

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
COMMON LAW AND EQUITY DIVISION**

**2015/CLE/gen/01929**

**BETWEEN**

**HARRY FERNANDER SR  
(DBA FERNANDER'S PLUMBLING)**

**Plaintiff**

**-AND-**

**(1)ROBERT J. ARNOLD**

**First Defendant**

**(2) JAQUINE ARNOLD**

**Second Defendant**

**Before:** The Honourable Madam Senior Justice Indra H. Charles

**Appearances:** Mr. Joseph D'arceuil of Prestige Law Chambers for the Plaintiff  
Mrs. Gail Lockhart-Charles KC and Ms. Tracy Wells of Gail Lockhart-Charles for the Defendants

**Hearing Dates:** 10, 11, 14 March, 17 May, 31 May, 1 November 2022

**Breach of contract – Terms of oral contract - Performance – Burden of proof on Plaintiff – Whether burden has been discharged – Damages**

The Plaintiff sued the Defendants for breach of contract. He alleged that he was orally contracted to locate and fix leaks on the Defendants' property. He further alleged that he performed the contract but the Defendants have failed/refused to pay him for the work done. He claimed damages in the amount of \$42,887.13, interest and costs.

The Defendants alleged that the Plaintiff did not perform the contract as the bills for water consumption have escalated exponentially even though the Plaintiff alleged that the work was performed.

**HELD: finding that the Plaintiff performed the contract and therefore the Defendants are in breach of it, the Plaintiff is entitled to damages in the amount of \$42,887.13 with interest from the date of judgment to the date of payment and costs to be taxed if not agreed.**

1. There was an oral contract between the parties for the Plaintiff to locate and fix the leaks.

2. On a balance of probabilities, the Court is satisfied that the Plaintiff performed the work that he was contracted to do namely to locate and fix the leaks.

## **JUDGMENT**

### **Charles Snr. J:**

- [1] Mr. Fernander Sr DBA Fernander's Plumbing ("the Plaintiff") sued the Arnolds ("the Defendants") for breach of contract and for failure to compensate and/or pay him for work that was performed and completed at the Defendants' property called Lucaya House, Edgewater Drive Lyford Cay, New Providence. The Plaintiff claims damages in the amount of \$42,887.13, interest and costs.
- [2] In a nutshell, the Plaintiff alleged that he was orally contracted by the Defendants through Mr. Maillis, their Attorney and Agent ("the agent") to carry out repairs to the plumbing system at the Defendants' residence. The Plaintiff informed the agent that the work would cost from \$1,000 to \$1,500 per day depending on the amount of leaks and the equipment to be used. The Plaintiff commenced the work on 8 June 2015 and it was completed on 16 July 2015 when all of the plumbing work was in good and working order. After the work was completed, the Plaintiff contacted the agent but did not get a response. He then submitted the invoice to the Defendants personally. The Plaintiff again contacted the agent who informed him that the invoice was not being paid because he and the Defendants did not agree to the amount. As a result, the Plaintiff instituted the present action.
- [3] The Defendant filed a Defence and Counterclaim which was met with a Reply and Defence to Counterclaim. The Defendant chose not to file witness statements which is their right in law but subpoenaed a witness from the water company, Waterco, to testify on their behalf. On the first day of the trial, the Defendants applied to withdraw their Counterclaim as no evidence was led in support of it. The application was granted and cost was awarded to the Plaintiff as a result of the withdrawal.

[4] The Defendants did not deny that the Plaintiff was contracted to fix the leak. Paragraph 3(a) of the Defence averred that:

**“...In the events which happened, the Plaintiff was told to fix the leak there was some discussion that this involved digging and effort and the said Mr. Maillis asked the Plaintiff as to whether he could do it and upon his affirmative answer in the initial conversation he was told to a fact that he should find the leak and solve it, and specifically to be professional and honest in his billing and that he would be paid by the defendants. There was no quote or discussion of price or rates no contractual formalities and any further details were left to imply terms of professional work and honest billing, all oral, by telephone and as implied by law.”**

### **The issues**

[5] By Order dated 14 December 2021, the Court directed the Plaintiff to file a Statement of Agreed Facts and Issues by 1 March 2022 and, in the event that the parties could not agree on the facts, that each party will file and serve their respective Statement of facts on the same date but the parties must agree on the issues.

