CIRCULATE

28.8.2003

OPEN COURT

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 132/2002

BETWEEN:

CADIAN EBANKS

Plaintiff

AND:

CATHERINE ANN DELAPENHA

Defendant

BEFORE: MADAME JUSTICE LEVERS

APPEARANCES:
Plaintiff in person
Counsel for the Defendant: Mr. Kyle Broadhurst of Broadhurst DaCosta

HEARD: 5th, 6th and 7th August 2003

JUDGMENT

The Plaintiff, Cadian Ebanks brought an action against the defendant, Katherine Ann Delapenha by way of a Writ of Summons dated the 19th February 2002.

The Plaintiff in his Statement of Claim pleads that he is a Building Contractor t/a Canadian Construction licenced in the Cayman Islands and that the Defendant is a National Drug Council Officer and that on or about the 25th January 1999, the Defendant authorized the Plaintiff to carry out extra work on her dwelling house at Mahogany Way, Prospect, Grand Cayman. He further states that the Plaintiff carried out extra work to the satisfaction of the Defendant and that the amount now due and owing for the cost of the extra work is the sum of CI$7621.33.

In her defence, the Defendant admits that the Plaintiff was authorized to conduct some additional work to the property but she denies that there was an additional cost for the extra work authorised. She further denies that the work was done to the satisfaction of the Defendant and puts the Plaintiff to strict proof of the figures claimed.

Alternatively, the Defendant counterclaims against the Plaintiff in the sum of CI$4000 for the following breaches:

a) failure to properly do blocking work correctly which has resulted in subsequent cracking of the walls of the property;

b) failure to install the windows of the property correctly. This was done so poorly that there were actual holes between the windows and the framing;

c) failure to render the windows correctly, resulting in the windows not being level;

d) failure to complete the walls of the property.

The Plaintiff's case

The Plaintiff is a builder of some 40 years. His case is that the Defendant approached him having being recommended to her by his son, who is her neighbor with a view to doing repairs to her premises at Mahogany Way, Prospect. As a result of negotiations, an agreement referred to by both parties as a "binding estimate" was reduced to writing and accepted by the Defendant

and Plaintiff. The contract was for the following repairs to be undertaken to the premises:

1. renewing shingles to roof with aspen gray shingles;
2. removing old windows and replacing with single hung colonial white;
3. enclosing garage and installing the same single hung white;
4. erecting the front door covering with concrete slab and shingle roof with round columns;
5. removing and replacing five yellow core and two bifold doors with new doors.

The estimate given was CI$15,600 dollars. It is also the Plaintiff's case that the Defendant accepted the CI$15,600 and he concedes that in an effort to encourage her to accept his particular estimate, he made a representation that his particular manner of installing windows would be far superior to that of anything done in the Cayman Islands. Other representations were in fact, alleged by the Defendant but denied by the Plaintiff and for the purposes of the Plaintiff's case these representations are not relevant at this stage. Both parties agree that the Defendant paid a sum of CI$6000 as a deposit and on payment of the same, further conversation took place about extra work the Defendant would have liked to be undertaken.

The parties are in dispute as to what works were included in the estimate and as to what representations were made at the time the estimate were provided. For

purposes of the Plaintiff's case however, it is suffices to specify that the extra work, the Plaintiff alleges that was agreed were the following:

1. Installing two new front doors;
2. Moving entry way for master bedroom;
3. Closing original front door;
4. Make openings by original front door;
5. Vynl Sofit;
6. Making new entry way from living room to garage/dining room.

The Plaintiff's case is that the extra work was undertaken in good faith by him and was not included in the figure of CI$15,600 which covered only the work itemized in the original contract. He states that no price was agreed at the time of authorization of the work, but that it was understood that the work would cost the Defendant.

The Plaintiff alleges that he completed his work under the supervision of the Architect, the Defendant's brother and the Defendant and left the premises. I should also mention that the Plaintiff further alleges that the extra work was not discussed with him but with his foreman, save and except for the purchasing of two front doors which he confirms was discussed with him by the Defendant.

The work took some six weeks and was completed around the middle of March 2002, when the Plaintiff cleared up his work and left the premises. At that time

he was paid the original contract price of CI$15,600. Nothing was said to him about unsatisfactory work or incomplete work. It is only when he sent the invoices for the extra work undertaken and the Defendant refused to pay him, a letter was written by the Defendant dated the 29th December 2000, claiming:

(1) that the Plaintiff used inferior materials;
(2) that the Defendant had to employ the services of other contractors, one to replace inferior materials used by the Plaintiff to improved his inferior workmanship; and
(3) complete the job which he had agreed to do but did not complete.

The Plaintiff therefore brought the suit, the subject matter of these proceedings.

