THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO. ANUHCV2005/0553

BETWEEN:

HORIZON CONSTRUCTION LTD **Claimant**

And

TEDDY SANTOS **Defendant**

Appearances:

Ms Samantha Marshall for the Claimant

Mr John Fuller for the Defendant

2009: November 29

2010: January 12 & 13

2011: March 25

JUDGMENT

[1] **THOMAS J**: On October 21, 2005 the Claimant, Horizon Construction ("Horizon") filed a Claim Form in which Teddy Santos ("Santos") was named as the Defendant. In this action the Claimant is seeking certain sums of money for work done as a building contractor, freight, duties and materials paid for and supplied to the Defendant at his request. Damages, interest and costs are also claimed.

[2] In the Statement of Claim the Claimant's case is that in or about August 2004 the Defendant agreed orally that the Claimant would do renovations, make additions and modifications to Villa 415E owned by the Defendant and located at Jolly Harbour.

[3] The Claimant contends that it was an implied term of the said agreement that all costs incurred by the Claimant would be paid by the Defendant within a reasonable time which in this case would be a month from the date on which the materials and incidentals were supplied and the work carried out.

[4] It is the Claimant's further contention that pursuant to the said agreement the Claimant ordered certain materials for the purpose of the renovations, modifications and additions to the said Villa which was carried out as instructed by the Defendant.

[5] At paragraphs 8 and 9 the Claimant details certain correspondence with the Defendant culminating with a letter dated 3rd June, 2005 in which the Defendant gave notice to the Claimant that all work on the Villa be halted until the details of cost were supplied. The result, according to the Claimant, is that work on the Villa ceased and all workers and materials removed from the said Villa as instructed by the Defendant.

[6] The Claimant avers that on 28th June, 2005 the details of the cost of labour being US$104,029.48 as requested by the Defendant by email on 29th May 2005. It is pleaded that thereafter the Defendant was requested to pay the said sum, but in breach of the agreement the Claimant has failed and/or refused to pay.

[7] The following particulars of special damage are pleaded:

1.	Cost of May 2004 Villa Renovations	$106,339.86
	Oversees purchases	54, 666.01
	Duties and Freight	7,150.21
	Deck	30,559.35
	Roof	1,150.00

	Job cost to May 2005	US$199,805.43
	Total Deposits	
	Outstanding Balance	US$104,029.48
2.	Interest @ 10% from June 03, 2005 to date	3,847.67
3.	Solicitor's costs @10%	10,664.86
	Conversion rate @US$2.71	EC$321,581.77

Defence

[8] The Defendant's Defence and Counterclaim was filed on March 03, 2006.

[9] In the Defence the Defendant avers that except for the agreement for the works in July 2004, it is contended that there was no agreement regarding the payment on imported materials, the supply of furnishings and that any costs to the Defendant would be reasonable in the normal course of works, and that all works and costs would be subject to a written description (provided by the Claimant) of the works and theirs costs.

[10] With respect to the oral agreement of July 22, 2004, it is the Defendant's averment that a written invoice for the works was provided and after some discussion the terms of the invoice were altered in the presence of a representative of the Claimant. According to the Defendant the amended invoice, in the agreed amount of US$68,868.00, formed the basis of the agreement.

[11] At paragraph 8 of his Defence the Defendant pleads that up to May 27, 2005 there had been no variation of the original contract price of US$68,000 except with respect to certain additional works requested by the Defendant; namely: (a) a railing around the deck and patios; (b) modification to the ground floor bathroom; (c) Installation of water filtration system; (d) replacement of stairway; (e) trowel-tex all internal walls instead of painting; (f) floor under the ground floor patios; (g) installation of two mini balconies to upper level and two wooden pengolas. In this connection the Defendant contends that the extra works could not and did not exceed US$19,000.00.

