THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ST. CHRISTOPHER AND NEVIS
ST. CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2007

CLAIM NO: SKBHCV 2005/0070

BETWEEN:

PHILIP HOPKINS **Claimant**

and

JAMES BUCHANAN **Defendant**

Appearances:
Mr. Fitzroy D. Eddy, Counsel for the Claimant
Mr. Adrian Scantlebury, Counsel for the Defendant

2007: March 29
2008: February 28

JUDGMENT

[1] **BELLE J.** In April of 2005 the Claimant filed suit against the Defendant claiming the enforcement of terms and conditions of an oral contract or agreement made on or about November 14, 2003, for the construction and management of the construction of a house at Frigate Bay, St. Kitts. The claim alleged that it was agreed that the Defendant build a house for the Claimant upon the terms and conditions of the said oral contract and or agreement and the Claimant paying from time to time such sums as became due to the Defendant (for the construction of the house). The Claimant claimed damages for breach

of the said oral contract and or agreement and other wrongful acts and or omissions of the Defendant including but not limited to:

1. his refusal to comply with the terms and conditions of the oral contract and or agreement , namely to construct and provide management services to complete the construction of the house;

2. his failure to do the work in a workmanlike manner and to use materials of the quality and kind required.

3. his failure to account to the Claimant for all sums of money received by him.

[2] The Claimant sought the following relief:

(i) *" An order for an accounting and reference to Rule 40, referring to a referee the matter of accounting by the Defendant for the construction and construction management services for the fixed period on or about November 14, 2003 to September 9, 2004; and without limiting the above, as part of the reference , an order directing that the Defendant file with this Court a full and complete audited accounting of all monies received by him from the Claimant on or about November 14 2003 to September 9, 2004.*

(ii) *All necessary and consequential accounts, directions, and inquiries.*

(iii) *Restitutionary damages for breach of fiduciary duty and unjust enrichment and /or breach of contract.*

(iv) *Judgment for the Claimant against the Defendant for any amounts found due and owing by him to the Claimant.*

(v) *Interest pursuant to the power conferred by Section 27 of the Eastern Caribbean Supreme Court Act 1975 on any and all amounts found due and owing to the Claimant.*

(vi) *An order allowing the Claimant to trace any deficiency determined to be due and owing by the Defendant to the Claimant to any and all assets of the Defendant.*

(vii) *Such further or other relief as this Honourable Court may deem just.*

(viii) *That the Defendant pays Prescribed Costs pursuant to CPR 2000."*

The Claimant's Legal and Factual Assertions

[3] In his statement of claim the Claimant stated that he and the Defendant entered into an oral contract for the construction and management of the construction of his dwelling house. The terms of the agreement according to the Claimant were that the Claimant would be paid $ 750 per month for his services and would be responsible for the construction and management of the construction of the said house to the stage where it was 'roof –tight,' meaning that all windows and doors would be installed, plumbing and electrical works and floors tiled.

[4] The Claimant asserted that the said oral contract was contained in or is to be inferred from a document prepared by Everton Harvey dated March 27th, 2003 which was reviewed and agreed to by the Defendant and the Claimant as forming a part of the basis upon which the construction and management of the construction was to proceed. The Claimant also claimed that under the agreement he was to advance monies, at specified periods of time after a certain stage of construction was reached to the Defendant and subject to an accounting monies were advanced ahead of scheduled completion stages

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[5] Under the contract also according to the Claimant the construction and management services were to cost US$200,000.00. The construction was to commence in November 2003 and be completed by November 2004. The Claimant claims that he paid US$208,673.28.

[6] The Claimant thought that the Defendant pursuant to the agreement would act in his best interest but according to the Claimant disagreements developed between the Claimant and the Defendant as to the quantity and quality of work being done on site. As a result the house was not completed to the stage agreed by the Defendant under the agreement. The claimant alleged that the Defendant abandoned the construction site on or about September 2004.

[7] Among his grievances against the Defendant the Claimant claims that he suffered damages and loss of opportunity based on the Defendant's failure to abide by the agreement between them. He claims to have lost the opportunity to rent his downstairs apartment. The Claimant also includes expenditure to date of EC$29,000.00 to remedy defects in workmanship and to continue construction of the house. He also expected to pay not yet quantified sums of money to bring the construction of the house to the stage where the Defendant ought to have reached. He also claimed to have incurred substantial travel and related costs.

