THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2010/0029

BETWEEN:

CHRISTOPHER WHEATLEY

First Claimant

HAZEL WHEATLEY

Second Claimant

AND

WATERPOINT CARIBBEAN HOMES LTD.

Defendant

Appearances:

Esco L. Henry for the Claimant

Septimus Rudd for the Defendant

2010: November 29, 30

2011: March 9

JUDGMENT

INTRODUCTION

[1] REMY J.: This is an action for damages for an alleged breach and repudiation of a building contract. The Claimants Mr. and Mrs. Wheatley and the Defendant Waterpoint Caribbean Homes Limited entered into a written contract on June 20th 2008 whereby the Defendant agreed to construct a dwelling house for the Claimants for the agreed price of $805,112.82. Pursuant to the contract, the Claimant made a downpayment of 50% on

the date of the execution of the contract. The parties agreed to an extended completion date of August 28th 2009. On or around August 10th 2009, and prior to the agreed extended completion date, the Claimants, by way of letter from their Lawyer, terminated the contract, claiming that the Defendant had repudiated the contract by virtue of its repeated delays in completing the construction. The Claimants further contend that the Defendant also failed to carry out the building works with due care, skill and diligence and in a good and workmanlike manner. The Defendant counterclaimed for damages for breach of contract.

THE PLEADINGS

[2] By Claim form and Statement of Claim filed on the 11th January 2010, the Claimants averred that by a contract in writing dated the 20th June 2008 the Defendant company, building contractors, agreed with the Claimants to build a 3 bedroom, 2 bathroom house (the dwelling house) for the Claimants on the Claimants' land at Buckleys Estate at a cost of $805,112.82. The dwelling house was to be built in accordance with the terms of the contract. The contract also provided that the construction of the dwelling house was to be completed within 32 weeks of receipt of DCA planning permission and a 50% down payment on the contract sum.

[3] The Claimants pleaded that in accordance with the contract, the Claimants paid to the Defendant the sum of $394,827.50 on June 21st 2008 and the remainder of the down payment on or about October 10th 2008. That the Defendant received DCA approval for the dwelling house on July 29th 2008 and commenced work by clearing the site on or about July 30th 2008. That the Defendant cleared the site but stopped work for approximately three weeks at the beginning of August 2008 and failed to lay out the dwelling house or proceed with any preparatory work, claiming that the delay was due to a shipment of building supplies being stuck at the port.

[4] The Claimants further stated that the Defendant resumed work towards the end of August 2008 but again stopped work without cause on or about the 2nd September 2008 until about November 2008 when the Defendant began digging trenches for the

foundations to be laid down. Further, that, having proceeded with work on the building "in fits and starts", the Defendant put frequent halts on the work throughout November and December 2008 and again during the period January to March 2009.

[5] The Claimants state that the work done by the Defendant included digging out the foundations for the house, building the cistern and constructing portions of the concrete beams specified in the plan. That all of this amounted to approximately 15% of the work required to complete construction. They add that, on or about the 4th August 2009, in breach of the contract, the Defendant ceased any further work, and has wholly failed to build or complete the house, thereby repudiating the contract which they "accepted by letter dated 10th August from their solicitor, or alternatively by the issue and service of the claim herein."

[6] The Claimants alleged that by reason of the Defendant's breach and repudiation of contract, the Claimants had to employ another builder to build the dwelling house at a price of $765,000.00 The Claimants further allege that they have lost the use of the land and the use and enjoyment of the dwelling house. Further, that they (the Claimants) have been put to "considerable inconvenience, trouble and expense" and have suffered loss and damage.

[7] The Claimants further pleaded that it was an implied term of the contract or alternatively, the Defendant warranted that it (the Defendant) would carry out the said work in a "good and workmanlike manner and with proper and sufficient materials." That the Defendant failed to build the dwelling house according to the contract and the specifications, as a result of which the Claimants had to employ an engineer to evaluate the work and also had to employ another builder to repair the defects. As a result, that they have suffered loss and damage.

[8] By its Defence and Counterclaim filed on the 15th February 2010, the Defendant stated that construction activities commenced on or around August 11th 2008. Further, that during the course of digging the foundation for the dwelling house, it was discovered that

the soil and terrain were extremely waterlogged. As a result, the Defendant made several failed attempts to pump out water from the foundation area. The Defendant contends that the Claimants were at all times fully aware of the water logged state of the foundation area since they had visited the site in or around October 2008. The Defendant stated that the Claimants were aware that it (the Defendant) was forced to suspend construction activities on or about 2nd September 2008 as, around that time, the effects of the passage of Hurricane Omar resulted in the "water- logged situation" becoming worse.

[9] The Defendant pleaded that the Claimants, without any prior notice, breached the agreement by terminating it with effect from August 10th 2009, and that the Defendant was instructed not to return to the building site as new contractors were being engaged to complete the dwelling house.

[10] The Defendant denied that it repudiated or is in breach of the contract. The Defendant contends that it carried out the building work in a good and workmanlike manner and with proper and sufficient materials.

[11] The Defendant counterclaimed that by virtue of the Claimants' termination of the construction activities and the Claimants' breach of the contract, the Defendant has suffered loss and damage. The Defendant's counterclaim is for the sum of $480,000.00 special damages and for general damages to be assessed.