[6] In compliance with the Order, the Plaintiff filed an Agreed and Non-Agreed Statement of Facts and Issues on 1 March 2022.

[7] The parties agreed that the following issues arise for determination namely:

1. Was there a contract between the Plaintiff and the Defendants?
2. Did the Plaintiff perform his duty under the contract?
3. Did the Defendants breach the contract? And
4. Is the Plaintiff entitled to damages?

### **The evidence**

[8] The Plaintiff relied on his Witness Statement filed on 22 January 2021 and a Supplemental Witness Statement filed on 4 February 2022 as his evidence in chief. He called Andrew Fernander, Rickey Russell and Valentino Franklyn Baker Sr as his witnesses. They all relied on their respective witness statements which stood as their respective evidence in chief. They were cross-examined by learned Counsel for the Defendants, Mrs. Lockhart-Charles KC.

[9] Dale Davis was called by the Plaintiff to give expert evidence in plumbing. However, his expertise was challenged. His witness statement was thereafter expunged from the record.

[10] The Defendants did not file any witness statements nor did they attend the proceedings. That is their right. They, however, subpoenaed Jeffrey Saunders, Manager of the Distribution and Sewer Division of the New Providence Water Development Company Limited (“the Waterco”) which is the utility provider for the properties in the Western District of New Providence including the Defendants’ property.

## **Discussion**

### **Issue 1: Was there a contract between the Plaintiff and the Defendants?**

[11] During oral submissions on 2 November 2022, Mrs. Lockhart-Charles conceded that there was a contract between the parties in that the Defendants told the Plaintiff to locate and fix the leaks.

### **Issue 2: Did the Plaintiff perform his duty under the contract?**

[12] The crux of this action revolves around this issue of whether the Plaintiff completed the work that he was contracted to do, namely, to locate and fix the leaks.

[13] In civil proceedings, the Plaintiff has the burden of proving his claim on a balance of probabilities.

[14] The Plaintiff, a plumbing contractor, testified that, prior to this contract, he had done works for the Defendants before, for about 25 plus years. He said that, prior to 1 June 2015, he was contacted by the Defendants to investigate leaks in their residence. He informed them, through their agent, that the cost would be about \$1,000 to \$1,500 per day depending of the amount of leaks and the equipment to be used. Acting upon this request, he carried out an investigation in all the bathrooms, kitchens and utility rooms on the premises. On the conclusion of this exercise, he opined that no leaks existed in the residence. After the residence inspection, all the plumbing fixtures and faucets were turned off so that no water

was being supplied to the residence. Once the meter was turned off, there was no water. Once on, it was spinning rapidly. He said that he recognised that the water bill was astronomical and out of proportion for a residence of that size. He concluded that the leaks might be located underneath the property which was about 3 acres in size. He was advised that the Defendants were leaving for vacation and they would not be there during the currency of the repairs but their agent would be around to oversee the repairs.

[15] Mr. Fernander stated that he organized a team of four to six skilled plumbers and helpers and began the task of locating the leaks underneath the ground. On 8 June 2015, they started the search at the Pump House, the water meter and the holding tank. The holding tank was the reservoir for the water which was supplied by the New Providence Development Company.

[16] Mr. Fernander stated that they used equipment such as a leak detector, Spartan Mini Camera, standard on-screen footage, a snake, jackhammer and other specialized equipment. On a daily basis, he would call the agent to report on the progress of the work. He also prepared a daily work order showing the men and what work they performed. He completed the contract on 15 July 2015. He conducted inspection and testing for a week after 15 July 2015. He said that after the repairs were done, the system was checked and all was in order. He had no part to play in the Reverse Osmosis System which was done by Rickey Russell.

