

ANTIGUA AND BARBUDA

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

(CIVIL)

A.D. 2010

CLAIM NO. ANUHCV2006/0234

BETWEEN:

EVERTON CORNELIUS

Trading as VEC Construction Company

Claimant

And

ALLAN STEVENS

CHRISTINE STEVENS

Defendants

Appearances:

Mr Dane Hamilton, QC and with him Mr Raimon Hamilton for the Claimant

Mrs Stacy Richards Anjo for the Defendants

2010: February 02
November 29

JUDGMENT

- [1] **THOMAS J:** On 10th May 2006 the Claimant, Everton Cornelius filed a Fixed Date Claim Form in which Allan Stevens and Christine Stevens were named as Defendants. In it the sum of \$305,487.00 is claimed as an amount due under a building contract for work and materials and in the alternative, damages. Interest is also claimed.
- [2] In the Statement of Claim of even date the nature of the Claimant's business is pleaded a written agreement on or about 27th June 2002 for the construction of a dwelling house on

land owned by the Defendants situate at Jonas Estate in the Parish of St. Peters, in Antigua. It is the Claimant's contention that the agreement consisted of a detailed estimate and the works, which included labour, equipment and materials and with a contract price of \$974,899.00.

[3] It is further pleaded by the Claimant that it was an expressed term of the contract that between the Claimant and the Defendants that the said dwelling house was to be constructed from start to finish in accordance with the building plans and engineering's specifications. It is contended further that after the commencement of the construction of the said house, on or about April 2004 the Defendants requested changes to the dimension of the building. These extra work, apart from payments made was \$245,233.00. Additionally, the construction of a second building was requested to be built of masonry blocks and reinforced concrete. This according to the Claimant, involved a cost of \$60,254.00.

[4] It is the plea of the Claimant that the Defendants acted in breach of the agreement by failing or refusing to pay the further sums of \$245,233.00 and \$60,254.00 notwithstanding the fact that they have been in possession and occupation of the completed building; and without any written or other allegation that the building was not constructed to their satisfaction.

[5] At paragraph 6 of the Statement of Claim the following is pleaded:

"It is an implied term of the contract that the Claimant would be paid a reasonable charge for the extra work and materials done and supplied at the Defendants' request. The said sum of \$245,233.00 and \$60,254.00 are reasonable charges for the said works."

[6] **Defence**

In their defence the Defendants deny the contentions by the Claimant in respect to the contract price as pleaded at paragraph 2 of the Statement of Claim. Instead the Defendants contend that the contract was for the construction of a 4128 square foot building at a total cost of EC\$180,000.00 per square foot for a total price of \$755,640.00. It is the Defendants' contention also that the terms of the agreement are detailed in a

memorandum dated 6th June 2001 and that sequently they received a statement from the Claimant captioned 'Extra Work on Your House at Jonas' in the amount of \$410,433.00. In this regard, it is the plea of the Defendants the prior to the service of the Statement of Claim they were unaware of the additional work in the amount of \$410,433.00.

[7] With respect to the matter of breach pleaded by the Claimant, this is denied by the Defendants. They contend that they never refused to pay the amounts of \$245,233.00 and \$60,254.00. They also contend that they were dissatisfied with the amount and quality of the work that had been done on the house and sought a statement of the amount that was needed to complete the house; and what monies, if any, was outstanding to the Claimant. And further, that the building is still not complete and the Defendants had to expend additional funds to try to complete the said house.

[8] In terms of the sums of \$245,233.00, \$60,254.00, \$974,899.00, the Defendants say that they will put the Claimant to strict proof in this regard.

[9] Finally, the Defendants contend that, in relation to their residence at Jonas, they paid the Claimant the sums of EC\$1,066,035.00 and £3975.00 and \$3817.03 for materials.

[10] **Counterclaim**

In their counterclaim the Defendants plead that the house built by the Claimant at Jonas has shown signs of faults and defects and that the works are still incomplete. In addition it was necessary to complete a broken fence that was destroyed by a backhoe used by the Claimant during construction of the said house.

[11] The Defendants' plead the implied terms of the contract being the memorandum dated 6th June 2001 between the Claimant and the Defendants. It is also contended that the Claimant owed them a duty of care in carrying out the works; and that the Claimant negligence and a breach of the contract by carrying out defective work using inferior, inadequate, insufficient or unsuitable materials thereby causing loss and damages to the Claimant and failed to complete the work as agreed between the parties. In this regard

certain particulars are pleaded and the sums of \$4000.00, \$16,733.50 claimed as well as damages for negligence and breach of contract, interests and costs.

[12] Defence to Counterclaim

In the Defence to Counterclaim the Claimant denies that there was ever \$755,640.00 in the agreement of 6th June 2001. Instead the Claimant maintains that the agreed price was \$974,899.00. It is also argued that the house was built in accordance with plans and specification supplied by the Defendants.

[13] The handing over of the building was not incomplete in accordance with the plans and specifications and required the expenditure of additional sums to complete the same.

[14] At paragraphs 4 and 5 of the Defence to Counterclaim the following is pleaded.

"4. The implied terms of the contract being memorandum dated the 6th June, 2001 between the Claimant and the Defendant are as follows:

- (a) that the Claimant would use materials of good quality*
- (b) that the Claimant would use materials which were reasonably fit for the intended purpose*
- © that the Claimant would exercise reasonable skill and care in carrying out his duties*
- (d) that the Claimant would carry out his works in a good and workmanlike manner.*

5. The Claimant owed a duty of care to the Claimant in carrying out the works for the Defendants; negligently and in breach of contract the Defendant and or his servants or agents carried out defective works using inferior, inadequate, insufficient or unsuitable materials thereby causing loss and damages to the Claimant and failed to complete the works as agreed between the parties."