[12] On the matter of payment the Defendant says that he paid the Claimant a total of US$95,775.95 which is approximately US$8,459.95 more than the total costs of the works. And it is the Defendant's further contention that the Claimant in breach of the agreement, presented invoices representing a demand for the sum of US$104,029.88 which did not represent any sum owed by the Defendant

Counterclaim

[13] In his Counterclaim the Defendant pleads that as a consequence of the Claimant's breach the Defendant "shall be required to expend an additional sum of US$30,000 to complete and correct the works performed by the Claimant." It is further pleaded that the Claimant when vacating the premises wrongfully removed property belonging to the Defendant; namely: 22 pieces of cut stone valued at $990.00 and 5 buckets of trowel-tex valued at $1250.00. And further still, the Defendant avers that by reason of the Claimant's breach, the Defendant is deprived of the rental of his home for 4 months at US$3500.00 per month or a total of US$14,000.00

[14] The Defendant therefore counterclaims: (a) EC$30,000.00, (b) EC$2240.00, US$14,000.00 plus interest.

Reply

[15] In Reply the Claimant joins issue with the Defendant on his Defence except in so far as it consists of admissions.

Defence to Counterclaim

[16] At paragraph 2 of the Defence to Counterclaim the Claimant, in relation to the allegation of breach of contract, contends that all the works were carried out by the said Claimant in a complete, professional and workmanlike manner for and on behalf of the Defendant as agreed between the parties. Further, the Claimant does not admit that the Defendant expended or will be required to expend the additional sum of $30,000 or any sums to complete and/or correct any work performed by the said Claimant.

[17] Paragraphs 18 and 19 of the Counterclaim in which the Defendant claims a total of $70,000 plus interest are not admitted by the Claimant.

ISSUES

[18] The issues for determination are:

1. Whether there existed an agreement between the Claimant and the Defendant, and if so, what are the terms of the agreement.
2. What is the nature of the agreement entered into by the parties.
3. Whether the Defendant requested or authorized variations, alterations or extra work outside the scope of the agreement; if any.
4. What are the costs of the variations, if any?
5. Whether the Claimant is entitled to recover all the costs of the variations.
6. Whether the Claimant has discharged its obligations under the said agreement.
7. Whether the Claimant is liable on the Defendant's Counterclaim.
8. The quantum of awards, interest and costs.

ISSUE NO.1

Whether there existed an agreement between the Claimant and the Defendant, and if so, the terms of the agreement.

[19] The law accepts and recognizes an oral contract. A succinal statement of the law on this regard is to be found in Vol.9 Halsbury's Laws of England at paragraph 214:

> "In the ordinary case, the law does not require a contract to be made in any particular form, nor according to any particular formalities, it is sufficient that there be a simple contract; such a contract may be validly made either orally or in writing, or partly orally and partly in writing."

[20] In this connection both parties[1] accept that there was an agreement between them. It is accepted on both sides also that the contract item in the agreement was an estimate to carry out renovation to the Defendant's Villa by the Claimant[2]. It is dated 22nd July 2004 and as it stood then identified eleven items which required work in relation to the said Villa.

[21] Immediately above the space for signature the following appears: "Please sign below to indicate that these terms and conditions are acceptable".

The terms of the agreement

[22] An agreement or contract is governed by its terms as agreed between the parties.

[23] The estimate, as noted before, simply identifies eleven matters to be done in relation to the Defendant's Villa the original price of US$92,518.00. But the evidence is that the parties subsequently agreed to a lesser sum in relation to the said items or some of them. The figure stated[3] as agreed is US$68,868.00 which may have a certain legal consequence, as examined later.

[24] At paragraph 9 and 10 of his witness statement, the Defendant, Teddy Santos gives this evidence:

> "9. In September 2004 I met with Larry Bennett, Project Manager for my Villa. During this meeting, we mutually agreed
>
> (i) that the Claimant would no longer do certain works, for instance the roadside patio extension and extension of the living room area were both cancelled;
> (ii) to save costs by substituting certain types of building materials, in particular while I initially wanted the deck to be constructed with green heart, I was informed by the Claimant that this was twice as expensive and so I changed and decided to use pine to save costs.

[1] See: Claimant's Closing Submissions filed March 08 2010 at paragraph 22 and Defendant's Pre Trial Memorandum filed September 17, 2009 at paragraph 2.

[2] Trial Bundle, Vol. 3 at page 272-273

[3] Witness statement of Teddy Santos at paragraph 9

(iii) that I would purchase and deliver to the Villa, certain of the needed materials, at which time the Claimant would then be responsible for the labour to install these materials, including appliances, fixtures and equipments.