The Defendant's case

The Defendant's case is that the Plaintiff contracted with her to do certain repairs as itemized in "the agreed estimate" for the sum of CI$15,600 and that this amount was to cover the cost of the itemized repairs.

The Defendant alleges that the reason why she entered into the contract with this particular Plaintiff was that he made a representation that he would be able to do the work cheaply even less than CI$15,600, as he would try to purchase the material at a reasonable cost in Miami and also that his workmanship would be far superior to which that she would be able to obtain in Cayman, as the windows he would fit would be cement framed as opposed to wooden framed. Based on

these representations she states that she entered into the contract and paid the Plaintiff the sum of CI$6000, as a deposit.

Sometime prior to the Plaintiff going abroad she does agree that she discussed further improvements to the premises with him. The parties are *ad idem* on the extra work undertaken with the exception of the work done on the foyer and the living room window. She alleges that this work was already incorporated impliedly in the original contract. She further states that she did not discuss the purchasing of doors at that time with him but she does agree that subsequently at the Plaintiff's suggestion that she replace the old doors, she agreed to the Plaintiff supplying two new doors. The Defendant denies that she owes any money for this extra work and what in fact she says in her defence as filed is this and I quote paragraph 2:

> "With respect to paragraph 3 of the Statement of Claim it is admitted that the Defendant did authorize the plaintiff to conduct some additional work to the property. It was agreed by the parties that the additional works would be completed with no additional cost to the plaintiff. Thus it is denied that the plaintiff was authorized to do any additional works which went beyond the original estimate".

In her counterclaim for the breaches itemized previously by me, the Defendant further states at paragraph 11 and I quote:

> "While the work was being completed the defendant inquired with the plaintiff if it would be possible for the plaintiff to do some minor additional works and what any additional works might cost. The plaintiff then

> told the defendant that the quoted and agreed upon price would be sufficient to cover the additional works."

I shall say more about this at a later stage, but the Defendant's case is that she does not owe the Plaintiff any further moneys as she then had to obtain services of initially a painter and secondly, a man to come and prepare the walls and thirdly, a contractor in the year 2002, to repair the Plaintiff's poor and incomplete work. She claims the cost of this was CI$1300 in preparing the internal walls for the painting and CI$4500 in relation to the external works.

I have previously outlined the Plaintiff's case and the Defendant's case as pleaded. However, the evidence in support is slightly different and it will be useful to highlight the differences and weaknesses in the evidence at this stage prior to my entering into a application of the law to the facts of this case.

1. The Defendant in her pleadings states that no further expenses were discussed for the extra work, however, in evidence she states that she asked the Plaintiff how much more it would cost to block a wall and he mentioned the sum of CI$250;
2. The Defendant in her letter talks of failure to complete the walls of the property. The Defendant was unable to call any evidence whatsoever as to the conditions of the walls of the property at the time the work was completed in March 2002;

3. The quantum that has been counterclaimed by the Defendant for the sum of CI$1300 for a painter. The letter in support of this claim does not bear the address of the painter nor, does it bear the address of the property upon which the work was done. Despite the fact that the letter was cross-examined up on by the Plaintiff (who was unrepresented) the Court finds it difficult to accept this evidence;
4. The remedial work that was undertaken as a result of the Plaintiff's alleged inferior workmanship cost $2500 at the most because the Defendant chose to use a particular type of paint for the outside walls for which the Plaintiff was not responsible and therefore, the remedial work alone would have only cost far less then $4000, if the Court accepts that the Plaintiff was responsible for it;
5. The Plaintiff's figures also are inaccurate. The Court is left to wonder exactly how much the extra work costs. The invoices are different from the further and better particulars supplied by the Plaintiff and also different from the list of materials supplied to the Defendant at her request.

The evidence therefore did not always support the pleadings. The question before this Court is, was there non-performance of obligations under the contract between the parties? The contract between the parties was both written and oral. It is perhaps convenient at this stage to examine the written contract. The written contract specified exactly what was to be done by the plaintiff and the cost of what was to be done. The representation that the plaintiff might save or

could save money for the Defendant by purchasing the material abroad and the fact that there was, in fact no savings does not mean that the Plaintiff is in breach of the obligations under the contract. The question to be asked by this Court is – was there performance of the contract and if there was, was it a binding on both parties that the sum for that performance would be CI$15,600.

An examination of the binding estimate shows that the new shingles had to be replaced on the roof, this was done. There is no mention of sofit and although it is peculiar that the Plaintiff purchased the sofit in January, when in fact he claims this was extra work discussed after that period, the estimate does not speak of renewing the facia board nor sofit. What it speaks of is renewing the roof of the house with new shingles. This was done by the Plaintiff. Was this satisfactorily done? The claim by the Defendant is that there was a leak due to the part of the roof where an unused electric pipe was present was not worked on properly and as a result of water seeping through it caused some damage to the facia board, on the roof. There are no photographs showing an unused pipe or any evidence about any leaks except from a report.

