THE FAIR TRADING COMMISSION

BEFORE THE BOARD OF COMMISSIONERS

IN THE MATTER of the Consumer Protection Act, 2010;

THE FAIR TRADING COMMISSION
VS.
AARJAY CONSTRUCTION (PTY) LTD
(Represented herein by its Director Mr. Ramesh Venkateswaralu)

CPA. 11. 152. 99

Mr. Kenny King – Complainant
Aarjay Construction (Pty) Ltd – Respondent

Mr. Daniel Cesar – Counsel for the Complainant
Mr. Rajasundaram – Counsel for the Respondent

QUORUM:
Dr. Shelton Jolicoeur – Chairman
Mrs. Dolly Tirant – Commissioner
Mrs. Jenna Thelermont – Commissioner
Mr. Phillipe Chong-Seng – Commissioner
Ms. Annie Vidot – Commissioner

Case presented on behalf of the Complainant by Mr. Georges Tirant – Director for Consumer Protection Affair (FTC)

RULING

[1] A formal complaint was lodged by Mr. Kenny King, the complainant herein, against Aarjay Construction (Pty) Ltd, the respondent, on the 1st of August, 2011 (See Complaint Form marked Exhibit 3) upon the complainant being dissatisfied with the quality of service he received from the respondent after he had contracted the respondent to build his two bedroom house. The nature of the complaint was as follows:-

- Aarjay Construction (Pty) Ltd sub-contracted Mr. King's project without his knowledge to a mason whose license has expired since November, 2010.

- There are defects with his house namely corrugated iron sheets are already rusted, prominent cracks and plastering defects everywhere.
- Several invoiced works on the approved plan that has not been executed.
- The site has been abandoned.

[2] Subsequent to investigations conducted by the Fair Trading Commission its officers were satisfied that the respondent was in contravention of Sections 40(1)(a)(b)(c)(d) and 50(2)(b)(i) of the Consumer Protection Act, 2010 and therefore deemed the case fit to merit a hearing before the Board of Commissioners. On the outset we feel it indispensable that we reproduce the above mentioned laws:

> **Sec.40(1)** Subject to this part, where a supplier undertakes to perform any service for or on behalf of a consumer, the supplier shall –
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> (a) perform and complete that service in a timely manner and give to the consumer timely notice of any unavoidable delay in the performance of the service;
> (b) perform the service in a manner and of a quality that persons are generally entitled to expect;
> (c) where goods are required for performance of the service, use, deliver or install such goods that are free of defects and are of a quality t hat persons are generally entitled to expect; and
> (d) return any property or control over any property of the consumer in at least as good a condition as it was when the consumer made it available to the supplier for the purpose supplying the service.

[3] Section 50(2)(b)(i) reads as follows:

> **Sec. 50(2)** For the purpose of this section, consumer goods fail to comply with the general safety requirement if they are not reasonably safe having regard to all the circumstances, including –
>
> (a) …
> (b) *(i)* any mandatory standard specification declared by the Seychelles Bureau of Standards; …

[4]In that light the case was fixed for hearing on Wednesday 9th November, 2011. The same was heard *exparte* after an application under Rule 12 of the Fair Trading (Procedure for

Conduct of Hearings) Rules, 2011 from Mr. Georges Tirant who was presenting for the Fair Trading Commission on behalf of the complainant due to the absence of the respondent or any of its representatives as well as that of his legal counsel, Mr. Rajasundaram, who had sent his law clerk, Ms. Nona Camille, who in turn informed the Board that she was neither qualified nor mandated to carry out the task at hand.

[5]The Complainant adduced evidence, both oral and documentary,and also called witnesses to support his complaint against the respondent. After perusing the documentary evidence so produced the Board is satisfied that:

i) on the 1st December, 2010 Mr. King and his partner Ms. Monique Adonis signed an agreement with Aarjay Construction (Pty) Ltd, a registered construction company (See Certificate of Incorporation marked Exhibit 1) holding a Class 1 Building Contractor License (See Exhibit 23), for the sum of Seychelles Rupees six hundred and two thousand for the construction of their two bedroom house on parcel No. C5157 at BaieLazare (See Exhibit 6).

