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ROYAL COURT
(Samedi Division) 87.

11th May, 1995

Before: The Deputy Bailiff and
Jurats M. W. Bonn and C. L. Gruchy

Between	Jersey Monumental Co. (1963) Ltd.	Plaintiff
and	Parvez Pirzada	Defendant

Advocate S. J. Willing for the Plaintiff
Advocate N. M. S. Costa for the Defendant

JUDGMENT

THE DEPUTY BAILIFF: Jersey Monumental Company (1963) Limited is a company incorporated in Jersey and engaged for some forty to fifty years in the business of monumental masonry and sculpting. The managing director of the company is Mr. Barry George Reynolds, who has been involved in the business for about thirty years. They are the plaintiffs in the action which they are bringing against Mr. Parvez Pirzada, a customer of the plaintiff. The facts leading up to the dispute are extremely simple. Just before Christmas, 1991, the defendant came in to see the work carried out by the plaintiffs. He apparently liked what he saw and invited Mr. Reynolds to his home. Mr. Reynolds went to the house, which he admired, and was shown the area - the hallway and the existing fireplace - which was required to be marbled. The hallway had a cement floor, because the carpets had been pulled up and Mr. Reynolds told Mr. Pirzada that they would be able to lay the marble "straight on", using an adhesive. He noted that the floors had a wooden skirting around them and obviously, if the floors were tiled, then the marble tiles would come about an inch up the skirting board. Mr. Reynolds distinctly remembers saying to Mr. Pirzada "What about the skirting?" and Mr. Pirzada said "I will sort that out". From that, Mr. Reynolds deduced that Mr. Pirzada would take away the skirting board and replace it when the marble floor had been laid. At that time, nothing was said in any detail about the fireplace, but a figure of about £4,000 was mentioned for putting the marble slabs on the floor of the hallway. Some time later (the date is uncertain), Mr. Pirzada came in to the plaintiff's workshop and chose a coloured marble that he liked. He had told Mr. Reynolds that he had marble in his home in Pakistan and had always admired the material.

The plaintiffs buy all their marble from a stockist in Kingston, Surrey, England. They did not have enough material to cover the hallway, which was to have been made in a heavily veined marble, which is a delicate material with which to work, as it sometimes breaks in cutting. That is its only disadvantage, because all the marble that the plaintiff deals in retails at about the same price.

Mr. McFarlane is the manager of the plaintiff and he had gone out to the property after Mr. Reynolds had met with Mr. Pirzada to discuss the design of the fireplace with Mr. Pirzada and to carry out the detailed measurements. When Mr. McFarlane returned with these sketches, Mr. Reynolds was able to draw up a quotation which he told us was to cover a larger area than originally envisaged, which was the lounge area, the main room, the hallway and a new fireplace. We should point out that (as in the hallway) there were also apparently no carpets in the lounge area nor in the main room. The price was worked out by Mr. Reynolds on Mr. McFarlane's sketches, and formed the basis of the quotation. At the time the estimate was prepared, Mr. Pirzada wanted to retain the brass frame or metal clump of the fireplace, but apparently, after the quotation had been given, changed his mind. The figures were calculated for carrying out the work, that is, supplying, fitting and polishing the marble, to be about £11,200. We have an extraordinary situation where two well established businessmen have reached what was described to us as an amicable agreement and have shaken hands on the basis that the work would be done for £11,000 with nothing reduced to writing. There had been some initial haggling. Mr. Reynolds told us "this was not the way that he normally did business" but each considered the other as established men of business. Mr. Pirzada at the time that the agreement was made was expecting to pay no extras, but clearly expressed the view that if further works were ordered, then he would expect to pay for them. Sadly, Mr. Reynolds did not appear on site again and Mr. Pirzada apparently putting caution aside in his enthusiasm for what was being done, arranged for extras without any thought of the consequences as to cost.

The action was commenced by simple summons, the claim was particularised and was answered. There were no further pleadings.