[12] In their Reply and Defence to Counterclaim filed on the 11th day of March 2010, the Claimants admit that the soil and terrain at the construction site were discovered to be waterlogged sometime in August 2008 and they visited the site in or around October 2008.

[13] The Claimants contend that they consistently expressed dissatisfaction with the progress of work on the building from as early as March 2009. They further contend that,

on more than one occasion, they indicated to the Defendant that "they intended to take such legal action as was necessary to protect their rights."

[14] In the Defence to Counterclaim, the Claimants admit that the contract with the Defendant was terminated by letter of Counsel dated August 10th 2009 but deny that this letter was in breach of the contract. They contend that the letter was in effect acceptance of the Defendant's repudiation of the contract. The Claimants further deny that they are indebted to the Defendant as alleged in its Counterclaim or at all.

EVIDENCE

The Claimant's Evidence

[15] The Claimants' case was presented through the evidence of the 1st named Claimant, Christopher Wheatley and his two witnesses namely Steven Belizaire and Lucine Hanley.

CHRISTOPHER WHEATLEY

[16] In his Witness Statement, Christopher Wheatley stated that in early 2007, his wife Hazel and himself purchased a parcel of land in the Buckleys area of Antigua. He had extensive dealings with Ms. Linda Gordon who was then employed as Executive Sales & Marketing Representative of G-90 Building Systems Limited (G-90), the Defendant's predecessor in title. G-90's business operations were eventually taken over by the Defendant, who eventually signed the contract with the Claimants.

[17] Mr. Wheatley stated that they transferred £75,000 to the bank account of the Defendant on the 26th June 2008. That on receipt of the funds by the Defendant, that they received an email from Linda Gordon confirming that the amount converted to $394,827.50 E.C., leaving a shortfall of E.C. $7,728.91 for the required 50% down payment. However, stated Mr. Wheatley, Linda Gordon confirmed by email that this amount could be paid by them on their next visit to Antigua in October 2008.

[18] Mr. Wheatley stated that on 29th July 2009, Linda Gordon "confirmed that DCA approval had been received and work would begin immediately." That in response to his email of 23rd August, Linda Gordon stated that the delay in marking out the ground had been due to a container of building supplies being stuck at the port. That she further stated that following the appointment of a new project manager "work would progress well."

[19] Mr. Wheatley stated that in October 2008, during a return trip to Antigua by himself and his wife, the balance of the 50% down payment was paid to the Defendant. He stated further that his wife and himself visited the site and found that "apart from the land having been cleared of vegetation no other progress had been made." He added that it was during this trip that they first met with Steven Belizaire of Leisure 2000 Limited to discuss the construction of a pool at the rear of the property, and that following their meeting, it was decided that they would "ask Steven to construct other aspects of the property i.e. a retaining wall on the rear building etc."

[20] Mr. Wheatley stated that they were advised by the Defendant that due to problems associated with water at the construction site, conventional methods could not be used and that it was going to be necessary to use piling, and that piling represented the best option. He added that they agreed to proceed with the piling and, on 29th December 2008, following a meeting with John Anjo and Linda Gordon, gave their authority to proceed subject to cost.

[21] Mr. Wheatley stated that, after repeated requests, they were finally provided with a schedule of works which stated that the dwelling house would be completed by 6th August 2009, which they agreed to accept.

[22] Mr. Wheatley stated that since entering into the contract with the Defendant, himself and his wife visited Antigua three times. That on the first two visits in October and December 2008, they saw little or no progress and even in May 2009 there was insufficient done to represent eleven months of work. He added that by August 2009, it was becoming

impossible to envisage that the dwelling house would ever get built. Additionally, he stated, they discovered that the work completed by the Defendant was sub-standard due to defective workmanship.

[23] Mr. Wheatley stated that in or about August 2009, they contacted Leisure 2000 to complete the construction of the dwelling house at a total price of $755,000.00 and that the dwelling house was completed by Leisure 2000 within a period of approximately five months.

[24] Under a lengthy cross-examination, Mr. Wheatley stated that himself and his wife looked at the land before purchasing it. He stated that his wife and himself traveled to Antigua in October 2008 after signing the contract. That this was the first time that they met Steven Belizaire. He later stated that his wife and himself had exchanged emails with Steven Belizaire in August 2008, and that the October meeting was the "first face to face" meeting which they had with Steven. He stated that he found Steven to be a "friendly individual." He testified that Linda Gordon took them to the site in October 2008, and that during this visit they discovered that "no progress had been made." He stated that they were not aware that there was a project manager assigned to their job and that Linda did not suggest that they needed to speak to anyone else.

[25] Mr. Wheatley acknowledged that Linda had sent emails stating that the trenches which had been dug for the foundations of the property were full of water and that both Linda and John Anjo indicated that there was a problem on the site. Further that they led him to believe that it was "a serious problem." He stated that he was aware that a survey was done and that the report was provided in December 2008. Further, that Mr. Anjo suggested that an engineer should visit the site as it was a problem that needed a solution.

[26] Mr. Wheatley testified that although at the time of reading the report he formed the opinion that the problem was serious, he did not agree that the problem could not have been discovered until the workmen had started digging. He added that he thought the

construction could have started in August 2008 and that they could have started digging in August 2008.

