EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(COMMERCIAL)

Claim No: BVIHCV 2007/0159

BETWEEN:

CHIVERTON CONSTRUCTION LIMITED
JUNIOR CHIVERTON

Applicant

and

SCRUB ISLAND DEVELOPMENT GROUP LIMITED

Respondent

Appearances:

Mr. Garvin Simonette, Mrs. Hélène Anne Lewis and Ms. Sophia Vailloo of SimonetteLewis for the Applicants, Chiverton Construction Limited and Junior Chiverton Mrs. Willa Tavernier, Mr. Kerry Anderson and Mr. Malcolm Arthurs of O'Neal Webster for the Respondent, Scrub Island Development Group Limited

(Construction contract – repudiation – abandonment – damages for developer's delay; defamation – slander of a person in his trade, profession or vocation)

JUDGMENT

[2009: 28 October]

[1] **Bannister J [ag]:** On 12 July 2006 the first Claimant ('Chiverton') entered into an agreement in writing with a company called Mainsail Development Group LLC ('Mainsail') for the construction of five retaining walls at the development being carried out at the Marina Village on Scrub Island ('the contract' 'the works'). For reasons which are unclear to me it is agreed between the parties that the Defendant is to be treated as the counterparty to and bound by the contract also responsible for any actionable defamatory remarks proved to have been made by the Construction Manager for the project. I am not

disposed to upset this convention if that is the way the parties wish to proceed. I shall refer to the Defendant as 'the developer'. In these proceedings Chiverton makes claims against the developer for breach of contract and the second claimant ('Mr. Chiverton') claims against the developer for defamation. Pleaded claims by Chiverton for conspiracy to injure and for unlawful interference with trade have been abandoned. I will take Chiverton's claim in contract first. I should say that Mr. Chiverton is the Managing Director and a shareholder of Chiverton and appears to be its controlling mind. It is clear that his knowledge can be treated for all purposes as that of Chiverton.

The contract claim

[2] I shall refer in a moment to the provisions of the contract as they affect Chiverton's claim, but I should first set out the narrative of the events which have given rise to the dispute between the parties. The evidence of Mr. Chiverton and Mr. McCarthy, the General Manager of Virgin Islands Project Management ('VIPM'), which acted as Construction Manager for the Scrub Island project, was that the terms of the contract had been discussed between them before it was concluded on 12 July 2006. There was a number of documents incorporated within the contract and important among them were six Bills of Quantities ('BoQ's'), one covering preliminaries and one for each of the five walls. Mr. McCarthy's evidence, which I accept, was that Mr. Chiverton had been provided with the BoQ's. The contract was for work and materials and the contract sum was US$554,587.48. The contract required work to start on 17 July 2006 and for substantial completion to be achieved by 17 October 2006. It was a term of the contract that time was to be of the essence, but for reasons which will become obvious neither side has relied upon it.

[3] Mr. McCarthy gave evidence showing how the labour component of the contract sum had been arrived at. He had allowed for 11,650 hours of labour and had calculated that in order for the works to be completed by 17 October 2006, Chiverton would need to have 21 men on site working a full five and a half day week. There was no evidence that Mr. Chiverton was aware of this calculation when he caused Chiverton to enter into the contract.

Certainly the contract did not stipulate that Chiverton was to maintain this (or indeed any particular) level of manpower during the term of the contract. Mr. Chiverton's evidence was that he thought from his understanding of the contract that he would need an initial crew of eight men rising to eighteen at the busiest period. It was never clear how he had come to that conclusion. He never prepared a construction schedule and said merely that he 'had an idea in his head' as to how the work would be progressed.

[4] Although Mr. Chiverton gave evidence (and, astonishingly, pleaded) that he was under the impression that payment would be made in two tranches, one after six weeks and one at the end of the three month contract period, the contract clearly provided for monthly progress payments to be made on a valuation of work basis, with the contractor providing its own valuation of the work done to date and the developer making the appropriate payment, subject to retentions, unless the contractor's valuation was objected to by the construction manager or architect. In fact, Chiverton did not calculate or proffer its own valuations. They were prepared by VIPM and payment was made against a Chiverton invoice based upon the relevant valuation. During the course of the contract, five such valuations were prepared by VIPM, four of which were countersigned by Chiverton. Payment was made to Chiverton in respect of those four. The fifth valuation was negative. It was never signed by Chiverton. In addition, Chiverton was paid US$10,000 'up front' on 1 August 2006.

[5] I should mention here the manner in which the contract provided for materials to be dealt with. Given the island nature of the site, the contract stipulated that contractors were not to buy their own materials from third party suppliers and bring them or have them delivered to the island independently. Instead, the developer would maintain a stores dump on Scrub Island, from which contractors were obliged to requisition materials required by them on site. The developer would transport requisitioned materials from the dump to the contractor's site. A materials price list was provided as part of the contract documents. It was the evidence of Mr. McCarthy, which I accept, that the materials had been imported duty free by the developer and were sold to the contractors at the relevant import value without mark up. The total value of the materials delivered to the contractor during the

period covered by each progress payment was then deducted from the amount of the progress payment. It is fair to say that once materials were incorporated in the measured work, the contractor would receive an additional 18.25% (because for the purposes of the estimates the materials were given a mark up of 10% and because an additional 7.5% of that figure was allowed in the estimate as part of the contractor's profit). Nevertheless, the system was capable of imposing severe economic constraint, because it allowed contractors only a maximum of one month's credit on their purchases of materials. In cases where materials had been delivered immediately before the end of the period covered by the progress payment, the credit could be 24 hours only.

