IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

C.I.C.A. (Civil) 09/2017
GC 126/2010

BETWEEN:

(1) CAYSTAR CONSTRUCTION
(2) WINSTON EBANKS

Appellant

AND

MARK MILLER

Respondent

Before:	**The Rt. Hon Sir Bernard Rix, Justice of Appeal** **The Hon. Sir Richard Field, Justice of Appeal** **The Rt. Hon Sir Alan Moses, Justice of Appeal**
Heard:	**10 November 2017**
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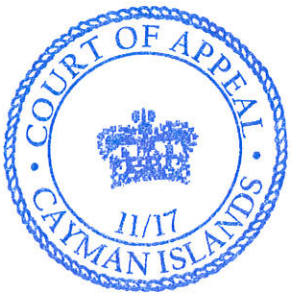

Appearances:	**Mr. Laurence Aiolfi of Priestleys for the Appellant** **Ms. Sheridan Brooks-Hurst QC Brooks & Brooks for the Respondent**

RULING

MOSES, JA

1. This is an appeal by a builder, Mr Winston Ebanks, from the order of Mr Justice McMillan of the 13th of March 2017, arising from a judgment he handed down on the 9th of September 2016. The judge gave judgment in favour of the employer, the owner of a

duplex on this island, who was the Plaintiff in the action, in the sum of CI$72,120 and interest plus costs. There were but few facts that were not in dispute.

2. The Appellant in this appeal, Winston Ebanks, was a builder living on the Cayman Islands and trading there as Caystar Construction. He had never previously built a construction such as this, on his own.

3. In July 2009, the owner of the land, Mr. Miller, the Respondent in this appeal, entered into an agreement with the builder, Mr. Ebanks, to build a duplex on Mr. Miller's land. The terms of the agreement and the amount for which the work was to be carried out were in dispute at the trial before Mr. Justice McMillan. But it was not disputed that Mr. Ebanks did carry out some building work on the site during 2009. Nor was it disputed that on the 1st of February 2010, Mr. Miller met Mr. Ebanks on site and orally terminated the contract.

4. The way in which Mr. Miller pleaded his case suing for damages is of significance to this appeal. But for the purposes of the narrative, it is sufficient at this stage to note that Mr. Miller, the Plaintiff, contended the agreement was contained in a written proposal dated the 23rd of July 2009 made by Mr. Ebanks for the construction of the duplex for the sum of CI$236,000. This sum was to be paid in stages identified by the completion of a proportion of the work with a final payment of CI$9,000 described as, in the terms of the proposal, "*including final inspection for occupancy*". In effect, this was a retention of CI$9,000 for remedial works. The offer made by the builder, Mr. Ebanks, was accepted and signed by Mr Miller on the 3rd of August 2009.

5. In order to pay for the building work, Mr. Miller needed to borrow money, and he sought to obtain the necessary finance from the Cayman National Bank. The bank wanted to know when the work would be completed. Accordingly, Mr. Miller asked the builder, Mr. Ebanks, for a letter stating the date of completion. That letter was signed by Mr. Ebanks and dated the 21st of October 2009. It read:

> "*Dear Sir/Madam.*

Contract and agreement with Caystar Construction to complete work for Mr Mark Miller..."

".....To complete the whole construction project would take upon [sic] till January 2010 to finish.

We ... once again thank you for considering Caystar Construction for your expansion project."

6. In evidence, Mr. Ebanks stated that this document did not contain all the terms of the contract, but that he and Mr. Miller had orally agreed that the work should be completed for whatever sum was needed to complete, although at trial he contended that there had been a document recording an agreement that the total contract price would be CI $292,000. The issue remained in dispute.

7. As I have indicated, the bank was only prepared to lend money on the basis of stage drawdowns dependent on certificates from quantity surveyors, DDL Studio, certifying completion of a proportion of the work.

