

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2010/0662

BETWEEN:

KHOULY CONSTRUCTION & ENGINEERING LIMITED

Claimant

AND

EDMOND MANSOOR

Defendant/Ancillary Claimant

AND

JESSY KHOULY

Ancillary Defendant

Appearances:

Sir Gerald Watt Q.C and Mr. Jarid Hewlett of Watt and Associates for the Claimant

Mr. Kelvin John, Mr Kendrickson Kentish, Mr. Loy Weste led by Mr. Anthony Astaphan S.C. for the Defendant/Ancillary Claimant

Mrs. Eleanor Solomon for the Ancillary Defendant

2017; February 14

RULING

- [1] HENRY J.: By Claim Form filed 7th October 2010, the claimant seeks damages for breach of a construction contract. The defendant disputes the claim and has counterclaimed for damages for defective work and overcharges. The Defendant has also asserted a claim against the Ancillary Defendant. The claimant submits that Rule 8.7, 10.5 (1) and 16.4 of the Civil Procedure Rules (CPR) requires the defendant to set out all of the facts upon which he relies in his Defence and

Counterclaim; **that the defendant's claim is rooted in contract and there is no claim of** negligence against the claimant and that certain matters or material facts have not been pleaded or properly pleaded by the defendant.

- [2] The claimant therefore submits that the defendant ought not to be allowed to lead or rely on any evidence of the following allegations:
- (a) Any alleged structural integrity or inability of the roof and/or rafters as agreed by the claimant and defendant and constructed by the claimant;
 - (b) Any alleged electrical defects;
 - (c) Any alleged inadequacy of the soil and concrete;
 - (d) Any alleged improper construction of the concrete roof as agreed which resulted in substantial cracks and numerous leaks through several rooms of the building or improper laying of the tiles which contributed to the leaks;
 - (e) Alleged defects which allegedly occurred or identified post the Chris Conway inspection in March 2010 and/or S. Amin mediation meeting;
 - (f) Any alleged engineering or design negligence on the part of the claimant.

- [3] The claimant refers the court to the cases of Eastern Caribbean Flour Mills Ltd v Ken Boyea¹ Three Rivers District Council v Bank of England (No. 3)², Charmain Bernard v Seebalack³ and Panatelli Associates Limited v Corporate City Developments Number Two Ltd.⁴

- [4] The claimant further submits that according to the cases, if one has pleaded a sufficiency of particulars, one is allowed to add to those particulars of the same genus in the witness statements or expert reports. One can only legitimately do so however, if one has already complied with the requirement to properly plead his/her case and the material facts upon which one rely. However, if **one does not properly plead one's case before the trial, one will not be allowed to rely on the** evidence, which is not supported by the pleadings. The claimant contends that the challenged evidence is not supported in the pleadings and the evidence cannot go beyond the pleaded case. The claimant points to the contents of the expert reports of Oliver Davis, Philip Sobers and Hugh Schamber as not being particularized in the pleadings. Further, no fees were claimed in respect of their services in the itemized special damages. The claimant asserts that it is therefore entitled to a ruling that the evidence should be confined to the case pleaded.

Defendant's Submission

- [5] Counsel for the Defendant submits that **the claimant's entire submission** is entirely off point. He states that there was no intention to plead a case in negligence at all. The decision was taken to bring the matter in contract because of the manner in which the issues unfolded. The construction

¹ CA 12 of 2006

² [2001] UKHL 16

³ [2010] UKPC 15

⁴ [2010] All ER (D) 110

defects alleged came to light months, or years after the pleadings were filed. The defendant admits that there are particulars not contained in the pleadings. But asserts that the defendant pleaded what he had and warned the other side what was going on.

