

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2019/CLE/gen/01797

BETWEEN

MYCHAL BETHELL
(T/A) ESQUIRE BUILDERS

Plaintiff

AND

SYDIRA WATKINS

Defendant

AND

DAHL BETHELL

Third Party

Before Hon. Mr. Justice Ian R. Winder

Appearances: Travette Pyfrom-Farrington for the Plaintiff

Charles Mackay for the Defendant

Mark Symonette-Rolle for the Third Party

22 March 2021, 24 June 2021 and 5 August 2021

JUDGMENT

WINDER, J

The plaintiff (Mychal) claims against the defendant (Sydira) for breach of contract arising from non-payment for renovation/improvement works on a home she jointly owns with the third party (Dahl).

Background

1. On or about 2016, Sydira and Dahl purchased a home in Coral Lakes Subdivision in anticipation of their pending nuptials through a loan agreement with Finance Corporation of Bahamas Limited (FINCO). The home required renovation/improvement works and as such, Sydira and Dahl took out an additional loan with FINCO in the amount of \$40,500.00 to carry out the works.
2. The works were commenced by building contractor Cyril Bethell (Cyril) trading as Esquire Builders. Cyril is the father of Dahl. Payment for the works which were to be performed were to be disbursed in three stages by FINCO. Cyril began the works in September 2016. Unfortunately, Cyril died in October 2016. However the works continued uninterrupted and were completed in January 2017. Mychal, Cyril's son, says that he had always worked alongside Cyril and continued to trade as Esquire Builders upon Cyril's death.
3. Sometime following Cyril's death the relationship between Sydira and Dahl broke down. Dahl moved into the Coral Lakes home where he continues to reside, however Sydira never took up occupation, although she continues to maintain half of the mortgage payment to FINCO. Upon the completion of the works Sydira refused to sign releases required by FINCO to enable the payment to Mychal. Dahl's position is that he was and remains willing to sign the FINCO payment. Sydira says that she advised Dahl that the work should have ceased upon the death of Cyril and that she never contracted with Mychal for the performance of any contract for works on the home.
4. Mychal says that Sydira knew that he completed the works.

5. On 16 December 2019 an Originating Summons was filed in this action by Mychal seeking the recovery of payment for the works.

6. On 10 August 2020, having regard to the factual disputes which arise, I ordered the conversion of the action to a Writ action. The Statement of Claim provides:

1. The Plaintiff was at all material times licensed as a contractor and operating a business pursuant to a licence to provide general construction services.
2. By contract contained in and evidenced by the Defendant's authorization dated the 23 November 2016, a copy of which is attached ("the contract"), the Defendant agreed with the Plaintiff for the Plaintiff to continue certain renovations work to a home jointly owned by the Defendant and Dahl Bethell.
3. The contract was initially negotiated (in February 2016) by Mychal Bethell acting on behalf of Esquire Builders.
4. The works under the contract included the following and were broken down in 3 stages:-

Stage 1	Wall Footing
Stage 2	Walls and Pillars
Stage 3	Masonry repairs
5. The costs of the renovation works were agreed between the Plaintiff and Defendant at \$40,500.00 payable in 3 installments at the completion of the different stages of the renovation project.
6. At the time of the negotiation of the contract Esquire Builders was operating as a family owned construction business in accordance with a licence issued to Cyril Bethell as contractor.
- ...
8. Pursuant to and in accordance with the terms of the contract works on the home commenced in September 2016 with Mychal Bethell acting as lead contractor.
9. Cyril Bethell died on the 10 October 2016 but work under the contract continued as agreed.
- ...
11. In due performance of the contract, on the 21 November 2016, the Plaintiff completed the second stage of the renovation work.
- ...
14. On or about the 18th January 2017 the Plaintiff completed the final stage of the work (stage 3).
- ...
16. At no time during the renovation works which continued after the death of Cyril Bethell did the Defendant notify the Plaintiff of an objection to the continued performance of the contract by the Plaintiff.
17. In the premise the Defendant is estopped from denying the existence and validity of the contract with the Plaintiff.
18. Despite repeated request (sic) made by the Plaintiff of the Defendant the Defendant has failed or refused to authorize the final two payments. The Defendant is therefore indebted to the Plaintiff in the amount of \$27,500.00

representing payment of the second stage, \$12,500 and the third stage payment in the amount of \$15,000.00.

