

8/1408

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE No. 78 of 2006

BETWEEN

- (1) SAGICOR GENERAL INSURANCE (CAYMAN) LIMITED
- (2) THE PROPRIETORS OF STRATA PLAN NO. 151 (KNOWN AS WINDSOR VILLAGE)

Plaintiffs

AND

- (1) CRAWFORD ADJUSTERS (CAYMAN) LIMITED
- (2) BOULD PATERSON LIMITED
- (3) ALASTAIR PATERSON
- (4) HURLSTONE LIMITED
- (5) HURLSTONE GENERAL CONTRACTORS LIMITED
- (6) JOHN HURLSTONE
- (7) ROBERT HURLSTONE

Defendants

Appearances:

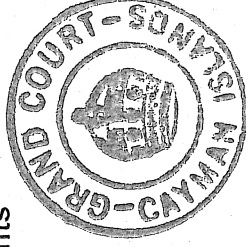
Mr. Hector Robinson and Mr. Simon Dickson of Mourant du Feu & Jeune for the 1st and 2nd Plaintiffs
 Mr. Michael Todd, Q.C. and Ms. Julia Beer instructed by Mr. Graham Hampson on behalf of the 1st to 3rd Defendants
 Mr. Thomas Lowe, Q.C. and Mr. Andrew Mold instructed by Mr. Christopher J. McDuff of Myers & Alberga for the 4th to 7th Defendants

Before:

Hon. Justice Henderson

Heard:

December 8, 2008



JUDGMENT

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7 The main action brought by the Plaintiffs against the Defendants has already
8 been dismissed. This judgment is in respect of a Counterclaim brought by the
9 Fourth Defendant for damages for loss of profit caused by the repudiation of a
10 construction contract. The contract was for clean up work and reinstatement
11 of the Windsor Village Strata, South Sound, following devastation caused by
12 Hurricane Ivan which passed over Grand Cayman on 11 and 12 September
13 2004.

14
15 The Second Plaintiff is the owner of the land upon which Windsor Village is
16 situated; the First Plaintiff is the insurer which originally commenced
17 proceedings against the Defendants relying on rights by way of subrogation.
18 Clean up and reinstatement work was carried out at Windsor Village by the
19 Fourth and Fifth Defendants (who are general contractors) between October
20 2004 and the end of June 2005. The Sixth and Seventh Defendants are the
21 individual principals of the Fourth and Fifth Defendants respectively.

22
23 The Counterclaim is pleaded in paragraphs 70 to 74 of the Fourth to Seventh
24 Defendants' Defence and Counterclaim and is denied in paragraphs 17 and
25 18 of the Plaintiffs' Reply and Defence to Counterclaim. Further particulars of
26 the Counterclaim were also provided voluntarily by the Fourth to Seventh
27 Defendants.

28
29 The first point now taken by the Plaintiffs in defence of the Counterclaim
30 concerns the very existence of a contract. However, their Amended
31 Statement of Claim pleads the existence of a contract at paragraph 30 and
32 reads:

33

1 *"In the premises a contract was formed between Windsor Village*
2 *and Hurlstone in accordance with which:*

3
4 (1) *Hurlstone undertook to provide construction services and*
5 *complete the reinstatement work required in relation to the*
6 *loss and damage occasioned to Windsor Village by*
7 *Hurricane Ivan.*

8
9 (2) *In the absence of a contract sum, there falls to be implied*
10 *into the contract on the basis of business efficacy a term that*
11 *Windsor Village would pay Hurlstone for work completed*
12 *satisfactorily on a quantum meruit basis*

13
14 (3) *Because the contract was to provide professional services,*
15 *there falls to be implied into the contract on the basis of*
16 *business efficacy a term that Hurlstone would exercise*
17 *reasonable skill and care. In the alternative, by assuming*
18 *responsibility to Windsor Village for the completion of the*
19 *reinstatement work, Hurlstone was under a duty to exercise*
20 *reasonable skill and care in the tort of negligence."*

21
22 Later, at paragraph 57 of the Amended Statement of Claim, the Plaintiffs
23 allege:

