

IN THE SUPREME COURT OF BELIZE, A.D. 2010

CLAIM NO. 343 of 2009

OSCAR. D. ROMERO

CLAIMANT

AND

CARLOS RAMIREZ

DEFENDANT

Hearings

2010

24th February

17th March

29th March

14th May

1st June

Miss Deshawn Arzu for the Claimant.

Mrs. Andrea McSweaney-McKoy for the Defendant.

LEGALL J.

JUDGMENT

The Claim

1. This is a claim by the claimant against the defendant for breach of an oral joint venture agreement to do excavation works, which included cleaning, filling and excavation of material for selling from an area in

Siene Bight Village, Placencia Peninsula, Belize. There is a dispute as to the date of the agreement. In the statement of claim, it was “In or about October 2007.” In the claimant’s witness statement, it was “In or about October, 2008.” The defendant states that the agreement was made in November, 2008. The excavation works were to be carried out using an excavator and Mack truck and trailer. It was agreed by the parties that the materials from the excavation works would be sold and the proceeds would be shared equally between them.

2. The complaint of the claimant is that the defendant carried out excavation works and collected monetary payments without accounting to him for same, and without equally sharing the payments. The claimant, in the statement of claim, estimated that the defendant earned approximately \$148,000 from the excavation works; and alleged that the defendant failed, not only to account to him for this sum, but also failed to share it equally.
3. The claimant also stated that he was the owner of the excavator, Mack truck and trailer; and the defendant, because of negligence or recklessness, caused damage to these pieces of equipment which resulted in the claimant incurring expenditure to repair the equipment. The claimant therefore brought a statement of claim against the defendant claiming as follows:

“1. Damages for breach of contract.

2. An accounting of monies received.
3. Interest at rate of 6%.
4. Further or other relief.
5. Attorney fees and costs.”

4. The allegation of the claimant is that he, as owner, had to provide the equipment for the excavation works, and the defendant had to provide, or cause to be provided, the labour required for the excavation works. Both of them were responsible for expenses, such as labour costs, fuel, oil and maintenance of the equipment. In order to prove his ownership of the equipment used for the excavation works, the claimant tendered in evidence a sales agreement dated 24th May, 2008 between himself as purchaser and one Sam Patton as vendor.
5. The agreement gives identification details of the excavator, Mack truck and trailer, and states a purchase price of US\$80,000 for all three items of equipment. The agreement required a down payment of US\$30,000 by 15th June, 2008 and the balance of US\$50,000 to be paid by 15th June, 2009.
6. The sales agreement states that the “Purchaser is purchasing as is where is, transferable title of vehicles to the purchaser’s name or his appointees” The agreement was signed by Sam Patton and the claimant, and witnessed by two witnesses. The claimant testifies that he has not yet completed payment for the equipment, and has paid to date about \$150,000 Belize. This is the claimant’s evidence that he is owner of the equipment, and that in accordance with the oral

agreement, he provided the equipment to carry out the excavation works.

7. To further support his claim that excavation works were carried out by the defendant for which the defendant received \$148,000 Belize, and from which he did not get his equal share, the claimant, first of all, relied on two excavation permits authorizing excavation of sand, silt and mud from two sites at Placencia. The permits were issued “To Oscar Romero for Belize Land Developers and Construction Co. Ltd.” The claimant says that he was affiliated with this company. One permit No. 174 of 2008 was issued on 22nd October, 2008 and valid up to 31st December, 2008; and the other permit was issued on 11th November, 2008 and valid up to the said December, 2008. The first permit related to Lot 72 Placencia Plantation (Site A) and the other permit related to Parcel 353 Siene Bight (Site B), all at Placencia Peninsula. Both permits stated that the extraction of sand, silt and mud were generally not to exceed 5000 cubic yards of materials, but with the approval of the Inspector of Mines, could exceed this amount up to a maximum of 16,000 cubic yards.
8. Secondly, the claimant relied on a report, done at his request, by the Inspector of Mines, Craig Elliott Moore of the Geology and Petroleum Department. In his report, which was tendered in evidence by consent, Moore found that in relation to the Site A in permit No. 174 of 2008, “Volume extracted: approximately 1100 to 1300 cubic yards;” and in relation to the Site B in permit No. 178 of 2008, “volume extracted: approximately 7300 to 8100 cubic yards.”