An expert report shows that the roof was patched after the Plaintiff left the premises. The expert, Mr. Andre Dacres state in his report and I quote:

> "The roof contained an area with unused electrical pipe and was patched in a way that water running down the roof settled and caused rotting of that area on the roof. Singles and eves were damaged, as a

result of the water settling. 1. Shingles had to be removed from the roof and replaced. 2. Eves required repairs to remove rotting sections."

The first item on the binding estimate is the roof – the evidence is that the shingles were not replaced and that Mr. Dacres did no work on the roof.

The second item on the binding estimate is – removing old windows and installing new window, single hung white. The evidence is that the windows were not installed to the satisfaction of the Defendant. There must be an implied warranty that the windows would be completed in a proper and workman like manner and will be reasonably fit for human habitation. (See *Miller v Cannon Hill Estate Ltd.* [1931] 2KB 113). The next item on the list is enclosing garage and installing single hung window to match existing part of the main house. No complaint about this aspect of the work is being made.

The next item, erecting front door covering with slab and columns, replacing 5 hollow cores, replace two bi-folds doors.

The complaint as to the Plaintiff's work that has been supported by evidence is that there were cracks to the walls and that the windows were not put in properly so that there was gaps between the windows. Was there therefore in view of the complains nonperformance of the obligations under the contract between the parties and if so were these obligations of such importance that they would operate to discharge the other party from further performance of this obligation?

Were the breaches so fundamental that they can either lead to a return of the monies or support a counterclaim alone by the Defendant? It is my view that the breaches were not that fundamental and I will deal with each one when I deal with the question of the counterclaim.

The oral aspect of the contract was the work that I have described previously as "the extra work" to be undertaken by the Plaintiff. The Defendant in her pleadings says that this extra work was to be absorbed in any savings promised by the Plaintiff. I do not accept this.

The Defendant in her evidence clearly states that when the extra work was discussed she asked for an estimate and the Plaintiff did not give it to her, but indicated one item would costs CI$250 she also must have expected to pay for the new doors.

The next question the Court has to resolve is what was agreed by the parties with respect to the extra work. The Plaintiff claims that he did not discuss all the extra work with the Defendant. I do not accept this, I believe that the Defendant and the Plaintiff had conversations pertaining to the extra work and that in fact the Defendant authorized the plaintiff to carry out the extra work.

I believe that the Plaintiff was clear that the extra work would cost more money, in fact, the Defendant herself says that she asked for an estimate. The savings,

if any, may have been for her credit but as it transpired there were none. I hold that the extra work was installing and purchasing two new front doors, moving entry way from master bedroom, closing original front door, making opening by original front door, making new entry way from living room to garage/dining room, I do not believe that the extra work included the sofit being put on, as the evidence is unclear and supportive more of the Defendant's assertion that this was agreed and implied in the original estimate. The fact that the plaintiff had purchased the sofit prior to discussion as to extra work leads me to believe that in fact the sofit was to be implied in the original estimate.

It now leaves the Court to decide on how much the extra work cost. As indicated previously, the amounts are different and the Plaintiff has not made the Court's life any easier by submitting one figure in the further and better particulars and another figure in the statement of claim and another one in the material list that he gave the Defendant. The Plaintiff admits in cross-examination that he added "a hidden fee that is not shown" into the further and better particulars. When it comes to the calculations, as to costing it is perhaps convenient at this stage to itemize some of the evidence given by the Plaintiff:

1. In response to a question as to why he purchased sofit if it was not included in the original estimate, he said, "I cant tell you then how I purchase sofit at A.L. Thompson's on the 28th January 1999".

2. He said that the cost in the further and better particulars could be an error in his calculations;
3. In the further and better particulars provided by him, he quotes the price of the front door at CI$1556.72, but the actual cost is reflected as CI$1352. The invoice from the Home Depot states it as CI$1387". To this he said, "It could be a mistake and an honest mistake".