24
25 *"Thereafter Mr. John Hurlstone and/or Mr. Robert Hurlstone ordered*
26 *almost all of the workmen employed by Hurlstone and/or Hurlstone*
27 *Contractors off the site at Windsor Village on or about 24 June 2005*
28 *and failed to attend a site meeting on 28 June 2005."*

29
30 At paragraph 58, it is alleged that:

31
32 *"Mr. Paterson then sent an e-mail qua project manager on behalf of*
33 *Bould Paterson to inter alios Mr. Harrigan on 1 July 2005 informing*

1 him that Hurlstone would not re-commence work until further
2 advances were made.”

3
4 This email constituted what the Plaintiffs allege (at paragraph 59 of their
5 Amended Statement of Claim) was a repudiatory breach of the contractual
6 obligations of the Fourth Defendant.

7
8 In the Defence of the Fourth to Seventh Defendants, the existence of a
9 contract was admitted (as is clear from paragraph 30). The parties proceeded
10 up to trial on the basis that there was a contract formed between the Second
11 Plaintiff and the Fourth Defendant. The Fourth Defendant's primary position
12 was that there was a repudiation, not by itself but by the Plaintiffs. However,
13 despite this settled state of affairs, in closing the Plaintiffs advanced an
14 argument that, because of a lack of certainty about the scope and price of the
15 reinstatement work, no contract came into existence and that the
16 Counterclaim should fail on this basis.

17
18 I do not accept that this argument is permissible. In light of the way the
19 Plaintiffs have framed their action up until trial, they cannot now advance an
20 argument that there was no contract. They are bound by their formal pleading
21 and thereby estopped.

22
23 In any event, the lack of detailed scope and price is not a bar to the existence
24 of a formal contract. It is well established that a lack of agreement on a fixed
25 price will not prevent a contract from being formed. It is entirely possible for a
26 contract to be made on the basis that a reasonable price would be paid. In
27 the present case, I consider that there is sufficient certainty for a finding that a
28 formal contract was reached between the Fourth Defendant and the Second
29 Plaintiff such that the Fourth Defendant would complete the clean up and
30 reinstatement of Windsor Village and be paid a reasonable sum for so doing.

31
32 The Plaintiffs' case is also that the Fourth Defendant refused to perform or
33 perform substantially work that it had agreed to do from 24 June 2005. The

1 Plaintiffs allege that the Hurlstones abandoned the Windsor Village site from
2 this time and thereby repudiated the contract with the Second Plaintiff.

3
4 The most reliable evidence of the events which took place around this time
5 was in a letter of 30 June 2005, from Robert Hurlstone. This letter reads, in
6 part, as follows:

7
8 *"We are in receipt of the minutes of the site meeting held on 28th June*
9 *2005 and would comment as follows.*

10 *The writer spoke with Mr. A. Paterson on 27th June 2005 and advised*
11 *that due to a medical situation, he would be off island and would not be*
12 *able to attend that particular site meeting.*
13 *Hurlstone have not instructed all workmen to vacate the site. We have*
14 *maintained a skeletal crew on site over the past five working days,*
15 *pending resolution of various financial and contractual matters that*
16 *remain unclear and need to be resolved immediately."*

17
18 The letter concludes:

19
20 *"We therefore request a meeting tomorrow to discuss the situation*
21 *intelligently and try to obtain some clarity on the direction of the project.*
22 *We can make ourselves available at any time or venue you desire. We*
23 *therefore request a meeting tomorrow."*

24
25 Other evidence suggests that there were normally around 25 workers on site
26 and that the skeletal crew numbered about five workers. Therefore, at this
27 time about 20% of the former work crew was on the job. It can reasonably be
28 inferred (and I find) that this reduced crew was doing some work on the site.
29 June 24th was a Friday and 25th and 26th June were weekend days. On the
30 27th and 28th June, Robert Hurlstone was attending an urgent medical
31 appointment in Miami. As he had been previously supervising the workers
32 directly, his absence alone would justify a skeletal crew and explain why he
33 did not attend a site meeting on 28 June 2005. Furthermore, by 28 June

1 2005, there were only three working days during which the existence of a
2 skeletal crew could possibly have affected the work at Windsor Village.