19. As a result of the matters set out above, the Plaintiff has suffered loss and damage.

7. On 27 August 2020 a Third Party Notice was filed in this matter by Sydira pursuant to Order 16 Rule 1(2) of the Rules of the Supreme Court. The Notice was served on Dahl, and provided in part:

[Sydira] claims against you to be indemnified against [Mychal's] claim and the costs of this action or contribution to the extent of the full amount of [Dahl's] claim or the following relief or remedy namely damages for breach of contract brought about by the outstanding balance relating to work authorized by the [Dahl].

8. On 31 August 2020, Sydira caused a Defence to be filed, which provides:

1. The Defendant does not admit to paragraph 1 of the Plaintiff's Statement of Claim and states that to her knowledge the Plaintiff is not a contractor and denies that she ever had any agreement with him.
2. Save for the home being owned by the Defendant and Dahl Bethell and which this Court by an Order dated 8th November, 2019 ordered the said home to be sold and the net proceeds of sale be divided between the Defendant and the said Dahl Bethell equally, the Defendant denies paragraph 2 of the Plaintiff's Statement of Claim and specifically states she did not nor has she ever entered into an agreement for renovations or the continuation of renovations with the Plaintiff.
3. The Defendant does not admit paragraph 3 of the Plaintiff's Statement of Claim or that she ever entered into any negotiations with the Plaintiff initially or otherwise regarding renovations of a home she jointly owns with the said Dahl Bethell, the brother of the Plaintiff.

...

5. The Defendant denies paragraph 5 of the Plaintiff's Statement of Claim and states that she never agreed to a contract with Mychal Bethell.
6. Paragraph 6 of the Plaintiff's Statement of Claim is not admitted. The Defendant knew Esquire Builders & Realty to be owned and operated by Mr. Cyril Bethell, a licensed contractor. To her knowledge the Plaintiff was a hotel worker and she has never been supplied with any documentation showing how the Plaintiff became involved with Esquire Builders & Realty...

...

9. Save that the Defendant agrees that Cyril Bethell died on the 10th October 2016, paragraph 9 of the Plaintiff's Statement of Claim is denied, and the Defendant

states that she never agreed for Mychal Bethell to continue with the renovations in any capacity whatsoever.

...

12. (a) The said Dahl Bethell and the Defendant were engaged to be married and the house which is the subject matter of the renovation contract entered into between the said Dahl Bethell and the Defendant as owners (hereinafter together referred to as "the intended occupants") and Cyril Bethell, the father of the Plaintiff was to be utilized as their matrimonial home and the intended occupants obtained a FINCO mortgage to complete the purchase of the house, part of which was allocated to cover the costs of the renovations in the sum of \$40,500.00. The renovations were to be completed in three stages.

...

(c) The Defendant had no knowledge that the renovation works on the house had continued and when she became aware of the same by the said Dahl Bethell that his brother, the Plaintiff, was doing work on the house, she made it abundantly clear to him through telephone calls and email correspondence that she did not agree and that the works should cease.

(d) The said Dahl Bethell has resided in the house since 2016 and still resides there to date. The Defendant has never lived in the house even though one half of the mortgage payments due and payable to FINCO are deducted from her salary on a monthly basis and those deductions will continue until the house is sold and the mortgage has been satisfied.

(e) The said Dahl Bethell without consulting the Defendant instructed the Plaintiff, who is his older brother, to continue the renovations. When the Defendant became aware that the works were being done by the Plaintiff, she informed the said Dahl Bethell that she did not agree because she did not have an agreement with him and she was not aware that the Plaintiff had any professional construction skills, to her knowledge he was a mere hotel employee. Additionally, she informed the said Dahl Bethell that they should work on solutions for them to recoup the monies put into the house seeing that they were no longer going to be married.

(f) The Defendant in November 2016 contacted the loan representative at FINCO and informed him that she did not agree with the "new" contractor and that she would not sign any stage release payment forms...

