

BY THE COURT:

Introduction

1. This action is a retrial of a matter that came before another adjudicator several months ago, who dismissed the Claim largely on the basis that the Claimant had been unable, due to language issues, to present a sufficiently cogent account to establish his case.
2. The Claimant appealed, and a Supreme Court judge sent the matter back to be reheard, with little opposition from the Defendant, on the basis that there had been a denial of natural justice and on the understanding that the Claimant would have a translator present. The judge also directed that Samuel Saijad Rad be considered to be a Defendant, though he had not originally been named. Again there was no opposition to this step from the fairly agreeable Mr. Rad.
3. The trial proceeded before me with a translator who, though not a professional, speaks fluent Arabic and did a creditable job. The Claimant was also represented by legal counsel. As such there was no real obstacle to understanding the evidence. Unfortunately for the Claimant, the result of this trial is not all that different from the first one, though for totally different reasons.

The parties and the facts

4. The Claimant is a corporation whose principal is Emad Karim (“Mr. Karim”). The Claimant is a painting contractor.

5. The Defendant Memar Homes Inc. ("Memar") is a company which is involved in residential construction. The Defendant Samuel Saijad Rad ("Samuel Rad") is the president. His father and brother are also involved in some unspecified way. I was not told their names, and they were not in court to testify.
6. Memar is a relatively new entry into the home construction business. In August of 2009 it had not yet built a home. Mr. Rad's father was an established builder who was building a home for himself and his wife, and he enlisted his son (using Memar) to provide some assistance in the project, mostly as a way of giving his son and the company some experience. It is not entirely clear what role Memar was to play, but one of the things that it did was engage the Claimant as a painting contractor.
7. The terms of the contract were entirely verbal, and as is often the case with verbal contracts, the terms were not entirely clear and it is entirely possible that each party had a different understanding, to some extent, of the terms to which they were agreeing. The initial discussion between Samuel Rad and Mr. Karim resulted in a verbal quote of \$15,000.00 "taxes in." It is clear that Mr. Karim was interested in getting all, or at least most of the money in cash. This was not necessarily clear to the Defendants at the outset, and certainly not a convenient way of doing business for a limited company.
8. Mr. Karim testified that he expected there to be a mix of cheques and cash, but he wanted mostly cash. It does not appear that there was any clear timetable for payments, though I believe both parties understood that

there would have to be partial payments in order for the Claimant to purchase supplies and pay his workers.

9. And so the work began. After the Defendant Memar had presented several cheques to the Claimant for partial payments, Mr. Karim protested and threatened to pull out of the job unless he received cash. Because \$7,000.00 had already been paid by way of company cheques, Mr. Karim insisted that there be a sum added to the contract sufficient to pay the HST on that amount, namely \$910.00, and a special invoice for \$7,000.00 plus HST was created. There had also been an earlier personal cheque from Mr. Rad for \$2,000.00, which he says was used because the company's bank account was not yet set up. After that invoice there were only cash payments, the precise amounts of which are in controversy in this case.
10. The other live issues are extras and non-completion. Mr. Karim says that there was an agreement to add \$2,500.00 to the contract price at the outset, to account for extra colours and premium paint. This verbal understanding was said to have been reached directly between Mr. Karim and Mr. Rad's father. Samuel Rad testified that he did not have any knowledge of this alleged agreement and questioned how he or his company could be bound to something of which he had no knowledge.
11. Mr. Karim also testified that there was a later agreement to pay an additional amount because of unanticipated extra work, which amount was never quantified but which he says should be pegged at \$900.00.
12. The issue of non-completion is a significant one. Mr. Karim testified that he was unable to complete the last few details, and to correct deficiencies,

because he was unable to obtain access to the house. He testified that he made several attempts to complete. Samuel Rad testified that he was desperate to have someone complete the house, as his parents had moved in and were very unhappy living in an unfinished state, and because they were trying to spruce it up for sale. In the end, he was obliged to hire another painter to complete the job at a cost of \$5,200.00.

13. There was some suggestion at the trial that the doorbell at the home had not been functioning properly which might have made it appear that no one was home despite the fact that the house was occupied.

The Claimant's position

14. The Claimant says he is owed \$5,400.00. He says that the total contract amount was made up of the following components:

original contract	\$15,000.00
extras	\$2,500.00
HST add-on	\$910.00
further extras	\$900.00
TOTAL	\$19,310.00

15. Toward that amount the Claimant admits that the following payments were made:

Cheque (personal) dated August 20, 2009	\$2,000.00
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Cheque dated September 4, 2009	\$2,000.00
Cheque dated September 8, 2009	\$5,000.00
Cheque dated November 23, 2009	\$910.00
Cash payments	\$4,000.00
TOTAL	\$13,910.00

16. The difference between \$19,310.00 and \$13,910.00 is \$5,400.00.

The Defendants' position

17. The Defendants say that the contract was for \$15,000.00, and that the additional amount of \$910.00 was only reluctantly agreed to. Samuel Rad testified that, in retrospect, he does not really understand why he agreed to that amount, since the original \$15,000.00 was supposed to be "taxes in."
18. As for the alleged \$2,500.00 in extras, Samuel Rad stated that he was unaware of this and did not agree to it. He admitted that there might have been a further amount for extras encountered after the job was in progress, but that it was never quantified.
19. Samuel Rad's evidence, which appears to be supported by all of the other evidence, is that the amount of cash paid to the Claimant was \$6,000.00, not \$4,000.00 as he contends. There were handwritten receipts which appear to support that position, although they could be open to interpretation.