We need to say this about the witnesses that we heard. We believe that all the witnesses gave their evidence fairly and truthfully. Sadly, there has been apparently a total lack of communication between Mr. Reynolds and Mr. Pirzada and to a large extent, we have had to rely on the evidence of Mr. Roger Samuel McFarlane. Mr. McFarlane is the plaintiff's senior stonemason. He has been employed by the company, as he put it to us, "on and off" since 1967, because at some time, he did other work on the mainland, but he has worked for the company for five years continuously and for 25 years as a stonemason. He is obviously a highly skilled craftsman and we found that his evidence was given

thoughtfully and fairly without bias to either side. At no time during the trial did we form the impression that he was prejudiced in any way and his evidence has been invaluable to us.

There were some problems when the marble was ordered, because the English suppliers had to arrange for a block of marble to be cut in Italy, half of which would have been ample for the whole area that had been quoted for. The marble comes from Italy in a block 9 ft. long x 5 ft. high and the price was to include the freight, fitting, labour and grouting. The marble block came to Jersey in March, 1992. The marble arrives on an "A" frame, but when the company started to cut it, the marble immediately began to break up. There was some question raised in Italy as to whether the cutting machinery at the company was adequate, but Mr. Reynolds told us that if the marble had been shaken in cartage, this could have caused it to fracture. The other half of the original block of marble was then cut successfully in Italy. The machinery at Jersey Monumental was checked and found not to be at fault. We should perhaps point out in passing that marble is classified as being equivalent to glass, and not insurable. Mr. Pirzada was upset at the delay, but understanding. We are satisfied on the evidence that we heard that Mr. Reynolds did not try to recoup any loss that he may have suffered by adding hidden extras. The "damaged" marble was being used for smaller units for other customers.

There were even more complexities in matching the veining of the marble, but Mr. Reynolds was happy to carry out his obligations for £11,000. This second consignment was ordered and laid. Mr. Reynolds told us that everyone was satisfied and he was very proud of the work. Mr. Pirzada paid (as he had said he would) in instalments until £7,000 had been paid and then there was what was described by Mr. Reynolds as "a bit of a drought" until the work was concluded.

To examine the facts in more detail.

It was in mid-January 1992, that Mr. McFarlane arranged to meet Mr. Pirzada on site to design the new fireplace. At the time, there was talk of retaining the stainless steel heat frame, which was considered to be an attractive piece.

We saw the plans which Mr. McFarlane drew up for the new fireplace, which obviously entailed a great deal of intricate work. The marble was to be cut into sizes and sections. It was all to be polished and fitted with edges and risers and a top.

Mr. Pirzada, shortly after that meeting, raised the question of other areas with a view to laying marble all the way through that area, which was the lounge area, the main room and the hallway. Mr. McFarlane eventually worked out drawings for these areas and for the fireplace. These were all to be separately

costed at that stage. There was, as we have said, a wooden skirting around the main room and the defendant said that it would probably remain there, but was told by Mr. McFarlane that he might have to raise it, because of the lie of the slope of the floor in the main room. One of the difficulties was how the base for the marble was to be laid. Ideally, a fresh sand and cement screed would have been laid, because there were different levels throughout. There was also a crack in the floor of the main room, and Mr. McFarlane was extremely worried that if the crack were to develop at a later stage, it might cause damage to the marble. Mr. Pirzada, with the optimism shared by so many house holders, told him that the crack would not cause a problem because the building had settled down. He did not want to take up the floor.