(g) Through a meeting and subsequent email correspondence FINCO suggested that the \$12,500.00 and \$15,000.00 i.e. the Stage 2 & 3 payments be placed on hold on a savings account until an agreement was made between the intended occupants to sign the stage release forms additionally the loan would have been converted to principal and interest payments, however, the said Dahl Bethell did not agree to the FINCO's proposals and requested that the account remain in its then current state until an agreement was made between the intended occupants and no such agreement was ever made. In

the premises the Defendant has no idea how the Reports dated the 22nd November, 2016 and 20th January 2017 can be said to have been prepared at her request and the author of the said reports, Mr. Randolph John will be called to give evidence as to how the request for these reports were made.

(h) The Defendant after years of trying to unsuccessfully negotiate with the said Dahl Bethell on an amicable way for them to part ways financially, inclusive of offers to purchase his interest in the house and or to place the house on rent, it ended up where the Defendant had no other remedy but to file a Partition Action, (CLE/gen/No.00134/2019 Sydira Watkins v Dahl Bethell) in which an Order was made and filed on the 8th November 2019 for the house to be sold with the net proceeds to be distributed equally between the parties to that action. ...

(j) ... the said Dahl Bethell has benefitted fully and completely from the renovations he instructed his brother, the Plaintiff, to perform without the consent of the Defendant. He has lived solely in the house for over four (4) years and therefore, if there is a debt owed to his brother, the Plaintiff, he alone should be liable for it.

...

9. On 12 November 2020, Sydira filed a Third Party Statement of Claim against Dahl, which provided:

...

4. The Defendant is claiming indemnity by the Third Party against all sums for which she may become liable to the Plaintiff in respect of moneys allegedly owed to the Plaintiff in respect of work carried out by the Plaintiff on the instructions of the Third Party alone on a house which the Third party is the sole occupant. The Defendant is also claiming to be entitled to contribution from the Third Party to the extent of the full amount of any sum which the Plaintiff may recover from the Defendant in the aforementioned action.

5. The Defendant's claim to indemnity against and contribution from the said Third Party is in respect of the whole of the Plaintiff's claim.

...

7. That on the 19th October, 2016, Cyril Bethell the contractor, died. Mr. Cyril Bethell was also the father of the Plaintiff and the Third Party. Shortly after the death of Cyril Bethell, the engagement between the Defendant and the Third Party came to an end

8. If there were an action against the Defendant it could only have been commenced by Mr. Cyril Bethell.

9. The Defendant was not aware that the renovation works on the house had continued and when she was made aware by the Third Party that his brother, the Plaintiff, was doing work on the house, she made it clear to him through telephone calls and email correspondence that she did not agree and that the works should cease forthwith.

...

12. In efforts to mitigate her loss the Defendant contacted their representative at FINCO in November 2016 and told him that she was not in agreement with the "new" contractor and that she would not sign any stage release payment forms.

...
16. The Order from the Partition Action should have been a sufficient and fair solution for the Third Party and Defendant to finally part ways financially. However, the Defendant is now being expected to incur further debt to the bank for a house she receives no benefit from.

...

10. On 2 December 2020 Dahl, filed a Defence to Sydira's Third Party claim in which he pleaded that Sydira has in fact suffered no loss and damage as set out in her Defence and Third Party Statement of Claim. The Third Party Defence says in part, the following:

4. The scope and costs of the work were agreed between the Defendant and the (sic) Mychal Bethell who was at the relevant time, as far as the Third Party was aware, acting as foreman and joint owner of Esquire Builders.

5. At no point did the Defendant inquire into the ownership structure of the business or indicated that she objected to the Plaintiff taking (sic) lead role in the renovation project. The Business was at the time a family owned business which the Defendant was fully aware of prior to negotiating and agreeing the renovation work. All of the work under the contract was carried out by Mychal Bethell or independent contractor employed by him. Cyril Bethell was at the date of the contract 71 years old and unable to perform much of the work.

6. At the completion of stage 1 of the work by Mychal Bethell the Defendant and the Third Party executed the payment release form authorizing the bank to release the stage payment.

7. As to paragraph 3 of the claim the Third Party will say that the Defendant is not entitled to any indemnity from the Third Party. The Third Party attempted to resolve the issue of the contractor's payment before proceedings were filed. The Third Party remains willing to authorize the bank to release the contractor's payment and have signed off on the payment release forms for the final two outstanding payments. The Plaintiff completed the works under the contract with the knowledge of the Defendant. The Defendant at all material times knew that the works continued and never indicated her objection to the Plaintiff continuing the works. As far as the Third Party is aware the Defendant never conveyed her objection to the work continuing by the Plaintiff until the same had been completed in full.