[27] When questioned about Steven Belizaire's involvement with the Claimants and the project, Mr. Wheatley stated that Steven went on site from January 2009 and kept them "up to date" with what was happening on the site, although he was not contracted to do so. Mr. Wheatley admitted that himself and his wife communicated more with Steven than with Mr. Swapnil, the Project Manager. He further acknowledged that he never obtained approval in writing from Linda or Mr. Swapnil for Steven to go on site.

[28] Mr. Wheatley stated that he got the impression that Steven "was performing efficiently and competently" and that Waterpoint (the Defendant) was performing "inefficiently and incompetently." He also acknowledged that the defective workmanship and inadequate materials were discovered after the Defendant left the job. He admitted that they (the Claimants) did, in fact, terminate the contract before the agreed extended date of August 28, 2008. He stated that he accepted that the reasons for repudiating the contract were (a) failure to construct and (b) that the work was sub-standard and acknowledged that, at the date of the termination of the contract, the time allowed for construction had not yet expired.

STEVEN BELIZAIRE

[29] The next witness to give evidence for the Claimants was Steven Belizaire. In his Witness Statement, Steven Belizaire averred that he met with the Claimants in October 2008 to discuss the installation of a swimming pool at their new property at Buckleys. That he discussed with them the designs and location of the swimming pool and "other ideas that they come up with to better enhance the back yard." They also discussed the completion date for the house and the timeline for the construction of the pool and walls as well as discussing the idea of a retaining wall and gazebo at the rear of the building.

[30] Steven Belizaire stated that after the Claimants left Antigua, Mr. Wheatley and himself were in constant communication and that they "emailed each other back and forth from

time to time" regarding not just the work he – Steven Belizaire – was doing, but also with respect to the progress of the Defendant's work. He stated that in April 2009, the Claimants appointed him as "their project manager to oversee the building of their home and to keep him abreast of things going on and to co-ordinate the building of the retaining wall, new cistern (other than the one addressed by the Defendant) gazebo and fences."

[31] Mr. Steven Belizaire stated that Mr. Wheatley arrived in Antigua in late April, and in early May, himself and Mr. Wheatley received a "revised schedule of works" from the Defendant, which stated that the construction of the house would be completed on the 28th August 2009. After Mr. Wheatley left for the U.K. on May 14th 2009, he (Steven Belizaire) called Mr. Wheatley almost daily to inform him that "not much was done and that only two individuals were on site periodically." That by late July, he explained to Mr. Wheatley that the building would not be completed by August 28th 2009.

[32] Mr. Steven Belizaire stated that, in mid-August, he was asked by Mr. Wheatley whether he would be prepared to build his home for him. He added that, on receipt of a letter that had terminated the Defendant and a letter appointing him as the contractor, he engaged the services of Mr. Lucine Hanley to do an evaluation of the property for the work that had been done up to that date.

[33] According to Mr. Steven Belizaire, he then undertook demolition of the work that the Defendant had done. He stated that the construction of the house by Leisure 2000 with new plans started in mid October and was completed by March 15th 2010.

[34] Under cross-examination, Mr. Steven Belizaire testified that, in the three to four years that he has been a contractor, that he has built four houses, inclusive of that built for the Claimants. He stated that when he first took the Claimants to look at properties during

their visit to Antigua, it was not to indicate to them his ability to build houses, but merely to show them the design of the pools and the design of the lining inside the pool. He

testified that he had not worked with the G 90 building system before and acknowledged that he was therefore in no position to say whether the house could be completed by April. Mr. Belizaire denied that he was on a mission to "take over the project and move Waterpoint (the Defendant) out." Although he stated that Mr. Wheatley discussed with him in November or December 2008 that he was considering terminating the Agreement with the Defendant, he disagreed with the suggestion of Counsel for the Defendant that from then on, he "positioned himself" to take over the project.

LUCINE HANLEY

[35] Mr. Lucine Hanley, a civil and structural engineer, followed Steven Belizaire as the final witness for the Claimants. In his Witness Statement, Mr. Hanley stated that in or about August 2009, he was contacted by Steven Belizaire to provide a valuation of the Claimants' building at Buckleys. He stated that he conducted the valuation in August 2010, prepared a report on September 2010 and delivered the said report to Steven Belizaire. He further stated that he was again contacted by Steven Belizaire in January 2010, this time to "provide a professional opinion regarding the structural integrity of the building under construction." That he visited the site again and conducted "further fieldwork" and prepared a report of his second visit on January 22nd 2010. He added that he delivered the report of this second visit to Mr. Belizaire.

[36] Under cross-examination, Mr. Hanley testified that he made numerous visits to the site and that he engaged a draftsman to do a survey of the existing building and included that in his report. He concluded that the structural integrity of the building had been compromised.

The Defendant's Evidence

[37] Mr. John Anjo, the Director of the Defendant Company, was the sole witness for the Defendant.