[17] Under intense cross-examination by Mrs. Lockhart-Charles, Mr. Fernander stated that he and Rickey convinced the Defendants that there was a leak from their pipes under the ground and that was **one** of the reasons for the astronomical water bill. Further cross-examination by Mrs. Lockhart-Charles went this way (See Transcript of Proceedings, 11 March 2022 at page 12 line 9 through to page 14 line 9):

“Q: So, my question is, why then did the bill and the meter readings continued at the astronomical levels that they started out with?

A. After I presented them with the bill?

Q: After you had fixed the problem.

A: Right. Like I said earlier, when they came back from their trip, my boys had already clean up the property, I put gauges in place. And I was going there at least once a week or so with them before I presented the bill to them. I went to see how -- I looked at the gauges to see how the pressure hold and if the pressure drop that indicates that you still have leaks. I did that for a week plus. Everything was smooth and I presented them with the bill.

Q: But they got a bill from the water company showing that the consumption for July and the consumption for August were even higher than consumption for May and June. So, how could you present them with a bill if you hadn't fix the problem?

A: The problem was fixed. Now, whatever happened after I leave, I don't know what happened. But the Arnolds saw the gauges and the gauges don't lie. And I gave them a week or so before I present him with the bill. Whatever happened after that, I don't know.

Q: Do you also agree that the meter readings don't lie?

A: The meter readings don't lie either. But I don't know what kind of water they consumed in there though. They left the sprinkler system on that, on the same water meter. They are always having guess (sic) coming in. I don't know what they were doing in there all day and all night.

Q: Right. So then why were you able to tell them beforehand that there was a leak because the water bill is astronomical. And then all of a sudden, even though the water bill is still astronomical, it doesn't mean that there is a leak?

A: Yes. Mr. Arnold knew that he had a lot of bad copper pipe in the next guest house. The old guest house connected to house. I keep telling him, Mr. Arnold, you have to take these out, at least some of the copper pipes out of the weak areas,

if not, they are going to burst on you and you are going to continue having these high water bills.

He didn't want to do it. So after we installed the reverse osmosis system, he was really convinced then that he had a leak. I called Ricky back in, Ricky came in. We pumped it back out. The water was again thousands of gallons that night. We did it again, I called Ricky the next day. Ricky came in and said Mr. Arnold you have leak, you have to fix these pipes or you will be wasting good water. That is why you put the system in.

Q. So, is it possible that the issue was the reverse osmosis system and not the pipes?

A: No, the reverse osmosis system just came in.

Q: But you said that the reverse osmosis system would lose water. And you said that you -- and you would fill it back up and it would drop again. Isn't it possible that it was the reverse osmosis system that was the cause of these astronomical bills?

A: No. The pipes were the problem. The pipes have been there from the building was build many many 10 years ago. And the pipes were faulty; copper pipes.

Q: Okay. So it's not the reverse osmosis system that is the cause of the problem, so then why when you fixed the pipes, as you said you did, why didn't the water bill go back to normal levels?

A: Like I said, I don't stay there. I only fixed what I did.

Q: Right. But you have seen the water bills for that property.

A. I can't deny it. I can't go by the meter reading either. I don't know what happened."

[18] Further, under cross-examination, Mr. Fernander repeated that "*I don't live there. That house runs like a little motel, so it is difficult to say what kind of water they consume there. They consume a lot of water there.*"

[19] Mr. Fernander agreed that the water bills are high for a property of that size. He said that, after he left the property, he did not know what happened. He had put the gauges in and left them for the Defendants to monitor. The gauges show the PSI on the system and if the gauges maintain 60 to 70 PSI that is indicative that everything is fixed and there are no more leaks on the property.

[20] On multiple occasions during cross-examination, Mr. Fernander maintained that he fixed the leaks. He stated that his duty was to fix the leaks and the Defendants confirmed that there were no leaks. He further stated that *“I isolate the system for that to let them see, the certain part of the houses. I turned one valve off and the gauge maintain, I turn the next valve off and the gauge maintain and he (Mr. Arnold) was satisfied. He never paid me but he was satisfied.”*

[21] Under re-examination, he said that the leaks were underground because the pipes are underground.

