

IN THE SUPREME COURT OF BELIZE, A.D. 1998

(SUMMARY PROCEDURE)

Action No. 28/1998

BETWEEN (CECILIO SHAW PLAINTIFF
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(KIER INTERNATIONAL LIMITED DEFENDANT

Before the Hon. Justice T.J. Gonzalez

Mr. Lutchman Sooknandan for the plaintiff
Mrs. Magali Marin Young of Barrow and Williams for the defendant

JUDGMENT

This case concerns the terms of an oral contract for works in the building Trade. Although this case was tried under the Summary Procedure, the filing of a defense and counter claim assisted the court in identifying the issues to be resolved. The evidence before the court came from the plaintiff himself and two employees of the defendant company who were directly concerned with the works, the quality of works performed by the plaintiff and the remuneration therefore.

These persons were all witnesses directly involved in the agreement entered into, the performance of the works, and the payments made. Their demeanor, condour, and partisanship had to be given the consideration these circumstances required.

Of utmost importance is the fact that the defendant had contracted to perform the works for the Central Bank of Belize to a standard acceptable to the Bank. The defendant for its part sub-contracted the work in issue to the plaintiff, who had previously been one of its employees, to perform the works in a workman like manner acceptable to the defendant. The supervisors employed by the defendant did oversee the works and inspected those works before payments were made for works completed. The Central Bank had an employee who inspected on its behalf but who had no direct relation with or supervision over the plaintiff. Remuneration for completed works were made on a fortnightly basis after the measurement and assessment by the defendant's employee (supervisor). In other words they measured and approved the works for payments. On occasions, there were remedial works done by the plaintiff when the work was of an unsatisfactory standard. There were conflicting evidence as to whether or not retention money was kept for unsatisfactory work but nothing turns on that except that it strengthen the plaintiff's case that his work was done to an acceptable standard up to a point in time.

Works under the agreement commenced on the 19th June, 1997, and came to an end on the 20th February, 1998 after which complaints of poor workmanship surfaced following the hiring of more workers by the plaintiff in January of 1998. This was not controverted by the plaintiff during the trial. Support is also found for this fact by Exhibit N.T.-iv, which shows an advance being made on the 23/1/98 on works up to the 22/1/98. The support is that a special meeting was held with the plaintiff by senior representative of the defendant on the 13/1/98 over their concerns about the quality of his work. It is to be noted that the money was for payments to be made for satisfactory work not advances.

The issues as to works to be performed and the remuneration therefore are clear for the most part. Plastering of walls at ½ inch was to be paid for at \$6.50 per square yard and at ¼ inch was to be paid for at \$3.50 per square yard. Revealing was to be paid for at \$1.00 per foot. The issue in dispute is whether or not revealing and “harris” meant one and the same type of work. The plaintiff case is that “harris” attracted \$1.50 per foot as distinct from the revealing. The defendant’s position is that revealing or “harris,” also referred to as mature work, was the leveling of protrusions and was in fact one and the same thing for which payments was agreed at \$1.00 per foot.

The other issue requiring resolution concerns the laying and filling of blocks, and as to what works this entailed and the payments therefore, and refilling of

blocks, what this entailed, and what payments were to be made for that work. The plaintiff claimed, payment claims \$2.00 per square yard for refilling while the defendant maintains that filling was a part of the laying.

To resolve these issues the court reviewed all the evidence on a balance of probabilities and arrived at the conclusion it considers just in finding what in fact and according to the evidence, were the terms of the oral agreement entered into concerning all the works. In my view that there was a contract of employment by the defendant for the plaintiff to perform works for agreed rates of payments upon completion of those work is not in doubt. That a gross figure for all payments was arrived at by both parties is also not in doubt. Both parties kept records, although there are difference as to the gross and net amounts. The defendant gross figure is \$44,750.00 while the plaintiff's is \$43,496.83. Actual payments made according to the plaintiff was \$36,615.48 while the defendant's after reconciliation, amounted to \$37,473.00. The defendant admitted that there is an outstanding amount but, seeks to set off this against its counter claim, counter charge for remedying unsatisfactory work.

It seems to the court that the evidence on a whole supports the fact that until January 1998, the standard of works were satisfactory to the defendant. This is evidenced by the payments made only after inspection were carried out to satisfy the defendants' inspectors as to the quality of work actually completed. When the

Central Bank through its employee found work below satisfactory standard, this was not a standard below that which was acceptable to the defendant when completed by the plaintiff. Most of the remedial work performed after the 20th of February, 1998 would therefore be as between the defendant and the Central Bank, and not as between the plaintiff and the defendant. Any contra charge up to 20/2/98 and for two weeks, namely, ten working days for remedial work, after the plaintiff's employment ceased would be as between the plaintiff and the defendant for defects pointed out to the plaintiff on or before the 20/2/98.