[6] Chiverton went on site on 17 July 2006. The footers necessary for it to commence work on the first wall to be constructed had not been cut, so that Chiverton was unable to start the work of erecting it. I should make clear that it was provided in the BoQ for each wall (and was thus incorporated as a term of the contract) that the site for its construction was to be handed over to Chiverton with the footer already cut by another contractor. It was the evidence of Mr. Chiverton and I find as a fact that no footers for the first of the walls to be constructed were cut until after 10 August 2006. The evidence of both Mr. McCarthy and of Mr. Bercow, an employee of VIPM, which I accept, was that it would be impractical, if not unsafe, to cut more footers that could be quickly filled with the necessary steel and concrete. The reason for this was the risk that cut footers left empty would fill with water and cause a landslip risk – more particularly since the work was being done during the rainy season. The footers therefore could not be cut except in sections as Chiverton was in a position to commence work on them. Mr. Chiverton agreed that footers could not be left exposed for too long and said that nobody expected that any footers would have been cut when Chiverton went on site.

[7] On first going onto the site Chiverton built itself a shed and tool box. About three days later, according to Mr. Chiverton, Chiverton personnel applied themselves to the tasks of cutting steel for matting and of bending reinforcing bar ('rebar'). Mr. Chiverton's evidence was that some three weeks was spent on this, by the end of which time he said that Chiverton had 'prepped' the steel for over 90% of the whole works.

[8] The footer for the first wall appears to have been cut by about mid August 2006 and work then started on putting the steel in place and erecting the first of the retaining walls. Almost immediately, a landslip occurred in the ground above this part of the site. Work on the retaining wall necessarily ceased while the footer was re-excavated. It is accepted that this involved a delay of some three weeks. So-called 'allocation sheets' (attendance records showing tasks carried out by Chiverton's men and compiled by VIPM) show that during this period an average of very roughly nine men attended for work on site each day. Some continued to work on prepping steel and selecting stone for a wall which, as will be seen, was never built; but work was found for others by the developer through VIPM. This work was directed to be carried out by non-conforming documents, but the instructions were accepted by Chiverton and were paid for by the developer under certificates signed off by Chiverton. It is not necessary for me to set out the nature of the work carried out in this way. Chiverton was paid some US$6,600 in respect of it.

[9] Some time in late August 2006 the developer decided to raise the height of the first wall from twelve to sixteen feet. It was accepted by Mr. McCarthy that this set the progress of the work back by about a month. It also involved some additional work for Chiverton, which had to remove steel already in place and reinstate it after the footer had been deepened. Chiverton was paid some US$3,400 for that additional work.

[10] On 23 August 2006 VIPM, by its site manager, Mark Jones ('Mr. Jones') faxed Mr. Chiverton confirming a discussion that had taken place earlier in the day and instructing Mr. Chiverton to carry out work on the lower and upper retaining walls in the sequence there mentioned. Although the fax said that an updated copy of VIPM's programme was being attached, no such document was produced in Court and I note that the fax is said to consist of a single page only. I find that no such programme was forwarded to Chiverton on 23 August 2006. The fax asked Mr. Chiverton to update Mr. Josiah Martins, VIPM's quantity surveyor, ('Mr. Martins') on all delays which Mr. Chiverton believed had occurred on the work to date. Mr. Jones said that he needed to work these delays into the programme 'to provide us with a realistic end date. Mr. Simonette, who appeared with Ms.

Vailloo for Chiverton, relied upon this fax as demonstrating that the contractual date for substantial completion had been abandoned by 23 August 2006 at the latest. I accept this submission.

[11] On 27 September 2006 VIPM sent Chiverton what was described as its target programme for October 2006. VIPM stated that it believed this programme was 'obtainable'. Although witnesses were cross examined as to the meaning and effect of this document (in bar chart form) it seems to me to be impossible, in the light of the disjointed evidence that was given, to derive any firm conclusions from it beyond the fact that it was apparently envisaged that the work on the two large retaining walls would be continuing throughout October. It did appear, though, that when the document was prepared it had been envisaged that the contractor responsible for the excavations would have begun to cut the footers for the second wall some time around 27 September 2006.

[12] On 13 October, 2006 Mr. Jones wrote to Chiverton complaining about lack of supervision and manpower on site. Charlie Bercow of VIPM ('Mr. Bercow') was on site offering informal project management assistance to Chiverton and Mr. Jones complained that his instructions were being ignored. Further complaints were that the men were working a short day and that the ordering of materials was late, resulting in shortages. I might mention at this point that it appeared to be part of Chiverton's case that the developer was obliged to deliver small orders within three days and large orders within seven. This is a misreading of the contract documents, which stipulated that materials would need to be ordered four weeks prior to the date when they were needed (Articles 2, paragraph 4 (c)). The five and seven day periods were *minimum* delivery times provided for by the materials price list. There was no evidence of late delivery on the part of the developer.

[13] Despite the indication given by the 'target programme', it was not until 17 October 2006 that the first footer for the second of the two large retaining walls was opened and Chiverton was able to begin work on it. Although the numbers fluctuated, during September and October Chiverton had (very roughly) between eleven and fifteen men on site, with more in October than September. A valuation certificate as at 27 October 2006,

some ten days after the footer for the second wall had been opened, shows that by then the first retaining wall was some 58% complete by value. By 27 October 2006 Chiverton had completed some US$137,000 of measured work and had materials on site for which it was entitled to be paid US$14,720, (a total entitlement as at 27 October 2006 of US$151,720). It received (after deductions for the price of materials) US$76,000 for this work. (It had received in addition some US$11,383 pursuant to the separate instructions mentioned in paragraphs [8] and [9] above).

[14] On 18 October 2006 Mr. Jones wrote to Chiverton again, expressing a need to reach agreement on manpower and working hours so that the current phase of the works could complete in a timely manner. Mr. Jones requested a meeting on 19 October, but it does not seem that any such meeting took place. Six days later Mr. Martins wrote to Chiverton complaining that there had been little or no improvement on site and that no personnel had been on site on 20 October. Mr. Martins added that Chiverton did not appear to have sufficient men on site and required Mr. Chiverton's attention at a site meeting on 26 October 2006.

[15] That meeting was attended by Mr. Jones, Mr. McCarthy and Mr. Martins for VIPM and by Mr. Chiverton. Proposed concrete pours for the following week were discussed. It was agreed that site hours would be increased and Mr. Chiverton was asked to aim to complete all exposed works by the end of November. To that end Mr. Chiverton was asked to provide a target schedule for the following month. There was no evidence that such (or indeed any) schedule was ever produced.