3
4 The closing paragraph of the 30 June 2005 letter clearly shows that the author
5 intended to complete the project if the issues were resolved. Certainly his
6 materials and equipment remained on site, which is inconsistent with the
7 contract having been abandoned. It is also clear that, by 1 July 2005, the
8 Fourth to Seventh Defendants were being denied access to the site. Security
9 had been put in place by the Plaintiffs. This is not denied by the Plaintiffs.

10
11 Repudiation occurs when a party, by words or conduct, manifests a refusal to
12 perform its obligations under a contract. The evidence, on the balance of
13 probabilities, does not satisfy me that Robert Hurlstone or Hurlstone Limited
14 (the Fourth Defendant) had the necessary intention to refuse to perform the
15 contract for the reinstatement of Windsor Village. The evidence does not
16 satisfy me that by 30 June 2005 the Hurlstones had instructed their workers
17 not to perform or that they had the intention not to perform.

18
19 In contrast, by 24 June 2005, Frank Delessio (of the First Plaintiff) had formed
20 the opinion that the Hurlstones had abandoned the site. This was based on
21 information from Patrick Harrigan, the Chairman of the Executive Committee
22 of the Windsor Village Strata. On 1 July 2005, Mr. Delessio attended the site
23 and saw that Hurlstone workers were on site. He immediately instructed Mr.
24 Harrigan to bar all of the Hurlstone workers from the site, which was done.
25 There are three inferences that I can draw from this:

- 26
27 1. Hurlstone workers were present on site on 1 July 2005, which is
28 inconsistent with the Hurlstones having repudiated the contract;
29
30 2. On 1 July 2005 the Plaintiffs manifested a clear and unequivocal
31 intention to repudiate the contract; and

32

1 3. Neither of the Plaintiffs manifested a good faith intention to remedy any
2 problems which existed at that time.

3

4 It follows that the Second Plaintiff is liable for breach of contract. Clearly,
5 Sagior (the First Plaintiff) induced that breach. Mr. Delessio took the decision
6 to lock the job site and Mr. Harrigan agreed to that course. Mr. Delessio also
7 told Robert Hurlstone that he was fired. I find Sagior liable for inducing the
8 breach of contract.

9

10 The amount of lost profit to which the Fourth Defendant is entitled is the gross
11 profit which it would have made had it been permitted to complete the
12 contract: see *Keating on Building Contracts* (7th Edition) at paragraph 8-59.
13 The Plaintiffs hired M&J Construction Ltd as replacement contractors to
14 complete the reinstatement work. This work included owner upgrades which
15 would, of course, have had to have been carried out if the Fourth Defendant
16 had remained as the contractor. I find that the Fourth Defendant is entitled to
17 profit on owner upgrades as well as the profit on the main part of the
18 reinstatement contract. M &J's gross profit was 25% on top of costs. The
19 Fourth Defendant has claimed 20% gross profit, which I consider to be
20 reasonable in the circumstances.

21

22 M &J's costs were analysed by Mr. Waters, who is the Fourth to Seventh
23 Defendants' expert quantity surveyor. Although there was a suggestion by
24 the Plaintiffs' attorneys that M &J's costs were higher than those which would
25 have been incurred by the Fourth Defendant, that is not supported by
26 evidence from any expert on behalf of the Plaintiffs. There was also
27 unchallenged evidence that the Fourth Defendant was not fully busy at the
28 time of the works and could have completed more work in addition to what
29 was done at Windsor Village.

30

31

1 I find the Plaintiffs liable to pay the Fourth Defendant the sum of \$791,716.28,
2 which is the 20% profit calculated on the basis of the M&J costs. I also find
3 the Plaintiffs liable to pay interest at the Court rates from 1 January 2006.
4
5

6 Dated this 8th day of December, 2008
7

8 *Henderson, J.*
9

10 Henderson J.
11 Judge of the Grand Court