However, the defendant in its counter claim for a set off is required to prove the extent to those contra charges as laid down in keeping with the principles in the case of *Burham - Carter v. Heple Park Hotel {1948} T.L.R. 177* cited by the plaintiff's counsel. Egbert Dakers evidence which is relied upon shows that two weeks work and not 62 days as claimed would suffice. The number of days having been proven, the court finds that the remedial work would require more than just labour. It also needed materials. The court relies upon exhibited statement of account which supports to a certain extent the need for remedial work, except that contra charges specified for August, September and December would not support in that payment up to that point as payments were made regularly after inspection as to the quality of work done. Those for February are acceptable to the extent of the \$270.00 for "making good wall" but necessary adjustments needed to be made

for plaster compound and the thirty-five days of work. Adjustments resulting in ten days at \$40 = \$400.00 + 37/35 x 10 buckets compound = 10.57 at \$30.00 = \$330.00 (10.57) totaling \$1,000.00 as contra charges be set off through counter claim against any outstanding sum due.

As an aid in arriving at its decision, the court considered the judgment of the justices of appeal in the Belize case of *Adolphus V. Popper Appeal No. 2 of (1986) BZ L.R.* at page 130 where they had found that there existed between the parties a contract of employment under which one party was engaged to do work for the other for payment which entitled the employed to the agreed remuneration. In the *Adolphus* case, their Lordships cited with approval from the case of *Way v. Letilla {1937} 3 All ER* at 759 the principles of law enunciated by Lord Athins which aided them in their findings. In the case of *Adolphus v. Popper* their Lordships said “. . . . the general rule as indicated by Lord Athins . . . is that where a contract expressly provides for a fixed remuneration on specified events, the court cannot award any other remuneration on those events or award any remuneration if they do not occur . . .” There are many employments, the remuneration of which is by trade usage . . if the amount . . . has not been finally agreed, the quantum merit shall be fixed after taking into account what would be reasonable . . . in the circumstances, and fixing a sum accordingly. This has been an every-day practice in the courts. But if no trade usage assists the court as to the

amount . . . it appears to me that the court may take into account the bargaining's between the parties . . . as evidence of the value which each of them put upon the services . . .”

Bearing those principles in mind, the court finds that the claim for refilling works made by the plaintiff amounting to 2,624.23 yards at an additional payment of \$200.00 per square yard has not been proven. From the evidence some wall or walls were in fact blocked up but the specified work appears to have been the laying of blocks which entails the filling of alternate cavities. This was agreed to attract .65 per block laid. This together with the plastering would complete the work unless cleaning/leveling of protrusion became necessary which work is also referred to as “harris.” The cleaning/“harris” attracts \$1.00 per foot payment. There is no separate payment of \$1.50 per foot for “harris” as the plaintiff claims or the gross sum referred to earlier would have differed substantially. To arrive at these conclusions, the court has considered well the evidence of the plaintiff and the two other witnesses weighing it all to be satisfied as to what is the normal building trade practices. Mr. Daker's evidence was found most valuable as to the extent of works he was supervising. The plaintiff for his part appears to be a skillful worker but lacks knowledge of some of the formal trade practices to assist the court. Mr. Topling's evidence shows that payments were made on a regular basis for works completed. The question therefore would be why would plastering

and “harris” which are finishing works be paid for and not payment for block laying, filling and ancillary work which must first be completed to go on to plastering. There is no reasonable answer to help the plaintiff’s case on those issues. In addition, the payment vouchers exhibited shows work description and account codes which differ and would support plastering, blocking, filling and “harris” addressed as 01B,103, 01B110 and 01A110. The answer then is that records were maintained by both the plaintiff and Mr. Toplin but there were errors in the final tally which upon reconciliation, showed a total of \$44,754.80 was due for works completed by the plaintiff of that sum \$37,473.00 has been paid to the plaintiff. A balance of \$7,281.80 therefore remains outstanding for payment to the plaintiff which when set off by \$1,000.00 contra charges entitled him to \$6,281.80.

The plaintiff’s claim therefore succeeds to the extent of \$6,281.80. The plaintiff is awarded cost as agreed or tax and interest of 6% on the judgment from the day of the judgment until full payment.

Judgment accordingly.

Dated this 9th day of May, 2008.

T.J. GONZALEZ
SUPREME COURT JUSTICE