Mr. McFarlane, using his own peculiar form of shorthand drawing, had prepared plans for the various detailed works that would be carried out. We are perfectly certain that Mr. McFarlane advised Mr. Reynolds on the pricing of the fireplace and the precise area that would have to be covered with marble. He also explained that extra work would have to be done to the floor, in order to fix the adhesive so that the marble lay properly when it was completed. We are satisfied that it was Mr. Pirzada who later ordered the extra works to the fireplace which were outside the original estimate cost. We are satisfied that the intricate work of fixing the levels of the floor were intended by the plaintiff to be outside the original quotation, but we are concerned whether Mr. Pirzada, even though he struck us as a most sensible person, would have understood that. We are however satisfied that Mr. Pirzada, having decided to place a border of dark marble around the floor to highlight its attractiveness, then decided on the additional refinement of having a marble skirting laid. This marble work was of some importance to Mr. Pirzada. His many friends in Pakistan had marble in their homes. He wanted to be able to show off the marble to his guests. He eventually received a piece of excellent workmanship which he was delighted to show to some of the plaintiff's prospective clients.Mr. McFarlane told us how Mr. Pirzada would sit in a white chair watching him while he worked. He felt the joints and even stood on slabs that had just been laid in order to test them. We believe Mr. McFarlane when he tells us that when the question of the skirting was mentioned, Mr. Pirzada was told that it would be expensive, and that the top of the skirting would have to be polished, but that he said it would finish off a lovely floor. Mr. McFarlane agreed that there was no talk between him and Mr. Pirzada over the cost of the work, but he had not negotiated the original price. He had merely prepared the sketches for costing. At Mr. Pirzada's request, he had left the office while the two principals negotiated. He was not concerned with quoting prices to Mr. Pirzada and would not have done so, even in the unlikely event of being asked. We are certain that as work proceeded, Mr. Pirzada went on to ask for certain, but not all, of the extra work itemised in the account. We are also certain that, except in the few cases that we have instanced, Mr.

Pirzada knew that there were extras and that Mr. McFarlane kept Mr. Reynolds informed at all times. As Mr. McFarlane said, probably in an under-statement, the level of interest shown by the defendant was, in his experience, unusual. It seems to us inconceivable that anyone could argue that all the items detailed in the account could possibly have been included in the original quotation. Indeed, it became abundantly clear as the trial progressed that the defendant would not be able to sustain much of his pleading and at the commencement of the afternoon session of the first day, and at his request, we allowed the defendant to make substantial alterations to his Answer. A very large number of the extras included in the account of 18th August, 1992 are now accepted as extras. A whole line of legal argument based on the English concept of "accord and satisfaction" (which we make no comment upon) has been discarded. Sadly, we do not feel that the alteration to the pleadings and the manner in which the Answer was pleaded initially have helped the defendant in his case today. Mr. Pirzada told us, in a descriptive expression, that he felt that Mr. Reynolds was "out of step" by asking for extras in such a large cumulative amount. He took advice and instructed those advising him to plead, similarly, "out of step". This meant denying that any extra work had been carried out at all. In the light of the late amendment to the pleadings made in the face of an untenable position, we question the wisdom of that stand. In any event, the defendant has already tried to compromise the action by offering a sum of money over and above the £11,000 that he originally claimed was the full and final settlement sum. Perhaps Mr. Reynolds might have made himself clearer, but he did say that the parties shook hands on a deal and he took the view (which does not seem to us to be unreasonable), that if a customer asks for work over and above what is agreed, that work can be regarded as an extra. Up until 2.30 on the first day (for example), the whole of the floor and skirting of the w.c. was considered by the defendant to have been included in the contract price. He conceded later that stand to be untenable and we allowed the pleadings to be amended. Each party is at fault in believing that the other understood what was agreed. It falls to this Court, on the balance of probabilities, to decide what the terms of the contract were.

The burden of proof is on the plaintiff and the standard of proof is on the balance of probabilities. Certain extra work was conceded during the trial and it falls to us to decide the additional matters in dispute. The plaintiff has to satisfy us that it brought to the defendant's notice that works requested were additional to the original quotation and that it intended to charge for these original works as "extras" and of course that the defendant agreed that the plaintiff should proceed with the additional work, or extras, at his expense. On this we rely to a large extent on the evidence of Mr. McFarlane who dealt with the defendant on a day to day basis.