[22] The Plaintiff called Rickey Russell who specializes in design and installation of Reverse Osmosis Systems for commercial and residential homes. He stated that Mr. Fernander was not responsible for the installment of the Reverse Osmosis System. His company carried it out and was paid \$13,500.

[23] The Defendants subpoenaed Mr. Jeffrey Saunders, the Manager of Waterco to produce the records of the Waterco. Mr. Saunders produced the water consumption statements issued by the Waterco for the property for the period 1 January 2014 to 31 October, 2017.

[24] The statements below produced by Mr. Saunders showed the following consumption activity:

ARAWAK INVESTMENT LTD - ACCOUNT 10-0040114 (HOUSE) 2014					
Year	Period	Last Meter Reading	New Reading	Meter	Water Consumption (gal)
2014	01 January to 31 January	2,881,520	2,984,110		102,590.00
2014	29 January to 28 February	1,842,430	1,974,360		131,930.00
2014	01 March to 31 March	3,105,710	3,214,400		108,690.00



2014	31 March to 30 April	<b>NO STATEMENT ON RECORD</b>		
2014	01 May to 31 May	3,335,680	3,454,700	11,902.00
2014	31 May to 30 June	3,454,700	3,548,540	93,840.00
2014	01 July to 31 July	3,548,540	3,605,500	56,960.00
2014	01 August to 31 August	3,605,500	3,683,090	77,590.00
2014	31 August to 30 September	3,683,090	3,802,780	119,690.00
2014	01 October to 31 October	3,802,780	3,844,380	41,600.00
2014	31 October to 30 November	3,844,380	3,988,690	144,310.00
2014	1 December to 31 December	3,988,690	4,217,370	228,680.00

**ARAWAK INVESTMENT LTD - ACCOUNT 10-0040114 (HOUSE) 2015**

Year	Period	Last Meter Reading	New Reading	Meter	Water Consumption (gal)
2015	01 January to 31 January	4,217,370	4,446,570		229,200.00
2015	29 January to 28 February	4,446,570	4,650,280		203,710.00
2015	01 March to 31 March	4,650,280	4,799,650		149,370.00
2015	31 March to 30 April	4,799,650	4,991,070		191,420.00
2015	01 May to 31 May	4,991,070	5,061,690		70,620.00
2015	<b>31 May to 30 June</b>	<b>5,061,690</b>	<b>5,119,020</b>		<b>57,330.00</b>
2015	<b>31-Jul</b>	<b>5,119,020</b>	<b>5,326,230</b>		<b>207,210.00</b>
2015	<b>01 August to 31 August</b>	<b>5,326,230</b>	<b>5,598,700</b>		<b>272,470.00</b>
2015	31 August to 30 September	5,598,700	5,692,040		93,340.00
2015	31-Oct	5,692,040	5,806,240		114,200.00
2015	31 October to 30 November	5,506,240	5,920,010		113,770.00
2015	1 December to 31 December	5,920,010	6,113,980		193,970.00

**ARAWAK INVESTMENT LTD - ACCOUNT 10-0040114 (HOUSE) 2016**

Year	Period	Last Meter Reading	New Reading	Meter	Water Consumption (gal)
2016	<b>01 January to 31 January</b>	<b>6,113,980</b>	<b>6,328,000</b>		<b>214,020.00</b>
2016	<b>29 January to 28 February</b>	<b>6,328,000</b>	<b>6,467,360</b>		<b>139,360.00</b>
2016	<b>01 March to 31 March</b>	<b>6,467,360</b>	<b>6,627,480</b>		<b>160,120.00</b>
2016	<b>31 March to 30 April</b>	<b>6,627,480</b>	<b>6,835,500</b>		<b>208,020</b>
2016	01 May to 31 May	6,835,500	6,983,230		147,730.00
2016	31 May to 30 June	6,983,230	7,015,360		32,130.00
2016	01 July to 31 July	7,045,360	7,076,640		61,280.00
2016	01 August to 31 August	7,076,640	7,165,780		89,140.00
2016	<b>31 August to 30 September</b>	<b>7,165,780</b>	<b>7,336,670</b>		<b>170,890.00</b>
2016	01 October to 31 October	7,336,670	7,425,820		89,150.00
2016	31 October to 30 November	<b>NO STATEMENT ON RECORD</b>			

