. It was a three story, six-apartment complex. The purpose of this project was to give the Defendants an income by participating in the tourist industry. It was built at La Pompe in the tourist island of Bequia in the Grenadines. The total cost of the building was to be between EC$800,000.00 and EC$900,000.00. The Defendants are not rich people. Most of the money for the

project came from an insurance payout from an accident. The balance of the financing was obtained from a bank. The project site is about 100 yards away from the home of the Defendants. Their windows overlook the site and they passed by it every day. The 1st Defendant is retired and does fishing now, while his wife, the 2nd Defendant, is a businesswoman in Port Elizabeth. The Plaintiff Company attempted to carry out the work set out on the plans to the best of its ability. This was a labour-only contract for the sum of EC$359,100.00. The Defendants were to supply building and other materials as and when ordered by the Plaintiff Company.

[5] The first matter of dispute between the parties is a claim made by the Plaintiffs for payment for an Extra Water Tank. There is a difference of recollection between the parties as to how there came to be extra space in the basement of the building that eventually came to be filled by the Extra Water Tank. The Plaintiff Company says that the Defendants were responsible for the excavation, and when the building was lined up it was realized that there was extra excavation that would have to be backfilled. The Defendants asked that the space be used instead for an Extra Water Tank. The Defendants say that they know nothing about building and plans. They claim that the Plaintiff's men excavated too much space in the foundations. They suggested that the space be used for an Extra Water Tank. They were promised, they claim, that the extra cost would only be the extra materials. In any event, the parties agreed that it would make more sense to fill the space with an Extra Water Tank than to waste it by simply backfilling it. I can take notice of the fact that Bequia is a dry island and that all the extra water storage that can be got is to the owners' advantage. The Plaintiff Company says that the parties agreed that that would be an extra to the contract because a lot more work would have to be done than to backfill the space. The Plaintiff Company claims that it was agreed that this extra as with the others would be valued and paid for at the end of the contract. The Defendants say, first, that they never agreed to any extras, and, secondly, that the Plaintiff's officer told them that there would be no extra labour cost for the Extra Water Tank. They were

promised, they claim that they would only have to pay for the extra materials needed for this Extra Water Tank, which they did. It is accepted by the Defendants that this water tank is a variation from the contract drawings, as it is not in the plan. They deny, however, that it is an extra in the sense that it is a variation that they should pay for.

[6] The Plaintiff Company claims that the Retaining Wall is not part of the plans, it is an extra. Carlton Stewart's evidence is that this wall was built right around the building, on the north, south, east and west. He claims that Mr Taylor requested the wall. Mr Taylor wanted it for the protection of the building and to enhance its value. Carlton Stewart claims that the Plaintiff Company agreed to construct the Retaining Wall with materials to be supplied by the Defendants and for labour to be paid for when construction was finished. Mr Taylor denies that he requested the Retaining Wall as an extra. He never discussed the Retaining Wall with the Plaintiff. From time to time, the Plaintiff's foremen simply gave him lists of materials to purchase, and he would purchase them. They had promised to give him a finished building, and the Retaining Wall was a necessary part of the project given the angle of the slope. He had always assumed the Retaining Wall was part of the contract plans. He was shocked at the end of the contract, he claims, to receive a bill for extra work for the Retaining Wall. I find that there is no Retaining Wall in the plans, however, and in the normal course of affairs in a building contract this is exactly what would be counted as an extra.

[7] Concerning the claim for the Front Yard Slab, the plans show a car park in front of the building. The Plaintiff Company constructed a five-inch thick slab with reinforcement in it where the car park is supposed to be. They claim a labour cost for this slab, certified by the engineer, as an extra. Carlton Stewart's recollection is that the car park was not originally in his plan. However, on being shown the site plans, he agreed that there was provision for a car park. He agreed that the planning department would not allow a commercial building of that sort to be built without a car park provision. He still insisted that the five-inch slab was extra work

requested by the Defendants. I find that the car park provision on the plans did not necessarily involve the pouring of a reinforced concrete slab. Having viewed the plans and heard the parties, I am satisfied that the plans did not provide for a five-inch reinforced concrete slab. This is exactly the sort of thing that in this building contract would have been an extra.

[8] I deal next with the 3 remaining items together. These are the kitchen tiles, the bathroom tiles, and the kitchen cupboards. The Plaintiff's evidence was similar for all three of these. First, these items were not on the plan, and so were not part of the contract. Secondly, the Defendants specifically requested them as extras and agreed to pay for the labour of installing them at the end of the contract. The Defendants deny that these were extras and claim that they are standard fittings for any ordinary modern construction. They deny they ever specifically requested them or agreed to pay for them as extras. As far as the kitchen tiles are concerned, the evidence is that this claim related not to the tiles on the floor of the kitchen but to the tiles on the wooden counter and on the splashboard behind the counter. The claim for the bathroom tiles refers not to the floor tiles but to the tiles going up the wall inside the shower. The claim for the kitchen cupboard refers to the overhead cupboard, not the cupboard on the floor. Clearly, it would have been impossible for the engineer to have put on his floor plans any of these items. They would have been put on the appropriate finish plans if an architect had been involved in doing the drawings. They would have been detailed in the finish specifications if an architect had done the plans and specifications. These are not matters that engineers are concerned to show in their drawings. From the evidence, I am satisfied that the Plaintiff Company contracted with the Defendants to provide them with a finished building according to the plans. I do not accept the evidence of the Plaintiff Company that the Defendants specially requested these three items. I am satisfied that these items were essential in a modern apartment for tourist use. They may not have been on the plans, but they were not extras in the sense normally understood.