[38] In his Witness Statement, Mr. Anjo stated that prior to the signing of the written agreement between the Claimants and the Defendant, the Claimants engaged in a series of communications with Linda Gordon, a former employee of the Defendant Company. That it was a term of the agreement that the Claimants would pay to the Defendant 50% deposit on the cost of the building and that further progress payments were to be made in accordance with the said agreement entered into on or around June 20th 2008. He stated that the 50% deposit was received on June 26th 2008 and DCA approval was received on July 28th 2008. This meant that the "projected completion date' would have been March 27th 2009, "subject to extensions resulting from force majeure or other stated occurrences."

[39] According to Mr. Anjo the construction commenced on or around August 11th 2008, and that during the course of digging the foundations of the building it was discovered by the Defendant that the soil and terrain was extremely waterlogged. He stated that the Defendants made several failed attempts to pump out water from the foundation area. He stated further that the Claimants "saw the waterlogged terrain" when they visited the construction site in or around October 2008. Mr. Anjo stated that shortly thereafter, the island experienced the effects of the passage of Hurricane Omar, which caused the situation on the site to worsen. As a result, the Defendant company was "forced to suspend construction activities", and that the Claimants were notified of the situation.

[40] Mr. Anjo stated that in or around December 3rd 2008, Addison Workman, a structural engineer, inspected the site and submitted an Engineer's report on or around December 5th 2008. That the contents of the Report were discussed with the Claimants and it was agreed between the Defendant and the Claimants that pilings would be installed "to shore up the foundation." The Claimants made payment for the pilings on or around February 17th 2009 and the installation of the pilings was completed on March 17th 2009. According to Mr. Anjo, it became necessary for the Defendant to change the original floor system to accommodate the piles which required heavy gauge floor joists. These joists could only be sourced from outside the region and therefore had to be ordered by the Defendant.

[41] Mr. Anjo stated that by letter dated August 10th 2009, the Claimants terminated the agreement with immediate effect. The Defendant company was instructed not to return to the building site "as new contractors were being engaged to complete the building." That by a subsequent letter dated September 8th 2009, the Claimants claimed the return of the sum of $272,322.41, legal expenses of $30,232.24 and general damages. He states that the Defendant denies that it is in breach of the agreement and counterclaims special damages in the sum of $480,000.00 and general damages to be assessed.

[42] Under cross-examination, Mr. Anjo stated that he had been a building contractor and had a reasonable amount of experience in constructing steel frame buildings, block buildings and wood frame buildings. He confirmed that he had read the Engineer's report and that he was one of the key persons seeking a solution to the water logging problems. He also confirmed that the Defendant was guided by the Engineer's report. He explained that the decision to go with the piles was that of Christopher Wheatley but that the recommendation came from the Defendant.

[43] Mr. Anjo disagreed with the suggestion of Counsel for the Claimants that the Defendant failed to meet the August 29th 2009 deadline and was therefore in breach of the agreement. He stated that the Defendant had not been allowed to reach the completion date as the Claimants terminated the agreement prior to that date. He further stated that, given the opportunity, it was a possibility that the Defendant could have completed by August 28th 2009

ISSUES

[44] The issues that fall to be determined by the Court are as follows:-

i. Whether the Defendant repudiated the contract.
ii. Whether the Defendant is liable for breach of the contract in failing to carry out the works in a good and workmanlike manner.
iii. Whether the Claimants breached the contract.

iv. Whether the Claimants are entitled to repayment of the deposit paid to the Defendant.

v. Whether the Defendant is entitled to succeed on its Counterclaim.

FINDINGS OF FACT

[45] From the evidence in its totality, I make the following findings of fact.

[a] The completion date of the construction of the dwelling house was, by agreement of the parties, extended to 29th August 2009. This is borne out by the evidence of Mr. Wheatley himself and also by the Claimants' pleadings and submissions of Counsel for the Claimant.

[b] There was no agreement between the parties for an extension of the completion date to October 30th 2009 as pleaded by the Defendant.

[c] The works were delayed by the waterlogging problem on the site which was discovered while the foundations were being dug. The works were also delayed by the passage of Hurricane Omar in October 2008.

THE LAW AND SUBMISSIONS OF COUNSEL

[46] A breach of contract occurs when there is a failure to perform an obligation which the terms of a contract impose. A breach of contract may take place in any of the following ways:-

(i) by repudiating one's liability under the contract.

(ii) by rendering the performance of the contract impossible.

(iii) by failing to fulfill the contractual obligations.

[47] Halsbury's Laws of England, 4th edition Volume 9 (1) at page 736 describes repudiation as follows:-

"Instead of merely failing to provide due performance at the stipulated time, one party (A) may put himself in breach by evincing an intention, by words or conduct, of repudiating his obligations under the contract in some essential respect … Such repudiation may occur at

> the time fixed for performance or before that time; in the latter case it is known as 'anticipatory breach' or 'anticipatory repudiation'."

[48] A breach of contract will not necessarily terminate the contract, so that the primary obligations of both parties may continue. However, if there has been a repudiatory breach of contract, then the injured party has an option to terminate or affirm the contract .The choice whether to affirm or not is the choice of the innocent party. It cannot be taken away from him by the party in breach attempting to make amends, – see Buckland v Bournemouth University Higher Education Corp. [2010] EWCA Civ. 121 where Lord Justice Jacob stated that :-

> "Once he has committed a breach of contract which is so serious that it entitles the innocent party to walk away from it, I see no reason for the law to take away the innocent's party right to go. He should have a clear choice: affirm or go. Of course the wrongdoer can try to make amends – to persuade the wronged party to affirm the contract. But the option ought to be entirely at the wronged party's choice. That has been the common law rule for all kinds of contract for centuries. It works. It spells out clearly to parties to contracts that if they actually commit a repudiatory breach, then whether the contract continues is completely out of their hands.."