9. It is the evidence of the claimant that he caused a company, A.L. Construction Company Ltd., of lot 84 Maya Beach, Placencia, to provide an estimate of the monies earned for the amount of materials excavated; and that the company, based on the market value for a truck load of materials, the company estimated that the sum of approximately \$32,725 was earned from Site A – permit 174 of 2008; and \$261,950 from Site B – permit 178 of 2008 by the defendant.

10. Other works were carried out using the equipment, including works at Larubeya Marina, for which the claimant alleged monies were paid to the defendant; but which, according to the claimant, were not shared equally with him. The defendant admitted that he was paid around \$25,000 for the Larubeya project, but that he shared the amount with the claimant by paying the claimant's share of the fuel and workers expenses.

11. The claimant also alleged, in the statement of case, that the defendant caused damage to the three items of equipment, and was negligent in their use. Yet the claimant did not claim damages for negligence in the statement of claim, nor did he plead any particulars of negligence. The claimant alleged that damage was done to the tyres and rims of the trailer, tyres of the Mack truck, and damage to the excavator. In relation to the Mack truck, the claimant alleged that he spent approximately \$5,116.00 on repairs. He also tendered estimates for further repairs marked O.R. 19, 20, and 21. An estimate for damage caused to the excavator in the approximate amount of \$4,113.00 was

also tendered as exhibit O.R. 22. Damage to the trailer was estimated at approximately \$4,649.92 in exhibit O.R. 23.

Denials by Defendant

12. The defendant states that he is part owner of the three items of equipment mentioned above, for which the claimant claimed sole ownership. The defendant states in his witness statement and his defence that he contributed \$64,000 towards the purchase price of the equipment. He said he had no documentary evidence that he contributed \$64,000 for the equipment because, according to him, the claimant did all the paper work. In his witness statement and defence the currency of the amount allegedly paid to the claimant in relation to the purchase of the equipment is not given. But in his oral evidence in re-examination, he stated that the sum of US\$64,000 was paid to the claimant in two installments; the first US\$40,000 and the second US\$24,000. He stated in re-examination, but not in his witness statement or defence, that the US\$64,000 came from clearing 3 ½ acres at Corozal. Since the proceeds of the work were to be shared equally, his contribution, according to him, to the purchase of the equipment was his share of the proceeds, the sum of US\$32,000 which is equivalent to BZ\$64,000.

13. The defendant also denied that he received \$148,000, as claimed by the claimant in the statement of claim, for the excavation work done under the agreement. In relation to Site A – permit 174 of 2008 – he said he carried out excavation works there between 24th November and 14th December, 2008 and excavated 45 loads of material. He said

he sold twenty loads and the remaining twenty-five were left at the site to fill lots. He said the amount of \$6500 which he received for the sale was used to pay workers, and to purchase diesel and hydraulic oil. He said he completed excavation at Site A on 14th December, 2008 and proceeded Site B, because the permit for that site would have expired on 31st December, 2008.

14. According to the defendant, he started excavation at Site B (Siene Bight) about 15th December, 2008 and excavated 1455 cubic yards of material, for which he received \$31,800. He said it would have taken over two months, once there was enough fuel, and the workmen were paid on time, for him to excavate at Site B, 8100 cubic yards of material, as claimed by the claimant and the report made by Moore. He said he stopped working with the claimant on 27th December, 2008. He said he paid the claimant \$27,000 which amounted to an equal share of the proceeds from the excavation works carried out in pursuance to the joint venture agreement.
15. The defendant also denied that he caused any damage to the items of equipment or that he was reckless or negligent in the use of the equipment.
16. The defendant, as we saw above, said that he paid the claimant \$64,000 towards the purchase of the equipment. He also alleged that the claimant did excavation works with the equipment which resulted in the sum of \$23,000 and that he was entitled to half of the amount based on the joint agreement. The defendant therefore counterclaimed

against the claimant for \$64,000 – not mentioning therein the type of currency allegedly paid towards the price of the equipment – and \$11,500 as his half share of said excavation works allegedly done by the claimant, making a total of \$75,500.