10. In light of these agreed variations, in particular my direct purchase of materials, the original invoice was reduced to US$65,000.00 and we agreed to proceed on this revised total".

[25] Given the foregoing it is of importance to note the "Observations and Comments on Contract Documentation" by Douglas Gillanders, the expert witness at page 6 of his Report dated February 09, 2007:

"1. It is not a cost plus contract. There is no 'add on' percentage or other method to cover overloads and profit.
2. On the basis that there was the estimate and it was then 'negotiated' it now becomes a fixed sum contract.
3. There is no date for commencement or for completion of the works, nor is there a stated contract period.
4. There is no reference to or stated 'Liquidated and Ascertained Damages' on other changes on any penalties for non-completion.
5. There is no reference to whether the costs would be free of import duty and/or other statutory charges.
6. There is no reference to a Schedule of Rates or other means by which variations are to be valued or charged.
7. There are no written instructions in regard to additional works or other variation.
8. There is no documentation as to the quality of materials to be used.
9. There is no documentation as to the quality or standard of workmanship to be used."

[26] Subject to what is determined by the Court regarding a fixed term contract or other contract, the Court accepts the observations made by the Expert Witness. Therefore as matters stand the express terms are confined to matters agreed on or around July 22, 2004, which called for work to be done to the Defendant's Villa at a cost of US$92,518.00. However, the evidence reveals that subsequently further negotiations between the parties resulted in Items 2, 3, 5, 6, 8, 10, and 11 of the Horizon Construction Invoice appearing at pages 272 to 273 of the Trial Bundle to be either reduced in cost or discontinued. This results in an initial contract price of US$62,658.00. The evidence further reveals that

based on further oral agreements between the parties extra work was done by the Claimant to the Defendant's Villa.

ISSUE NO. 2

What is the nature of the agreement entered into by the parties.

[27] Counsel on both sides disagree as to the nature of the contract. Added to this is the matter of the extras and the manner in which they were requested have coloured the issue.

[28] For the Claimant the following are the submissions:

> "37. [W]here a price for work done is not previously agreed to between the parties, the builder/contractor is entitled to recover a fair and reasonable value for work done, and the materials supplied by him on a quantum merit[4] basis. Such price will include payment of the skill, supervision and services of the contractor as well as for materials and labour.
>
> 38. Hence the Claimant submits a cost plus contract at the rate of 20% to cover all overhead cost, as normally billed by the Claimant is a reasonable amount in the circumstances, and accordingly, the Defendant should pay the Claimant the sum outstanding as represented in the last job costing in the sum of US$116,713.35".

[29] On the other hand, the submissions on behalf of the Defendant are in these terms:

> "23. The Defendant's case is that the sum originally agreed upon, was in respect of the fixed price contract, i.e. the price quoted included sums for overheads and profits and all associated costs for the carrying out of the works in the job estimate.
>
> 24. While the Claimant disputes this, it is crucial to note that both the jointly instructed expert Mr Douglas Gillanders and Civil Engineer, Sheon Samuel, who both gave evidence in the matter, indicate that the agreement between the Claimant and the Defendant was a fix price contract. In fact, this is the first point made by Mr Gillanders in his report.
>
> 25. Additionally, the law is clear on this point also. It has been stated that 'under what has been judicially called the all inclusive principle, all

[4] The following authorities are cited: Hudson's Building and Engineering Contracts, Chapter 1 pages 143 to 150 paragraphs 1.262 – 1.272, 3-045, Chapter 3 pages 438 paragraph 3.045 – 3.046

> indispensably or contingently necessary expenditure required in order to complete the described work will be included in both the contractor's price and in his completion obligations in the absence of express provision to the contrary[5]... see A.E. Farr Ltd v Ministry of Transport [1995] BLR 94."

[30] It is further submitted that the Claimant is not entitled to recover additional sums being claimed in respect of overheads (including gasoline and brake fluid for vehicles), profit management, administrative and landing fees and all other sums above which were estimated, in particular the Claimant's attempt to recover a 20% fee on top of the agreed price for the works is not permissible by law.