THE EVIDENCE

[15] Everton Cornelius

In his witness statement Mr Cornelius details the history of the relationship between himself and the relationship also with Mrs Jacklyn Payne whom he described as a "draft technician" and agent of the Defendants.

[16] At paragraphs 4 to 7 the witness gives evidence of a number of events surrounding his agreement to construct a house for the Defendants.

1. In June 2002 Mrs Payne presented him with the drawings for the Defendants' house of reinforced concrete at Jonas Road.
2. Upon agreeing to construct the said house, the engineering specification to the drawings were prepared and returned to Mrs Payne who sent them to the Development Center Authority who later approved them.
3. Copy of the approved DCA plan was received from Mrs Payne.
4. Preparation of a written quantitative analysis of the estimated cost of the works inclusive of the building materials, furnishings, labour and transport.
5. Letter dated 27th June 2002 was prepared and attached to it the estimated list of material and cost.
6. Written agreement was also attached to the foregoing. Agreement signed and faxed to the Defendants in England.
7. The agreement was not signed by the Defendants and in good faith proceeded with the building in good faith on the basis of "our family connections".
8. On a visit to London in August 2002 discussions concerning the construction were held with the Defendants which included the agreement and there was an expression of satisfaction with its terms. Also discussed were minor preferences to the furnishings.
9. Agreed to build in accordance with the drawings.
10. Defendants agreed to pay according to the Payment Schedule to the agreement.
11. All payments by the Defendants were "in full accord with the agreement, the said monies were paid into my business account at Royal Bank of Canada, St. John, Antigua and Barbuda.
12. Construction began in April 2004.

- [17] At paragraph 7 of the said witness statements the various payments are detailed commencing on 4th May 2004. Also detailed at paragraph 8 and 9 are the total areas of the house and its configuration, the contract sum of \$974,899.00, as detailed in the agreement, and the final cost of construction of \$1,000,000.00.
- [18] The issue of the "pattern changes ... made and ordered by the Defendants" is elaborated upon by the witness at paragraphs 10 to 20. Also given are the consequential costs.
- [19] At paragraphs 21 and 22 the evidence is as follows:
21. *I constructed the extra works in accordance with the requests of the Defendants. A statement outlining the extra works performed was delivered. The first extra work statement listed items 1 through 13, in a total sum of \$416,433.00. The sum of \$55,101.00 was paid leaving an outstanding balance of \$355,332.00.*
22. *The second statement of extra works was submitted to the Defendants towards the end of construction. The statement included the first 13 items outlined in the first statement less payment of \$55,101.00, in addition they were several items listed from the number 14 through 28."*
- [20] According to the witness in view of the extra work which costs \$456,342.00 the total construction cost was \$1,425,241.00 of which the Defendants paid \$1,180,008.00, leaving a balance of \$245,235.00. The witness goes on to say that he is entitled to this amount having performed the agreed works in accordance with the drawings and specifications.
- [21] The remainder of the witness statement, Mr Cornelius dwells on events after the Defendants took up residence in June, 2005 and complained of experiencing problems with the plumbing and the sequel thereto, including the request for a storeroom projected to be 14 ft by 26 ft at an estimated cost of \$60,254.00.
- [22] It is also the witness' evidence that he withdraw his services from the Defendants for the reason that they decided to withhold any further payments to him. At this time, according to the witness, \$245,233.00 was owed to him on the first agreement plus \$60,254.00 on the second agreement which were demanded by letter of 29th March 2006.

- [23] Under cross-examination by learned counsel for the Defendants, Mrs Richards Anjo, Mr Everton Cornelius testified that he is a civil and construction engineer with no expertise in design or architecture.
- [24] In terms of the design of the house constructed for the Defendants he said that it was done by his sisters, Mrs Jacklyn Payne. He added that it was not done at his request but it was used.
- [25] With respect to a document appearing at page 36 of Vol. III of Bundle Mr Cornelius said he first saw it when he came to Court but accepted that it says VEC Construction Design Office and shows a cost of \$755,680.00. He however, went on to say that did not come from his office. And it is also his testimony that plans for the house were submitted to DCA as prepared by Mrs Payne. He further admitted that a copy of the plan was not given to the Defendants which is normal.
- [26] In further cross-examination Mr Cornelius testified that the plans were submitted to DCA on 6th June 2001 and accepted that it is the same date appearing on the document at page 36 of Vol. III which also shows VEC Construction as the builder.
- [27] Regarding the contract to construct the house, Mr Cornelius said he signed it and then faxed it to the Defendants, but he did not have a copy of the said contract signed by them. He went on to say that he was paid what was laid out in the contract.
- [28] Concerning the construction of the house, the witness said that he commenced work after he was paid \$250,000.00 and that the Defendants in accordance with the Payment Schedule. He went on to say that the work was supposed to last six months but after one year work was still continuing because of the additional work due to changes to the plan. He also said that at the time of the new estimate "maybe 80 – 85% of the work was completed. And even further Mr Cornelius testified that the document appearing at pages 24 and 38 of Trial Bundle Vol. 3 reflects the extra work.

[29] With respect to the specific item of the storeroom, it is Mr Cornelius' testimony it was 90% complete based on an estimate of \$70,000.00 a copy of which was given to the Defendant. It was then put to the witness that there was no such estimate but this was denied.

[30] Continuing his testimony the extra work, he continued thus: *"I completed the paved driveway 100% what I set out to do I did. They asked for an extension to the driveway 2 to 3 ft wider towards the northern side on entering the compound. There is a drawing."*

[31] Returning to the matter of the estimated cost of \$755,640.00, Mr Cornelius said that this figure has no bearing on him. He went on to say that the plan had an estimate for 4198 sq. ft and ended by saying that: "I recall the Defendant saying that I destroyed a fence but I repaired it. Whatever was damaged when I were doing the construction were fixed and even made better.