[6] The case for the defendant, he states, is a case of breach of contract to construct a dwelling house. An implied term of the contract between the parties is that the claimant would use all proper skill and care in carrying out the contract. The claimant has admitted that this implied term was in place. According to Counsel, paragraphs 15, 23, 26, 27, 29, 33 (1 – 4), 34, 37 and 39 clearly set out the defendant’s case in such a way that the claimant knew the case they were coming to meet. The defendant denies that there is nothing in the pleadings to support the above-mentioned expert reports. His position is that once sufficient instances of breaches of contract have been made, evidence of additional instances can be allowed. The defendant therefore concludes that the Defence and Counterclaim are properly pleaded. He asks the court to look at the pleadings as well as the witness statements and to marry them to find in his favour.

[7] **The issue for the court is the adequacy of the defendant’s pleadings including the sufficiency of the particulars.**

[8] It has been said that the basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it⁵. Lord Woolf in *McPhilemy v Times Newspapers Ltd*⁶ took a similar approach when he stated:

“The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of the party’s witness statement, will make the detail of the nature of the case the other side has to meet obvious. . . Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader. This is true both under the old rules and the new rules.”

[9] In *East Caribbean Flour Mills Ltd v Boyea*⁷ the court concluded that once the material in the witness statement and report could properly be regarded as particulars of allegations already made in the pleadings such material was relevant and, therefore admissible.

⁵ Per Saville LJ in *British Airways Pension Trustees Ltd v Sir Robert McAlpine & Sons Ltd* (1994) 72 BLR 26, 33-34.

⁶ [1993] 3 All ER 775,

⁷ Civil Appeal No 12 of 2006, St. Vincent and the Grenadines

[10] Before examining the specific material objected to by the claimant, it is helpful to look at certain aspects generally pleaded in a claim of this nature. Chitty on Contracts section 37-074 identifies certain implied terms including the following:

Standard of workmanship: the contractor must carry out his works using all proper skill and care, and the standard required in the particular case is to be gathered from all the circumstances of the contract.

Fitness of material: where the contractor is responsible for the supply of materials for the building works then there will be an implied warranty that the materials (1) will be reasonably fit for their purpose; and (2) will be of good quality. In each case, the warranties can be excluded or negated by reference to the express agreement of the parties, or by reference to evidence of the intentions of the parties. In order for the implication to arise there must be reliance on the skill of the contractor.

Fitness of works: there will be a further implied warranty that the work carried out by the contractor will on completion be reasonably fit for its particular purpose where: (1) the employer makes known to the contractor the particular purpose for which the building is required; (2) the work is of a kind which the contractor holds himself out as performing; and **(3) the employer relies on the contractor's skill and judgment.** The scope for the implication of a warranty as to fitness for intended purpose will vary considerably depending upon the nature of the express obligations of the contractor.

[14] **The defendant's position is that he has pleaded a breach of the implied** term of the contract that the contractor would use proper skill and care. This is the basis of his claim and basis of the reports of the expert.

The Pleadings

[15] Paragraph 2 of the Defence pleads the existence of a contract between the parties consisting of an agreement dated 14th February 2008 together with two letters dated 7th February 2008 and 14th February 2008 written to the defendant. Paragraph 6 pleads that by the agreement between the claimant and the defendant, the claimant indicated that it had thoroughly evaluated the drawings and the project manual and agreed that the claimant could fully comply with all the architectural, structural, electrical and plumbing specifications as well as the relevant schedules and details, and Raymond Khouly confirmed his ability to comply with specifications, schedules and details by affixing his initials on each page of the drawings as well as each page of the project manual.

[16] Paragraph 7 of the Defence pleads an implied term of the contract in the following terms: "It was an implied term of the contract between the claimant and the defendant that the claimant would carry out its works using all proper skill and care."