[16] Meanwhile, some time in September or October 2006, the developer had decided not to construct any of the three remaining walls on which work had yet to start. Chiverton did not receive notice of this change until 15 December 2006.

[17] As discussed at the October 26 meeting, three concrete pours were ordered by Chiverton on three separate days in late October/early November. The equipment provided by the developer failed to function, resulting in further delay. Chiverton had assembled a team to

manage these pours. There was no evidence as to whether some or all of the men were able to occupy themselves with other work in lieu, but it is obvious that these mechanical failures resulting in inability to carry out these pours must have wasted time and money.

[18] Chiverton continued working through November. Between the first and tenth of that month there were some sixteen to eighteen men on site daily but thereafter the numbers began to tail off. A valuation prepared by VIPM dated 24 November 2006 (but never agreed by Chiverton) put measured work at $193,000 (an increase of some US$56,000 from October) and showed the first retaining wall as 66% complete by value. It also shows the second retaining wall as being 38% complete by value. Further, it appears that extra concrete used by Chiverton in raising the height of the first retaining wall from twelve to sixteen feet had given Chiverton an additional entitlement of some US$8,400. These figures, taking into account a variation in materials on site, meant an uplift in gross valuation between 27 October and 24 November of some US$55,500. The price of materials alleged by VIPM to have been drawn down by Chiverton, however, had increased by some US$50,000, reducing the net amount payable to Chiverton to US$5,500 and that was swallowed up by the retention. Chiverton, it was claimed, owed the developer US$800 for its month's work.

[19] Mr. Jermian Esprit ('Mr. Esprit') one of Chiverton's labourers, gave evidence that by mid-September 2006 the workforce had not been paid for several weeks and that although those arrears were subsequently settled, there was a later period of three weeks when the men were unpaid. Mr. Chiverton's evidence was that after 30 November men began to drift away because Chiverton was unable to pay them. Some, who were not BVIslanders, left the island. Mr. Chiverton says in his witness statement that wages are still owed for the period 17 July 2006 to 15 January 2007.

[20] On 6 December 2006 Mr. Bercow wrote again to Chiverton. He complained that the project was six weeks behind schedule, although there was no evidence as to what schedule he might have been referring to, who had produced it, or what were the timelines which it contained. Mr. Bercow complained of general lack of management and gave

some details of alleged complaints. Mr. Bercow went on to say that it was being said that Chiverton had not paid his crew for eight weeks. Although the allegation as to the fact of non-payment is inadmissible hearsay, the statement that it is what was being said is not and gives some indication of the unhappiness affecting the workforce.

[21] Between the first and fifteenth December 2006 there was an average of about three men a day on site. None attended thereafter. On 12 December 2006 VIPM issued what it claimed was a Construction Change Directive under Article 7.3 of the general conditions of contract. It purported to 'omit' from the works two jobs with a contractual value of some US$30,400.

[22] Mr. Chiverton's evidence was that on 14 December 2006 his son, Lyndon Chiverton, who had been acting together with his father as foreman/supervisor for the works, passed on to him a message from Mr. McCarthy asking Mr. Chiverton to telephone him. Mr. Chiverton told me that he had done that and that Mr. McCarthy had asked him why he had no men on the job. Mr. Chiverton says he told Mr. McCarthy that he could not put more men back on the job unless he got paid and that he had been asking him for money, but had had no response. Mr. Chiverton says that Mr. McCarthy told him that he would pull the contract from him because he was 'tired of talking'. In cross examination Mr. Chiverton confirmed the substance of this conversation.

[23] When he was asked about this in chief, Mr. McCarthy confirmed that he had asked Lyndon Chiverton to get his father to call, but said that he did not believe that Mr. Chiverton had done so. He did say, however, that he had met Mr. Chiverton in the car park at Trellis Bay, apparently at about this time, and that Mr. Chiverton had complained to Mr. McCarthy about not being paid.

[24] I accept Mr. Chiverton's evidence on this point and find that there was a conversation on 14 December 2006 in the terms to which Mr. Chiverton deposed.

[25] Mr. Chiverton's evidence was that on the following day he received a further purported Construction Change Directive dated 14 December 2006. That document purported to 'omit' from the contract the remaining three walls that had not been worked upon in situ (although some steel had been prepped for them), reducing its value by a further US$152,148. The effect of the two letters of 12 and 14 December 2006, therefore, if valid, was to strip some US$182,000 worth of value out of the contract. In oral evidence Mr. McCarthy stated that the decision to abandon this part of the works had been taken, as already mentioned, in September or October 2006 and that the three walls remain unbuilt to this day.

[26] No Chiverton personnel attended the site after 15 December 2006, although Chiverton's tools were not removed.

[27] On 22 December 2006 Chiverton (by Mrs. Chiverton, who is Chiverton's other shareholder) wrote to VIPM. In her letter she accused VIPM of 'refusing' to cut the footer for the second wall and alleged that VIPM had been trying to edge Chiverton off the contract since early October. She added that VIPM's conduct had caused Chiverton a loss of US$58,000 and announced Chiverton's intention of making a claim.

[28] The reply came from Charles Roberts of VIPM ('Mr. Roberts') on 11 January 2007. It admitted that Mr. Chiverton had indeed requested that the footer for the second wall be cut, but gave as the reason why that was not done the need adequately to progress the first wall to allow another contractor to begin work in that area. The letter went on to point out, as was the case, that the first wall was still uncompleted and said that VIPM had instructed other contractors to carry out work unfinished by Chiverton. Although that did indeed happen at some point in time, the evidence was inconclusive as whether those other contractors were instructed to finish the Chiverton walls before or after the developer had purported to terminate Chiverton's contract by letter dated 15 January 2007, as I will shortly mention. I hold that the replacement contractors had indeed been instructed by 11 January 2007 (although there was no evidence before me when they started work). That, after all, is what the contemporaneous document clearly states and although Mr. McCarthy

attempted to characterize it as a mere threat, I reject his evidence on that point. I should quote the final paragraph of Mr. Roberts' letter in full:

> "We invite Chiverton Construction to prove VIPM wrong and further more to complete the works that you were initially contracted to do. However, we believe that this is beyond your capability. To allow this situation to continue would not be in the best interest of the project or even your company."