...

12. By a signed and executed payment release form addressed to The Manager, Finance Corporation of the Bahamas dated the 23 November 2016 the Defendant authorized the bank to release to Mychal Bethell the sum of \$12,500.00 representing the stage payment outlined in the attached inspector's report. The sum represented the 2nd payment due under the agreement with respect to stage 2 of the contract. The contract works were completed on or about 19 January 2017.

The Defendant never contacted the Third Party concerning the work being completed by the Plaintiff. Paragraph 9 of the claim is denied.

...

11. At the hearing of this matter Mychal, Sydira and Dahl all gave evidence on their own behalf. Witness statements were filed by each of them, which stood as their evidence in chief. Randolph John of Construction Services Group Ltd. gave evidence under subpoena.

12. Mychal's evidence did not differ materially from those in his pleadings. He says that he worked with his father Cyril and upon Cyril's death he took over the running of Esquire Builders. This work, he says, included the work to the home jointly owned by Sydira and Dahl. He says that Sydira was aware that he did the work on the home as she extended (through him) the scope of the renovation which included 'removing a partition wall and work in the master bath. Mychal says that he did this at no additional cost to Sydira or Dahl. Sydira signed off on the second stage payment for the renovation work, however, the paper work was rejected by the bank as it was beyond the two month validity period allowed by the bank. He needed an updated release from Sydira in order to receive payment.

13. Mychal says that Sydira never told him at any point that she did not wish for him to continue as contractor on the works as if she had he would have respected her wishes and ceased his efforts. Referring to Randolph John, he says even her independent contractor has recommended that the payments be released. He says that he wrote to both Dahl and Sydira on 12 October 2017 requesting that the balance of the payments be released. Dahl advised that this was not something that he could do alone as FINCO required both signatories to the loan to sign the release. There were no complaints concerning the quality or standard of the work he performed.

14. Sydira's evidence likewise did not differ materially from her pleadings. She maintained her evidence that there was a contract for renovations between herself and Dahl with the deceased Cyril. She deposed that she never agreed to Mychal performing any of the works, which she expressly advised both Dahl and FINCO that she did not

agree and would not sign any release for payment to Mychal. Sydira maintains that she has never lived in the home, but has continued to have financial responsibility for it through salary deductions, while Dahl has lived there alone. Further, she averred that the reports of John at Construction Services Group were never requested by her. She says that any debt owed should be paid by the Dahl to his brother and not by her.

15. Dahl denied the allegations made by Sydira as to Mychal's involvement. His evidence was that Sydira was the party who actually selected and paid John to oversee the works. Construction Services Group, in turn had an inspector review the works and prepare and submit a report at each stage of the work to FINCO, while a copy was also sent to her. He also stated that Sydira knew that because of Cyril's age and health issues that Mychal would be the one to carry out the works. He denied Sydira's claim that she called and emailed him with concerns about the contractor. There is no justification for Sydira's refusal to pay the contractor. The value of the home has increased as a result of the works carried out and to suggest that the contractor's fees be applied to offset the parties debt to the bank is not only unreasonable but is quite unjust in the circumstances. The contract for the renovation works was performed as agreed.

Mychal's submissions

16. Counsel for Mychal submits that the FINCO payment authorization form of 23 November 2016, came from both Sydira and Dahl 'acknowledged and affirmed' that Mychal would continue the renovation works after the death of Cyril, is signed by Mychal and Sydira. This affirmation is binding on Sydira and she is estopped from raising objections that Mychal completed the works, she submits. Mychal relies on the case of ***Stocznia Gdanska SA v Latvian Shipping Co. No.3 [2002] EWCA Civ 889*** and the dicta of Thomas J:

"Once the innocent party has affirmed, he must go on performing. He must then be able to point to behavior that amounts to repudiation after the affirmation either by way of some fresh conduct amounting to repudiation or by way of the continuing refusal to perform amounting to a repudiation..."