20. Even if there is a balance outstanding, the Defendants say that the Claimant did not complete the job. Samuel Rad finds it hard to believe that Mr. Karim could not gain access to the home to complete the job, and his position was clear that he was desperate to have someone complete and ended up overpaying to have someone else finish the work.
21. In his original defence to the claim, the Defendant's position was that the Claimant was still owed \$1,000.00 and that he had been promised payment of that amount if he would just come in and complete the job.

Findings

22. It is painfully clear that Mr. Karim did not take care to negotiate a clear contract, and that he did not establish clear parameters as to who he was contracting with. There is nothing written down which confirms amounts of the contract or of extras. While it is tempting to blame language or cultural barriers, I have concluded that the real reason was that Mr. Karim was more concerned with getting as much of his money in cash than he was with documenting a contract. The only reason to require cash, and to take such great exception to payments by way of cheque, was that Mr. Karim had no intention of remitting HST. The events surrounding the additional invoice for \$910.00 clinch this fact. His statement to the Defendants was, in effect, "if you are going to pay by cheque then you will have to pay the added HST amount" which was, at that time, 13%.
23. I find that the Defendants were at most passive parties to the Claimant's plan to evade the payment of HST. Samuel Rad had an understanding that the initial contact was for \$15,000.00 "taxes-in", which meant that the

Claimant would still have to pay tax out of that amount. I find that it came as a surprise to the Defendants that they were under pressure to pay in cash, and that they agreed to pay cash and the additional \$910.00 in HST because they were already into the job and Mr. Karim was pressuring Mr. Rad, who was also under pressure from his parents to have the job completed.

24. I observed openly at the trial that I had a concern that the contract upon which the Claimant sues was an illegal contract. There is no doubt in my mind that the Claimant wanted cash payments in order to avoid the payment of HST, which has the effect of defrauding both the federal and provincial governments of this tax revenue. It is also a fair inference that cash payments were also designed to facilitate the evasion of income taxes.
25. The case of *Prince Electric Ltd. v. Brar* 2004 CarswellBC 425, 2004 BCPC 36, provides an illustration of the illegality principle:

20 The action by Mr. Brar against Prince Electric and Grewal is significantly compromised by the cash payment made to Grewal. The purpose and effect of that transaction was to avoid the payment of taxes to both the Federal and Provincial governments. This was an illegal contract.

21 The law is clear that a court will not assist a party in enforcing an illegal contract. See for example, the case of *Matériaux de construction Castonguay Inc. v. Pelletier*, [1982] N.B.J. No. 68 (N.B. Q.B.). In that case the supplier of certain construction materials sued for payment. The purchaser had agreed to pay cash and not to document the transaction. This would allow the parties to avoid the payment of federal and provincial sales tax. Hoyt J found that this was an illegal contract and dismissed the supplier's claim.

26. I take notice of the fact that there is a vast underground economy in this country and that much business is done in the construction business on a cash basis. I further take notice that the purpose of such arrangements is to avoid or minimize the payment of both sales and income tax, and that there are often agreements which allow for such tax savings to be shared by both parties.
27. Notwithstanding their ubiquity, such contracts are illegal and unenforceable. Parties who do business on this basis cannot expect another branch of the state, namely the court, to assist them when things do not turn out as hoped. The bottom line is that this court will not assist a party to recover money that is alleged to be owing on a contract, when a significant feature of that contract was to defraud the government and breach the law.
28. Under the circumstances, it is my duty to dismiss the Claim in its entirety.
29. If I am wrong in my conclusion about illegality, I find that the contract was for \$15,000.00 "taxes in" and that there were further agreements to pay \$2,500.00 and the HST portion of \$910.00. I find that Mr. Rad's father had the authority to bind the company to that additional amount. I am not satisfied that there was an additional agreement to pay \$900.00, as there was virtually no evidence to support such a contention. The total of such sums is \$18,410.00. I find that there were payments of \$15,910.00 by way of cash and cheques, leaving a balance of \$2,500.00. I find that the Claimant's failure to complete the work was a breach of contract, and I do not accept that he made sufficient efforts to go back and complete. As such, the Claimant would be at least partly responsible for the additional

cost of completion which cost the Defendants \$5,200.00. The amount owing to the Claimant, after docking him some portion of that completion cost, would be minimal, if anything at all.

30. In any event, on the basis of illegality, the claim is dismissed.

Eric K. Slone, Adjudicator