The Evidence

[8] The Claimant stated in his evidence in chief that he had discussions with Mr. Bernard Boland as to how much he would charge to construct the house. The discussions between Boland and himself ended when in his estimation the amount of money being requested by Boland was too high. According to the Claimant he never hired Boland to be contractor of the house. The Claimant added that he was dissatisfied with the quality of work done by Boland and brought it to the attention of Buchanan. But he did not and could not terminate the services of Boland, as it was Buchanan who was responsible for Boland's employment.

[9] The Claimant also registered his dissatisfaction with the poor quality of work being done by Derrick Browne, Boland's foreman, who had been contracted to carry out the work after Boland was dismissed, and brought this to the attention of the Defendant. Browne's services were also terminated. But again the Claimant said he could not terminate Browne since it was Buchanan who was responsible for Browne's employment.

[10] The Claimant expressed the view that based on a visit to the work site in September of 2004 Mr. Buchanan was not paying the workers and suppliers of construction materials and equipment. Indeed he paid US$1500.00 to Wilsie Hines to continue the work on site.

[11] The Claimant claimed also that he paid St Clair Herbert, Building Contractor of Herbert's Construction, Lower Monkey Hill, St Peter's St. Kitts to carry out remedial work to correct

work done by Mr. Buchanan. He paid St Clair Herbert the sum of EC$29,781.20 (US$10,961.43) to carry out the said remedial work. The Claimant's calculation at the time was that the Defendant had failed to account for EC$220,467.23 or (US$81,146.61).

[12] Under cross-examination the Claimant explained that he relied on the expertise and experience of the Defendant in the hiring of Mr. Boland. However he became dissatisfied with Mr. Boland's work and drew it to the Defendant's attention. **They agreed** to dispense with Mr. Boland's services. In the Claimant's words the Defendant was becoming too expensive. The Claimant also discussed hiring Derrick Browne. The Claimant said that Browne was not doing any work. The Claimant reiterated the general position that they dispensed with people because of the quality of work.

[13] The Claimant refuted the idea that he instructed the Defendant not to pay suppliers or labour. As far as the method of payment was concerned the Claimant stated that the Defendant did not always give him receipts. He did query a couple of the receipts. But the Defendant said his secretary had made a mistake on one occasion. He had noticed that the amount of work done and the money paid did not tally.

[14] The Claimant denied that he hired the project manager after he found that Browne was not doing any work.

[15] The Claimant also brought the witness Mr. St Clair Herbert. Mr. Herbert had stated in his evidence in chief that he was a building contractor and owner of Herbert's Construction, of Lower Monkey Hill, St Peter's St. Kitts. In September of 2004 the Claimant with respect to doing work on the construction of a house a Frigate Bay had contacted him. According to this witness the work that was to be done was identified as the removal of a section of the first floor veranda; fixing and plastering columns, screwing down the roof sheathing; removal of concrete from the outer steel beams; casting in outer steel around the first floor; removing door heads to master suite on the ground floor and putting them in the right place; and capping of the floor on the inside of the house.

[16] Mr. Herbert estimated that the remedial work would cost EC$29,781.20.

[17] Under cross-examination Mr. Herbert stated that he had estimated the house to be 35-40% completed. He noted that the steel holes in the walls were filled with concrete but not the block holes. He had to tie down the roof and thought that the person who worked on the house before him had not done a very good job. Mr. Herbert had been in construction for more than 25 years. I believe the evidence of this witness and consider him to be a witness of truth.

The Defendant's Legal and Factual Assertions

[18] The Defendant's defence was that he was not responsible for the construction of the house at Frigate Bay, but he was responsible for the management of the construction only. The Defendant also denied that he had agreed to a monthly salary of $750.00 for management services on the building project. He insisted that the agreement was that he would be paid 6% of the valued work at the end of his tenure. The Defendant also denied that there was any agreement as to the contract period by reference to the stage at which the house was "roof tight." However he agreed that money was advanced to him from time to time by the Claimant based on accounting being presented for various stages of work.

[19] The Defendant further denied that there was an agreement that the construction and management services were to cost U.S. $200,000.00. He asserted that no figure was agreed. The Defendant alleged that the Claimant wanted him to build the house as cheap as he could. He said that he told the Claimant that he knew some contractors who could get the house built for less than the larger contractors and he would supervise them.