[49] In order for the contract to be terminated, the injured party must have accepted the repudiatory breach as terminating the contract. In the case of Decro-Wall International SA v Practitioners in Marketing Ltd [1971] 1 WLR 361, Sachs LJ stated at page 375:-

> "The general law as to the effect of repudiation has long been settled. The locus classicus for reference purposes is the statement in plain and simple terms in the speech of Viscount Simon LC in Heyman v Darwins Ltd [1942] AC 356, 361: 'But repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other.' Whether the other party accepts is a matter for his option: if he does not, the contract remains alive…"

ISSUE # 1 - WHETHER THE DEFENDANT REPUDIATED THE CONTRACT

[50] Counsel for the Claimants in her Submissions has stated that one of the issues to be determined by the Court is:- "Whether the Defendant breached the contract with the Claimants by repeatedly stopping the construction works on the dwelling house and

evincing an intention not to complete the house by the agreed timeline of August 28th 2009 thereby repudiating the contract with the Claimants."

[51] Learned Counsel for the Claimant quotes from Halsbury's Laws of England 4th Edition Volume 9 (1) paragraph 997 which states that "repudiation may occur at the time agreed between the parties for completed execution of the agreement or even before that time (anticipatory breach.)"

[52] Counsel cites the case of In re Arbitration between Rubel Bronze and Metal Company Limited and Vos [1918] l KB 315 quoted with approval by Mitchell JA (Ag) in Woods Development Limited v Roy Nicholas, Antigua and Barbuda Civil App. No 4 of 2001, paragraph 5, where the learned Judge stated that:-

> "… The principle set out in that decision (In re Arbitration) is found in the judgment of McCardie J at page 322 as follows:
>
> > It has been authoritatively stated that the question to be asked in cases of alleged repudiation is "whether the acts and conduct of the party evince an intention no longer be bound by the contract."

[53] It is the submission of Counsel for the Claimants that "the overall conduct of the Defendant viewed objectively amounts to repudiation of the contract which the Claimants were entitled to accept and rely on in bringing the relationship between the parties to an end." Counsel contends that "the totality of the evidence including the many emails passing between the parties supports the version of events outlined by the Claimant and his witnesses and should be accepted as being credible."

[54] Counsel for the Defendant on the other hand, submits that:-

> "… The Defendant throughout made it clear to the Claimants that it intended to fulfill its part of the contract. The Defendant was actively sourcing the materials necessary to carry out the construction. The combination of the water logging, the need to install piles and the necessity to install floor joists with the appropriate studs that could accommodate the changed foundation all contributed to the

unavoidable delays. The Claimants were kept fully informed by the Defendant as to what it was doing."

[55] Counsel for the Defendant seems to be implying that, because the Defendant was not unwilling to perform the works, that it could not be guilty of repudiating the Agreement. With respect, I find no merit in Counsel's submission. In the case of Spiricor of Saint Lucia Limited v Attorney General of Saint Lucia, Civil Appeal No. 3 of 1996 pages 15-16, Byron C.J. (Ag) as he then was, stated as follows:-

> "The legal principles are not controversial. It is clear that conduct, which inevitably leads to the conclusion that a party to a contract will not be able to perform, amounts in law to a repudiation of the contract. Willingness to perform is irrelevant if it is evident that there is no ability to do so. The contract becomes determined if the other party adopts the repudiation by so acting as in effect to declare that he too treats the contract as at an end."

[56] It is the further submission of Counsel for the Defendant that "by the Claimants' own admission, they terminated the contract while it was still validly in existence." Respectfully, this is an argument without merit. As stated by Chitty on Contracts (supra) at page 1560, under the Rubric "Anticipatory breach and actual breach":-

> "When establishing whether or not there has been a renunciation of the contract, there is no distinction between the tests for what is an anticipatory breach and what is a breach after the time for performance has arrived. It follows, therefore, that where the conduct of the promisor is such as to lead a reasonable person to the conclusion that he does not intend to fulfill his obligations under the contract when the time for performance arrives, the promisee may treat this as a renunciation of the contract and sue for damages forthwith. The innocent party is not obliged to wait for the time for performance because the renunciation, coupled with the acceptance of that renunciation, renders the breach legally inevitable and the effect of the doctrine of anticipatory breach is precisely to enable the innocent party to anticipate an inevitable breach and to commence proceedings immediately."

[57] According to the Claimants' evidence, by the 10th August 2009, that is, eighteen (18) days prior to the extended completion date, the work done by the Defendant included "digging out the foundations for the house, building the cistern and constructing portions

of the concrete beams specified in the plan". According to the Claimants, "all of this amounted to approximately 15% of the work required to complete the construction."

[58] There is a marked lack of contrary evidence from the Defendant to counter the Claimants' assessment.