[32] In re-examination, Mr Cornelius said that with respect to the storeroom some painting was to be done and a manhole to be constructed. He also said that he was not sure if some plastering had to be done. He testified that the storeroom was built with his money.

[33] **Wills Thomas**

In his witness statement Wills Thomas details his services his services as an independent contractor for plumbing services and the services provided for the Claimant is April 2004. He also dwells on such services provided for the Claimants after the house at Jonas Road was completed; and the work done to remedy the problems identified. He also gave evidence regarding the installation of drainpipes on the Defendants' roof.

[34] There was no cross-examination of this witness.

[35] **Alan Stevens**

In his witness statement Mr Alan Stevens gives evidence that by memorandum dated 6th June 2001, he and his wife were given an estimate of \$755,680.00 for the construction of

their home in Antigua by the Claimant. According to the witness, "the letter dated 6th June 2001 was signed in which the cost per square foot was EC\$180.00 per square foot.

[36] According to Mr Stevens, construction of the house commenced in April 2004 but as construction progressed there was a realization that some adjustments "*would have to be made to the original plan.*" These were agreed on. He contends that the figure given for the adjustments was total estimate of \$416,433.00 which was the only estimate agreed to.

[37] On the bigger picture of the cost of the entire construction, it is Mr Stevens' evidence that he did receive or agree on an estimate of a contract price of \$974,899.00 before the commencement of the project or at any time for the duration of the project.

[38] At paragraph 6 of his witness statement Mr Stevens details the nature of the repairs, both inside and outside that were necessary after the house was occupied by him and his wife.

[39] On the accounting side Mr Stevens says that at least \$1,072,000.00 was paid to the Claimant "*which we can support by credit and debit advices in and out of the account belonging to the Claimant and is at the Royal Bank of Canada.*" It is the further evidence of the witness that material and fixture for the house were purchased in England in the total amount of \$4,106.73 in 2004 and 2005.

[40] Pursuant to leave granted by the Court to comment on evidence, Mr Stevens denied that having an argument with Mr Cornelius about £250,000.00 and also denied telling Mr Cornelius that he had the money to pay.

[41] In cross-examination by learned senior counsel, Mr Dane Hamilton, QC, Mr Stevens said that Mr Cornelius would phone him to say how much money was needed each time and the amount was transferred to his account. According to him the transfers amounted to \$755,000.00.

- [42] On the matter of the plans, Mr Stevens said that he never saw the plans which were prepared by Mr Cornelius and his sister, Mrs Payne.
- [43] On being referred to page 36 of Trial Bundle Vol. III, Mr Stevens conceded that his signature appears and that he also sees a signature under the space marked 'Designer'. It was then put to the witness that it was a bill for the designer, Mrs Payne. This was referred by Mr Stevens who said it was part of the construction fees. It is the evidence of Mr Stevens that on 6th June 2001 he made an application to construct a building. He said that he submitted a plan of the building that he intended to construct and it was signed. He went on to say that everything was left to Mr Cornelius and Mrs Payne.
- [44] On being shown the document at page 36 of Trial Bundle Vol. III Mr Stevens agreed that Mr Cornelius' name does not appear thereon. And according to him, when the decision was taken to build in August 2004 he did not think about escalating building costs from year to year.
- [45] In relation to the document appearing at page 139 of Trial Bundle II, Mr Stevens said that he never received it but noted that the sum of \$190,000.00 in the Payment Schedule represented the first payment. He went to give evidence of other payments of \$165,000.00 on 12th July 2004, the second payment, and \$160,000.00 on 1st September 2004. But in relation to a deposit of \$250,000.00 Mr Stevens testified that he was surprised at what he saw but admitted that account number 7185184 was his. He testified further that on 13th December 2004 he paid \$125,000.00 being the fourth payment to Mr Cornelius. In this context it was put to the witness that he sent a letter to the bank authorizing payment but this was denied.
- [46] In further cross-examination Mr Stevens gave evidence of other payments to Mr Cornelius being \$125,000.00 on 3rd March 2005, \$150,000.00 on 1st June 2005, and a \$150,000.00 on 21ST September 2005. He explained that payments were made after telephone conversations with Mr Cornelius but did not keep track of what was paid. He explained further that at the time he lived in England and also that the bank did not pay unless he

gave instructions to do so. He explained even further that this realization only came to light when the storeroom stage was reached. He said that at this stage he asked Mr Cornelius to do a check up and he refused.

[47] Returning to the matter of the signing, Mr Stevens said that he did not discuss anything with Mr Cornelius to construct a building at a cost of \$755,000.00. In particular he said that he did not sign the document appearing at page 36 of Trial Bundle Vol. III. He added that he had an agreement but it was not signed. According to him it was trust and belief.

[48] In reference to the memorandum referred to at paragraph 2 of his witness statement, Mr Stevens said that it was given to him on 6th June 2001 and which time Mrs Payne was present. In this context Mr Stevens continued his evidence under cross-examination in this way:

"I did not receive any fax with an estimate from Mr Cornelius. I did not see the original plan. I am not sure if the building included an apartment downstairs with two bedrooms. I did not tell the designer this was an addition. I did not extend the driveway. I did not do anything to the plan. I am not sure what is in the plan as I did not see it. When we started I spoke of a generator room. I have never refused to pay \$245,000.00. The \$60,000.00 was for a storeroom. I did not refuse until I saw how much money he got."