Ownership of Equipment

17. The question is who provided the funds to purchase the equipment. The claimant testified that he provided the funds and that the defendant did not make any contribution in that regard. It is the defendant who has counterclaimed for the \$64,000 which he said he paid towards the purchase of the equipment. The burden is on him, on a balance of probabilities, to prove the counterclaim that he did so. To discharge that burden all he has produced to this court is his evidence to that effect. There is no receipt or any document to support his evidence of payment of the money. Nothing from any bank or other financial institution; nothing from any witness; and no dates or time of payment were given in evidence to support the payment. Moreover, as we saw above, in his oral evidence in court the defendant said the claimant was paid \$64,000 US, but in his witness statement and his defence, he failed to mention the type currency of the payment, and that it was paid to the claimant for work on 3 ½ acres of land at Corozal. As a matter of fact, he failed to mention in his witness statement and defence any amount in US currency.

18. Moreover, in a letter to the claimant dated 20th January, 2009, the defendant wrote “Regarding item/equipment in your custody you may

well keep them.” We have the claimant’s evidence of his ownership supported with the sales agreement. It must be a very charitable person who would contribute \$64,000 to purchase equipment and not ensure that his name appears as joint purchaser in the sales agreement, and who would then tell the other purchaser to keep the equipment.

19. On the counterclaim, I am not satisfied, on a balance of probabilities, that the defendant contributed \$64,000 towards the purchase of the three items of equipment. I am therefore not satisfied that the defendant has, by virtue of any financial contribution, any rights of ownership of the equipment.

Amount of Material Excavated

20. The claimant did not take part physically in the excavation works and he was not directly involved in using the equipment for the excavation. But he knew the location of the two sites where the excavation took place. I have no evidence that he was present throughout the excavation works and knew from his own knowledge the volume of materials extracted from both sites. This explains why the claimant caused the Geology and Petroleum Department to inspect both sites excavated, and caused the department to estimate the amount of material excavated. Personnel from the department visited the sites on 4th February, 2009 and prepared a report dated 10th February, 2009 referred to above, which gives an approximate amount of materials extracted from both sites, as we saw above.

21. Two issues arise with respect to the report, which was tendered in evidence as O.R. 5. The excavation work on Site A was completed on 14th December, 2008 and the work on Site B was completed around early January, 2009. The inspection of the department was done on 4th February, 2009, about one month after the excavation works were completed on both sites by the defendant.

22. During that period of one month, did any other person do excavation works on the sites? This is an unexplained gap in the evidence. The report gives an approximate, not an exact amount, of materials extracted from the sites at the date of the inspection. But the report does not give the amount extracted at the date of completion of the works by the defendant, which was about one month before the date of inspection by the department. The report does not say whether or not any other person or persons did excavation works at the sites during that month; and the witness Moore who prepared the report did not give any evidence in this regard. He did say that there was no inspection done on the sites prior to 4th February, 2009.

23. Moreover, Moore said that, on his inspection of the sites, he saw a dirt road along a canal. The road in question he said was about 30 feet wide and 400 feet long with an elevation of 2 ½ feet, and that the volume of materials on page 2 of the report “account for the materials used to build the road.” The defendant had said, as we saw above, that remaining material was used to build a road. The claimant testified that the defendant provided material for the road; but he, the claimant, was unaware that filling the road was an obligation put on

the defendant by the Village Council or Town Board. Even if the defendant did excavate the amounts of material stated in the report, there is the evidence of the defendant, supported to some extent by the claimant, that materials were used to build the road. There is no evidence that he was paid by the Village Council for the material used to build the road.