[59] In the circumstances, it is not unreasonable to conclude that this would give rise to the evidence of repudiation, or that it would not be unreasonable for the Claimants to conclude that the Defendant manifested an intention to be no longer bound by the terms of the Agreement.

[60] It is my view that an examination of the relevant provisions of the Agreement between the Claimants and the Defendant ("the Agreement") which deal with the performance of the works will be useful in assisting the Court in deciding whether the Defendant repudiated the Agreement.

[61] Clause 11 of the Agreement states:

> "The Builder shall construct the house on land designated by the Owner as the house site. The Builder hereby undertakes to execute and complete the construction of the house and all work incidental to its proper execution and completion in a thorough and workmanlike manner and to hand over to the Owner the said house in a state of practical completion within (32 weeks) of the receipt of the downpayment of Fifty Percent (50%) of the purchase price and the receipt of Development Control Authority ("DCA") approvals."

[62] As stated above, the issue for the Court's determination is whether the Claimants were justified in concluding that the Defendant had evinced an intention no longer to be bound by the terms of the contract. Based on the facts and circumstances of the case at bar, I am of the view that the Defendant did not progress the works promptly and efficiently and evinced an intention to repudiate the contract. It is the Claimants' contention in their Pleadings that, on or about 4th August 2009, in breach of contract, the Defendant ceased any further work, and has wholly failed to build or complete the house, thereby

repudiating the contract. The Defendant's contention, that, with the installation of the pilings, which was completed in March 2009, it became necessary for it to change the original floor system to accommodate the piles which required heavy gauge floor joists, and that these joists could only be sourced from outside the region, that it had ordered the joists and that it had placed an order for high strength Studs and Tracks for the floor and that this was "on high seas" and expected by mid August, is irrelevant.

[63] It is the further contention of the Claimants, as stated in the above-mentioned letter of 10th August 2009, that the Defendant "keeps extending completion date without good reason" and are "now unreasonably seeking to extend the completion date to October 2009." I am of the view that a reasonable person would objectively conclude that the Defendant's request for another extension of the completion date to October 2009 was further evidence of repudiation .

[64] I therefore conclude that the Defendant repudiated the contract by evincing inability to perform its obligations.

[65] Did the Claimants accept the Defendant's repudiation?

[66] It is prudent at this stage to reproduce the letter of 10th August 2009 ("the Letter") which was written by the Claimants' Attorney to the Defendant and then consider the issue of the acceptance of the alleged repudiation.

"ESCO L. HENRY
Attorney –At-Law

Omega Law Chambers
Lower Market Street
P.O. Box 180 Suite 408
St. John's
Antigua

10th August, 2009

Dear Sirs,

Contract with Mr. and Mrs. Christopher Wheatly for construction of dwelling house.

I act for Mr. and Mrs. Christopher Wheatley, on whose behalf I have written to you previously on the above-referenced matter. My clients instruct me that you are once again in breach of your obligations to them under the building contract executed on June 20, 2008. My instructions are that you have failed to meet the scheduled deadline for completion of construction as stipulated in the said contract. This is in clear violation of your contractual obligations.

Clause 11 of the contract provides that you, the builder shall construct the building within 32 weeks of receipt of the downpayment of 50% and the receipt of DCA approval. I am advised that the downpayment was advanced to you on June 26th, 2008 and DCA approval was granted on July 28th, 2008. Accordingly, practical completion should have been effected by March 9, 2009.

My Clients have been very reasonable and have attempted to work with you to arrive at an amicable resolution of all your scheduling difficulties. Each time you have abused the trust they have placed in you and keep extending completion date without good reason. I am instructed that no work has been done on the said building since around the third week of July 2009 and you are now seeking to extend the completion time to October 2009. In addition, you have failed to demonstrate good faith by conducting the work in a workmanlike fashion and with due dispatch. It is inconceivable that you have only managed to date to complete the cistern, piles and block work for the decking and ring beams in view of the advance of $ 402,556.41 to you on June 28th, 2008. Your conduct throughout the entire period from July 2008 smack of willful disregard for your contractual obligations and suggests that it was never your intention to deliver the project as agreed.

As you are aware my clients have had to forego rentals on their property due to your failure to complete the building as scheduled and contracted. In all the circumstances, my clients have decided to terminate your services with immediate effect. My clients also seek reimbursement for such of the funds as were not utilized in the building project. Kindly provide an account and account of the use of those funds on or before August 28, 2009 and a cashier's cheque for the difference. If you fail to comply, I am instructed to initiate legal action against you to recover the same.

On behalf of Mr and Mrs Christopher Wheatley and in accordance with their instructions, as their attorney, I hereby terminate the agreement dated June 20, 2008 between Waterpoint Caribbean Homes Limited and Christopher and Hazel Wheatley with immediate effect. You are accordingly requested not to return to the building site at Buckleys as new contractors will be engaged to complete the project. Kindly advise and instruct all of your servants and agents accordingly.

Sincerely yours

Esco Henry (Ms)

pc. Mr & Mrs Christopher Wheatley"

[67] It is the contention of Counsel for the Defendant that "nowhere in that letter have the Claimants treated the supposed non-performance by the Defendant as a repudiation of the agreement and which repudiation was accordingly accepted by the Claimants."