[29] It seems to me that the obvious meaning of that final paragraph is not that the developer, by VIPM, was truly inviting Chiverton back on site. The letter, after all, was saying in clear terms that there was nothing left for Chiverton to do. Mr. Roberts did not give evidence at trial, but it seems to me that the invitation to prove VIPM wrong and complete the works was probably written to try to avoid any suggestion that the developer was repudiating the contract. The thrust of the letter is that Chiverton was being told not to return and that the work which it had done to date was to be completed by others.

[30] On 15 January 2007 VIPM wrote to Chiverton:

> "Dear Sirs,
>
> Re: Scrub Island Development Project – Retaining Walls
>
> Due to your company repeatedly refusing to supply enough properly skilled workforce on the project to successfully complete the works, we hereby notify you, under clause 14.2.1.1 of the AIA 101/ CMA Standard Form of Contract on behalf of the Scrub Island Development Group, your contract to construct the remainder of the Retaining Walls on Scrub Island is terminated effective immediately.

> As from today's date you will no longer be allowed access on the island."

[31] After some skirmishing between lawyers, Chiverton commenced these proceedings in or before June 2007. There is no counterclaim by the developer.

Chiverton's claims in contract

[32] I hope that I do no injustice to the claims made by Chiverton if I summarise them by saying that its primary case is that VIPM's letter of 15 January 2007, set out in paragraph [29] above, operated as a repudiatory breach of contract, which was accepted by Chiverton by a letter from its lawyers, Simonette Lewis, dated 19 March 2007. But in addition Chiverton relies upon other conduct of the developer as repudiatory: in particular, it says the site was not delivered as provided for by the contract; that Chiverton was delayed by negligent excavation; by design changes; and by the failures in the contract pours to which I have referred above The omission of parts of the works purportedly affected by VIPM's letters of 12 and 14 December 2006 is also relied upon as a repudiatory breach.

[33] I should add that at trial a mass of unpleaded complaints (such as an alleged failure on the part of VIPM to produce the 'Schedule and Programme of Works' referred to in Article 9.1.6 of the contract, which is silent as to whose responsibility it was to produce this document) and the fact that the Method Statement referred to in the same sub-Article was signed off only after the contract had been concluded and was in any event too bald to be of any assistance. I do not propose to lengthen this judgment by examining these unpleaded issues which, even if they are properly to be treated as breaches by the developer, do not seem to me to go to the heart of Chiverton's case, which is that the developer wrongly repudiated the contract. As I have already mentioned, it was Mr. Chiverton's evidence that he already had an idea in his head how Chiverton was going to carry out the works before he started work. It seems to me, and I find as a fact, that none of the alleged deficiencies in the provision of programmes of work or method statements

and the like was demonstrated to have caused any delay or loss to Chiverton in its execution of the works. The problems lay elsewhere.

[34] It seems to me that, leaving aside the letter of the 15 January 2007 and the two omission letters of 12 and 14 December 2006, the other matters which I have shortly summarized in the preceding paragraph cannot now be relied upon by Chiverton as repudiatory, since Chiverton by its conduct clearly affirmed the contract by continuing to work for a substantial time after even the latest of these matters of complaint had occurred. So that it seems to me that the claim that the developer repudiated the contract must be confined to the two omission letters and the termination letter of 15 January 2007. I shall deal first with the latter. Before doing so, it will be necessary to consider certain of the terms of the contract.

[35] The main agreement was concluded using the American Institute of Architects ('AIA') Document A101/CMA – 1992 ('Standard Form of Agreement between Owner and Contractor where the basis of payment is a STIPULATED SUM'). Clause 1 of the main agreement provided that the contract incorporated the AIA General Conditions of the Contract for Construction, Construction Manager-Adviser Edition (Document AIA201/CMA, 1992 Edition) (which I shall call 'the General Conditions') together with Drawings, Specifications, Addenda issued prior to execution of the contract, other documents listed in the main agreement and modifications issued after the agreement had been executed.

[36] Article 14 of the general conditions is, so far as relevant for present purposes, in the following terms:

> "ARTICLE 14 TERMINATION OR SUSPENSION OF THE CONTRACT
>
> 14.2 TERMINATION BY THE OWNER FOR CAUSE

14.2.1 The Owner may terminate the Contract if the Contractor:

1. persistently or repeatedly refuses or fails to supply enough properly skilled workers or proper materials;
2. fails to make payment to Subcontractors for materials or labour in accordance with the respective agreements between the Contractors and the Subcontractors;
3. persistently disregards laws, ordinances, or rules, regulations or orders of a public authority having jurisdiction; or
4. otherwise is guilty of substantial breach of a provision of the Contract Documents.

14.2.2 When any of the above reasons exist, the Owner, after consultation with the Construction Manager, and upon certification by the Architect that sufficient cause exists to justify such action, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may, subject to any prior rights of the surety:

1. take possession of the site and of all materials, equipment, tools and construction equipment and machinery thereon owned by the Contractor;
2. accept assignment of subcontracts pursuant to Section 5.4; and
3. finish the Work by whatever reasonable method the Owner may deem expedient.

14.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 14.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

> 14.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, including compensation for the construction Manager's and Architect's services and expenses made necessary thereby, such excess shall be paid to the Contractor. If such costs exceed the unpaid balance, the Contractor shall pay the difference to the Owner. The amount to be paid to the Contractor or Owner, as the case may be, shall, upon application, be certified by the Architect after consultation with the Construction Manager, and this obligation for payment shall survive termination of the Contract.

[37] Mr. Simonette characterizes this as a forfeiture clause and on that he bases a submission that it is to be strictly construed. He says that in the present case the provision was operated incorrectly, because the prior consultation required by Article 14 had not taken place and because the Architect had not certified that sufficient cause existed for termination (whether of the contract or of Chiverton's employment under it). He relied upon authority to the effect that a botched attempt to invoke provisions of this sort can be treated as repudiatory conduct on the part of the employer and he says that that is this case.