[31] The submissions end in this way at paragraph 28:

> "As such, it is finally submitted that the Defendant cannot in any event, be held liable for those amounts which were apparently unilaterally added or by the Claimant *after* the contract price had been negotiated and determined".

Analysis

[32] The Court notes the ruling in **A. E. Farr Ltd v Ministry of Transport**[6], that a contractor's price is taken to include all indispensably or contingently necessary expenditure required to complete the described work unless there is an express provision to the contrary.

[33] It is in this context that the Claimant contends that having regard to all the circumstances and because no prices were agreed previously there emerged a cost plus contract at the rate of 20%.

[34] As noted above, amidst all of this the Court appointed expert, Mr Douglas Gillanders of Cooper Kauffman Ltd, makes a number of observations and comments on the Contract to include the following:

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[5] Cited is: Hudson's Building and Engineering Contracts, Eleventh Edition, by I.N. Duncan Wallace, Volume 1 at 3-012

[6] [1995] BLR 94

"1. It is not a cost plus contract. There is no 'add-on' percentage or other method to cover overheads and profit.

2. On the basis that there was the estimate and that it was then 'negotiated', it now becomes a fixed sum contract".[7]

[35] And at page 8 of the said Report the following is recorded:

> "In some sections the documentation for additional works submitted by the Claimant indicates overheads in the region of 10% plus a 'construction charge' (profit) of 20%. These are not directly related to the agreement but are percentages that have been applied by the Claimant for additional works.
>
> In this instance, and in this report; it is considered by the expert witness that 29.9% on the rates and costs determined by the expert witness is a fair and reasonable rate".

[36] The Court finds that a fixed sum[8] contract and an added 29.9% of the rates and costs to be contradictory. Moreover, it must be recalled that the expert in observing and commenting on the contract documentation noted that there were commencement or completion date, whether the costs would be free from import duty and/or other statutory charges, there was no reference to a 'Schedule of Rates', no written instructions regarding the additional works on other variations, no documentation as to quality of materials to be used and no documentation as to the quality or standard of workmanship to be used.

[37] It is common ground that with respect to the 'initial' part of the contract there were negotiations and the Court finds as a fact that the price agreed was US$62,658.00. This is not the findings of the Expert Witness as he appeared to have overlooked[9] the changes in certain materials to be used in the Construction of the deck. But beyond that in the said Report the Expert at pages 30 to 32 list some 34 items with CKL Calculated Cost in one column as opposed to 'Negotiated Cost' in the other column. The clear implication being

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[7] At page 6 of the Report

[8] See Review of Contract Documentation at page 5 of the Report

[9] See page 30 of the Report

that while the negotiated items totaling US$62,658.00 the other items were not so negotiated.

[38] Both Mr Piacentini for the Claimant and Mr Trevor "Teddy" Santos address the question of extra after the agreement and after the work had commenced.

Conclusion

[39] It is this view of the Court that a fixed price cannot survive in a context where prices and very related matters are not negotiated.

[40] This leaves the Court to come to the conclusion that the contract to renovate the Defendant's Villa fell into two phases: phase one was negotiated at a price of $62,658.00; while phase two came as a result of requests by the Defendant for extra work without negotiations as to price. This leads to the further result that with respect to phase one the Claimant cannot add any 'profit' while with respect to phase two it is entitled to add a fair and reasonable rate to the rates and costs. Indeed, under cross-examination, as submitted by Mr John Fuller for the Defendant, Mr Piacentini conceded that the Defendant had not been informed about the additional 20% in advance of entering into the contract.

[41] However, in relation to the extras the same witness says that Mr Santos was informed of the matter of 20% plus after the initial request for extra work.

Is cost plus 20% reasonable

[42] In defence of the costs plus 20% learned counsel for the Claimant submits as follows:

> "[W]here a piece of work as done is not previously agreed to between the parties, the builder/contractor is entitled to recover fair and reasonable value of the work done, and the materials supplied by him that is on a quantum merit basis. Such price will include payment of the skill, supervision and services of the contractor, as well as for materials and labour supplied".

[43] Ms S. Marshall also points to the following extract from the Report of the Expert Witness:

"In some sections of the documentation for additional works submitted the Claimant indicates overheads in the region of 10% a construction charge (profit) of 20%. These are not directly related to the agreement; but are percentages that have been applied by the Claimant for additional works.