[17] Paragraph 15 states:

“The defendant contends that the construction of the concrete roof as agreed between the parties, was not properly constructed by the claimant, or properly engineered by RAYMOND KHOULY and has resulted in substantial cracks and numerous leaks throughout several rooms of the building. Further the tiles covering the roof were improperly laid which contributed to the leaks hereinbefore mentioned. In addition the **(varnish/paint) used on the inner portions of the ceiling was of inferior quality.**”

- [18] The claimant contends that missing are the particulars of the standard required in this case. As pleaded, paragraph 7 is general. The pleadings need to set out the facts of what was required under the circumstances of the contract.
- [19] Further, no implied fitness of works has been pleaded. The defendant has also omitted to plead any express term of the contract breached or any particular provision of the work manual. **Accordingly, the defendant’s case is confined to a breach of the implied** term of the contract to use skill and care. The only relevant evidence therefore will be evidence to show the manner in which the claimant carried out its works under the contract.
- [20] **In regard to the roof, the claimant’s position is that there are no particulars pleaded of how the roof** was not properly constructed, or how the roof was improperly laid. This is only to be found in the expert reports.
- [21] The parties are in agreement that as pleaded, the case is based only on breach of contract. The defendant accepts that there is no case of Negligence pleaded against the claimant or Raymond Khouly. The defendant also concedes that there is no pleading in support of soil tests. There is also agreement that issues in regard to the retaining wall are not to be considered.

Defective Construction of the Roof

- [22] Paragraphs 7 and 15 of the Defence and Counterclaim allege a lack of skill and care in the construction of the concrete roof as agreed resulting in cracks and numerous leaks. It is alleged that the tiles covering the roof were improperly laid which contributed to the leaks. The Conway report was incorporated by reference into the Defence and Counterclaim. That report sets out details of how the roof was improperly constructed and the tiles improperly laid. It also speaks to structural integrity or inability of the roof and or rafters. Specifically paragraph 15; paragraphs 25 and 26; and paragraph 27 consist of allegation of improper construction of the roof.
- [23] After the Defence and Counterclaims were filed, further expert reports were obtained. Specific objection is taken to the reports of Oliver Davis, Hugh Schamber and Philip Sobers. Although the reports were served on the claimant, the pleading was not amended to include the details of their reports.
- [24] The Davis Report is headed Analysis: Design and Construction of Master Bedroom Roof. It speaks of rafters and ring beam. It states that the reinforced concrete roof system is resting on the ring beam around the perimeter of the room. The slab should be structurally tied into the ring

beam. It also concludes that the vertical re-bars shown are not sufficient to form the structural connection required to transfer the loads in the event that they need to receive support from the ring beam during super-imposed live loads. It concludes by recommending a supplementary system of timber trusses below the timber rafters as a supplementary support system.

- [25] The Schamber report is headed Roofing Observations and Assessment. In it he sets out the existing roof conditions, identifies certain roofing problems and defects and then provides some solutions. As to the roofing problems identified he states that he observed water ingress and finish damage to both the interior and exterior walls along the lower eave of the vaulted roofs in many locations. He observed that rainwater was obviously getting through the concrete tile roof system and leaking into the exterior walls where it would exit into the building interior or behind and below the exterior gutter system. He further identified the roof system defects. He states that the source of water ingress problems is that the tile roof system installation is not in keeping with international industry standards or the concrete tile manufacturer installation requirements. The remainder of the report contains further particulars of the said roof defect.
- [26] The Report of Philip Sobers dated 11th July 2012 states the purpose of the visit and subsequent report was to inspect the cracks that were visible in some elements of the building. He identified cracks next to the front steps, cracks where the front steps join the main building, in the entertainment room and in the slab of the garage. Mr. Sobers gave his opinion generally on the reasons why reinforced concrete might crack and commented on the cracks in the specific areas.
- [27] In the **court's view the Davis and Schamber** reports speak to additional instances of the lack of skill and care in the improper construction of the roof including faulty laying of the tiles and **substructure**. In the **court's** view the reports amount to additional particulars of allegations already made in the pleadings, including in the Conway Report. The Sobers report however, identifies defects other than those pleaded in paragraph 15 or identified in the Chris Conway report and/or S. Amin mediation meeting and as such constitutes new particulars of breach of the implied term of the contract to use proper skill and care not included in the pleadings. Upon receipt of the Sobers report, the pleadings ought to have been amended accordingly.
- [28] Counsel for the defendant requests that if the court finds that the particulars in the Sobers report ought to have been pleaded, that the defendant be allowed to amend. Counsel reminds the court that initially paragraph 15 of the Defence and Counterclaim was admitted by the claimant. However, shortly before these submissions an amended Reply and Defence to the Counterclaim was filed in which the claimant denied paragraph 15 and asserted that the allegations were untrue.
- [29] During arguments, Counsel for the claimant had consented to allow the defendant to amend **paragraph 15 in light of the claimant's** late amendment. Counsel for the defendant had submitted that because of the admission of the paragraph, in their preparation for trial, defendant would not have considered any additional particulars necessary.