17. Counsel for Mychal submits that both Mychal and Cyril operated under the same business licence. Further, the works were openly performed in the presence of Sydira, who also made requests for additional modifications to the home. Esquire Builders, under whom both Cyril and Mychal traded was not an incorporated company and as such does not benefit from a distinct legal personality. It was a family owned business which upon the death of Cyril, Mychal was able to obtain a licence to continue with the business. It is contended that Sydira never informed the bank of her intention to find another contractor. They say there is no evidence that Sydira ever notified Mychal or Dahl of her objections to him continuing the works. She is therefore obliged to continue her part in the performance of the contract, (*Johnson and Another v Agnew [1980] AC 367*).

18. It was also submitted that Mychal was a joint contractor on the renovation works with Cyril and as such any obligations to fulfill the contract do not fall on the personal representative of his estate, but rather on Mychal as joint contractor. No authority was offered for this proposition. Dahl has been and remains willing to execute the FINCO documents that would allow Mychal to be paid.

19. Counsel for Mychal highlighted the exchange during cross examination with Sydira, in which she was questioned as to how her signature appeared on a FINCO payment authorization form dated 23 November 2016, which authorized the second stage payment to be paid to Mychal or an unknown contractor. Sydira admits, she says that she was aware that Cyril had died approximately one month earlier. However, Sydira averred that she signed a blank document which did not have Mychal's name on it. She also admits to never asking Dahl who the replacement contractor would have been. Counsel for Mychal suggested that all decision making for the works was left to Dahl.

20. During cross examination Sydira admitted that she trusted Dahl to ensure that the works was done properly. Mychal submits that even if the decision was made by Dahl to allow him to continue the works, he would have done so on the agreement of Sydira in the circumstances. Living only 5 minutes from the home it was submitted that Sydira could have easily made her objections to Mychal continuing the works known. However, there was no documentary evidence at trial which pointed to her informing Dahl that she

objected to Mychal continuing the work. It is argued that Sydira waived her right to object, per *W J Alan & Co Ltd v El Nasr Export and Import Co [1972] 2 QB 189* and the dicta of Lord Denning:

“The principle of waiver is simply this: If one party, by his conduct, leads another party to believe that the strict legal rights arising under a contract will not be insisted upon, intending that the other should act on that behalf, and he does so act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so... There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice in that behalf, or otherwise making it plain by his conduct that he will thereafter insist upon them... But there are cases where no withdrawal is possible... it may be too late to withdraw, or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights...”

21. Additionally, Mychal says that the unchallenged evidence was that Sydira made changes to the renovations and with the consent of Mychal and not Cyril. Those additional works were in fact carried out by Mychal. Further, the evidence that she gave Mychal the key to enter the home after he locked himself out, was also unchallenged at the trial.

22. Counsel for Mychal says that Sydira cannot take the benefit of the end product of Mychal's labour without paying as per *Parkin v Thorold (1852) 16 Beav.*

“Courts of Equity make a distinction in all cases between that which is a matter of substance and that which is a matter of form; and if it finds that by insisting on the form, the substance will be defeated, it holds it to be inequitable to allow a person to insist on such form, and thereby defeat the substance.”

23. Additionally, they submit that Mychal is entitled to the common law remedy of quantum meruit for the works, otherwise Sydira would be unjustly enriched if she does not have to pay for the works. The conclusion that must be drawn from the surrounding

circumstances is that Cyril's death was never intended to end the contractual obligations of the works contract. The Defendant should pay Mychal for the works.

Defendant's submissions

24. Counsel for Sydira submits that before the loan for the works was taken out, she and Dahl approached Cyril to carry out the works to the home. Cyril issued a letter on 15 January 2016 in which he proposed that the work would cost \$45,500 and be done in three stages. There was no evidence produced, they contend, to show that Cyril's estate was ever probated and how in particular the contract for the works would have devolved on Mychal for his completion.

25. Further, relative to John's certifications that all three stages were completed, Counsel for Sydira submits that this was solely in relation to a wall in the home, with nothing about renovations to the home. It is averred that Sydira did not instruct John to undertake any certifications as she never even spoke with him, which they say has never been rebutted by John, himself.

26. At paragraph 10 of her submission, Sydira states:

10. There are two legal positions militating against the plaintiff's claim in this matter namely (i) under the rules of privity of contract it is well known that only a party to a contract can bring or defend an action to the same. The plaintiff, was never a party to the agreement between Mr. Cyril Bethel and the defendant and the third party and there was never any intention to create a legal relationship with him; therefore, he has no standing to have brought this action an (sic) (ii) the only person who could have dealt with the defendant and the third party with respect to the above-mentioned agreement would've been Mr. Cyril Bethell's personal representative, it appears that the plaintiff has usurped the position of the personal representative and had taken on a role to which he had no right in law.