[9] There is no point in complaining that the engineer did not supply the parties with the correct standard form of contract, including all of the appropriate conditions and specifications. The Court will have to do the best it can with the materials that the parties themselves had to work with. Little help is to be gleaned from the law, as the texts and authorities do not appear to have anticipated a situation such as this. The Defendants relied on the Trinidad case of Nurse v Campbell (1966) 10 WIR 139. This judgment of the High Court dealt with a case of *quantum meruit* in a lump sum contract for materials and labour. Our case is not a case of a claim in *quantum meruit*. However, Kelsick J, as he then was, relying on Emden and Watson's Building Contacts and Practice, 6th edition, at page 172, gives a number of general rules applying in building contract cases. The Defendants urge the Court to apply these rules to the facts in this case. The first rule counsel asks the court to apply is taken from page 142 of the judgment at the letter I:

> In the case of a lump sum contract, the owner will not, even where he assents to alterations, be liable to pay more than the contract price, unless he was informed, or should have known that additional labour would be incurred; and if the alteration is by way of concession to the builder, he cannot recover more than the lump sum.

And later, at page 143 at the letter H:

> The builder is under an obligation to do all indispensable and necessary works to make the building complete, even though such works are not described in the specifications. If the particulars shown in the drawings are impractible or calculated wrongly, or their costs or extent are understated in the specifications, the builder cannot recover any extra expense incurred in completing the work;

The Defendants also relied on the English Court of Appeal case of Courtney and Fairburn Ltd v Tolaini Bros (Hotels) and anor [1975] 1 All E R 716. This was a

building contract case where the price had not yet been agreed. In our case, the price was agreed; there was simply no provision for extras, nor any method for determining the price for alleged extras.

[10] Counsel for the Plaintiff Company relied principally on Hudson's Building and Engineering Contracts, 10th edition, 1970. Counsel referred the Court to page 530, which deals with the power to order variations. The text and illustrations refer to cases where the power to order variations is contained in the building contract itself, hardly applicable in our case. Counsel also relied on the learning in the paragraph at page 543 dealing with the situation where a builder can recover payment for extra work without an order in writing. An examination of the text reveals that the author anticipates that the contract will provide a clause dealing with extras, exactly what is missing in our case. Counsel also drew the Court's attention to the learning at p 548 under the rubric, "Where the Extra Work is Outside the Contract". A perusal of the text does not reveal that it is applicable to the facts in this case. The Plaintiff Company also relied on the High Court case from Barbados of Moore and others v Smith (1972) 19 WIR 376. This was a claim in *quantum meruit* for reasonable remuneration for work done. It is not easy to see how this applies in the present case, as the Plaintiff Company in our case has not claimed in *quantum meruit*.

[11] This is a case where the Defendants, the owners or employers under a building contract, relied on their engineer to provide a form of building contract that would result in them getting the building they wanted for the sum of money they agreed to. They had $800,000.00 in savings. The building in the end cost more than their savings, and they were forced to borrow about $100,000.00. After furnishing, the building has cost them nearly $1,000,000.00. They are not prepared to pay one cent more than they are contractually bound to. They agree that the Extra Water Tank is an extra, but they say that the foreman of the Plaintiff Company, the person they dealt with principally throughout the construction, promised them that the only extra they would have to pay was the cost of the materials for the extra

tank, which they have paid. They deny asking for any other variation or agreeing to pay the cost. Their engineer has sent them a letter certifying the extras claimed by the Plaintiff. I give very little weight to this certificate. It is not that the evidence is that the engineering company and the construction company are constituted by brothers who work closely together in the construction industry in Bequia. What is significant is that the engineering company which selected the standard form of contract for execution by the parties, produced a form which made no provision for extras. The Defendants have no experience with building contracts, while such contracts are an essential part of the trade or business of the Plaintiff Company. The Plaintiff Company must know that extras are frequently a contentious matter between builder and owner. That is why the conditions in a building contract normally set out in great detail the steps that are to be taken for requesting, valuing, certifying, and paying for extras. It was essential for the Plaintiff Company to have ensured that proper evidence of any request for or agreement of the Defendants to pay for extras was obtained. This is particularly so where, as in this case, the contract had been so badly prepared that it omitted all of the normal conditions, including the conditions that provide for extras. Given the evidence that the engineer frequently visited the site, observed the work in progress, and spoke to the Plaintiff's employees and officers and to the Defendants, it would have been a simple matter for the Plaintiff Company to have negotiated and put into writing and had signed by the Defendants any request for extra work and any fees it thought were due to it for extra work done at the time when the extra work was being done. To have left it to the end of the contract to begin considering the question of payment for the extras borders on extreme carelessness on the part of the Plaintiff Company.

[12] Given the matters set out above, I am not satisfied that the Defendants either requested or agreed to pay for the alleged extras. The Certificate of the engineering company is worthless as the building contract made no provision for the engineering company either unilaterally or, as happened here, in consultation with the Plaintiff Company to certify the value of extras. The claim of the Plaintiff

Company is therefore dismissed with costs to the Defendants to be taxed if not agreed.

I D MITCHELL, QC
High Court Judge