2016	1 December to 31 December	7,474,640	7,526,680	52,040.00
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<b>ARAWAK INVESTMENT LTD - ACCOUNT 10-0040114 (HOUSE) 2017</b>					
<b>Year</b>	<b>Period</b>	<b>Last Meter Reading</b>	<b>New Reading</b>	<b>Meter</b>	<b>Water Consumption (gal)</b>
2017	01 January to 31 January	7,526,680	7,568,340		41,660.00
2017	29 January to 28 February	7,568,340	7,620,320		51,980.00
2017	<b>01 March to 31 March</b>	<b>7,620,320</b>	<b>7,786,720</b>		<b>166,400.00</b>
2017	<b>31 March to 30 April</b>	<b>7,786,720</b>	<b>8,060,590</b>		<b>273,870</b>
2017	<b>01 May to 31 May</b>	<b>8,060,590</b>	<b>8,268,680</b>		<b>208,090.00</b>
2017	<b>31 May to 30 June</b>	<b>8,268,680</b>	<b>8,551,950</b>		<b>283,270.00</b>
2017	01 July to 31 July	8,551,950	8,641,950		90,000.00
2017	<b>01 August to 31 August</b>	<b>8,641,950</b>	<b>8,894,300</b>		<b>252,350.00</b>
2017	31 August to 30 September	8,894,300	9,025,490		131,190.00
2017	<b>01 October to 31 October</b>	<b>9,025,490</b>	<b>9,195,790</b>		<b>170,300.00</b>
2017	31 October to 30 November	NO STATEMENT ON RECORD			
2017	1 December to 31 December	NO STATEMENT ON RECORD			

[25] Mrs. Lockhart-Charles correctly submitted that, from the above records, the bills show that the water consumption escalated considerably after June 2015. In fact, the consumption in May 2015 was 70,620 gal and in June 2015 it was 57,330 gal whereas after July 2015, when the Plaintiff claimed to have resolved the problem leading to the astronomical bills, the bills in fact skyrocketed to 207,210 gal in July 2015 and 272,470 in August 2015 and, with the exception of June 2016 and December 2016, the bills remained consistently higher that they were in June 2015.

[26] It is clear from the table shown above that the water consumption fluctuated from month to month, not only in July and August 2015 but long after, even in 2016 and 2017. The Plaintiff left the scene in July 2015 and, more than two years later, the astronomical bills continue. A reasonable inference to be drawn is that there may be some other problem. The Plaintiff had not retracted from his statement that the water bill for the residence was astronomical and out of proportion but, as he stated under cross-examination, *"I don't live there. That house runs like a little motel, so*

*it is difficult to say what kind of water they consume there. They consume a lot of water there.”*

[27] I found the Plaintiff to be a straightforward and honest witness. I also have no difficulty in accepting the evidence of Mr. Saunders whom I found to be frank and credible. He agreed that the water consumption fluctuated from month to month and there is no stable consumption of water. He could not say what caused the fluctuation.

[28] On a balance of probabilities, the Plaintiff has satisfied the Court that he performed the work that he was contracted to do: namely, to locate and fix the leaks. His witnesses, whom I also found to be credible, corroborated his evidence. I also believe the Plaintiff when he stated that Mr. Arnold was satisfied with the job but refused to pay.

**Issues 3 & 4: Did the Defendants breach the contract and if so, is the Plaintiff entitled to damages?**

[29] Having found that the Plaintiff performed the contract, the next issue is whether the Defendants breached the contract. The simple answer is in the affirmative and as a result, the Plaintiff is entitled to damages in the amount of \$42,887.13 with interest from the date of the judgment to the date of payment with reasonable costs to be taxed if not agreed.

**Dated this 23<sup>rd</sup> day of February 2023**

**Indra H. Charles  
Senior Justice**