[49] In reference to the document appearing at page 38 of Trial Bundle Vol. III, Mr Stevens admitted receiving it and admitted also that he made payments towards the \$410,433.00. But the requests for changes to the building were denied. In fact, Mr Stevens evidence is that we did not know what the building would look like and he went on to testify that he purchased the electrical equipment in England based on a list supplied by Mr Cornelius.

[50] In relation to the document appearing at page 133 of Trial Bundle Vol. II, Mr Stevens denied receiving "*one like this*". According to him he bought light fixtures based on what the builder told him.

[51] Returning to the question the matter of addition to the building, Mr Stevens admitted that the gazebo was not on the plan but he gave instructions for its construction.

[52] Finally, it was put to Mr Stevens by learned senior counsel that he owed Mr Cornelius \$245,233.00 plus \$60,000.00. This was denied.

[53] In re-examination Mr Stevens said that he paid Mr Cornelius \$1,070,000.00. He ended his testimony in this way: "Mr Cornelius has not done any extra work. I saw the document, I see what it says and he did not do any extra work. In May 2005 I did not receive any fax from Mr Cornelius."

[54] **Christine Stevens**

In the witness summary of Christine Stevens it is stated that on 6th June 2001 she was advised by memorandum by the Claimant the cost of building a 5 bedroom masonry house was EC\$755,640.00 at \$180,000.00 per square foot. The memorandum was signed by the witness, Alan Stevens and the Claimant on 6th June, 2001. It is further stated that subsequently the Claimant submitted a further memorandum to the witness and her husband detailing additional work as total estimate of \$410,433.00. In this regard it is stated that the estimate excluded the costs of kitchen, cabinets, electrical generator, fencing, gate and swimming pool. The receipt of further estimates for a total of EC\$245,233.00 is denied.

[55] At paragraph 5 of the witness summary it is stated that the witness paid the sum of EC\$1,066,035.00 to the Claimant plus expenses of EC\$20,512.00 in the purchase of materials for the house. Other expenses are also detailed at paragraph 6 with respect to repairs and completion of the house.

[57] In cross-examination by learned senior counsel Mrs Stevens testified that she was not aware that Mr Stevens signed the DCA application, however she did acknowledged that her husband's signature appears on the said application dated 6th June 2001. She went on to testify that she did not see the plan and that everything that was being done was done by her husband. She also said that she was not sure when the construction commenced; did not play any part in the construction; did not agree to any apartment with

two bedrooms, bathroom; and kitchen, did not agree to the construction of a gazebo or to a storage room on the premises.

[58] In terms of banking it is Mrs Stevens' testimony that while the house was being constructed she and her husband had an account at the Royal Bank of Canada, while the construction was in progress she did not know if the account held over one million dollars. And she said further that she was not aware of a deposit of \$250,000.00 on account No. 7185184 which is a joint account.

[59] With reference to the document appearing at page 36 of Trial Bundle Vol. III, the witness said that she did not see her signature on it but did not know the other signature.

[60] It was put to the witness that she was not telling the truth, but this was denied. The matter of the participation in the extension of the patios was also put to her. Again it was denied. The extent of her participation in the extensions to the house was next put to the witness and she then said she had no idea as to the building, and she explained her part in this way.

"I spoke to Mr Cornelius when he came to London. My husband and Mr Cornelius spoke about the building. This was in 2002. I was there and I know the discussion took place. The only view I had was that when it was finished I would like to do the interior."

[61] In ending her testimony Mrs Stevens again denied any involvement in the financial aspect of the building;

[62] There was no re-examination of the witness.

ISSUES

[63] The issues for determination are:

1. Whether there was a valid contract between the Claimant and the Defendants and, if so, what were the terms,

2. Whether the Claimant is entitled to reasonable costs in respect of the extra works performed on behalf of the Defendants by virtue of the contract.
3. Whether the Claimant is liable on the Defendants' counterclaim.

Issue No 1. Whether there was a valid contract between the Claimant and the Defendants and, if so, what were the terms.

[64] Learned counsel for the Defendants Ms Stacy Richards-Anjo contends that an offer cannot be effective unless seen by the offeree. She contends further that the totality of the evidence shows that the Claimant and the Defendants did not agree on a figure or an exact figure for the construction of the house.

[65] On the other hand, Learned Queen's Counsel Mr Dame Hamilton, for the Claimant submits that there was a contract between the parties since the Defendants pleaded case allege such an existence. He contends further that the evidence is very clear that in that Claimant constructed a time for the Defendants who remitted to him the costs for such construction by debits or their account, #7188184 at the Royal Bank of Canada.

[66] On this basic point the Court agrees with Mr Hamilton that the contract is common ground between the parties. A further legal principle which the submission of learned counsel for the Defendants overlooks is the fact that acceptance can arise from sheer conduct of the parties. The principle is addressed in *Chitty on Contracts (General Principles)* 25th ed in this way at para. 55;

"An offer may be accepted by conduct. For example, an offer to buy goods can be accepted by supplying them; and an offer to sell goods, made by sending them to the offeree, can be accepted by using them. But conduct will only amount acceptance if it is clear that the offeree did the act with the intention (actual or apparent) of accepting the offer. Thus in one case it was held that an offer by an insurance company to insure a car had not been accepted when the offeree took the car out on the road, as there was evidence that he intended to insure with another company. But sometimes the court can resolve the uncertainty by applying the standard of reasonableness or by reference to another contract between the parties, or even to a draft agreement between them which had never matured into a contract. For example, in *Brogden v. Metropolitan Ry.* a

railway company submitted to a merchant a draft agreement for the supply of coal. He returned it marked "approved" but also made a number of alterations to it, to which the railway company did not expressly assent; but the company accepted deliveries of coal under the draft agreement for two years. It was held that once the company began to accept these deliveries there was a contract on the terms of the draft agreement."