[38] Mrs. Tavernier, who appeared with Mr. Malcolm Arthurs for the developer, deployed a wealth of powerfully argued learning aimed at refuting this submission. Partly she relied upon the construction of Article 14 and upon the express wording and precise intendment of the letter of 15 January 2007, but she also said that even if the letter did not have contractual effect under Article 14, it operated as an acceptance at common law of Chiverton's repudiatory conduct in, effectively, abandoning the works. This submission led into a legal minefield involving abstruse questions about inconsistency of outcome.

[39] It is not, on the evidence before me, necessary for me to attempt to resolve these legal points for the purposes of my decision. In my judgment the letter of 15 January 2007 is irrelevant. As I have already found, on 14 December 2006 Mr. Chiverton was telling Mr. McCarthy that unless he got paid he could put no more men back on the job. He told the

Court in answer to a question from Mrs. Tavernier that he would have restarted work once Chiverton had got some money and that everyone had trickled off the job because they had not been paid. It seems to me that this is the clearest evidence that Chiverton was unable to carry on performing under the contract and had been compelled, because its economic circumstances had forced it to, to abandon the contract. That was the clear impression I got when Mr. Chiverton gave this evidence. He was candidly admitting that he had reached the end of the road with the contract, although he placed the blame for that on the developer, for underpaying Chiverton. Furthermore, it seems to me that Chiverton's declared intention, stated in its letter of 22 December, of making a claim, was yet further evidence of Chiverton treating the contract as at an end so far as performance by Chiverton was concerned. The developer, by Mr. Roberts' letter of 11 January 2007 had recognized and accepted that state of affairs. The letter of 15 January 2007 had no effect whatsoever, because in my judgment the contract had already come to an end before it was sent.

[40] That leaves the letters of 12 and 14 December 2006. Those letters, as I have said, purported to remove some US$182,000 worth of value from the contract.

[41] Article 7 of the general conditions provided for the making of change orders, construction directives or orders for minor changes in work. The latter can be ignored for present purposes. Change orders required to be agreed between the owner, construction manager, architect and contractor. Construction change directives were unilateral and (provided that they were 'within the general scope of the Contract') mandatory instructions from the developer.

[42] Article 7.3 of the general conditions deals with construction change directives. They had to be signed by each of the owner, construction manager and architect and had to state a proposed basis for any adjustment of the Contract Sum or Contract Time (as defined). Article 7.3.1 stipulated that:

> "A Construction Change Directive is a written order prepared by the Construction Manager and signed by the Owner, Construction Manager and Architect, directing a change in the Work and stating a proposed basis for adjustments, if any, in the Contract Sum or Contract Time, or both. The Owner may by Construction Change Directive without invalidating the contract, order changes in the Work within the general scope of the Contract consisting of additional deletions or other revisions, the Contract Sum and Contract Time being adjusted accordingly."

Article 7.3.2 directed that a construction change directive was to be used in the absence of total agreement on the terms of a change order. Articles 7.3.6 to 7.3.9 contain elaborate provisions for adjusting the Contract Sum where the contractor does not agree with the adjustment put forward by the construction manager and architect.

[43] The omission letter of 12 December 2006 was in the following terms:

> "Dear Sirs,
>
> Re: Scrub Island Development Project- Scrub Island
>
> Further to previous instructions issued by VIPM, which to date Chiverton Construction refuses to carry out.
>
> Under Clause 7.3 (Construction Change Directive) of the AIA A101/Cma Form of Contract, we hereby instruct Chiverton Construction to omit from your works the following items:-
>
> - Bill item 09/1B – Two coats of bituminous paint.
> - Bill item 02/1A – Underground drainage with gravel backfill
> -

The accumulation of both groups of items amount to the sum of $30,445.02.

These works will be omitted from your account and will no longer form part of your contract."

[44] The letter of 14 December 2006 stated:

"Dear Sirs,

Re: Scrub Island Development Project – Scrub Island

Following constant letters and non-conformance notices issued by the VIPM Site Team we hereby instruct Chiverton Construction under clause 7.3 (Construction Change Directive) of the AIA A101/Cma Form of Contract, to omit from your works the following items. This letter is in addition to the writer's letter of December 12th 2006 omitting the underground drainage and the bituminous paint.

- 4' high retaining shone wall – Bill items 03/1A – 09/1A
- CMU Safety Wall – Bill item 03/1A – 09/1A
- Retaining wall below CMU wall – Bill item 03/1A – 09/1A

Where you have carried out the formation of any reinforcement, these items have been deducted from the above.

The accumulation of the above items amount to the sum of $152,148.25.

From this date, these works are omitted from your account and no longer form part of your contract."

[45] Neither of these letters complied with Article 7.3.1, since neither was signed by Mainsail, the person named as owner in the contract, or by the architect. It is said by Mrs. Tavernier that given the significant disregard paid by both sides to the formalities demanded by the contract, this point can simply be ignored. I disagree with her. Since the effect of a construction change directive is to impose a variation against the will of the contractor, it seems to me that the contractor is entitled to know that those seeking to impose it are those who under the contract are the persons entitled to do so. The construction manager has no power on its own and by itself to impose changes through the mechanism of construction change directives.

[46] In my judgment, therefore, the letters of 12 and 14 December 2006 were without contractual effect. The next question is whether, that being so, they, or either of them, amounted to a repudiation of the contract. In my judgment, they did not. In order for a communication, or conduct, to be repudiatory, it must be such as to evince an intention not to be further bound by the contract. These communications do not, in my judgment, fall into that category. If anything, they affirm the contract (see the last paragraph of each). The fact that they purported to operate a contractual provision which, if properly exercised, might have had the effect of making a very significant reduction in the amount of work outstanding does not, in my judgment, affect the position.