In this instance, and in this Report, it is considered by the Expert Witness that 29.9% on the rates and costs determined by the Expert Witness is a fair and reasonable rate."

[44] The Court finds that there is nothing to suggest that in these circumstances costs plus 20% is unreasonable especially in light of the conclusion in this regard reached by the Expert Witness.

ISSUE NO. 3

Whether the Defendant requested or authorized variations, alterations or extra work outside of the scope of the agreement, if any.

[45] Learned Counsel for the Defendant, Mr. John Fuller has submitted that both parties have admitted that there were changes to the scope of the work done to the Villa. Ms Samantha Marshall, Learned Counsel for the Claimant makes a similar submission. However, the extent of the variations, alterations or extra work is a question of pure fact.

[46] The Defendant in his witness statement says that he "requested the following extra work".

(a) Railing around the deck and patios
(b) Installation of water filtration system
(c) Replacement of stairway
(d) Trowel-tex all internal walls instead of painting but in addition to purchasing some of the trowel-tex myself, I also paid Mr Abraham, directly for all labour costs.
(e) Cast light cement floor under the ground floor patios, which was a very minor operation.
(f) Installation of two 'mini' balconies to upper level and two wooden pergolas"

[47] But beyond what the Defendant says he requested, the Expert Witness in his report details the following items as "Extra."[10]

> "Handrail to deck
>
> Build new closet on bathroom side approximately 8'0" wide x 92" high including 3 cupboards above closet and shelves in cupboard.
>
> Build ceiling and 3 lights into closet.
>
> Build new frame. Sheetrock ceiling and install doors
>
> Build in frame sheetrock and mirror doors to existing closet
>
> Prime apply trowel tex
>
> Build new balcony
>
> Build safety rail to new balcony
>
> Install internal TV and telephone lines
>
> Demolish entry door install client provided door.
>
> Supply and install ceiling fan
>
> Thoroseal cistern twice, install manhole cover, install new garage door.
>
> Remove existing driveway, prepare and install simulate stone concrete driveway.
>
> Construct 4ft x 2ft concrete pad for Air-Conditioner
>
> Additional revision to partitions to extend 3'0" and install pocket door. Door supplied by client and change to lower powder room.
>
> Remove ceiling, install new 1' 0" higher
>
> Plumbing labour remodeling costs
>
> Agree with HCL costing[11]

[10] At pages 30 – 32 of Report

[11] This 'Extra' appears under the following: "Extend Living Room Area (NO) including new 12ft PGT sliding door (light tint glass – YES).

Remove existing roof and install new torchdown roof

Build new balcony (Guest bedroom same as master bedroom)

Build new 12'0" patio door

[48] The Court found it quite critical to detail the findings of the Expert Witness in view of the obvious gap between the Defendant's admissions in this regard and the findings just mentioned. And further the matter of the extra work is critical issue in these proceedings.

[49] For her part Ms Marshall for the Claimant "wholly accepted"[12] the details outlined by the Expert Witness. On the other hand, Mr John Fuller for the Defendant submits that: "It is not disputed that after the original price was reduced, there were a few additions to the scope of the work, however it is vehemently denied that the cost of these works amounted to more that US$19,000 which would not have at most brought the cost of the works to US$4,000 over the original price".

[50] In view of the Expert Witness' findings the Court finds it difficult to comprehend the variations as a 'few additions'. In any event the Court accepts the evidence of the Expert Witness as to the nature and the extent of the variations and additions as requested by the Defendant.

ISSUE NO. 4

What are the costs of the variations, if any?

[51] This issue can be dealt with quite shortly. This is because the Court has already accepted the Expert's conclusion that there was a series of extra work requested by the Defendant. The difficulty lies in the costs of such variations. But the claims are miles apart.