[67] Terms of the Contract

The Claimant addresses this issue by an analysis of Defendants contentions in this regard. These are that there was an agreement dated 6th June, 2001 for the building of their house at a cost of \$755,640.00, hence there were no plans relating to the house and they never saw any plans submitted to the DCA and the payments were made which total \$1,066,035.00.

[68] As against the foregoing, learned senior counsel submits the following: the claimant's evidence is that he faxed an estimate to the Defendants on 27th June 2002 which he (the Claimant) signed; discussion between the Claimant and the Defendants in August 2002 concerning the proposed house; the fact that such a meeting took place was accepted by the other Defendant; the denial by Allan Steven that he saw the estimate (said to be faxed on 27th June 2002) bearing a total cost of \$974,895.00 the suggestion put to Allan Stevens on cross-examination that the Defendants offered to pay the Claimant £250,000 as they had no idea as to how much they were to pay; the inference that the sum of £250,000 is the equivalent of \$1.25 million; the money sent was contended the agreed cost of construction 'fixed at the time at \$974,899.00; the Defendants' contention that they were not aware of plans for the house 'cannot stand the light of day' as the plans submitted to DCA on 6th June 2001 bore the signature of Allan Stevens, one of the Defendants which was acknowledged in cross-examination; the construction of the house commenced in May 2004 the Claimants name does not appear on the plans submitted to DCA on 6th June 2002 but which contains amounts relating to the cost of construction, the claimants acceptance that the plans emanated from the VEC Design Office but that he was not connected therewith; the estimate contained in the document dated 6th June 2001 coming from designer Nathalie Payne cannot stand as a contract between the Claimant and the Defendants; the said document of 6th June contains nothing relating to plumbing and

fixtures; the lapse of time between the date of the 2001 document, the date of actual construction being May 2004 and the costs of construction being impacted by inflation; and whether the said document addressed the numerous changes to the perfect.

[69] In making the Defendants case, learned counsel points to certain main events on facts to substantiate her contention that the document of 6th June 2001 is the operative document. They are: First the said document is the only document signed by the parties. Second, the said document emanated from the VEC Construction Company who the Defendants expected to build their home. Third, Claimants' evidence that Mrs Payne was never an employee of his and Mrs Payne and the Defendants got together and signed the memorandum of 6th June 2001 without his knowledge.

[70] **Analysis**

Critical to the Defendants' submission that Mrs Payne was an employee or at least an agent of the Claimant. On the evidence there is nothing to say that Mrs Payne held such a position. What Mr. Cornelius did say in cross-examination is that the plan was not prepared at his request but was used.

[71] On the other hand, as far as agency is concerned the learning is that can either arise expressly or by implication. There is nothing in the evidence that gives rise to agency arising by implication in this instance. With the foregoing conclusion by the Court in mind, the Defendants' other contention that the 6th June 2001 document is the only document signed by the parties falls. It falls because the Claimant did not sign it; nor was it signed on his behalf. And above all, the third contention the Defendants are asking this Court to reject the Claimants evidence in so far as the preparation of the plan and connected events are concerned. This the Court is not prepared to do having regard to the events subsequent to 6th June 2001.

[72] The Court has as a matter of fact that the terms of the contract are contained in the document appearing at page 32 of Trial Bundle vol. III (the faxed document). And in this connection the Court accepts the submission by Mr Hamilton that the 6th June, 2001

document does not contain any details regarding fixtures and plumbing more than that; the faxed document contains a payment schedule which featured substantially in the evidence.

- [73] The payment schedule is governed immediately by clause 9 of the faxed document. It says that "The contractor shall be entitled to payment on account by the Employer from time to time of the following sums:

"PAYMENT SCHEDULE

(a) To mobilize and to construct foundation wall and fill and compact include cistern	.....	\$.190,000.00
(b) Upon completion of phase I. To place electrical & plumbing ruffing casting 5" thick concrete floor, build block to ring beam	.....	\$165,000.00
(c) Upon completion of phase II. To place ring beam and frame roof, place purlin & galvanise sheeting, start rendering of walls	.....	\$160,000.00
(d) Upon completion pf phase III. To complete rendering of walls, place ceiling. Install widows and doors	.....	\$125,000.00
(e) Upon completion of phase IV to pull electrical wire, prime walls place plumbing fittings completely rendering start painting	.....	\$140,000.00
(f) Upon completion of phase V to start tiling complete priming of walls complete painting	.....	\$110,000.00
(g) Upon completion of VI. To complete all other works and site cleaning	.....	\$74,000.00
(h) Rentition for three months	.....	\$20,899.00"

- [74] As agreed the foregoing the Defendants' documents as contained at pages 39 to 46 of the Trial Bundle Vol III, show the following debits with respect to Defendants' accounts numbers 718 5184, 202 8736 and account number 202 8736 – VEC Construction Limited: May 04, 2004 - \$190,000.00; 12, 2004, - 165,000.00; September, 01, 2004 - \$160,000.00; December, 31, 2004 - \$125,000.00' March 3, 2005 - \$125,000.00, May 03, 2005 - \$1000.00 June 01, 2005 - \$150,000; September 21, 2005 - \$150,000.00.

- [75] The various credit memos did not arise on the evidence so that any reference would be unwarranted. But what is not in doubt is the fact that the payments to VEC Construction Ltd were substantially in compliance with the payment schedule contained in the faxed

document beginning with the first payment of \$190,000.00 on May 4, 2004 which on the evidence coincides with the start of contribution. Thus cannot be a mere coincidence that continued to so coincide.