He also concedes that 20% interest was not agreed by the parties. The Court therefore has no alternative but to look at the invoices and allow the prices according to the invoices. I therefore turn to the cost of the items of the extra work:

1. The front door and windows – I intend to allow the invoice price that is the Home Depot invoice price of US$1352 or CI$1135.68.
2. Frames – I intend to allow this cost of CI$120.32
3. 3 pairs of hinges. Although there is no documentary evidence CI$10.65 is allowed.
4. Two flush bolds invoice at CI$21.60 are allowed.
5. One entrance lock CI$169.99. The invoice is provided. It is allowed.
6. Blocking and plastering both sides of front door CI$215 is allowed.
7. Two lengths of conduits $7.50 is allowed.
8. Two drop cloths $5.76 is allowed.
9. One masking tape CI$3.19 is allowed.
10. Freight, duty and truckage. The figures provided by the Plaintiff do not truly represent the costs of freight duty and truckage for

material for extra work undertaken, namely two doors. I agree with counsel for the Defendant that a more realistic calculation would be about 31% of the value where as just for the doors alone and thus the figure would be $199.49 or CI$200 freight.

11. As far as the duty is concerned when the plaintiff supplied the defendant with a list of the materials for the original work undertaken the entire duty for the shipment was included in that $15,600 so it is my view that he is not entitled to a sum for duty. The same would apply for truckage, I do not intend to allow for truckage. There is no evidence as to port charge and therefore it cannot be allowed. Extra work required labour, the entire period spent has been charged for in the original estimate breakdown that was given to the defendant and it would appear therefore that the defendant has been charged twice in this instance and therefore I do not intend to allow anything more for labour.

The Counterclaim

The Defendant's object in entering into the said contract was to acquire a house to which renovations were to be undertaken by the Plaintiff in a workman like manner of good quality in which she could reside with some satisfaction and ease. (The windows, the front door, the roof and the walls). Are these defects in breach of the obligation of a builder to provide the Defendant with a house of an acceptable standard of workmanship material and fitness for dwelling? The Defendant, called Mr. Dacres an expert, who as it transpired, turned out to be not an expert but a man whom she hired purely to remedy the defects some two years after the Plaintiff left the building site.

Dealing with the complaints one by one. The windows -I find as a fact there were gaps in the windows and I find that the Defendant is to be believed. However, I

have no evidence before me as to the cost of repairing those windows. Mr. Dacres who not only gave evidence but also supplied a report (which has proven to be inaccurate) is only qualified to speak of four windows which he inspected. He repaired the cracks to the outside walls. It is perhaps interesting to note that the Defendant has accepted that she employed a painter to make some temporary repairs to the window and the cracking or the gaps to the window were never mentioned by him. In the circumstances as there is no counterclaim for the replacement of the windows, the fact that I have held that they were gaps in the windows is of no moment. I accept that they were cracks around the front doors.

The roof – there is no evidence before me that the facia board had to be replaced as a result of negligent work by the Plaintiff. Mr. Dacres visited the premises some two years after the Plaintiff had left and anything could have caused these cracks. The photographs do not show an unused pipe. Mr. Dacres agrees that the shingles were not replaced by him although he stated so in his report. I do not allow this counterclaim.

The walls – Mr. Dacres agrees that the external walls were not ready for painting. There is no evidence before me that the walls were to be made ready for painting by the Plaintiff. The Defendant may have believed that the walls were not ready for painting, and the Plaintiff may have believed that by building the walls he had done his contracted obligations. There is disagreement on the evidence of the

Plaintiff and the Defendant as to this and the documentary evidence does not support the Defendant's. The Plaintiff alleges that the walls were built by him and that there was no conditions on the contract that the walls were to be made ready for painting. Mr. Dacres testified that he rendered a bill for the repair for all the above exterior work for CI$4500. He states that the cost of CI$2500 was in relation to the mammarand finish. In evidence and on a question by the Court he stated that the sum of CI$1000-CI$1500 would be needed to repair the cracks in the wall. This is 2 years after the Plaintiff left the premises. As the Court has accepted the fact that they were cracks in the wall and that is the only counterclaim that the Defendant is entitled to, I would allow a sum of CI$500 as the counterclaim. The Court will not be allowing CI$4500 as the mammarand which cost CI$2500 was done at the Defendant's option (one reason being it looked better). The CI$500 would allow for the cracks at the front door to be repaired and the cracks under the four windows to be repaired.

Conclusion

The first transaction can be classified as a lump sum contract and I hold that on the payment of CI$15,600 the matter came to an end. The Defendant having accepted the price for work that was undertaken by the Plaintiff.

The second oral transaction, I hold that the Plaintiff is entitled to the sum of CI$2712.59 with interest at 6% per annum from due date to payment

On the counterclaim there is no evidence before me that proper materials were not used or that the house was not fit for habitation. The only evidence before me which is acceptable and supported by some evidence is that there were cracks on the wall. In those circumstances that is the only item I can allow for the counterclaim and allow the sum of CI$500. No interest is allowed on the sum as no counterclaim was made until the suit was filed.

Dated this 28th day of August 2003

GRAND COURT CAYMAN ISLANDS

Madame Justice Levers
Judge of the Grand Court