[68] The law is clear that there is no strict requirement as to the form that an acceptance of a repudiatory breach should take. As stated by Lord Steyn in Vitol SA v Norelf Ltd, [1996] AC 800, "An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that the aggrieved party is treating the contract as at an end". This principle was confirmed by Moore-Bick L.J. in Stocznia Gdanska SA v Gearbulk Holdings Ltd. [2010] QB 27, 46 at paragraph 44 of his judgment as follows:-

> "It must be borne in mind that all that is required for acceptance of a repudiation at common law is for the injured party to communicate clearly and unequivocally his intention to treat the contract as discharged."

[69] Contrary to the submissions of Counsel for the Defendant, I am of the view that the Letter was a sufficiently unequivocal acceptance of the alleged repudiation.

[70] It is for the party alleging the existence of the breach of contract to prove that a breach has occurred. In its Defence, the Defendant denies that it repudiated the Agreement. Having seen and heard the witnesses and considered all of the evidence, both oral and documentary, I am of the view that the Defendant's conduct was a repudiation of the contract, which was unequivocally accepted by the Claimants.

ISSUE # 2 - WHETHER THE CLAIMANTS BREACHED THE CONTRACT

[71] The Court has dealt with this issue in Paragraph 70 above. Accordingly, no further comment or discussion is necessary.

ISSUE # 3 - WHETHER THE CLAIMANTS ARE ENTITLED TO REPAYMENT OF THE DEPOSIT PAID TO THE DEFENDANT

[72] It is the submission of Counsel for the Claimants that the Claimants are entitled to recover the full amount of $ 402,556.41. However, by their lawyer's letter dated 8th September 2009, the Defendant was informed that:

> Paragraph 1 "… Further to my letter to you of August 10, 2009, please be advised that my clients retained a certified valuer and obtained a valuation report on the work done to date by your company. A copy of the said report is enclosed for your information. Kindly note the valuation of $130,234.00 assigned to the work to date."
>
> Paragraph 2 "… It is a matter of record that your company received an advance of $402,556.41 on the execution of the contract in June 2008, representing 50% of the contract sum. In all the circumstances, my clients are entitled to recover from you the difference of $272,322.41 and hereby claim the said sum plus their legal expenses …."

[73] Further, the Claimants pleaded in their Statement of Claim that "based on the amount of work done up to the said date (i.e. the 10th August, 2009), the cost of construction is valued at approximately $130,234.00"

[74] There has been no challenge by the Defendant to the Claimants' valuation of the work, nor has the Defendant supplied its own valuation. I find therefore, that the Defendant is to repay to the Claimants the sum of $272,322.41, being the difference between the downpayment and the value of the work done.

ISSUE # 4 - WHETHER THE DEFENDANT IS LIABLE FOR BREACH OF THE EXPRESS TERMS OF THE CONTRACT IN FAILING TO CARRY OUT THE WORKS IN A GOOD AND WORKMANLIKE MANNER

[75] It is the testimony of the Engineer Mr. Lucine Hanley who gave expert evidence for the Claimants that the building was constructed with "sub-standard materials" and in an "un-workmanlike fashion".

[76] The Report of Mr. Hanley dated 22nd January 2010, states, among other things that:-

> " (1). The lack of proper placement of the columns and "irregular" dimensions of the masonry walls have resulted in a skewed structural frame. This has resulted in, among other things, the following:-
>
> (a) Different column sizes
> (b) It should be also noted that the reinforced concrete (RC) column along gridlines A4 and 56 is supported on masonry blocks as per photograph 1. The column should be supported on a RC pad instead of the masonry blocks.
> (c) Nine of the twelve columns have bulkheads.
> (d) Most of the columns are not vertically plumb.
> (e) As a result of some of the columns not vertically plumb, the connection of the beams is off at the top of the column.
> (f) The reinforcement extending from the RC column (along gridlines A3 and 57) into the beam is exposed. Photograph 5 shows the exposed reinforcing bars which have now started to corrode."

[77] The report further states that:-

> "(3). A destructive test of the masonry wall in the south-east (along gridlines G and 1) of the foundation (Photograph 6) revealed the following:-
>
> No horizontal reinforcement was used in the construction of the wall. This is in violation of the Caribbean Uniform Building Code (CUBIC) …

Photograph 6 shows the wall before the destructive test was carried out. A random testing of the other masonry walls revealed that no horizontal reinforcement was used in the construction of those walls.

Photograph 7 shows the lap/splice of the vertical reinforcement in the aforementioned wall to be 8 ½". This is in violation of the Building Code requirements for Concrete Masonry Structures… It should be noted that ½" diameter reinforcing bars were used in the construction of the wall.

(4). Photograph 8 shows a portion of one of the columns where the concrete was either not properly vibrated or not vibrated at all. This has resulted in "honey comb" of the concrete in that portion of the member.

(5). The finish cistern slab which should have been part of the main floor slab as per Development Control Authority (DCA) approved drawings is 3'-0" below the main floor slab. It is also observed that some of the cistern blocks are not properly "buttered".

[78] The conclusion of the Report is that:- "Based on the deficiencies outlined above, it is my professional opinion that the structural integrity of the building (at the time of inspection) is compromised."