[47] I therefore hold that the developer did not repudiate the contract. Accordingly, Chiverton's primary claim fails. Chiverton does, however, make an alternative claim for damages for breach of contract and, given the issues raised on the pleadings; it seems to me that I should proceed to consider a claim for damages for delay. Although I have held that Chiverton abandoned the contract, it does not follow that it is not entitled to enforce rights and claims accrued before it did so. It seems to me that a claim for damages for loss caused by delay for which the developer was responsible falls within this principle.

[48] Significant delay was caused to the progress of the works through events for which Chiverton was not responsible. It was the responsibility of the developer to prepare the

site of each of the five walls ready for Chiverton to work on. Each of the BoQ's relating to the walls contained the following statement:

> 'The site will be handed over as a fully prepared platform ready for footing excavations; i.e. all bulk excavations will be carried-out by others.'

It was common ground that a developer is in breach of an implied (if not express) term of the construction contract if failures on his part prevent or delay the contractor from proceeding with or progressing his work.

[49] Mr. Chiverton frankly admitted that (contrary to what might have been thought from the pleadings in the case) he did not think that Chiverton would arrive on site to find all the footers cut for all five walls. Indeed, I find as a fact that the only safe way to progress the work was to cut the footers with as short an interval as possible between cutting and filling. And Mr. Chiverton clearly accepted that that must be so – more particularly given the fact that the work was to be carried out during the rainy season.

[50] Nevertheless, the first footer was not available to be worked upon until 14 August 2006. True, Chiverton was able to prep steel for the walls, but it seems to me that this period of nearly a month during which Chiverton, after having prepped an adequate amount of steel to get under way, could have been progressing with the job of constructing the walls themselves must have been damage causing, although it may be less easy to quantify what actual loss was caused by the delay. As between Chiverton and the developer the delay, or at any rate the bulk of it, was the fault of the developer. By 28 July 2006 Chiverton had only managed to carry out US$20,284 worth of work, of which US$9,692 was preliminaries. Cost of materials meant that Chiverton received a payment of only US$5,137 for July. By 25 August 2006 had produced work valued at only US$25,815 more – almost entirely consisting of steelwork. Some time after the first steel had been incorporated in the footer for the first wall, a landslip occurred and Chiverton was prevented from working on the wall for a period of some three weeks. Again, as between Chiverton and the developer this delay was the responsibility (if not the fault) of the

developer. Although some odd jobs were found for Chiverton around the site (for which it received US$6,252), and although it could still prep steel, progress on the main task – getting the walls up – was put on hold because the site was unavailable to be worked upon and no footers had yet been opened for any of the other walls.

[51] A further three week delay was caused by a change order issued on 29 August 2006 requiring Chiverton to remove debris from the trench. Another change order issued on 7 September 2006 required Chiverton to remove and replace steel from the footer of the first wall in order to accommodate a design change raising the height of that wall by four feet. That caused a delay of one month. These delays were caused by the developer. What loss they caused to Chiverton is another question. For example, by 29 September 2006 (Certificate #4 – dated 29 August by mistake) Chiverton had completed work to the value of US$110,000, including concrete to foundations and the actual wall of the first wall.

[52] Then there was the admitted fact that the footer for the second wall was not even begun until 17 October 2006, despite requests made by Mr. Chiverton that it should be opened earlier. This astonishing delay was clearly the fault of the developer. Mr. McCarthy gave (in my judgment) no convincing explanation for this delay, although he pointed out that Chiverton never had 21 men on site and, during the period I have been considering, never had more than fifteen men on site and frequently had less. For all that, the fact that Chiverton was only able to add value of only some US$27,000 during October is striking. Indeed, Chiverton received only a net US$10,425 for its work during October. It is not surprising, therefore, that it was in the following month that the workforce started to trickle away, as Mr. Chiverton put it, although it seems that it was only during the third week in November that the real exodus began.

[53] Despite these difficulties, to which must be added at least three days of delay caused by the malfunctioning of the concrete truck and pump (again, the developer's responsibility), Chiverton, as I have already said, added work valued at US$56,500 during November. The vagaries of the contract meant that Chiverton received nothing at the month end in respect of this work. Chiverton's position clearly became untenable, resulting in the

decimation of the work force and, as I have found, in the ultimate abandonment of the contract.

[54] It seems to me that the delays which I have briefly summarized amounted to a failure by the developer, in breach of the implied term, to provide Chiverton with a platform to carry out its work under the contract and (in the case of the concrete truck and pumps) with the equipment which it was the responsibility of the developer to provide in order that work could proceed. Chiverton is entitled to be compensated for loss which it can prove to have been caused by those breaches. If invited to do so I shall give directions for an inquiry as to the loss and damage (if any) suffered by Chiverton as a result of the breaches which I have found to have occurred.

[55] There are two other specific matters which I must mention. First, it was at one point asserted that Chiverton was owed outstanding payments for change orders. I am satisfied that payment was properly made and agreed by signature of Mr. Chiverton in respect of all change orders (in a total sum of US$11,382.91) other than that which involved the addition of the four extra feet of height to the first retaining wall. Although it appears that Chiverton has been credited with US$8,413 in respect of a concrete component for that work, there is no evidence that it has been paid for extra materials used or for labour. Some figures prepared by Chiverton's expert (but not yet formally in evidence) suggest that Chiverton has been underpaid by some US$19,000 in respect of the additional work done and materials consumed by reason of the increase in the height of the wall. Since, however, it appears that by 27 November 2006 Chiverton had completed 66% only by value of the wall as originally designed, leaving work and materials to a value of some US$43,000 uncompleted, it is difficult to see that any additional labour and materials as yet unclaimed for can be due in respect of this wall from the developer to Chiverton, despite the design change to its height.

[56] I should add that I am satisfied that no additional payment for overheads and profit is due from the developer to Chiverton in respect of the US$11,382.91 paid for the change orders down to 29 September 2006. The payment of those sums was plainly intended to be in full

settlement for the additional work which they encompassed. Had Mr. Chiverton thought otherwise, he would not have countersigned the certificates under which they became payable.