8. Mr. Ebanks did start work on the duplex and DDL issued interim valuations.. The first valuation that the court had, as we are told, was dated the 26th of October 2009, although it referred to an earlier document of the 8th of June 2009. By that time, that is the 26th of October 2009, DDL certified that work to the value of CI$82,060 had been completed, including some materials that were both on and offsite and deposits which had been paid for by Mr. Miller.

9. DDL recorded that the building construction estimate was $267,500 and not the $236,000 which was referred to in the agreement of the 21st of October 2009. There was a further valuation on the 3rd of December 2009 in which DDL certified that the total value of the work that had been performed was CI$167,135. At this stage, the construction cost was increased to allow for some upgrades.

10. The last valuation was made by DDL dated the 11th of January 2010. By that time, DDL had come to the view that the cost of the upgrade was offset by savings in the foundation and thus it estimated the total cost was CI$267,000. The work that had been executed,

including materials on and offsite, with deposits made by Mr. Miller, was valued at $186,070 at that date. DDL recorded that work was progressing generally in accordance with specifications and drawings but went on to say:

> *"During my inspection a number of defects requiring remedial works were noted. The major items of concern include:-*
>
> - *Head of rear sliding doors is constructed of cement board and not reinforced concrete as originally specified. This is due to an error in the setting out of the door openings within the reinforced concrete block structure.*
> - *1# sliding door has received impact damage to the sliding door component and requires replacing/repair.*
> - *A number of windows have been installed in openings of the incorrect size. Remedial action taken to-date is insufficient as gaps around the windows remain apparent and new mortar/concrete is showing signs of cracking.*
>
> *I have assessed the works completed to date as set out on the following pages and have added a line entry for expected cost of remedial works required to correct the above defects."*

11. In the 'Value of Work Completed to Date' document, the quantity surveyors have a heading 'Deductions for Work Requiring Remedial Action': As noted — "*Work to rear sliding doors and windows. The value put on that is CI$6,650*".

12. What Mr. Miller says about this in the statement adopted as his evidence is by no means clear. Nor is it particularly elucidated by any findings of the judge himself based on oral evidence. But one thing is clear and that is that Mr. Miller asked Mr. Ebanks to stop work on the 1st of February 2010 and leave the premises with his employees. This he did.

13. The reason why Mr. Miller requested Mr Ebanks to leave before the work had been completed is set out in Mr. Miller's first statement. At paragraph 15 of that statement he says:

"*In that report* [that is the report to which I have just referred of the 11th of January 2010] *DDL also specified a number of defects in the construction by the Defendants pointing out that this required remedial work and they also confirmed that I had paid several deposits for materials...*"

14. Paragraph 16:

"*I also obtained a cost estimate from Dwaineroy Construction to establish the value of the work left to be completed as at 18th January, 2010...*"

And they provided an estimate to complete the house as at 18th of January 2010 of CI$83,023.

15. He refers to the counterclaim of Mr. Ebanks and goes on at Paragraph 19:

"*However, the bank refused to pay any further funds because of the construction defects and remedial work required, to which the report referred and also it was clear that the Defendants could not complete the work on time.*"

16. Mr. Miller then goes on to speak of defects in the electrical works and of discovering that some materials had gone missing and concludes at paragraph 23 of his statement:

"*As a result of the breaches outlined above, I requested that the Defendant no longer carry out any work on the house and that he leave the premises together with his employees, which they did.*"

17. In his statement of claim, Mr. Miller states:

"*In breach of the contract between himself and the Defendant, although paid CI$206,000.00 by the Cayman National Bank, has not completed the work to proper specification and in their Report dated 11th January, 2010 DDL Studios have specified a number of defects in the construction requiring remedial works...*"

18. Paragraph 20 of the Statement of Claim then refers to the electrical defects, and continues in paragraph 21.

"*As a result of the Defendant's breach of contract and negligent workmanship, the Plaintiff has suffered loss and damage.*"

19. Within that Statement of Claim, there is no suggestion that these were repudiatory breaches committed by the builder, Mr. Ebanks, the Defendant. Nor is it contended that as a result of those repudiatory breaches Mr. Miller accepted the repudiation.