ii) the Seychelles Planning Authority approval was granted on 29th March, 2010 (See approved plans marked Annex 12(e)(iii) of Exhibit 17 and Annex 12(g)(10) of Exhibit 19 as well as letter marked Exhibit 29)

iii) Rs. 355, 000/-was paid to the respondent as part payment of the contract price (See receipts marked Exhibit 4 and 5)

iv) the house contained several defects which were observed on a site visit namely corrugated iron sheets already rusted, prominent crack and plastering defects throughout the structure and incomplete invoiced works. (See Exhibits 14 to 19)

v) upon documenting those defects the complainant called for several tests to be carried out to ascertain their cause, namely, a Single Spot Test for the rusted corrugated iron sheets and a Schmidt Rebound Hammer Test for the concrete. The Seychelles Bureau of Standard carried out the said tests and filed a report of their findings (Exhibits 8 and 9)

vi) no Commencement Notice was filed at the Seychelles Planning Authority as required by the law and therefore no proper supervision was administered on the site (See letter marked Exhibit 2).

vii) Mr. Malvina, the mason undertaking the construction of the complainant's house, was a sub-contractor working under the supervision of the Aarjay Construction (See Exhibit 25)

[6]A further perusal of the oral evidence submitted in the case the Board is also satisfied that works on the approved plans had not been executed accordingly as per the evidence of Mr. Herminie, the engineer who worked on the said project, who testified that upon a visit of the site he noticed that several changes had been made to the original plan. That

he did not effect those changes nor was he aware that such had been made to his structural plan.

[7]Being absent at the hearing very little evidence has been submitted on record on behalf of the respondent. Be that as it may we have taken what we have into due consideration. In a letter dated 3rd August, 2011 (Exhibit 10) in response to the complainant's letter of 25th July, 2011 (Exhibit 7)the respondent stated that the complainant had not complained of his quality of work till the 22nd July, 2011, that in fact previously the complainant had expressed satisfaction. That with regards to the rusty corrugated iron roofing sheets since they purchased it locally the issue had been addressed with the supplier and they will address what was used on the site as agreed. The respondent disputed that there were prominent cracks in the structure but rather, from what can be seen, there are superficial cracks on the plastering surface. That works have been stopped temporarily pending the resolving of payment issues after which outstanding works shall be completed as per the contract agreement. On the issue of incomplete works the respondent stated that "As per the contract all works are measureable and payable on completion of each stage" and further that "I would appreciate if you let me know where and how we have not executed the work according to the approved plan." The respondent also provided a quotation dated 1st December, 2010 (Exhibit 11) detailing all thework to be carried out and the amount charged.

[8]After careful deliberations we noticed that there were several lapses in the due processes of this project but for the purpose of this ruling we have focused on issues touching the relevant area of the Consumer Protection Act, 2010 to the extent that we are mandated to. Looking at the evidence as a whole it is our opinion that the quality of work on this project is clearly below the expected standard of a Class I Building Contractor. Tests carried out by the Seychelles Bureau of Standard on samples of the corrugated iron sheets taken from the site shows that the same do not meet the requirements of our national standard of specification for Hot-Dipped Zinc Coated and Aluminum/Zinc coated corrugated iron steel sheet for general purposes which states that the minimum coating mass of zinc (including both surfaces) shall not be less than 155g/m^2 for a single spot test. The sample tested had a zinc coating mass of 113g/m^2 (See SBS report marked Exhibit 8). Mrs. Sreekala Nair, from the Seychelles Bureau of Standards, confirmed this when she was giving evidence under oath.

[9]Mr. Dave Madeleine, the Manager of Engineering and Metrology Services, also from the Seychelles Bureau of Standards testified that his establishment also tested samples of concrete from different part of the site through a Schmidt Rebound Hammer Test and confirmed that the results of the test revealed that all the concrete samples tested were below the required concrete grade C30 save for one which was above the required

concrete grade at C30.1 (See report marked Exhibit 9). It also came out in evidence that the plastering work was of poor quality (See Exhibit 15).

[10]Mr. Alphonse, a licensed carpenter (as per Exhibit 27), who was approached to conduct all carpentry works on the site gave evidence that to the effect that all materials were provided by the contractor (Aarjay Construction (Pty) Ltd). That no one supervised his work on the site and he was paid by Mr. Malvina. He testified that when the corrugated iron sheets were received they were not in proper condition already rusty. Ignoring his warnings Mr. Malvina instructed him to use them for the roof. Moreover, when he asked for the approved plan for the roof he was informed that there was none instead Mr. Malvina traced a sketch of how the roof should be and he followed the same relying on his experience. Furthermore that despite his expressed concerns he was given screws to use that were inappropriate for the task as it would cause leaks in the roof and indeed Mr. King confirmed in evidence that the roof is leaking. Mrs. Margaret Sunhua, the owner of Vantage Enterprise, testified that the respondent purchased corrugated iron roofing sheets from her company. She explained that Mr. Ramesh Venkateswaralu bought the cheapest corrugated iron sheets from her shop but regardless if the sheets are handled correctly they should not give the customer such problems. On the other hand the corrugated iron sheets will easily rust if they are cut incorrectly for instance with the wrong machinery. Transporting, carrying and storing them in the wrong way and position will also cause them to rust.