[57] Finally, there was an issue at trial as to the cost of transport. Mr. Chiverton brought his men over each day from Virgin Gorda to Scrub Island at a cost, he said, of some US$600 per day. He says that this expense should have been contained within preliminaries, but it clearly is not. Mr. McCarthy's evidence was that Mr. Chiverton had told him when the contract was being discussed that he would take care of the transport cost. Mr. Chiverton told me about a conversation which he had with Mr. Roberts and Mr. Martins after the contract had been on foot for some time, in which he complained about the serious burden that was being placed upon Chiverton by the transport cost. He said that they told him that they would raise the matter with a representative of the developer and see what could be done. But nothing happened. In his report on loss suffered by Chiverton as a consequence of the developer's repudiation (something which I have held never happened) Chiverton's expert includes a figure of US$20,000 for the cost of transport. No claim can lie against the developer for this amount. It is a very unhappy situation, but the Court cannot mend the contract by providing for something which could have been, but was not, included, unless the omission is the result of equitable or actual fraud or mistake. Neither is pleaded, and there is no evidence to suggest that anything of the sort occurred.

[58] The result is that with the exception of Chiverton's claim for damages for delay, which, if it is to be pursued at all, will have to be dealt with by way of an inquiry, Chiverton's contract claim fails.

Mr. Chiverton's defamation claim

[59] This claim originally encompassed statements made to the Honourable Premier on 20 December, 2006 and to various civil servants in the Labour Department. It is now accepted that statements made to the Honourable Premier were made on an occasion of qualified privilege. There is no probative evidence that any statements, let alone defamatory ones, were made by the developer or any agent of the developer to the Labour Department.

[60] Thus the claim as finally presented at trial rested principally on an allegation that Mr. Bercow had said to Chiverton's employees, at a time when they were protesting about the fact that they had not been paid, that (I quote) 'you should have been paid all the time because we paid Chiverton US$200,000'. There were other statements complained of, however, to the effect that Mr. Bercow (and Mr. Jones, who did not give evidence) had told members of the workforce that Chiverton had been paid (with no reference to any specific figures), so there was no reason why they should not have been paid; that the developer did not owe Chiverton money; and that Mr. Chiverton knew nothing about construction. Apart from admitting that Mr. Jones had told members of the workforce that it did not owe Chiverton money, the developer put Chiverton to proof that any of the words pleaded had been uttered by the developer or by any agent of the developer. The statements that the developer did not owe Chiverton any money and that Chiverton had been paid (so that there was no reason why Chiverton's employees should not be paid) were, if uttered, true. I therefore hold that no claim can lie in respect of those statements.

[61] That leaves the allegation that Mr. Chiverton knew nothing about construction and the US$200,000 complaint. The only evidence as to the alleged ignorance of Mr. Chiverton was contained in the witness statement of Mr. Eric Williams ('Mr. Williams'), one of Chiverton's foremen. He withdrew that evidence in cross examination, so that that complaint falls away.

[62] Mr. Esprit, one of Chivertons former employees, gave evidence for Mr. Chiverton. His witness statement did not contain any allegation that Mr. Bercow had told workers that

Chiverton had been paid US$200,000, nor did he make any such allegation during any part of his oral evidence.

[63] In his witness statement Mr. Williams said that he had heard Mr. Bercow say that Mr. Chiverton had been paid US$200,000 'on several occasions from around October 2006'. Mr. Williams also claimed that Mr. Roberts (who was not called to give evidence) had said words to the same effect. Mr. Williams' witness statement also contained a passage in which he said that Mr. Jones had said that Chiverton was being paid weekly, had been paid US$200,000 and was not owed money by the developer. In cross examination Mr. Williams abandoned all the evidence in his witness statement about what Mr. Jones was supposed to have said and admitted that he did not hear Mr. Bercow tell the workers that Mr. Chiverton knew nothing about construction. He insisted, however, that he had come upon Mr. Bercow telling a group of workers that Chiverton had been paid US$200,000. Mr. Williams said he had been approaching Mr. Bercow from behind and that once Mr. Bercow had appreciated that Mr. Williams was present, he stopped the conversation.

[64] Mr. Bercow's witness statement admitted that he had told workers that as far as he was aware Chiverton's bills had been paid. As I have said, this was true and certainly not defamatory. In cross examination the following exchange took place between Mr. Bercow and Mr. Simonette:

> Q. You recall saying that he had been paid $200,000, to some of his workers?
>
> A. No, I don't recall saying $200,000.

From this I understood Mr. Bercow to be confirming that he had told members of Chiverton's workforce that Chiverton had been paid. Significantly, while Mr. Bercow did not recall saying that Chiverton had been paid US$200,000, he did not deny having done so.

[65] I have the gravest reservations about Mr. Williams' evidence upon the US $200,000 point. His witness statement said that he had heard Mr. Bercow make this remark on several occasions. In cross examination this turned out to be a single occasion overheard while Mr. Bercow was speaking with his back to Mr. Williams. I also take into account the wholesale jettisoning by Mr. Williams of his witness statement evidence about what Mr. Jones was supposed to have said and about the derogatory remarks said to have been made about Mr. Chiverton's knowledge. I reject Mr. Williams' evidence as to Mr. Bercow's alleged statement that Chiverton had been paid $200,000.

[66] Although there is no longer any claim being pursued in respect of it, Mr. Simonette pointed to Mr. McCarthy's statement (albeit qualified) that he had told the Honourable Premier during a meeting in December 2006 that Chiverton had been paid US$200,000. Mr. Simonette said that this made it likely that the 'party line' (he did not put it like that) at VIPM was that Chiverton had been paid US$200,000. In his second witness statement Mr. McCarthy said that what he told the Honourable Premier was that Mr. Chiverton 'had about US$200,000 of the contract had (sic) been completed and he had been paid and should be able to pay his men.' In re-examination he said that he had explained to the Premier that '*on the value of his works* [Mr. Chiverton] was paid approximately US$200,000' [emphasis added]. In oral evidence Mr. McCarthy gave an elaborate account of how this statement could be justified by reference to the mechanisms of the contract, but could not say whether he had given a similar explanation to the Honourable Premier. The matter being thus at large, I think that I may safely say that I find it improbable in the extreme that Mr. McCarthy would have qualified a statement to the effect that Chiverton had been paid US$200,000 by reference to measured work and the doctrine of set off. I find that Mr. McCarthy simply told the Honourable Premier that Chiverton had been paid US$200,000. I therefore accept what I have called Mr. Simonette's 'party line' argument.