27. Further they submit, Mychal's actions upon the death of Cyril were acquisitive and do not accord with the Probate and Administration of Estates Act. As Dahl was obviously the one they say who instructed Mychal to carry on with the renovation works and he alone is occupying the home, then he should be responsible for the payment of the same.

Sydira was not aware that the works continued as she never visited the home after Cyril's death.

28. No business licence was produced to show the averments by Mychal and Dahl that Mychal owned Esquire Builders with his father to be true says Sydira. The business licence he did produce is partially illegible and cannot be relied on she says. There was also no evidence of a new contract. Sydira submits that the contract for the renovation works was frustrated upon the death of Cyril and that the contract was of a personal character, as per ***Hudson's Building and Engineering Contracts 11th edition, Volume 2 paragraph 14-071:***

Death

Upon the death of a contracting party, his rights and liabilities on non-personal contracts vest in his executors or administrators, and, to this extent, the liability of his estate is an exception to the general rule of law which prevents the assignment of contractual liabilities. But the distinction between "personal" and other contracts remains of vital importance, since the former become void upon death and have no future effect thereafter, although rights accrued at the date of death will be enforced."

29. The case of ***Gomez v China Emperor Co. [1985] BHS J. No. 124*** and the dicta of Malone Sr. J. is also relied on by Sydira, with regard to frustration of the works contract as follows:

"40. The doctrine of entire contract which implies as a term of the contract that no part of the price is to be recovered without complete performance then applies unless this case falls within one or other of the recognised exceptions to the doctrine. In England the effect of the Law Reform (Frustrated Contracts) Act, 1943 has been to bring about in certain circumstances a change in the consequences resulting from the frustration of a lump sum contract. An equivalent Act has not, however, been enacted here. Consequently, I am concerned only with those exceptions to the common law doctrine of entire contract that are recognized at common law. Frustration as such is not an exception since the common law adopts the maxim that " the loss lies where it falls". Consequently, where a contract to which the doctrine of entire contract applies is frustrated, nothing is recoverable since the work has not been completed. The recognised common law exceptions are where:

1. the defendant prevents complete performance;
2. there is acceptance of partial performance; and
3. there is substantial performance."

Third Party's Submissions

30. Counsel for Dahl did not challenge the background facts as to Sydira and Dahl having secured the loan from FINCO. He submits however that Esquire Builders which includes Mychal was engaged by the then engaged couple to carry out the renovation works. Also, that John was to certify that the works were performed to standard upon the necessary site inspections. If satisfied he would inform FINCO that the stage payments could be released as it went along. It was only after the relationship between Sydira and Dahl broke down did Sydira refuse to sign the FINCO authorization form to have the stage payments released to Mychal.

31. They say that Sydira acted in bad faith by not releasing the monies to Mychal even after the completion of the works. Regarding the certificates issued by John, Counsel for Dahl submits that the certificates were duly issued within the scope of the contract. As such they say that Sydira and Dahl were bound to execute the forms so that Mychal could be paid for the work he performed. It is noteworthy, they say that there have been no complaints as to the quality of the work performed by Mychal. Sydira alone could not have revoked John's authority to inspect the works and issue certificates thereon without giving notice of withdrawal, submits Counsel for Dahl.

32. Dahl says that the death of Cyril did not discharge the contract for the works. The parties were all under a contractual obligation to perform and he and Sydira's performance was to ensure that the contractor was paid for the work. He further submits that a term of good faith and fair dealing between parties should be implied in this case.

Analysis & Disposition

33. Having considered the evidence and observed the demeanour of the witnesses as they gave their evidence, I find in favour of Mychal. It is an unchallenged fact, as Sydira herself admitted in her own evidence, that he completed the work when Cyril died. While Sydira says she did not accept Mychal as contractor after Cyril's death, there was however, no evidence that she notified FINCO in writing via email or any other means that Cyril had died and she was in search of a new contractor to continue the works.