[11]In view of the foregoing it is our considered view that as a Class 1 Building Contractor Aarjay Construction (Pty) Ltd has neglected to undertake minor processes to enable the appropriate completion of Mr. King's project by firstly not sending the Commencement Notice to the Seychelles Planning Authority. Secondly, by failing to conduct regular supervision to ensure that construction was as per the approved plans. Thirdly, by purchasing building materials that were below the required standard in quality. Finally, by not ensuring that the workers engaged were suitably qualified to perform the task with which they were entrusted. The aforementioned has led to the obvious poor quality and incompletion of substandard works. We also take into account the behavior of the respondent, for instance not being present for the hearing of the case proper as well as his representatives absenting themselves necessitating the Board to proceed with the same *exparte*. This comes across to us as a lack of co-operation with the Fair Trading Commission on the part of the respondent.

[12]The Board of Commissioners has taken due consideration to the recommendations made by the Fair Trading Commission, the submissions of Mr. Georges Tirant, the Director of Consumer Protection Affairs from the Fair Trading Commission, statements made by the respondent and all the evidence brought forward by the complainant in

support of his case together with the relevant sections of the Consumer Protection Act, 2010. We find that there is sufficient evidence to prove that the respondent has contravened Section 40(1)(a)(b)(c) and (d).

[13]With regards to the second limb of the case based on the evidence from the two experts from the Seychelles Bureau of Standard who both failed to say for sure that the discrepancies in standards of the samples of building material from the site of Mr. King's project (i.e. the corrugated iron sheet and concrete) with that of the national standards set by the Seychelles Bureau of Standards will deem the house "not reasonably safe" as stipulated in Section 50(2) the Act. We therefore dismiss the contention that there has been a contravention of Section 50(2)(b)(i) for lack of solid evidence to prove this limb.

[14]*Vis a vis* our decision we find it obligatory to consider Section 40(2) of the Consumer Protection Act, 2010 which provides that:

> **Sec. 40(2)** Where a supplier fails to perform a service to the standards specified in subsection (1), the supplier shall at the direction of the consumer –
>
> (a) remedy any defect in the quality of the services performed or goods supplied; or
> (b) refund to the consumer a reasonable portion of the price for the service performed and goods supplied, having regard to the extent of the failure.

We are therefore in agreement to enforce section 40(2)(a) and order that the respondent takes steps to remedy the roofing sheets which should be replaced; all the defective plastering works and concrete blocks should be repaired or replaced so as to reflect the expected required standards. To aid this exercise an independent professional quantity surveyor is to carry out an evaluation of these remedial actions. All costs to be borne by the respondent.

[15]It has also come to light from the evidence that the house was positioned at a different location than that which was documented on the plan. As a result of this Mr. King claims that on top of the Rs. 355, 000/- already paid to the respondent as part payment of the contract he had to pay an additional Rs. 7, 000/- towards blasting work on a rock which presented a danger to his house. In relation to this it is hereby ordered that the structural design engineer who worked on Mr. King's project to draft a report stating whether this is indeed the case and if yes whether this relocation of the house was necessary and if yes, why. Also the engineer is to clearly set out all the discrepancies

between his original plan and the house that was constructed and whether these discrepancies have any effects on the structure of the house. In the event that the engineer's report reveals that the relocation of the house was via a mistake of the contractor then it is ordered that the respondent shall refund the complainant any extra cost incurred as a result of this act, the latter being redundant if the former is opposed.

[15]After further scrutiny of the circumstances of the case we find it reasonable to apply the provisions of Section 67(1) of the Consumer Protection Act, 2010 which states that *"Where the Commission determines after a formal hearing that a person has contravened any requirement or prohibition contained in sections the Commission may order the person –(a) in the case of an individual, to pay a penalty of a sum not exceeding SR100,000; or (b) in the case of a person other than an individual, to pay a penalty of a sum not exceeding SR400,000"* and propose that the respondent pays a fine of a sum equaling 10% of the full contract sum of SR602,000.

[16]Right of appeal explained.

Ruling pronounced by us on the …….day of ……, 2012

Mrs. Dolly Tirant
Commissioner

Mrs. Jenna Thelermont
Commissioner

Mr. Philippe Chong-Seng
Commissioner

Ms. Annie Vidot
Commissioner