After some protest by Advocate Willing, we allowed the evidence of Mr. William David Tweed B.Sc. ARICS to be heard. The protest was based on the pleadings which we have already had reason to criticise in that no proper cross examination had taken place on the questions to which Mr. Tweed was being called to give his expert evidence. We do not need to enter into the arguments because although Mr. Costa agreed that there had been no direct challenge as to the price of the materials, he felt that there had been an oblique challenge in the reference to a rough guide estimate provided by the plaintiff to a Mr. Paul Voisin of Hunter & Co. Ltd. as a result of an enquiry made by him. The fact that the enquiry did not concern a named property and covered exactly the same area as that in dispute at Mr. Pirzada's house had been something of a source of enjoyment between Mr. Reynolds and Mr. Voisin. Nevertheless, Mr. Reynolds supplied the information that had been requested and it was on that basis that Mr. Tweed's evidence was given. He had also attended on site and took measurements there.

Mr. Tweed based his valuation of the work on the "budget estimate" sent by the plaintiff to Mr. Voisin. He told us that it was common practice in the industry that where work can be properly measured and valued, then the work is valued at contract rates if the work is of similar character and executed under similar conditions, but where it cannot be so properly measured and valued, then "day work" rates apply. He had used the estimate of the plaintiff given to Mr. Voisin as a basis for calculating the approximate value of the additional works, but his calculations were based on a most vague estimate which states that the company has had no site drawing nor even seen the site. When closely questioned by Mr. Willing, Mr. Tweed had to agree that if he had added certain items (for example, the skirting, the frame to the fire and the granite step), this would have closed the gap between his suggested settlement figure for extras of £4,400 and the actual additional amount requested of some £9,000. We have found the matter difficult to deal with and the case might have been foreshortened if the parties had explored the detail by the means of a request for further and better particulars of the extras claimed. This presumably was not dealt with at the time, because of the decision taken to plead that the action had been settled by the payment of the cheques and the denial that any extras were owing at all.

In the circumstances, the Court is not minded to depart from the original method of calculation set out in the account which it does not regard as unreasonable and we are left with deciding in this most difficult matter what we can properly consider to have been extras and what we can clearly consider as not to be extras.

We have weighed in the balance most carefully all the evidence that we have heard and, having regard to the account of 18th August, 1992, we consider certain items (totalling £660) have

been included in the original estimate. They include such items as "patching pipe holes. Repairing cracks in screed, removing skirting carpet pieces & nails" and "self levelling screed in bad areas of main floor". We have not dealt with each item that we regard as an extra. We have relied on the evidence of Mr. McFarlane. We are satisfied that he did no additional work without the express agreement of Mr. Pirzada and that when he did such work, he relayed the information to Mr. Reynolds.

We therefore award to the plaintiffs £8,735 by way of extras.

No Authorities

[Following the delivery of the above judgment the plaintiff applied for costs on an indemnity basis.

The Deputy Bailiff awarded the plaintiff indemnity costs up to the commencement of the afternoon session on the first day of the trial when the defendant was granted leave to make substantial amendments to his answer. The original answer denied that the plaintiff had carried out any additional work and averred that the payment of the £4,000 made on the 11th December, 1992, (which brought the total payments made by the defendant to the plaintiff to the sum of £11,000) was not a payment on account but had been accepted by the plaintiff as a payment in full and final satisfaction of the plaintiff's claim of approximately £20,000.00. The defendant withdrew the "accord and satisfaction" defence at the commencement of the trial.

The amended answer filed at 2.30 p.m. on the first day of the trial admitted that the majority of the previously disputed additional works were in fact extras and formally withdrew the "accord and satisfaction" defence. The exceptional (or special or unusual) circumstances which the Deputy Bailiff indicated justified an award of costs on an indemnity basis are those referred to on page 5 of the judgment, lines 5-35. The plaintiff was granted the taxed costs of the action subsequent to 2.30 p.m on the first day of the trial.]