[52] For its part the Claimant claims US$104,029.28 plus further sums for interest and Solicitor's costs. On the other hand, the Defendant contends, in his Witness Statement that

[12] At paragraph 45 of the Claimant's closing submissions

the amount owed cannot exceed US$19,000.00. However, in his Counterclaim sums of EC$30,000.00, $2,240.00 and $14,000.00 plus interest are claimed

[53] In all the circumstance the Court accepts the Expert's findings with respect to the cost of extras:

1.	Handrail to deck	US$4,136.00
2.	Build new closet on bathroom side approximately 8'0" wide X 9'2" high including 3 cupboards above closet and shelves in cupboard	$1,518.93
3.	Build ceiling and lights into closet	$818.00
4.	Build new frame, sheetrock ceiling and install doors	$1,135.81
5.	Build on from sheetrock and mirror doors to existing closet	$1,033.26
6.	Prime and apply Trowel-Tex	$186.00
7.	Build new balcony	$2,369.25
8.	Demolish entry door install client provided door	$489.01
9.	Supply and install ceiling fan	$221.90
10.	Toro seal cistern twice, install manhole cover install new garage door	$2,019.56
11.	Remove existing driveway, prepare and Install simulated stone concrete driveway	$1,411.97
12.	Construct 4ft X 2ft concrete pad for air conditioner	$150.00

13.	Replace ceramic floor tile throughout Villa	$5,248.00
14.	Additional revision to partitions to extend 3'0" and install pocket door	$5,634.05
	Door supplied by client and charge to lower Powder room	$5,634.05
15.	Remove ceiling, install new 1' 0" higher	$938.58
16	Plumbing labour remodeling costs	$1,636.91
17.	Remove existing roof and install new Trodour roof	$545.29
18.	Build new balcony (guest-room same as Master Bedroom)	$2369.25
19	Build new 12' 0" patio door (Claim as HCL)	$3,005.00

[54] The foregoing yields a total of US$98,464.92; but this is subject to the determination made by the Court in relation to ISSUE NO. 5.

ISSUE NO. 5

Whether the Claimant is entitled to recover all the costs of the variations

[55] Mr Fuller for the Defendant raises serious doubt as to the costs of the extras. And in this regard he makes extensive submissions, including the following:

> "The Claimant (per Phillip Piacentini) admits that it never provided the Defendant with any written or verbal estimate for the costs related to the changes or additions to the scope of the work. Both Larry Bennett and Natasha 'Joi" Hurst of and for the Claimant under cross examination also confirmed that normal business practice is that there should have been a written record of changes that were requested to the original work and that

> the client would sign the written record, they both admit that in the instant case, this was not done."

[56] Mr Fuller further submits that there are items for which the Defendant was billed twice, including two water heaters, two washing machines, 20 step lights and overcharging for PGT doors and windows.

[57] At the same time Mr Phillip Piacentini for the Claimant admitted in cross examination that there were errors in their billing.

[58] Fundamentally, Mr Fuller makes the following submission regarding the extras:

> "...The Defendant cannot properly be held accountable for items billed under such general or vague terms without being informed with specificity what each billing entry referred to so that he could double check that these items were in fact used on his villa to do the work commissioned by him."

[59] In another instance Mr Fuller makes this further submission:

> "[H]aving failed in its duty to warn the Defendant of the likelihood of significantly increased costs, and further, having failed to keep any proper accounts or to provide the requested breakdown of billed items, the Claimant is not entitled to these exorbitant sums claimed for above that which was mutually agreed in the estimate which formed the basis of the legal relations between the parties and which clearly set out the cost of the works."

[60] In the final analysis there is a lack of specificity on both sides and as matters stand the Court by implication is required to peruse the evidence to find the duplication in charges in view of the admission by Mr Phillip Piacentini that the billing of the Claimant was deficient.

[61] But while Mr Fuller's submissions are perhaps valid, what they do overlook is the fact that the Expert Witness in his Report has indicated with some certainty that the extras were in fact done as indicated in his Report.

[62] In all the circumstances the Court is reminded of the following:

> "Whether a cost plus contract creates a fiduciary relationship is unclear, but it is plain that a contractor under cost-plus contract does not have a 'blank check' to spend the owner's money. The contractor has a duty to keep the owner informed about actual or projected cost overruns as soon as possible. If the contractor incurs unreasonable costs, the owner may seek to avoid payment."[13]

[63] In the circumstances the Court considers that a nominal deduction or reduction of US$5000 should be allowed to the Defendant. This includes two amounts of US$500.00 and US$400.00 which the Expert Witness indicated should be at the Claimant's expense.[14] Beyond these reductions or deductions the Defendant is liable for the costs of the extras as found to be done by the Expert Witness, but with some defects.

