[2022] JMCA Civ 34

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

SUPREME COURT CIVIL APPEAL NO COA2020CV00065

BETWEEN	**EVERETT BRADY**	**APPELLANT**
AND	**NICOLA LAUDER**	**1ST RESPONDENT**
AND	**LYDIA JONES**	**2ND RESPONDENT**

Ruel Woolcock instructed by Ruel Woolcock & Co for the appellant

Clifton Campbell instructed by Archer Cummings and Company for the respondents

26 September 2022

BROOKS P

[1] This is an appeal from the judgment of Wolfe-Reece J handed down in the Supreme Court on 22 July 2020. The learned judge, after conducting an assessment of damages, ordered that Mr Everett Brady should pay damages in the sum of $4,433,552.00, together with interest thereon, to Ms Nicola Lauder and Ms Lydia Jones ('the respondents'). The damages were to compensate the respondents for the cost of correcting Mr Brady's breach of contract in failing to construct a roof on the respondents' building, according to specification.

[2] Mr Brady has appealed that decision asserting that the learned judge erred by awarding damages which exceeded the scope of her remit.

The background

[3] The factual background to this appeal is accurately and concisely set out in the skeleton arguments of Mr Woolcock, who appeared on behalf of Mr Brady. The relevant paragraphs state as follows:

> "(a) The respondents are the joint owners of premises known as lot 14 Jamaica Beach in the Parish of Saint Mary;
>
> (b) [Mr Brady] and [the] respondents entered into a verbal agreement whereby [Mr Brady] for the sum of $2,100,000.00 would construct atop the building at lot 14 Jamaica Beach a roof in keeping with certain approved drawings;
>
> (c) In breach of the agreement [Mr Brady] constructed a different roof from that which was designed and depicted on the approved drawings. The designed roof was to be constructed primarily of concrete slab but in fact [Mr Brady] built a predominantly timber roof.
>
> (d) As a consequence of the breach the respondents filed a claim in the Supreme Court in 2009…seeking damages for breach of the verbal agreement."

[4] The respondents succeeded on the issue of liability and the case came on for assessment of damages before the learned judge, by way of a decision of this court.

[5] At the assessment of damages hearing, the learned judge rejected the respondents' claim to redo the roof, which the quantity surveyor, Mr Clifton Logan, who testified on behalf of the respondents, estimated to be $26,182,747.97. Instead, she ordered that Mr Brady pay the cost of installing a ceiling and certain amenities for the timber roof. Those items would not have been required if a concrete slab roof had been constructed according to specification.

The appeal

[6] Mr Woolcock argued that the learned judge erred in failing to follow the guidance of this court in the earlier appeal (**Brady v Lauder and Jones** [2017] JMCA Civ 18). Learned counsel argued that this court ruled that the respondents were entitled to be compensated for the cost of making the roof functional. He particularly pointed to paragraph [62] of the judgment of F Williams JA, with whom the other members of the panel agreed, in which F Williams JA said, in part:

> "…the measure of damages stated in **McGregor on Damages**, which is first, 'the cost of remedying the defect'. The assessment should, therefore seek to focus on the cost of making the adjustments that are necessary to correct the defects in order to make the existing roof functional, bearing in mind at all times the consideration of reasonableness. If that cost is disproportionate to the end to be obtained, then the measure should be: 'the value of the building had it been built as required by the contract less its value as it stands'." (Emphasis as in original)

[7] Learned counsel submitted that the guidance of this court was for the assessment of damages to be aimed at the cost of correcting defects in the roof. He argued that the learned judge's failure to follow that guidance is evident when the evidence of civil-structural engineer, Mr David Abrikian, is assessed. Mr Abrikian, who gave evidence at the assessment of damages on behalf of the respondents, seemed to have accepted in cross-examination that the roof was functional in the sense that it could keep out rainwater. The following exchange is recorded at page 117 of the record:

> "Q. …do you still say that the roof was not functional in the sense that it could keep out rainwater?
>
> A. I can say functional. I never saw water marks that would be used as an indication."

[8] Mr Woolcock submitted that the aspects of the construction for which Mr Abrikian advocated, namely the ceiling, fascia boards and their associated elements, which formed the basis of the learned judge's decision, were not for the functionality of the roof, but

for the completion of the building. He submitted that Mr Abrikian conflated the two elements and thus led the learned judge into error.

The analysis

[9] Mr Woolcock's reasoning cannot succeed. Learned counsel has not given sufficient weight to the evidence of Mr Abrikian that if the roof had been constructed as specified, the concrete slab would automatically have formed a ceiling. Mr Abrikian was the only engineer to have given evidence. Mr Abrikian said, in part on page 7 of his expert report to the court, that the failure to provide a concrete slab roof deprived the building of an "instantly" formed ceiling and, "there being no sarking, the underside of the metal sheeting is visible". He further stated on page 7 that:

> "Hence it appears to be the case that for the substitute roof to be considered complete this 'false ceiling' should be installed, as with the originally designed slab roofs, the soffit [or underside of the concrete slab] would immediately provide the ceiling, one that will be missing under the previous arrangement, unless the 'false' ceiling is installed."

[10] Mr Abrikian also testified that the other aspects that were mentioned in his report were necessary adjuncts to the ceiling. These were hurricane straps, fascia boards, wall plates and correction to belt beams. It was open to the learned judge to have accepted that evidence, and she did so.

[11] Mr Woolcock's submission that the absence of a ceiling is not a defect, cannot be accepted. The essence of Mr Abrikian's testimony is that the absence of a ceiling is a "defect". Mr Abrikian said that the false ceiling was required as the "substitute" roof failed to provide a ceiling.

[12] It is to be noted that Mr Brady did not adduce any evidence that contradicted Mr Abrikian's testimony or that of Mr Logan. Mr Logan provided the estimates for the cost of installing the ceiling and other items that Mr Abrikian opined were needed to complement the incorrect roof.

[13] The learned judge was entitled to hold that Mr Brady had contracted to provide a roof with a ceiling and in providing a roof which required a separate ceiling, he was obliged to compensate the respondents for the additional expense that they would incur to install that type of ceiling.

[14] Mr Brady cannot succeed in this appeal. The judgment of the learned judge should be affirmed. Fortunately for him, the respondents incurred no costs in respect of this appeal. Mr Clifton Campbell, representing the firm of attorneys-at-law, that is on the record for the respondents said that he had no instructions to resist the appeal. Accordingly, no costs can be awarded to the respondents.

SIMMONS JA

[15] I have read, in draft, the judgment of Brooks P, and I agree.

LAING JA (AG)

[16] I too have read the draft judgment of Brooks P and agree.

BROOKS P

ORDER

1) The appeal is dismissed.
2) The judgment of the Supreme Court handed down in this case on 22 July 2020 is affirmed.
3) No order as to costs.