[20] The Defendant said that he was paid US$202,982.58 for the job and not US$208,673.28 as alleged by the Claimant. The Defendant denied that disagreements developed between himself and the Claimant on or about March or April 2004. He summarized the demise of the relationship between himself and the Claimant in the following terms at paragraph 12 of his defence.

"With further reference to paragraph 9 of the Statement of Claim the Defendant denies that he abandoned the construction site on

or about September 9, 2004 and asserts that he resigned for professional reasons. In this regard the Defendant states that he was dissatisfied with the quality of work done by a contractor, Mr. Wilsie Hines and was unwilling to pay Mr. Hines as a result. On or about the 9th September 2004 the Defendant received a call from the Claimant wherein the Claimant sought an explanation for the non-payment of Mr. Hines. The Defendant told the Claimant that he was willing to give the reasons for his actions and come to the construction site to point out his concerns. When the Defendant arrived at the site neither the Claimant nor Mr. Hines was on the construction site. The Defendant was informed by one of the labourers on the site that the Claimant paid Mr. Hines. The Defendant found this to be unprofessional conduct on the part of the Claimant and tried to contact the Claimant to communicate his intention to resign to no avail."

This explanation was never refuted by the Claimant.

[21] The Defendant recalled a meeting, which took place some time on or about September 2004 at the Law Office of Sylvester Anthony and attended by the Claimant, Mr. Henry Browne, Mr. Sylvester Anthony and the Defendant in which the Defendant agreed to furnish the Claimant with a detailed accounting of the Defendant's management of the said funds. The Defendant stated that he furnished the Claimant with the accounting in the same month of September 2004 but never received a response from the Claimant. This too was never denied by the Claimant.

[22] In his Counterclaim the Defendant explained that on or about April 5th 2004 and on instructions by the Claimant he terminated the services of Mr. Bernard Boland as the Claimant found Mr. Boland's services were too costly and instructed the Defendant to hire Mr. Boland's foreman Derick Browne. According to the Defendant some time around June 2004 the Claimant instructed the Defendant to terminate the services of Mr. Browne due to the poor quality of work performed by him. The Defendant complied with the Claimant's instructions.

[23] The Defendant further explained that he introduced Mr. Wilsie Hinds to the Claimant as a possible replacement contractor. The Claimant approved of this appointment however the Claimant soon grew dissatisfied with the quality of work being done by Mr. Hines and he (the defendant) exercised the power given to him by the Claimant, not to pay Mr. Hines.

[24] Based on this amalgam of facts the Defendant's counsel claimed that the Defendant acted as nothing more than the Claimant's agent. He also claimed for an indemnity having contracted for materials and services on the behalf of the Claimant and not receiving from the Claimant the requisite remuneration to pay for these materials and services calculated at the sum of EC$199,116.12.

Evaluation of the Evidence

[25] On the other side of the spectrum the Claimant's claim fell woefully short of the kind of evidence, which one would expect to see as proof that a contractor misspent funds, which were advanced to him. The objective onlooker would therefore have to rely on the estimates provided by those who were contracted to value the work done after the Defendant terminated his services. This is so because there was no written contract and there were no order forms or other evidence of actual detailed pricing of the works produced in writing to establish how the payments were made other than the accounts produced by the Defendant for the purpose of the law suit. It should be noted that these accounts remain substantially unchallenged in any specific way by the Claimant.

[26] The Claimant had procured the witness summary of Mr. Robert Rogers, Manager of Rogers Architectural Designs of Wades Garden, Basseterre. Mr. Rogers provided a valuation of the Claimant's building. In support of this evidence a document was produced including a detailed breakdown of the valuation showing the total estimated cost of US$80,039.29, representing labour cost of US$30,014.73 and material cost of US$50,024.55. The document also included photographs of the site.

[27] Under cross-examination Mr. Rogers stated that his valuation was true and thorough. He said that site clearing was included in his valuation and he had concluded that this would cost about $1000.00. He added that he had included the cost of renting equipment in the labour cost. He justified this on the basis that the contractor would take into account the cost of whatever equipment he or she would have to put on the site.

It would not be Mr. Hopkins responsibility to rent equipment. This is why it was included in the labour cost. In response to the court this witness said that he had put in an extra percentage in case of cost overruns. He repeatedly denied that there was any excavation of the area for a swimming pool. I believe Mr. Rogers' evidence was given honestly but it had certain deficiencies.