34. Insofar as the plea of privity of contract is concerned, I do not believe that this was a contract that should be construed in the strictest sense as is averred by Sydira. It is a fact that Cyril was past retirement age when he took on the renovation works for his son Dahl and his then fiancé, Sydira. This would have been known to both Sydira and Dahl. Further, I accept that notwithstanding Mychal may also have worked in the hotel industry he completed the second stage works under the contract to the standard accepted by John. I accept that there were no complaints as to the standard of the work. I accept that Mychal worked jointly with Cyril in what was a family type business and that they shared the trade name.

35. There have been no contentions by either Sydira or Dahl that the work performed by Mychal was sub-par. Sydira, as per her evidence took a laissez faire approach to the works and left decisions primarily in the hands of Dahl. Having made it clear that she trusted Dahl to ensure that the works were done to standard, she cannot now say that this family arrangement made no room for Mychal to complete the works.

36. I was also not convinced on balance that Sydira was not aware that the works had continued and had been completed. I believed the evidence that she also asked for modifications which were effected by Mychal at no additional costs to either her or Dahl. The fact is, the works would have added value to the home, the benefit of which is due to be taken by both Dahl and Sydira when the court ordered sale of the home takes place. Sydira is not entitled to watch Mychal work to his detriment and then take the benefit of his labour.

37. In any event it could not seriously be disputed that Mychal is entitled to payment on a quantum meruit basis.

38. Regarding Sydira's claim that, Dahl as the Third Party, the case of ***Wolmershausen v Gullick [1893] 2 Ch. 514*** speaks to how common liability may be addressed by the Court with respect to contribution and indemnity.

"A surety against whom judgment has been obtained by the principal creditor for the full amount of the guarantee, but who has paid nothing in respect thereof, can maintain an action against a co-surety to compel him to contribute towards the common liability; and for this purpose the allowance of a claim by the principal creditor against the estate of a deceased surety is equivalent to a judgment; and where the principal creditor is a party to the action, the surety may obtain an order upon the co-surety to pay his proportion to the principal creditor. Where the principal creditor is not a party, he may obtain a prospective order directing the co-surety, upon payment by the surety of his own share, to indemnify him against further liability."

39. The concept in *Wolmershausen*, is sustained by the learned authors of ***Chitty on Contracts, 32nd Edition, Joint Obligations, Contribution between joint debtors*** as follows:

17-028 It is a condition precedent to the right to recover contribution that the claimant should have been liable to pay the whole debt and should have paid more than his share of it. If he merely pays his share and no more, he has no present right to contribution, but he will acquire such right as soon as anything happens in the future which discharges the debt and thus brings it about that he has paid more than his share, for instance if the debt should become statute-barred. Moreover, a surety against whom the principal creditor has obtained judgment for the full amount of the debt, to indemnify him against further liability, or (if the principal creditor is a party to the action) an order directing the co-surety to pay his proportion to the principal creditor. A surety suing his co-sureties for contribution must join as defendants all those who are liable to make contribution, unless one of them is insolvent or there is some other good reason why he should not be joined.

40. Notably, it appears that FINCO was willing to pay Mychal for the works or at the very least they took no objection to paying the named contractor on the payment release

form, so long as both Sydira and Mychal agreed to him being paid. With that said, I was not convinced after reading the email in evidence of 23 November 2016 from Sydira to Tharell Duncombe of FINCO, where she stated that the payment release form was attached for the sum of \$12,500 that she was ignorant of the fact that that payment was being released to Mychal. After all, Cyril had died in October 2016.

41. In all the circumstances, Mychal succeeds on his claim against Sydira. I find that he is entitled to payment for the works. This was a family Sydira was marrying into and she placed her trust in her husband to be – Dahl to ensure that the project was completed, which it was. Sydira is to pay Mychal the claimed amount of \$27,500.00 as well as the reasonable costs in this matter to be taxed in default of agreement.

42. In respect of the Third Party claim against Dahl, I find that Sydira is entitled to a 50% contribution from Dahl with respect to the judgment for the outstanding contract sum, but not with respect to any costs. Having regard to the fact that Dahl has been willing to sign the release from FINCO it would not be fair that he be made to contribute to Sydira's costs in this action. In respect to the Third party claim I make no order as to costs.

Dated this 1st day of February 2022

A handwritten signature in black ink, appearing to read 'I R Winder', written in a cursive style.

Ian R. Winder

Justice