1981/

25th February, 1981

T.W.Jameson Limited -v- Olivia Cuming-Butler

This action arises from work carried out at "Elliston House", The Boulevard, St. Aubin, by the plaintiff company for the defendant, Mrs. Olivia Cuming-Butler, the owner of the property.

Some years ago Mrs. Cuming-Butler saw the property and decided that she wanted to buy it. She was introduced to Mr. Peter Gallaher, an architect practising in Jersey, of several years experience and she took him along to see the premises and they discussed them generally. It is clear from the evidence we have heard from her and from Mr. Gallaher that she did not instruct him to survey it. It may be that she would have been wiser to have done so, but the fact is she did not. After that meeting, and before getting any further professional advice about the state of the building or how much it would cost to do it up the way she wanted, she told us and we accept her evidence on this point, that she went away and signed the agreements, and thereby bound herself to buy "Elliston House".

The work was carried out on "Elliston House" as a result of the defendant being introduced to the plaintiff company or rather to Mr. Jameson, Senior, the beneficial owner of the company. There is a conflict of evidence about what took place which I shall deal with now. According to the defendant it was on the 19th March that she first met Mr. Jameson with Mr. Gallaher at "Elliston House" and they discussed the work to be carried out. She told us it was at that meeting, and this is part of the defence, that she placed a limit of £25,000 for painting and decoration but said that she would be responsible for any other sums for other works that might become necessary. To support her evidence she was allowed to refer to a diary which she said she made contemporaneously, but it was apparent to us that certain of the entries in that diary she herself could not decipher and we think that she got the dates wrong although she may

well have entered the figure of £25,000 in the diary on the 19th March because we know from her evidence and it seems to be accepted by both parties that at a later date, again we do not know exactly when, she opened a special account with her bankers into which she paid the sum of £30,000. There is no written evidence at all about the dates of that meeting except there is a letter on the file which contradicts and conflicts with Mrs. Cuming-Butler's evidence and which is adressed to Mr. T.W.Jameson at a St. Mary's address and is dated the 9th April. It is the first indication that he was being approached by Mr. Gallaher to undertake work at "Elliston House" and therefore taking the letter into account as well as the denials by Mr. Jameson and Mr. Gallaher that any limit was placed as to the amount of work that was carried out, we have come to the conclusion that in fact, no such limit was placed on the work at this meeting of the 15th March. I mention this here because as Mrs. Cuming-Butler was mistaken in her evidence on this point we are entitled to take that into account in assessing the rest of her evidence.

There is no doubt, however, that she was a lady living alone who placed her total trust in her architect, Mr. Gallaher. In the course of the hearing certain questions were put by her counsel to Mr. Gallaher, which we felt might have been more appropriate to an action to be brought against Mr. Gallaher by Mrs. Cuming-Butler, and we therefore stopped Mr. Falle from pursuing that line of questioning. We make no observations at all concerning Mr. Gallaher's professional obligations towards Mrs. Cuming-Butler. That is not a matter which we are called upon to pronounce on, and indeed it would be quite wrong for us to do so in this case, but as I have said it is apparent to us that Mrs. Cuming-Butler placed her trust in Mr. Gallaher and virtually handed over to him the conduct of operations at "Elliston House".

Mr. Jameson's firm having submitted their accounts to Mr. on previous occasions before payments were refused, were doing so because, and we are satisfied that this was so, the contract was for day work, that is to say, for labour and materials as approved by Mr. Gallaher and indeed we are supported in that finding by the pleadings themselves. I look now at the defence filed by the defendant, paragraph 1 of which reads:-

> "The Plaintiff is a builder and he was employed by the Defendant under a contract partly parol and partly in writing to carry out works involving the conversion of four flats at the Defendant's property Elliston House The Bulwarks St Aubin in the Parish of St. Brelade".

Well as to that first paragraph we accept, as Mr. Valpy says, that the contract was in fact parol entirely. There is no writing to which we can have regard in considering that paragraph of the defence. Secondly, this supports as I say, the view we formed that the defendant handed over the control of "Elliston House" to Mr. Gallaher, paragraph 2 of the defence reads:-

> "That the Defendant employed one Peter Gallaher of Messrs. Hewitt and Gallaher as her Architect to obtain all necessary consents for the works to prepare all necessary outline and detailed plans and generally to supervise the said works to be carried out by the Plaintiff."

Now the position was quite clear from the evidence we have heard that the day work sheets were available on site weekly with the accounts for materials brought into the site and every four weeks they were collated and sent to Mr. Gallaher for checking. This was not a fixed price contract and therefore it was inappropriate for Mr. Gallaher to issue as he did what were called on the face of them "four interim certificates", and which included a ten per cent reduction. We are satisfied that they were not interim certificates and that a ten per cent reduction was wrongly deducted because not being interim certificates under a fixed price contract, there should only have been deducted such sums as Mr. Gallaher was satisfied represented either over-charging or for materials which had not reached the site.

is pertinent to point out that when the plaintiff eventually submitted further applications for payments, numbers five and six, he in fact described them as proposed payments. He did not refer to them as certificates or interim certificates. The claim totals £11,987.67 which is the total that the plaintiff says is due to him not only in respect of the ten per cent retained on the first four certificates but also for the two other applications, numbers five and six, and for a further application for works specifically carried out on the instructions of Mrs. Cuming-Butler after, it appears, she had dismissed him from the site in the year 1975. The defence is firstly, the defendant says it was a term of the contract that the work would be completed by the end of June. By this we assume that she meant, because it was so evident in the questions put to the witnesses by her counsel, that it was an express term of the contract. As regards that question, we have no evidence that a completion date was mentioned except in letter number 2, which was a letter written on the 8th May, by Mr. Gallaher to Mr. Jameson as regards the flat on the first floor which Mrs. Cuming-Butler wanted to move into because her present house had to be vacated by the 18th May. Her own evidence upon that was that she did ask Mr. Jameson to expedite his work and all he said was that he would try to do it by the date. Mr. Gallaher told us that it was impossible for a date to be given for completion. The way in which the contract continued throughout the work is best expressed, as Mr. Gallaher told us, as being on an ad hoc basis, as they went along. It was decided what was necessary, mainly by Mr. Gallaher, we think, although sometimes with Mrs. Cuming-Butler's consent although she told us that Mr. Gallaher was seldom there when she went there, but on the other hand, for a time she was living there certainly towards the end of the contract, so that it was impossible for Mr. Jameson's company to fix a time for the ending of the contract as he received continual instructions.