[28] On the behalf of the Defendant Dr. Landrith Isaac provided a detailed valuation of EC$737,953.00 or approximately US$ 266,000.0. This contrasted with the evidence of Mr. Rogers whose total valuation estimate was EC$216,106.08 or US $80,039.29. Dr. Isaac mentioned in his evidence in chief that he assessed the site works, concrete and masonry works, reinforcements electrical and plumbing works, steel frame structure, plant and equipment rental, materials, labour and construction supervision and management. At first glance this appears to be a more thorough assessment than that of Mr. Rogers who made no mention of the steel frame and argued that the cost of rental of equipment would be included in the management and labour cost. That approach did not show appreciation for the kind of management services that the Defendant was providing.

[29] However the parties had agreed to exclude the value of the steel structure supplied by TIAHCO from consideration in this action and the relevant sum which the parties agree is in itself in dispute is to be excluded based on what was paid for the structure up to the point when the Defendant stopped working on the site.

[30] Comments from other witnesses including Mr. Boland, Dr. Isaacs and the Defendant himself give the impression that the terms of the contract must have been very vague. This fact opened the door to various interpretations and indeed the possible inability to account for materials and costs in the works.

[31] Mr. Boland denied that he had asked for a contract sum of $750, 000.00. He could not remember any sum being agreed. He stated that the job was done in phases. The first phase involving laying the foundation was worth about $40,000.00. He recalled speaking to the Defendant about a mixer. He knew of contracts where contractors charged for the

mixer. When he received a letter informing him that the Claimant no longer wanted his services, he was owed and still up to the time of trial is owed about $14,000.00.

[32] This vagueness in the approach to the project explains in part the vast difference between the estimate of Mr. Rogers and Dr. Isaacs and the Defendant's position that he did not have enough money to do the job. One thing remains clear however and that is that some of the work was defective. But in trying to determine who pays for unaccounted costs and shoddy work we have to take into account the testimony of Mr. Boland the first contractor on the site.

[33] Mr. Boland said that he thought that he had been appointed as a contractor to build the house by both the Claimant and the Defendant together. He considered that he was working for Mr. Hopkins and being paid by the Defendant on Mr. Hopkins' behalf. He never thought that the Defendant was his employer. There is nothing in the evidence to give rise to an assumption that the situation was any different with any of the other contractors. I therefore hold that Mr. Boland's assertion was correct in fact and law and that the same applied to all other relevant contractors. This also explains why the Defendant felt that when he had decided to stop paying Mr. Hines because he was not doing the work properly and the Claimant insisted on paying him, the agreement had to come to an end. The shoddy work discovered thereafter could be used by either side to support their case. But it does not establish any aspect of the Claimant's case on a balance of probabilities.

Applicable Law

[33] It falls to the court to assess the law applicable to this case. The main point that arises relates to the question whether the Defendant was an agent or a building contractor employed to manage the construction of the Claimant's dwelling house.

[34] Counsel for the Claimant relied on the case law which defines the duties owed by a building contractor especially in circumstances where the owner is relying on him to

receive funds and allocate it to the aspects of the work needed in accordance with the request.

[35] Counsel for the Claimant argued that the first question that arises is whether there was a contract. He opined that this was important and the Defendant had admitted that there was a contract. He further submitted that the contact would be implied from the course of dealing and cited Hog **John Bay Development Ltd v The Proprietors Condominium Plan No. 20 of 1989** Claim No. ANUHCV 334/2001. That course of dealings was already described above. No doubt there were dealings, which implied an intention to form legal relations. The question is what kind of legal relations.

[36] Counsel then moved on to look at the issue of whether the Defendant was unjustly enriched. But he did not state how he would apply this law to the evidence. Unjust enrichment applies when a party uses funds or a position entrusted to him to make secret profits for himself or accepts bribes which he does not share with his principal. Because of the lack of evidence the legal authorities cited on this issue were not helpful in resolving the legal issues in this case. I cannot see how on the evidence before the court it is possible to prove unjust enrichment. The substantiation of unjust enrichment would have flowed from an evaluation of the accounts, but the Claimant cannot show the basis for challenging the accounts.