[64] The award to the Claimant is calculated as follows: The total costs of the work done is US$161,122.92 of which the Defendant paid a total amount of US$95,775.95 which cuts into the costs of the extras of US$98,464.92 and yields a net balance of US$65,346.97 for the remaining costs of the extras payable by the Defendant. This is further reduced by the nominal amount of US$5000.00 which leaves a liability of US$60,346.97 on the part of the Defendant.

ISSUE NO. 6

Whether the Claimant has discharged its obligations under the said agreement.

[65] The work on the Defendant's Villa commenced in or around August 2004 and up to 2nd June, 2005 it was still incomplete. And by letter dated 3rd June 2005[15] the Defendant was requested that all work on the Villa be halted until details of the costs were supplied.

Submissions

[66] The following submissions were advanced on behalf of the Claimant:

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[13] See: Cost Plus Contracting without a GMP Contractors Risks Owner's Rights?" Construction Litigation Reporter', Vol 29 Number 11, November 2008.

[14] See pages 1344 of the Report.

[15] See Trial Bundle Vol. 3 at pages 263 – 264.

"49. The Defendant in his defence stated the Claimant brought a 'grossly inflated claim [and] not representing any sums owed by the Defendant to the Claimant.' In an effort to substitute this the Defendant had Mr Cleveland Seaforth, Managing Partner of KPMG an International Accounting Firm give evidence that he was asked by the Defendant to verify expenditures as contained in a very large file against the costing sheet of the job costing the Claimant has done'.

50. However, the reliability of this Witness' evidence is of serious concern as the Witness himself admitted that the only documents he looked at were the ones provided by the Defendant and that he did not consult with the Claimant nor did the Witness, Mr Seaforth, see the Report of the Expert which was already in existence some 4 months prior to his report.
51. The witness under cross examination alluded to the fact that for the first time he had seen the Theo's Tug and Barge Invoice in the sum of $13,050.00 stamped paid, nor had the witness previously seen documentation which all speak to items for the kitchen showing a total cost of US$22,315.30. The Witness further admitted under cross examination that, he had not visited the premises of the Defendant and so therefore could not speak to the contents, or details of the Defendants premises."

[67] After urging the Court not to accept or rely on the said KPMG Report concludes in this way:

"53 Further it is instructive from the evidence of the Defendant himself that he by letter dated the 3rd January 2010 ceased the Claimant from continuing the said work. The Claimant therefore humbly submits that had it not been for this the Claimant would have continued and completed all works and there could have been no defects.

[68] The following submissions were made on behalf of the Defendant:

"52. The evidence of both Mr Gillanders and Mr Sheon Samuel also point clearly to the various defective works done by the Claimant and in particular, Mr Gillanders, in his answers to questions put to him, pursuant to Pt, 32.8(1) of CPR 2000, effectively stands behind the findings in the report of Sheon Samuel and formed the opinion that the works identified in Mr Samuels Report were in fact defective and required remedying."

53. For ease of reference, Mr Gillanders in his response which forms part of his report pursuant to Pt 32.8(3) of the CPR states inter alia:

'Here are significant items that are not installed to a reasonable standard ... the contractor [should] complete, correct and make good all defective items and outstanding items from Mr Sheon Samuel's list of 'Outstanding Items to be completed with the costs incurred to his account.

54. The preceding extract from the experts' report does two main things. First, it expressly reaffirms that there are in fact significant defective work as carried out by the Claimant and secondly, having been presented with a copy of Sheon Samuels' report, the expert goes and endorse Mr Samuel's findings and further holds that the costs of remedying all the defective works listed in Mr Samuel's report, ought to be borne by the Claimant."