20. The defence, as I have already noted, was that the true contract was to complete works for a sum higher than $236,000, the sum provided to the bank, and the defence also relies on the fact that he was told that if that was not sufficient, Mr. Miller would make further payments. On the contrary, it was the Defendant himself who first raised the issue of repudiation. In his counterclaim, he contended that Mr. Miller had wrongfully repudiated the contract, refused to allow the builder to continue, and claimed various sums by way of set-off of damages for breach and for sums he said he had loaned Mr. Miller.

21. Unfortunately, perhaps due to lapse of time — the judge had to wait a considerable time for final written submissions to arrive — the judge failed to find, with any precision, what facts it was that he was relying upon in reaching his conclusion. But it is sufficiently clear to recall that the judge did find that Mr. Ebanks had agreed to construct the duplex property for CI$236,000 and not for any greater sum, still less the sum of CI$292,000. He preferred the evidence of Mr. Miller and said this in his judgment:

> *"Taking all of the factors into account, I find upon a balance of probabilities that the Plaintiff has proved the facts upon which this case is based. In other words the Court accepts the Plaintiff's account of the matter."*

22. Although it was not contained in any pleading, the judge notes that in closing argument, it was contended that the defective work was a fundamental breach of the contract which entitled the Plaintiff to repudiate. (See paragraph 57 of the judgment.)

23. We have seen the closing written submissions. There were written submissions on behalf of Mr. Ebanks and two sets of written submissions on behalf of Mr. Miller.

24. The judge was right to interpret those submissions as a contention that the basis upon which Mr. Miller was entitled to accept conduct of the builder as repudiatory was the defective building work.

25. The judge also considered the other argument that was advanced in written submissions, although again it never formed part of the pleading, namely, that the letter written to the bank by Mr. Ebanks on the 21st of October 2009 made time of the essence and that Mr. Ebanks' failure to complete the building work by the end of January was a further ground which justified Mr. Miller in repudiating the contract.

26. The judge then referred in his judgment to a decision of Sir Nicolas Browne-Wilkinson, as he then was, in ***British and Commonwealth Holdings Plc v Quadrex Holdings*** [1989] QB 842, in which he stated that:

> *"In equity time is not normally of the essence of a contractual term. ... However, in three types of cases time is of the essence in equity: first, where the contract expressly so stipulates; second, where the circumstances of the case or the subject matter of the contract indicate that the time for completion is of the essence; third, where a valid notice to complete has been given."*

27. The judge continued at paragraph 61:

> "61. *The Defendant contends that the pleaded case demonstrated a claim based only on the alleged failure to complete the work to specification and on defective work itself.*
>
> *62. The Defendant argues at paragraph 21 that the defective work in question did not go to the heart of the contract and could not possibly justify the Plaintiff repudiating the contract.*
>
> *63. The Court finds as a matter of fact that it accepts the evidence of the Plaintiff in this regard and that the Plaintiff was justified on this specific basis as to defective work repudiating the contract."*

28. The first ground of appeal advanced by Mr. Aiolfi, who did not appear below, on behalf of Mr. Ebanks, is that it was not open to the judge to find that as a result of the defects Mr. Miller was entitled to repudiate the contract.

29. The law in relation to repudiation in building contracts was not in dispute in this appeal. There is ample authority for the proposition that, generally, defects in building work

during the course of a construction contract do not justify the employer repudiating the contract.