[37] Counsel next moved on to the question of the repudiation of the contract. In this regard he referred to the case of **Woods Development Limited v Roy Nicholas** Civil Appeal No 4 of 2001. (Antigua) where Mitchell JA (Ag) relied on the judgment of Sir Dennys Williams Chief Justice of Barbados in **Alleyne , Arthur and Hunte Ltd v Griffith and Another** (1992) 42 WIR 53 and the authority of **In re An Arbitration between Rubel Bronnze and Metal Company Limited and Vos [1918]** 1 KB 315 in the judgment of MacCardle J. at 322 where that learned judge stated as follows:

> *"It has been authoritatively stated that the question to be asked in cases of alleged repudiation is "whether the acts and conduct of the party evince an intention no longer to be bound by the contract.": See per Lord Collins in General Billpostiing Co. v Atkinson [1909] AC 118, 122. The doctrine of repudiation must ofcourse be applied in a just and reasonable*

manner. A dispute as to one of several minor provisions in an elaborate contract or refusal to act upon what is subsequently held to be the proper interpretation of such provisions should not, as a rule, be deemed to amount to repudiation. But, as already indicated in Withers Reynolds (1831) 2 B & Ad 882, a deliberate breach of a single provision of a contract may, under special circumstances and particularly if the provision be important, amount to a repudiation of the whole bargain. In every case the question of repudiation must depend on the character of the contract, the number and weight of the wrongful acts or assertions, the intention indicated by such acts or words the deliberation or otherwise with which they are committed or uttered, and on the general circumstances of the case."

[38] Counsel also submitted that in the case **Brend Kalthoff v Llewllyn Xavier** Claim No. 0406 of 2001 reference was made to the following quotation from Halsbury's laws of England , Fourth Edition, paragraph 548 Vol.9.

"*Repudiation may be an express renunciation of contractual obligations. However, it is more commonly implied from the failure to render due performance or, in cases of anticipatory repudiation, by the party in default putting himself in such a position that he will apparently be unable to perform when the time comes. A party seeking to rely on repudiation implied from conduct must be able to show that the party in default has so conducted himself as to lead a reasonable man to believe that he would be unable to perform or will be unable to perform at the stipulated time."*

And at paragraph 556 of Halsbury's Laws the following is stated.

" The question whether or not a party has elected to rescind is one of fact. An election to rescind must involve an unequivocal assertion by the innocent party that he regards himself as no longer bound by the contract as a result of the breach.

Where the defaulting party is a plaintiff in an action and the innocent party is merely relying upon the breach as justification for his non-performance, the innocent party need show no positive acceptance of the breach as terminating the contract though he will not be able to rely upon that breach as discharging him if his inaction is such as otherwise to constitute affirmation."

[39] Counsel for the Claimant appeared to reject the argument that this contractual relationship was one of agency. I say appeared to because his reasoning did provide a subtle

impression that his views on the matter had not fully crystallized. I also think that his view of the facts was somewhat off balance. His argument implied that the Claimant must have relied on the Defendant's skill as a building contractor and construction manager to represent his interests. He submitted that there was no privity between the Claimant and the respective contractors. He referred to the contractors as the sub-contractors. The authorities the claimant relied on **Hampton v Glamorgan** [1917] 1 AC 13 and **A Vigiers Sons & Co.Ltd v Swindell** [1939] 3 All E.R. 590, referred to situations involving main contracts for service to construct buildings. However I do not think that these authorities were applicable to the circumstances in this case.

[40] Indeed I accept the Defendant counsel's argument that the defendant acted as the Claimant's agent. The fact that there was no written contract stipulating terms and conditions and laying down even the methods of payment lends to the veracity of the assumption that there was no building contract between the Claimant and the Defendant. Indeed they were making it up as they went along. First the terms were vague and left undocumented. Then the selection of the contractor was based largely on the fee. The contractor was dismissed on the Claimant's instructions in all verifiable instances. But when a contractor was obviously falling short the Claimant would not allow the Defendant to make the independent decision to penalize him. The Defendant promised to supervise the work on the Claimant's behalf. The Defendant never held himself out as a building contractor. From the very start and as things changed in the course of dealings the Defendant responded to the Claimant's instructions.