[76] The other point which points away from the document of 6th June, 2001 being the contract is the figures quoted in relation to the building works in 2001 which would as Mr Hamilton contends would have been 'impacted by inflation', certainly by May 2004.

[77] A further point about the payments and the June 6, 2001 document is that by March 2005 the \$755,640.00 which it called for payment would have been reached and surpassed and hence a time for the Defendants to raise a query. This was not done and payments continued.

[78] In the final analysis the payments accorded substantially with the payment schedule. The word substantially is used because up to March 3, 2005 they were in strict compliance and although after that they were not; they were more rather than less that was agreed.

[79] It is therefore the conclusion of the Court that the terms of the contract are contained in faxed document which required the Claimant to, inter alia, construct a house "approximately 3,000 square feet", the contract sum is \$974,899.00 "which represents the construction – costs", the building was to be completed six months from the commencement date (which is not stated) property insurance was to be purchased and maintained by the Defendants and payment of the contract sum was to be in accordance with the payment.

ISSUE NO 2

Whether the Claimant is entitled to reasonable costs in respect of the extra works performed on behalf of the Defendants by virtue of the contract.

[80] With respect to this issue the contentions by the Claimant are: First, given the admission that the document at page 38 of Trial Bundle Vol. III was received and in transcript in the

document requested the transfer of \$150,000.00 and a payment of \$150,000.00 was made on 1st June 2005, the events go hand in hand. Second, in view of the Allan Stevens' evidence at paragraph 3 of his witness statement, the proper inference to be drawn is that "the work was agreed to and discussed prior to the commencement, prior to the date of this was sent at it is not an estimate but a detailed summary and/or invoice of the extra work." Third, Allan Stevens had admitted that he was the benefit of a second building. This was paid for out of the Claimants own funds and was 98% complete when he ceased by reason of more payment. Thus, according to Mr. Hamilton, the claimant, a bill was tendered in the amount of \$60,254 which the Defendants have not denied on claim to have refused to pay and therefore the Claimant is entitled to recover.

[81] The following is submitted on the question of extra work at paragraph 11 of the written submissions on behalf of the Defendants:

- ii. "The Claimant also claims to have submitted to the defendants an undated invoice for extra work on your house at Jonas' for an amount due of EC\$245,223.00. The said invoice an amount paid of EC\$1,180,000.00 bal presupposes that the original contract amount is EC\$974,899.00 [page 24 of bundle III]. The Defendants do not admit to receiving this document, hence the pleading that they did and refuse to pay the said amount."

[82] At paragraph 3 and 4 of the Claimant's statement of claim the following pleaded:

3. The Claimant duly commenced the construction of the aforesaid building on or about April 2004 and during the course of the construction of the aforesaid building, the Defendants requested changes to the dimension of the building, the materials use, such as windows, the addition of a ground floor with two bedrooms, bath and kitchen, a generator room and garbage storage area, a paved driveway with retaining wall 21ft x 195ft x 5ins inter alia. The value of the said extra work apart from payments is \$245,233.00.
4. Apart there from the Defendants requested the construction of a second building of a dimension 14ft x 26ft of masonry blocks and re-enforced concrete divided into two rooms to be used as a storeroom. The Claimant duly performed this contracted work at a cost of \$60, 254.00 and thereafter on completion on or about August 2005 duly tendered a bill for the same."

[83] The Defendants response to this pleading is a mixture of denial and admission. At paragraph 4 and 5 of their defence the Defendants, the said paragraph 3 and 4 of the Statement of Claim and denied. And at the said paragraph 4 of the defence the following is pleaded by the Defendants:

"Prior to the service of the Claim and Statement of Claim herein, the Defendants were never made aware of any estimates for additional work except for the referred to in paragraph 2 of the Defence in the amount of EC\$410,433.00."

[84] In cross-examination on the issue of the alterations, as noted before Mr. Stevens said that he never refused to pay the sum of \$245,233.00 and also acknowledged that the sum of \$60,254.00 was for the storeroom. His evidence regarding the payment, however, is that he only stopped payment when he saw how much the Claimant had been paid.

[85] **Analysis**

The matter of alterations to the building as pleaded by the Claimant is denied by the Defendants in their Defence which led to the submission by Stacy Richards-Anjo. But subject to what is said below regarding the undated invoice, the evidence is abundantly clear that Extra Work Invoice appearing at page 38 of Trial Bundle III was faxed to the Defendants May 15, 2005 together with hand written request for the transfer of \$150,000.00. The evidence shows that such a transfer was made on June 6, 2005. In any event, Mr. Stevens admitted under cross-examination that he did not receive the said document and in the same breath also acknowledged that the \$60,254.00 was for the storeroom. This cannot be construed as a denial. In the final analysis Mr. Stevens in fact denied that he owed the Claimant \$245,233.00 plus \$60,254.00. The contradiction is that Mr. Stevens also said he only stopped paying when he realized how much the Claimant had received. Mr. Stevens is a victim of his own confusion in failing to keep even rudimentary accounts for such a massive undertaking.

[86] It is impossible for the Court to conclude that the Claimant went on a frolic of his own and made alterations to the Defendants' home without authority. The Defendant case falls into difficulty when after March 2005 when the figure he claimed was the contract price (being \$755,640.00 had been exceeded but payments continued unabated on June 01, 2005 and September 21, 2005. These were payments of \$150,000.00 each.

[87] The document at page 24 of Trial Bundle Vol. III is another 'Extra Work Invoice' which the extra work done has the following sub-total: Extra work: \$450,342.00, original contract \$974,899.00, original plus extra \$1,825,241.00, amount paid to date \$1,180,008.00 and amount due is \$245,233.00. There is nothing to suggest that this undated document was received by the Defendants. But as noted above Mr. Stevens did testify that he did receive the other Extra Work Invoice faxed on May 15, 2005 which shows a total of \$410,433.00.