[67] More direct is the evidence of Mr. Chiverton in his witness statement, where he said, at paragraph 16:

> "In November, 2006 I learned that Charley Bercow VIPM Construction Manager on the Job site and Mark Jones also of VIPM had told CCL employees including Eric Williams and Jermian Esprit, that I had been paid $200,000 by VIPM and that I should therefore be paying my men." [Later in the same paragraph he said], "I recall that on 30th November, 2006 when the workers returned to the Marina on Virgin Gorda they confronted me in a hostile manner demanding that they be paid since they had been told by Charley Bercow and Mark Jones that CCL had been paid and that VIPM did not owe CCL any money."

[68] Mr. Chiverton was not cross examined on this evidence. While I bear firmly in mind that Mr. Esprit does not corroborate this part of Mr. Chiverton's evidence in detail, he does say in his witness statement that:

> At some point CCL paid us workers the back pay that had been owed to us but we subsequently worked for another 3 weeks without being paid. In November, 2006 Charley told 4 of us workers including me that CCL and Junior Chiverton had been paid every Friday, during the time that we were not being paid. Twice Bercow mentioned to us that we should have been paid because CCL and Junior Chiverton were paid. The four of us then told the rest of the workers all that Bercow had told us about Chiverton getting paid all this time.

[69] I accept Mr. Chiverton's evidence about the employees' complaint and the incident on 30 November 2000, which I think is intended to be read together and to mean that he was confronted by members of his workforce with an allegation that he/Chiverton had by that date been paid US$200,000. Given that he remained even at trial firmly of the view that Chiverton had been paid only US$87,000. US$200,000 cannot have been a figure that came out his own head. It must be the figure thrown at him by the employees. The figure

of US$200,000 cannot have been arrived at by the employees by the light of nature and is strikingly close to the figures in certificate #6 of 27 November 2006, which fits the date given by Mr. Chiverton for the confrontation. Once that point is reached, it follows that the employees must have received this information from some source and the only available source is VIPM.

[70] I therefore find as a fact that Mr. Bercow and/or Mr. Jones told members of Chiverton's workforce late in November 2006 that Chiverton had been paid US$200,000. I also find as a fact that that statement was unqualified by reference to the terms and mechanics of the contract.

[71] The maker of a statement must take his audience as he finds them. If unpaid employees of a contractor in the position of Chiverton are told by representatives of the site owner, to whom they are making complaints that they have been going without pay, that their employer has been paid US$200,000, they are going to understand by that that the employer has had US$200,000 in cash. They are not going to assume and, for all the evidence reveals, had no means of deducing that part of that US$200,000 was paid by way of contra against materials supplied. The plain meaning of the statement was that Chiverton had had US$200,000 in cash. That was untrue.

[72] Given the context in which it was uttered, the statement was also, in my judgment, defamatory. The employees were not surprisingly distressed and angry at not being paid and the remark was calculated to make them believe that Mr. Chiverton had caused Chiverton not to pay the men despite having been put in funds to do so. In other words, that he had left Chiverton's employees to whistle for their money in disregard of Chiverton's obligations to pay them, which is more or less the meaning pleaded.

[73] Mrs. Tavernier advanced a defence of qualified privilege, on the grounds that the maker of the statement and those to whom it was made had a corresponding duty in making and interest in receiving it. I do not think that there can be any duty to impart false information, nor any interest to receive it. This defence therefore fails.

[74] I accept that the position has been aggravated by a refusal to offer an apology and by the attempt to justify the statement by way of defence. It seems to me, however, that the most serious factor which I have to take into account in assessing damages is the impact it was calculated to have upon the reputation of Mr. Chiverton as an employer in what is a very close knit community. In his witness statement Mr. Chiverton gives evidence about threats of violence which he received and about the difficulty he has experienced in remobilizing his workforce. He says that many of Chiverton's employees doubt him when he says that Chiverton did not receive a cash payment of US$200,000 under the contract. He says that several members of the public have been heard to refer to him as a crook and he describes the difficulty he felt for a long time in facing the public. None of this evidence was challenged.

[75] Despite what is contained in his witness statement and which I have attempted to summarise above, there is no claim for specific damages. Further, while I pay full regard to the outrage that Mr. Chiverton must have felt when he heard what was being said, I have to recognize that my task is to compensate him, and, so far as an award of damages can do so, to help to restore his reputation not to reward him.

[76] It seems to me that the surest way to achieve this result is for the developer to put Mr. Chiverton in funds which he can make available to Chiverton so that Chiverton can pay the members of the workforce what it owes them. I therefore direct Mr. Chiverton to supply to the developer full particulars, verified by affidavit and supported by appropriate documents, of the amounts outstanding to workers employed by Chiverton on the Scrub Island job. The developer is to pay the gross amount so disclosed into a joint account to be held by the lawyers to the parties. The account holders will pay the arrears to employees on being satisfied as to their identity as the amount of their claim. The parties are to have liberty to apply in case of any difficulty or question.

[77] In addition I award Mr. Chiverton personally the sum of US$5,000 for his own distress.

[78] For completeness I should add that I have not ignored the difference in point of legal personality between Chiverton and Mr. Chiverton. I am satisfied, however, that although it was Chiverton which was the employer and Chiverton which had the legal obligation to pay the workforce, the natural object of the statement which I have found to have been made was, in context and in all the circumstances of the case, Mr. Chiverton as an individual.

Conclusion

[76] There will be an inquiry as to damages for delay in the contract claim and an order for payment of the amount, if any, found due upon the taking of that inquiry. I award Mr Chiverton the sum found payable pursuant to paragraph 76 above together with US$5,000 by way of damages for defamation. I will hear the parties on the question of costs.

Commercial Court Judge
28th October 2009