- [30] After the matter was adjourned, the court received a letter from the Attorneys for the claimant in which Counsel informed the court that he was led into not objecting to the relevant particulars by **the attractiveness of Sir Gerald's objection. That upon reflection he believes Sir Gerald's objection** has no merit and accordingly wished to withdraw his non-objection. Counsel for the claimant makes the point that paragraph 15 and the other paragraphs objected to were incurably bad when filed. Significantly, the defence without the necessary particulars were filed **before the claimant's** reply. Consequently, the defendant ought not to be heard to allege that he was misled or prejudiced into filing his defence without particulars by the filing of the Reply and admission, which came afterwards.
- [31] The fact is that even if the late amendment by the claimant had not taken place and the particulars of paragraph 15 had remained admitted, the Sobers report would not have been admissible since no pleadings to support such particulars are contained in the Defence and Counterclaim. The court appreciates that at the time the Defence and Counterclaim was filed, the defendants were not in receipt of the Sobers report and therefore could not have pleaded the defects identified therein. The claim was filed in October 2010 and the Defence and Counterclaim was filed in January 2011. The Sobers report was completed in July 2012. It was served on the claimant shortly thereafter.
- [32] **Blackstone's Civil Practice**⁸ states that although amendments can be made during the course of the trial, and even during closing speeches, lateness is one factor to be considered on an application for permission to amend. Lateness is often combined with related factors such as whether the party seeking to amend can be criticised for failing to apply earlier. In *Stansburys v Pashley*⁹ it was held that where the proposed amendments had been raised in earlier statements of case and affidavits, delay in applying to amend should not, of itself, preclude permission being granted. Here the claimants were in receipt of the Sobers Report for over two years before the commencement of the trial. Further, the court is of the view that both parties are at fault for the late application to amend. In a case of this nature with multiple reports and numerous documents, the parties ought to have met and agreed the reports to be used at trial and should have cooperated with each other. **In the court's view, the amendment ought to be allowed.**
- [33] Accordingly, the court finds as follows:
- 1) The defendant has pleaded a claim of breach of contract specifically, breach of the implied contract between the parties that the claimant would carry out its works using all proper skill and care. .
 - 2) No claim in negligence has been pleaded. No pleading has been made to support soil tests and no claim has been made in respect of electrical defects.
 - 3) The court will not allow an amendment to expand the claim at this stage to include breach of other implied terms not previously pleaded. Therefore no evidence will be allowed in regard to the lack of fitness of the materials such as concrete and soil.

⁸ Paragraph 31.5

⁹ (2000) LTL 6/4/2000

- 4) The court will allow an amendment to plead the particulars in the expert reports of which the claimant has had notice for in excess of 2 years. The court will also allow an amendment of the special damages to include the profession fees of the said experts. The court will also allow the defendant to amend to include the omitted facts of what was required under the contract in regard to the standard of workmanship.
- 5) Accordingly, leave is granted to the defendant to amend his defence and counterclaim as follows:
 - (a) to particularized the defects mentioned in the Sobers Report;
 - (b) To amend the special damages to include professional services and consultation fees in respect of Davis, Schamber and Sobers;
 - (c) To set out the standard of workmanship required under the contract.
- 6) The defendant is to file and serve the amended defence and Counterclaim in accordance with the above no later than 28th February 2017. Re-amended Reply and Defence to Counterclaim, if necessary, to be filed within 21 days thereafter. The matter is adjourned to a date to be fixed for resumption of the trial.

CLARE HENRY
High Court Judge
Antigua & Barbuda