30. If authority is needed for such a proposition, it can be found in ***Hayes and Gallant*** [2008] EWHC 2726 (TCC). The judge in that case identified a number of principles all going to support the proposition that mere negligent omissions or bad workmanship are not repudiatory conduct (paras. 181-185). In the context of building cases, the judge commented in paragraph 186: "*However, an accumulation of breaches may indicate an inability on the part of a contractor to deliver the contract to a reasonable standard.*"

31. That case also referred to another building case ***Sutcliffe v Chippendale & Edmondson (a Firm)*** 18 BLR 157, in which the Official Referee, Judge Stabb QC, referred to a manifest inability to comply with the completion date requirements, including the facts that:

> "*the quality of work was deteriorating and the number of defects was multiplying, many of which he had tried unsuccessfully to have put right, all* [of which] *point to the truth of the plaintiff's expressed view that the contractors had neither the ability, competence or the will by this time to complete the work in the manner required by the contract.*"

32. In my judgment, this case is miles away from showing that the defects to which DDL had referred, which required $6,500 to rectify, showed that Mr. Ebanks did not mean to accept his obligations any further or was totally unable to complete the contract. There was no basis, in my view, for saying that the nature and the extent of the defects amounted to a fundamental breach.

33. The judge gives his conclusion but nowhere explains why these defects, in their number and extent, had reached such a stage as showing that that defective work amounted to a fundamental breach on the basis of which the employer, Mr. Miller, was entitled to accept those breaches as repudiatory conduct.

34. Indeed, during her submissions, Ms. Sheridan Brooks-Hurst QC sought to widen the argument so that in effect it did not rely merely on those defects to a value of $6,500. She said that the matter had to be looked in the far wider context of the undoubted fact that it

appeared that the bank regarded those defects, coupled with the failure to complete by the end of January, as a ground for no longer pursuing the building contract with Mr. Ebanks. She said that looked at in the round, this was a fixed-price contract, pursuant to which Mr. Ebanks was required to finish the building work for the sum of $236,000, and that the result of his failure to do so, coupled with those defects, meant that the bank was no longer willing to lend any more money.

35. The difficulties with that submission are manifold. Firstly, that was not Mr. Miller's evidence as to the reason why he ordered Mr. Ebanks to leave the site; secondly, it was not pleaded by him in his statement of claim or indeed in the defence or reply to the counterclaim; and thirdly, it was not the basis upon which the judge found that Mr. Miller was entitled to repudiate the contract.

36. There are further difficulties with that argument. It does appear that the bank was not prepared to lend any more money so that Mr. Ebanks could continue with the contract. But despite that, once Mr. Miller had ordered Mr. Ebanks off the site, it appears that further estimates to complete the work were obtained - one, surprisingly, from Mr. Ebanks and another slightly lower from another builder, which was accepted.

37. Furthermore, it was not for the bank to decide whether Mr. Ebanks was guilty of a fundamental breach or repudiatory conduct which entitled Mr. Miller, who was borrowing the money, to repudiate. The question was as between the two parties to the original contract, the builder and his employer.

38. In those circumstances, although it is true that it appeared at that time that the bank was pulling the plug, that does not assist on the question of whether, as a matter of proper analysis, Mr. Ebanks was guilty of repudiatory conduct; and in any event, as I have already said, it was not the basis upon which the judge reached his conclusion.

39. In my judgment, there was no factual basis upon which the judge could conclude that the defective work of Mr. Ebanks justified the Plaintiff in repudiating the contract.

40. That, however, was not the only basis upon which the judge found that Mr. Miller was entitled to repudiate. He also concluded that time was of the essence, saying in his judgment at paragraph 64:

> "*In addition, as to the issue of time being of the essence, the Defendant submits at paragraph 28 that in order validly to terminate for failure to complete by a certain date in a contract, time must be expressly of the essence in the contracting terms as to date of completion of the work, and that no such term exists.*"

41. The related point was also made at paragraph 27 of those written submissions: the defendant's letter to the bank was drafted subsequently to the contract being agreed and that it is not backed by the requirement for consideration.