[88] The Court is forced to comment on the fact that the undated invoice at page 24 shows 28 items with a total for the extra work of \$450, 342.00 while the other invoice at page 38 shows 13 items for a total of \$410,433.00. This is to say the least is strange.

[89] **Conclusion**

The Court therefore determines that the Claimant is entitled to payment for the extra work, including the storeroom based on the following totals: original contract price \$974,899.00. Extra work \$245,233 plus \$60,254.00 deducted from the amount paid by the Defendants bring \$1,077,000.00 is \$214,386.00.

ISSUE NO 3

Whether the Claimant is liable on the Defendants' Counterclaim

[90] It will be recalled that in the Defendants' counterclaim it is pleaded that the house constructed for them by Claimant has shown signs of faults and defects and that the works are incomplete plus the need to repair a fence broken during the construction of the house. Certain implied terms are pleaded in relation to the contract evidenced by the memorandum dated June 6, 2001 between the Claimant and the Defendants. At paragraphs 5 and 6 of the counterclaim the following is pleaded:

“5. The Claimant owed a duty of care to the claimant in carrying out the works for the defendants; negligently and in breach of contract the claimant and or his servants or agents carried out defective works using inadequate, insufficient or unsuitable materials thereby causing loss and damages to the [Defendants] and failed to complete the works as agreed between the parties.

6. The said faults and defects are incomplete works were caused by the negligence of contract of the claimant his servants and agents.”

[91] The particulars of negligence pleaded are in these terms.

- (a) the roof spouting was leaking and improperly placed.
- (b) The portion of the verandah at the south side of the property is moving or breaking away from the main portion of the house.
- (c) Screws in the roof incorrectly placed and insufficiently screwed causing leaks.
- (d) Hot and cold water pipes have been placed so that not hot water comes from the showers in the house and an outside faucet runs with hot water only.
- (e) Cistern not sealed and no cover made.

[92] On the counterclaim the Defendants Claim sum of \$20,733.50, damages for breach of contract; damages for negligence interest and costs.

[93] Here it is submitted by Mr Hamilton, QC for the claimants that having regard to the report of Everton Zachariah says that the said report identifies a number of problems with the

house including water seepage, termite attacks, cracked verandah wall, and seeping cistern. According to the learned Queen's counsel the Defendants have not established negligence or breach of duty on the part of the Claimant in the construction of the house. Further, one crack in a two storey house and termite attack cannot be regarded as negligence. Nor did Mr Zachariah attribute to the Claimant the repair of the cistern because he found no leaks and there were no other evidence that such exists. Mr Hamilton goes on to comment on certain findings by Mr Zachariah. These will be addressed in the analysis.

[94] Ms Stacey Richards-Anjo for the Defendants submits that "The evidence of the First Defendant and that of the expert report identify several failures by the Claimant to build in accordance with good building standards. According to her the issues identified were: water seepage, the discoloration and a crack in the wall, the entrance to the downstairs verandah, termite attack and a leak to the cistern.

[95] The matter of the damaged fence is also addressed by learned counsel and notes that the claimant has admitted the damage and his claim to have fixed it. In the context the submission is that "In the absence of any evidence to the contrary, I ask that the evidence of the Defendants pointing to an amount expressed for the repair of a fence at that time in Antigua, be accepted."

[96] **Expert Report**

By order of this Court Mr R. Everton Zachariah submitted a report on the submitted a report on the subject property. He identified several problems (already referred to in the submissions) to include water seepage, termite attack, crack in the wall, leak to cistern.

Under the rubric: Rectification of Defects/Remedial Works at paragraph 6.0 the following is stated:

"Water seepage into interior and Tile discoloration. The most convenient way to rectify seepage problem would be to rework the water from the roof to the cistern external walls of the house. This however, may be considered to have an adverse aesthetic effect on the property. Once this is completed, any permanently discoloured tile may be repainted.

Crack in wall at entrance to verandah this crack may be easily identified by breaking away the interface between the two walls sections, reinforcing then recasting. The area is then plastered and repainted. Repairs to the cistern would require that it be pumped out and inspected to determine the nature of the leak. It is likely that if a crack exists, this may be broken out reinforced, boxed and recast. As a secondary precaution it is advisable that all the interior wall be roughened and re-plastered using a bonding agent ... to ensure adhesion of the old mortar with the new. Finally a water proofing coating can be applied....”

[97] **The law of Negligence**

In discussing the requirements the tort of negligence, **Clerk and Lindsell On Torts** states the following at paragraph 16-04:

“The tort is committed when damage which is not too remote is caused by breach of a duty of care owed by the defendant to the plaintiff. In traditional terminology the ingredients of liability are a duty of care, breach and damage; but for reasons that will become apparent, each of these terms is so ambiguous that unnecessary confusion result. Between them they yield an irreducible minimum of requirements, namely, (1) the existence in law of a duty of care situation is one in which the law attaches liability of carelessness (2) careless behaviour by the defendant, ie that it failed to measure up to the standard and scope set by law. (3) Forseeability that such conduct would have inflicted damage on the plaintiff and of a kind of which he complains. (4) a causal connector between the defendant’s carelessness and the damage. When these four requirements are satisfied, the defendant is liable to negligence. Then and only then do the next two considerations arise, namely, (5) The extent of the damage attributable to the defendants; and (6) the monetary estimate of that extent of damage.”

[98] To the point of paragraph 1116 of Vol. 4 of **Halsbury’s Laws of England** the following principles are stated:

“The principles of negligence apply where a person is injured or property damaged as a result of construction works. The contractor owes a duty of care to provide a safe means of access to the site. He also owes to all lawful access of the property to carry out the work with proper care, and this duty is owed even where the contractor is also the vendor or lessor. Where the subject of the claim is damage to a building or works, a cause of action in negligence crisis when the defective work is done not when it manifest itself.”