[41] The Defendant's duty was to act on the Claimant's behalf and in his best interest. He also owed a duty of care, see: **Hedley Byrne & Co Ltd v Heller & Partners Ltd** [1963] 2 All ER 575. However the fact that beyond him there were other persons responsible for the construction of the house the hiring of workmen and the use of materials, skill and equipment also supported the presumption that the Defendant could not be held responsible for losses in these areas unless it was proven that he was in collusion with these persons to steal from the Claimant. The Defendant had a duty to act in good faith in relation to his tasks as an agent. He was not to make a secret profit or do anything, which

knowingly created a conflict of interest or served someone else's interest. There is no evidence that the Defendant acted in breach of these duties.

[42] Based on this analysis of fact and law, I must conclude that the claim that the Defendant was employed as a contractor to manage the construction of and construct the Claimant's dwelling house must fail. The Defendant's duty was to assist in procuring builders and supervising the process. He recommended persons on the basis that the Claimant did not want to employ the more expensive builders. He collected the funds on the supply of the requisite bills and paid for labour and materials as needed. If Dr. Isaac is to be believed he had successfully supervised the work up to a fairly advanced stage although not to completion. The Defendant also dismissed those contractors who were not providing satisfactory work on the Claimant's instructions. When things came to the point where the Defendant could not act according to previous instructions and dismiss or refuse to pay a contractor who was not doing the work or was doing shoddy work, the Defendant decided that the contract had been repudiated and accepted the repudiation. When one looks at these peculiar facts one must conclude that the Defendant cannot be held responsible for the weaknesses of the respective contractors or their failure to reach as far as the Claimant would have liked.

[43] I therefore conclude and hold that if there was work performed below the required standard that the specific building contractor involved would be responsible for such breaches of contract. But the Claimant did not sue the contractors. He sued the Defendant. It may be true that the Defendant fell short on advising the Claimant on the persons whom he should hire. But no evidence was brought to show that these contractors who were hired were known to be inefficient. At the end of the day the question is whether the Claimant proved that the Defendant fell short in his duty as an agent of the Claimant. Indeed these contractors were hired to save the Claimant money.

[44] Counsel for the Defendant sought support for his contention that the agreement was one of agency based on the case **Andrey Lych and Olga Mirimskaya v Coffee Commidities**

Ltd, Elena Collongues and Icaza, Gonzales –Ruiz a& Aleman (BVI) Limited BVIHCV2004/008 a decision of Harisprashad-Charles J. In this case agreeing with the position of the Claimants that the Defendants were their agents made the following findings of fact and law:

> *"Ms Collongues consulted the Claimants on all weighty matters pertaining to Coffee Commodities. Some of the documents establishing the agency relationship are set out at paragraph 4 of the amended skeleton submissions. The cumulative effect leaves no doubt as to the capacity in which Ms. Collongues was acting when she conducted various transactions through Coffee Commodities.*
>
> *The Claimants instructed Ms. Collongues to resign as director and to appoint Mr. Khomyakov and themselves as directors in her place having taken the decision to restructure their business affairs so as to assume greater control of Coffee Commodities. This she did.*
>
> *The Claimants instructed Ms. Collongues to substitute them as signatories of the bank account of Coffee Commodities. She complied."*

[45] On the issue of the Defendant's fiduciary duty the Claimant would have had to show how far the fiduciary relationship would go in this case. In **Boardman v Phipps** [1967] 2 A.C. 46 Lord Upjohn states as follows in relation to the "fiduciary" relationship of agency:

> *"The facts and circumstances must be carefully examined to see whether in fact a purported agent* and *even a confidential agent is in a fiduciary relationship to his principal. It does not necessarily follow that he is in such a position."*

In any event the consequence of such a relationship is that the Claimant is entitled to at least an accounting of the use of any funds on his behalf. But the Claimant has not disputed the Defendant's evidence that the Defendant provided an account of his spending in 2004 and he did so again in 2007.

[46] No specific duties were spelled out for the Defendant by the Claimant. In the Privy Council decision **Kelly v Cooper** (1992) 41 WIR Lord Browne- Wilkinson set our the relevant law on the issue of agency as follows:

> *" In the view of the Board the resolution of this case depends upon two fundamental propositions: first, agency is a contract made between principal and agent; second, like every other contract, the rights and duties of the principal and agent are dependent upon the terms of the contract between them whether express or implied. It is not possible to*

say that all agents owe the same duties to their principals. It is always necessary to have regard to the express or implied terms of the contract."