> "*66. With great respect to the Defendant, the Court is unable to accept the validity of these arguments.*
>
> *67. As Sir Nicolas Browne-Wilkinson has pointed out, (in the judgment to which I have already referred) time is of the essence in equity where the circumstances of the case or the subject matter of the contract indicates that the time for completion is of the essence.*
>
> *68. In the proper context of the history of this matter, the Court finds that the circumstances of this case and the subject matter of the contract both indicate that the time for completion was of the essence, and that work was to be done within the proper time for completion.*
>
> *69. Therefore in respect of time being of the essence the Court also finds specifically and independently that the Defendant's conduct amounts to a breach of a fundamental condition of the contract thereby enabling the Plaintiff to terminate the contract as the Plaintiff did.*"

42. Ms. Sheridan Brooks-Hurst QC seeks to argue that when looking at all the circumstances of the case, the judge was entitled to find that time was of the essence, and in particular she refers not only to the letter that Mr. Ebanks wrote to the bank but to the fact that the bank had cut off its financing to the Respondent and that the practical effect of the breaches went to the root of the contract, since without financing the Respondent was

unable to complete the duplex, and it made it justifiable for Mr. Miller, her client, to repudiate the contract. (See paragraph 51 of her written argument.)

43. The judge, as I have noted, referred to the proper context of the history of the matter and the circumstances of the case but nowhere elucidates what he meant by that. There was, again, no dispute as to the law. The time for completion was not made part of the original contract, and the letter to the bank which was said to make time of the essence was made after the contract had started and was not incorporated, for any consideration, as a term of the contract. It was no more, on the facts as found by the judge, than the builder's estimate to the bank of how long he would take to complete for the sum of CI$236,000.

44. At the end of January, Mr. Ebanks was given no notice to finish by a certain time, and this was, therefore, not a case where after a reasonable time had elapsed one party gives, as he or she may be entitled to do, notice to complete within a further reasonable period.

45. There was, in my judgment, therefore, no basis for saying that it was a condition or term of the contract that it be completed by the end of January. Nor was there any particular circumstance in this building contract to demonstrate and establish that time was of the essence and that to fail to complete would have, in effect, deprived Mr Miller of the whole or central benefit of the building contract. In short, in my judgment, there was no basis for the judge saying that time was of the essence and, accordingly, that the failure to complete by the end of January entitled Mr. Miller to repudiate.

46. Those were the two grounds upon which the judge found that Mr. Miller was entitled to repudiate. No other ground was advanced, which might have permitted Mr. Miller justifiably to repudiate the contract. There was no Respondent's notice. That, in my judgment, disposes of the Appellant, Mr. Ebanks', appeal. He has succeeded in showing that neither ground on which the judge found in favour of Mr. Miller was justified, and in those circumstances, I would allow the appeal.

47. I should only add that there was, as part of the appeal, an attempt to revisit Mr. Ebanks' counterclaim on the basis of which he sought damages for wrongful repudiation by Mr. Miller. But very sensibly, he has taken the view, a view with which I entirely agree, that

at this length of time and having regard to the fact as to the doubts as to the reliability of his evidence expressed by the judge, it would be quite wrong, in order to do justice between the parties, either to remit this case for determination of those damages or to attempt to determine those damages ourselves. For those reasons, I would allow this appeal.

FIELD, JA: I agree.

RIX, JA: I also agree.

I sincerely regret that this litigation has brought the parties nothing but anxiety and expense. It is possible that based in the background facts or, at any rate, the alleged facts of this case, a different result or a partially different result might have been obtained. However, this court has had to reach a just result as far as it is capable of doing so in the light of the cases pleaded and argued by the parties and in the light of the judge's findings and judgment, much of which were not as helpful to the solution of this dispute as they could and perhaps should have been.

It is a pity that the parties were unable to find a solution to their dispute. Perhaps they tried and failed. Litigants, however, should be aware that where possible a fair consensual solution to disputes can frequently be the best policy. Lawyers can of course play an important role in facilitating such consensual solutions.