The two other matters relied on in the defence as pleaded again

in paragraph 3 are implied defences that the work should be carried out and I read "in accordance with the laws and bye-laws of this Island". Well that was an implied term and we think it is right that the works would be carried out in accordance with the laws and bye-laws of this Island and "generally in a sound and workmanlike manner to the Defendant's reasonable satisfaction"; that also was an implied term of the contract. In effect, however, the defendant has said that the standard of work was not sufficiently high and so was not up to her satisfaction. We can find no evidence to support that assertion. Indeed, Mr. Lyon, a quantity surveyor called by the plaintiff, said that when they met on site on the 18th October, 1979, it was a friendly meeting and no complaints were made and as far as he could see, in general terms, the workmanship was of good quality. Mr. Richards, an architect, who was called by the defendant said that the workmanship was not grossly bad and he himself would have signed the certificates had there been certificates in the proper architectural sense as we understood them. Therefore, we cannot find that that part of the defence has been proved.

So far as the three main planks of the defence, leaving aside the illegality, for the moment, are concerned, we are satisfied and we so find (1) that the figure of £25,000 was not limited - was not made into a contractual limit; (2) a fixed time was not laid down by the defendant; and (3) the works were not below the reasonable standard which the contract impliedly carried.

In the course of the hearing the defence wished to call quantity surveyors to indicate that the charges, this would be for the materials alleged to have been used in the work and the labour costs were exorbitant. However, the Court ruled and I wish to repeat this, that the contract was for a day-work contract. Therefore the price at which it was charged up was fixed by the accounts being submitted to Mr. Gallaher for checking and it would be no more than checking. As regards the applications of the plaintiff which in fact were not met,

5 and 6, Mr. Gallaher clearly said, quite unequivocally, that apart from checking them perhaps a little more closely because they were towards the end of the job, and, had it not been for Mrs. Cuming-Butler's insistence on wanting final estimates at that particular point of the contract, he would have certified them as he had done previously in earlier applications. Therefore the method of fixing the price was perfectly clear and quantum meruit and measured work were not applicable in a contract of this nature.

The Court, therefore, is satisfied that the plaintiff is entitled to his money and as far as the action is concerned against Mrs. Cuming-Butler, judgment is given for the plaintiff in the sum of £11,987.67.

However, that is not the end of the matter, because there is also a counterclaim as regards the infringements of the building bye-laws for the work which had to be made to conform to them. The Court has no doubt, as has been accepted by Mr. Valpy, that the building bye-laws were infringed and in this connection I cite from a judgment by Lord Ellenborough C.J., in Langton -v- Hughes (1830) M.S.596:-

> "What is done in contravention of the provisions of an Act of Parliament cannot be made the subject matter of an action".

Likewise I quote from the case of Brightman and Company Limited -v- Tate and another (1919) 1 K.B. 463, where that extract I have just read was quoted with approval and I read from page 467 of that judgment. Here McCardie J. cites from the judgment of Holt C.J. in the same case:

> "Every contract made for or about any matter or thing which is prohibited or made unlawful by statute is a void contract, though the statute itself does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute."

He then goes on to cite the passage that I have already quoted of Lord Ellenborough.

It is therefore clear from the authorities such as I have been able to find that where a plaintiff has carried out unlawful work, illegal work, he is not entitled to remuneration for that work. However, in this particular case, Mr. Valpy has urged that because of the pleadings

themselves which I have referred to and the evidence we have heard, so to speak, the builder is entitled to be protected from the effect of his illegal work because he took his orders from Mr. Gallaher and he can therefore shelter under his mantle. We are not prepared to accept that. We are satisfied that a builder of thirty years' experience knew, though he said he did not, or ought to have known of the building bye-laws in force in Jersey. They were common ones:- they applied to lavatories and staircases both of which are very often used for the purposes of the reconstruction of old buildings and we cannot accept that Mr. Jameson did not know that what he was doing was an illegal matter or contrary to the bye-laws. The case of Townsends (Builders) Limited -v- Cinema News & Property Management Limited (1959) 1 AER 7. which we had referred to us, was different. In that case the Judges went out of their way to distinguish between a breach of a licence and a breach of a bye-law which was illegal. We are satisfied that when Mr. Jameson's company having carried out illegal work it ought not to be paid for it.

However we cannot - it would be an impossible task for any court - delve into the accounts to find out what parts of the accounts related to that illegal work and we think the proper way to deal with it is therefore to allow the counterclaim for the work to put right the illegal building in the sum of £2,312.79. We therefore give judgment as regards the counterclaim for that sum. There should be added to that 10% for the architect's fee - that is £230.

As regards interest, we think that the proper date from which interest should run on both the judgment and the counterclaim is the 21st September, 1979, which was when Messrs. Bois & Bois wrote formally to the plaintiff company dismissing it. The interest will be at a commercial rate and if the parties cannot agree what that should be, they will have to come back to us.

The plaintiff company will have five-sixths of its costs.