[79] The evidence of Mr. Hanley, inclusive of his Report was not discredited by the Defendant's witness Mr. Anjo. Significantly also, no mention of the Report was made in the Witness Statement of Mr. Anjo. When questioned about the use of properly vibrated concrete, Mr. Anjo testified under cross examination that when columns are not properly vibrated, that cracks would develop in future, as a worse case, or there would be cosmetic flaws. Mr. Anjo also testified that he was familiar with the Caribbean Uniform Building Code. He stated that, since the Claimants' home had steel frame walls, there was no need for "horizontal reinforcement." However, he provided no expert evidence that this was so.

[80] Based on the totality of the evidence, the Court is satisfied that the Claimants have proved, on a balance of probabilities, that the Defendant failed to construct the building in accordance with the contract specifications. Further, that the Defendant failed to carry out the work in a good and workmanlike manner.

ISSUE # 5 - WHETHER THE CLAIMANTS ARE ENTITLED TO SUCCEED IN THEIR CLAIM FOR LOSS AND DAMAGE.

[81] In the Statement of Claim the Claimants have pleaded that "by reason of the Defendant's breach and repudiation of contract, the Claimants have had to employ another builder at a price of EC $765,000.00 (greatly increased price) to build the said house and have lost the use of the land and the use and enjoyment of the said house and they have further lost the sum of $272,322.41 (the difference between the downpayment paid by the Claimants to the defendant on account and the value of the work actually done by the defendant), and the Claimants have been put to considerable inconvenience, trouble and expense and they have thereby suffered loss and damage.

[82] The Claimants plead Particulars of the loss and damage as follows:-

Particulars

Loss of use of land and house from the 10th day of March, 2009 to the 10th day Of January, 2010	$58,310.15
Or alternatively, Loss of use of land and house from the 22nd day of May, 2009 to the 10th day of January, 2010	$63,463.14

Loss of use of land and house from the	
Date of service of claim and continuing	
At the daily rate of $271.21 per day	$
Amount paid to the defendant on account	
Less value of work done	$272,322.41
Amount paid to contractor to complete house	$765,000.00

[83] The above sum of $63,463.14 is purportedly for loss of use ("rental expectations") of the house from May 22, 2009 to January 10, 2010. However, there is no evidence provided by the Claimants to substantiate this claim in the form of rental agreements or otherwise.

[84] With respect to the Defendant's breach of contract for failing to carry out the work in a good and workmanlike manner, the Claimants plead special damages as per the Particulars hereunder:-

Particulars

Professional fees to engineer	$10,700.00
Cost of demolishing and replacing beams	$42,800.00

[85] Again, the Claimants have provided no documentary evidence either by way of receipts, cheques or otherwise to substantiate the above amounts.

[86] The law is settled that special damages must be specifically pleaded and strictly proved. As stated in Chitty on Contracts (supra) at page 1602, "… The main meaning of special damages is that precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in his pleadings."

[87] Counsel for the Defendant submits that the Claimants claims "have not been substantiated by any receipts, invoices, bills or other evidence." Counsel further submits that "the claim for these stated items should fall as the Claimants have not been able to satisfactorily prove these 'losses'". I agree with Counsel's submission. Therefore, the Court will not make an award for special damages.

[88] However, the Court finds that the Claimants are entitled to general damages comprising two elements, namely (a) the Defendant's breach in failing to carry out the works in a good and workmanlike manner, being the extent of the dimunition in value of the work which the Defendant was contracted to do. In this case, the sum of $272,322.41, which represents the difference in the downpayment paid by the Claimants and the value of the work done by the Defendant, and (b) the loss incurred by the Claimants by virtue of the Defendant's delay in completing the works.

[89] With respect to the extent of damages for the delay in completing the works, the Agreement between the parties specifies damages by way of liquidated damages "to the limit of EC $250.00 per week" until the works reach the stage of practical completion. I find that this is a genuine pre-estimate of damages which may flow from delay rather than a penalty. I therefore award general damages under this head in the sum of $7,000.00 for the period 29th August 2009 (the agreed completion date) to the 15th March 2010, (the date of the completion of the house by Leisure 2000, and which date was not challenged by the Defendant.), i.e., 28 weeks at $250.00 per week.

ISSUE # 5 - WHETHER THE DEFENDANT IS ENTITLED TO SUCCEED IN ITS COUNTERCLAIM

[90] The Defendant claims damages for breach of contract as set out in its counterclaim. Based on my findings that the Claimant did not breach the Agreement, the Defendant is not entitled to the relief claimed in his counterclaim.

[91] In conclusion, based on the reasons stated above, I find that the Claimants have established their claim against the Defendant.

ORDER

[92] The Court's Order is as follows:-

i. Judgment for the Claimants for breach of contract.

ii. The Claimants are awarded general damages in the sum of $279,322.41 (i.e. the sum of $272, 322.41 plus $7000.00).

iii. The Claimants are awarded interest on the above sum of $279,322.41 at the rate of 5 % per annum from the 11th January 2010 (the date of filing the claim) to the 9th March 2011 (the date of judgment).

iv. The Defendant's counterclaim is dismissed.

v. The Claimants are awarded prescribed costs in accordance with the Eastern Caribbean Supreme Court Civil Procedure Rules (CPR) 2000.

JENNIFER REMY

High Court Judge