[48] The Claimant can only blame himself for not having clearly set the terms of the relevant contract in writing and failing to ensure that the money which was sent was precisely accounted for. However if we accept the appraisal of the work given by Dr. Isaac then we note that based on the difference between what the Claimant says he spent and the value of the work done, one would have to conclude the Claimant has not paid for all of the work done. Counsel for the Claimant says that at this time about US$ 106,52.01 is unaccounted for. To arrive at this figure he used the sum he allegedly paid and subtracted from it the value of the work provided by Mr. Rogers and excluding the TIAHCO bill. However Dr. I saac's valuation put this figure in question. I have observed that I consider Dr.Isaac a witness of truth. On the other hand it appeared that the provider of the Claimant's valuation did not consider the costs of certain items at all. In any event Dr Isaac's valuation accounts for the shortfall between US$80,039.00 and US$208,000.00

[49] In the midst of all of this is an area of some uncertainty which could have been resolved if greater attention were paid to systematically analyzing such accounts as have been produced and asking for explanations where they appeared to be deficiencies. But even if this were done the problem of ultimate responsibility under the law would still have arisen and would be determined in favour of the Defendant because the Claimant's perspective was clouded by a determination to build the house for the fixed price of $208,000.00

The Counterclaim

[50] The Defendant explains why he refused to pay Mr. Hines and why he resigned from the job. However I do not see the basis for a counter-claim. It appears that whatever sums the Defendant may be or is being sued for in other law suits he has included as a Counterclaim in this suit. He has not claimed that he was forced to spend money on the contract on the demand of the Claimant. Since the method of payment was based on the presentation of projected costs to take the project from one stage to the other, I am at a loss to understand how the Defendant would find himself in a position where suppliers or

subcontractors were not paid. Indeed if money was presented to him from phase to phase he would not need to make orders beyond the value of the sums presented unless to do otherwise would in some way hinder the proper construction of the house. But based on the method of payment which has been outlined such costs should have been covered by the monies advanced and if they were not, then in the process the Defendant should have been able to justify the necessary advances from the Claimant to pay the respective claims. There should be no need to be indemnified against these claims. Again these things would be better explained by the contractor on site.

[51] This point is made clear by the Defendant's admission of the Claimant's pleading that subject to an accounting monies were advanced ahead of scheduled completion dates. The Defendant has not been able to show how the shortfall would have occurred in the circumstances. Clearly this demonstrates that the parties operated at cross-purposes. The Claimant apparently expected the Defendant to behave like a contractor and complete the work in spite of the shortfall in funding because he believed that there was an agreed contract price.

[52] I conclude that the Defendant has not pleaded any basis for a Counterclaim against the Claimant. He was not required under the agreement to go beyond the point where the funds provided by the Claimant would take him. The Defendant's Counterclaim must fail.

[53] Were it possible to save defective pleadings by including material in a witness statement the Defendant could be credited for making an attempt to do so. However the attempt though made, was feeble to say the least. The substance of the Defendant's evidence in chief in relation to this matter was that the sum of EC$551,483.36 which he received from the Claimant was not sufficient to pay for all materials and equipment involved in the project during the time he was in charge. He calculated that a balance was still due to various suppliers and sub-contractors. I have already said that this makes no sense and restating it in the witness statement does not imbue the argument with the coherence, which it so wantonly lacks.

[54] Nevertheless all in all I have to conclude that the Claimant has failed to prove his case on a balance of probabilities. It is unfortunate that the Claimant failed to tackle the issue of an accounting more seriously and to deal with it as a preliminary issue which may have provided more precise evidence relating to any failure to account for discrepancies. But the greatest failing was the failure to properly define the Defendant's role in a written contract. Additionally the alleged terms set out in a document prepared by Everton Harvey were never produced in evidence. It is not the duty of this court to account for the apparent losses suffered by the Claimant by blaming the Defendant. The Claimant must prove his claim. I hold that the Defendant was the Claimant's agent and eyes and ears on the ground but he was not the Claimant's building contractor.

[55] I therefore find that the Claimant is not entitled to any further accounting, neither is he entitled to restitution for unjust enrichment, nor for monies found to due and owing as a result of a breach of contract nor to a tracing order. These claims are all dismissed. The Defendant's counter-claim is also dismissed for the reasons already stated.

[56] The Defendant should be paid ¾ of his costs pursuant to part 65 of the CPR 2000.

Francis H V Belle
High Court Judge