24. The burden is on the claimant to prove, on a balance of probabilities, that the amount of materials extracted from the sites by the defendant amounted to the quantities stated in the report; and that he was paid for those quantities. A similar burden is on the claimant to prove that the defendant was paid for the materials used to build the road. I am not satisfied, on a balance of probabilities, because of the above mentioned gap in the evidence, that the defendant extracted from both sites the amount of materials mentioned in the report, and that he was paid for those amounts. The defendant it must be remembered admitted that he extracted materials from both sites, but the amounts he said he extracted were, as we saw above, much less than the amounts in the report. I am also not satisfied that the defendant received payment for the material used on the road.
25. The claimant arrived at the value of the material extracted by considering the volume of material extracted as stated in the report, and an estimate of the market value of that material, which estimate was provided by A.L. Construction Ltd. Because of the said gap in the evidence in relation to the volume extracted, and the evidence that material was used to build the road, an estimate of the market value of

the material by A.L. Construction Ltd., is not reliable to prove, on a balance of probabilities, that the defendant earned from the sale of material the amounts of money estimated by the company. Moreover I accept the defendant's evidence in relation to the sharing of the moneys from the Larubeya project.

Damage to Equipment

26. The claimant alleged that the defendant caused damage to the equipment and produced as exhibits estimates for repairs to be done on the equipment. The claimant also said that he spent \$5,116.00 on repairs to the Mack truck, but a receipt for labour and vehicle parts for the Mack truck was tendered stating the amount of \$2,850.00. There were also estimates exhibited for repairs and parts, but there is no evidence, that the amounts stated in these estimates were in fact paid by the claimant or whether the repairs were done.
27. The burden is on the claimant to establish, on a balance of probabilities that the defendant did cause the damage to the equipment by negligence or recklessness or in breach of a contract, and that the damage, if any, was not caused by ordinary use and wear and tear of the equipment. The claimant said that he was not physically at the sites where the equipment was in use. No particulars of negligence or recklessness were pleaded in the claim or given in evidence.
28. Moreover, there is no evidence from anyone describing how the items of equipment were used by the defendant which resulted in the damage to the equipment. If there was such evidence of how the

equipment was used, the court would have then been in a position to examine the use and make a decision whether the defendant was negligent or not. Was the defendant the only person who used the equipment? Were the parts allegedly damaged, intact when he began using the equipment? Was there a term of the oral agreement that the defendant would be liable for any damage to the equipment? These questions are left unanswered. I am not satisfied, on a balance of probabilities, that the defendant negligently or recklessly or in breach of the agreement caused the damage to the items of equipment.

29. As mentioned above the defendant counterclaimed also for \$11,500 against the claimant for excavation works done. As has occurred in this case, the counterclaim gave no particulars of the excavation works, such as the date or dates of the works and the quantity of material extracted. Moreover, neither the defendant's witness statement nor his oral evidence in court provided these particulars with respect to the counterclaim. He said the counterclaim was based on contract moneys which were paid into the claimant's account in the U.S.A. How he came to this information was not given in evidence. He did however say that he had no document to prove the amount in the counterclaim because the claimant did all the paperwork.
30. For the reasons given above, I am not satisfied, on a balance of probabilities, that the defendant has proven that the claimant owes him the amounts claimed in the counterclaim.

Conclusion

31. The claimant has failed to satisfy the court that the defendant excavated the amount of materials claimed and received the payments for the said materials. The defendant has given an account of the monies he received and the quantity of materials he excavated.

32. The defendant has failed to prove his counterclaim that he paid \$64,000 towards the purchase price of the equipment, and that the claimant is indebted to him for excavation works allegedly done by the claimant.

33. I therefore make the following orders:
 1. The claims in the statement of claim are dismissed.

 2. The claims in the counterclaim are dismissed.

 3. Each party to bear his own costs.

Oswell Legall
JUDGE OF THE SUPREME COURT
1st June, 2010