[99] There can be no debate that the claimant owed a duty of care to the defendants in the construction of the house. But the question of breach and the other factors must be considered with respect to each finding by the expert. He identified termite attack, water seepage, crack in the wall and leak to cistern. Each one must be considered in turn. It is prudent at this point to note that Mr Hamilton for the Claimant makes the broad submission that in the round negligence against the Claimant has not been made out.

[100] **Termite attack**

The expert noted that there was 'severe termite attack was evident.' However, for the purposes of the law of negligence one of the relevant questions is whether there is a causal link between the claimant and the termite attack. Mr Hamilton for the Claimant says no and the Court agrees in that this event cannot be attributed to his client as there is supply no evidence to this effect.

[101] **Water Seepage**

At paragraph 5.0 of his report the narrative is in these terms:

"There were some problems associated with water seepage into the wall of the structures and finally into the floor. These problems could be the result of ruptured down spouts conducting water from the roof to the cistern. These ruptures could be as a result of drilling a hole in the wall for a number of reasons or due to improper sealing of connecting fittings. The above has caused tiles in some sections of the building to become saturated and change colour; and wall to become mildewed."

[102] The causes of the water seepage as identified by the expert point to the conclusion that the conduct of the claimant did not meet the standard or scope established by law. They are all construction events and the damage of this type is clearly foreseeable especially with water being the dominant agent.

[103] In the circumstances the two remaining questions or issues are the extent of the damage attributable to the Claimant and the monetary estimate of that extent of damage. The expert has identified the procedure to be followed in order that the problem may be rectified. He estimates the cost at \$5000.00 but the Defendant Allan Stevens in evidence

says that he expended \$4000.00 for labour and \$2112.00 for materials. This has not been challenged and as such the Court accepts and awards this amount in damages.

[104] As far as the matter of the replacement of discoloured tiles and repainting of discoloured walls is concerned the Defendants' say that they received an estimate of \$6500 which compares favourably with the expert's estimate of \$6000. In any event there is no challenge to this amount. The court therefore awards the sum of 6,500.00 in this regard.

[105] **The cistern**

In the particulars of negligence the Defendants plead that the cistern was not sealed and no cistern cover made. The expert was unable to substantiate the contention and went on to prescribe a methodology whereby the matter can be determined one way or another. However, although the expert did not identify "any other" 'tell tale' signs he implicitly accepted the tell tale sign of vegetation grow advanced by the Defendants. And in any event the method proposed by Mr Zachariah is time intensive as it involves monitoring the cistern. It has been noted that liability in this context arises when the defective work has been done and not when it manifest itself. Given the fact that the expert could not find any other tell tale signs and accepted what Mr Stevens told and which he would have seen in his survey, this points to or wrong without damage. In any event the recommendation for the sealing of the cistern given the fact that the issue is the sealing of the cistern and the methodology proposed by the expert, the court considers that normal damages of \$3,000.00 is fair and reasonable.

[106] **Crack in the wall**

Mr Hamilton for the claimant takes the view that it is a simple crack involved in the context of a two storey building. But Mr Everton Zachariat puts the matter and points to his finding that the crack is a result of 'inadequate structural tying of this into the existing structure.' In other words, it is structural. And again the same two questions fall for consideration as above. According to the expert, this issue involves reinforcing and then recasting and he estimates the cost to be EC\$2700.00. The Court awards this sum in damages.

[107] Broken fence

This matter raises issues of serious credibility. On the one hand the Claimant has admitted the damage to the fence but says that it was repaired. On the other hand the Defendants rely on an invoice in the amount of \$6,733.50 for the same damage. Learned Queen's counsel takes issue with the invoice in that he says that details such as 116ft of fencing wire and 25 bags of cement render the invoice suspect. The Court accepts the Claimant's evidence in this regard and the amount is disallowed.

[108] Interest

In view of the determination by the Court that the Claimant is owed EC\$214,386.00 interest is awarded at the rate of 6% from 15th May, 2005 until the date of trial being February 02, 2010. Interest will accrue to Defendants, on the sum of EC\$17,812.00 in accordance with the Judgments Act.

[109] Costs

Both the Claimant are entitled to costs on their claim and counterclaim in accordance with Part 65 of CPR 2000.

Apology

It is common ground that after this judgment and others had been reserved a number of other matters which touch and concern governance and/or the national interest of Antigua and Barbuda and in the Commonwealth of Dominica arose and as such were given priority. Further, this judge was transferred to another jurisdiction, where a single judge presides, with effect from 1st September 2010 with the foreseeable consequences. This accounts for the delay. Despite the foregoing a deep sincere apology is tendered for the delay.

ORDER

[110] IT IS HEREBY ORDERED AND DECLARED as follows:

1. A contract existed between the Claimant and Defendants by virtue of agreement faxed to the Defendants on and accepted by the Defendants by their conduct in the form of

payments to the Claimant in accordance with the payment schedule to the said agreement.

2. The Claimant is entitled to the sum of EC\$214,386.00 with respect to work carried out on the Defendants house.
3. The Claimant is liable under the Defendants' counterclaim and must pay damages to the Defendants in the amount of EC\$17,812.00
4. The Claimant is awarded interest at the rate of 6% on the sum of \$214,386.00 from 15th May 2005 until 2nd February 2010 and the Defendants are entitled to interest in accordance with the Judgment Act
5. The Claimant and the Defendants are entitled to costs in accordance with Part 65 of CPR 2000.



High Court Judge
Errol L. Thomas