[69] The circumstances of the appointment of the Expert Witness has already been noted and the conclusions reached by him and highlighted by Mr Fuller in his report points to the question of part performance. In connection the following learning is to be found at Vol. 9 Halsbury Laws of England at para 472:

> "The basic rule is that a promisor must perform exactly what he undertook to do; and the question whether what has been done amounts to exact performance is a question in each case of the construction of the terms of the contract (eg. Leases, contracts of employment, site or for services or in respect of other matters). The promisor is not entitled to substitute for what he has promised something else which is equally advantageous to the promisee. The parties may however, by express agreement or waiver substitute a different mode of performance for that or originally agreed on. The question whether there has been a sufficient performance may arise in a number of different ways ...
>
> In all cases, however, the requirement of exact performance is qualified by the de minimis rule, that is that minute and unimportant deviations from exact performance will be ignored."

[70] In plain terms, significant defective work' cannot fall within the de minimis rule.

[71] It is trite law that defective performance of a contract gives the innocent party the right to rescind the contract. Thus the letter of 3rd June 2005 giving notice to the Defendant to cease work together with legal action by way of a counterclaim in these proceedings go towards a rescission of the contract by the Defendant. At the same time the contention by Mr Marshall on behalf of the Claimant that had the Defendant allowed the work to continue there would have been no defects cannot stand. Implicit in this contention is an acknowledgment of defects. But these are not just defects, these are substantial defects. And the Court has no basis upon which it can question or differ from the Experts' conclusion in this regard.

[72] Defective performance of a contract gives rise to an action by the injured party for damages.[16] Accordingly the matter of damages will be considered when the Defendant's counterclaim is addressed.

[73] Therefore in answering the issue being considered, it is the determination of the Court that the Claimant did not discharge its obligation in accordance with the agreement. As such the Defendant was entitled to rescind the said agreement.

ISSUE NO 7

Whether the Claimant is liable on the Defendant's Counterclaim

[74] The essence of the Defendants counterclaim are: (a) 22 pieces of cut stone at EC$45.00 each: $990; (b) 5 buckets of trowel-tex @EC$250.00 each: $1,250.00 (c) Deprivation of rental of the Villa for 4 months at US$3500 per month. These must be addressed.

[75] The details of the Defendant's counterclaim are (a) EC$30,000 expended to complete and correct works performed by the Claimant; (b) wrongful removal of 22 pieces of cut stone at EC$45.00 each: $990.00 are 5 buckets of trowel-tex at EC$250.00 each: $1250.00 (c) deprivation of 4 months rent of the Villa at US$3500 per month: US$1400.00. These must be addressed.

Submissions

[76] Mr Fuller submits that the Defendant ought to be put into the position he would have been, had the contract been completed as agreed and to a standard reasonably expected of professionals in the trade. It is submitted further that the Defendant is entitled to the full sum claimed on the counterclaim plus approximately US$8000 paid to the Claimant over and above that which was agreed and which sums the Claimant is unable to account for or in any way justify or substantiate.

[16] See for example Hoenig v Isaacs [1952] 1 All ER 176

[77] On the other hand, Ms Samantha Marshall for the Claimant rejects all of the counterclaim and after an analysis of various aspects of the evidence in relation to money claimed to be expended to complete the defective works submits the following:

> "63 The Defendant himself seeks to bring before this Court evidence that his kitchen was so defective that he demolished and reinstalled a new kitchen. All at a costs of EC$5000.00. but despite the Defendant's own evidence that this was done after the filing of this claim the Defendant for reasons best known to himself did not see fit to disclose this evidence before the Court by way of documentary receipt or otherwise despite being invited previously to do so by letter dated 27th day of November, 2007. Hence the Defendant's evidence in this regard must be rejected."

Money expended to complete work

[78] It must be common ground that the Defendant is entitled to damages in the circumstances already outlined.

[79] Ms Marshall for the Claimant makes heavy weather of the absence of evidence to the claim for EC$30,000 but this is not fatal.

[80] The case of **Biggin and Co v Permanite Ltd**[17] requires the Court to do the best it can in such circumstances. Accordingly the Court will resort to a detailed proposal for the completion of the work to Villa 415E[18] in the amount of EC$25,350.00. Against this must be juxtaposed the finding of the Expert Witness that there are "significant items that are not installed to a reasonable standard."

[81] In all the circumstances the Court award the sum of EC$30,000 as damages, having regard to the fact that the estimate is dated 26th June, 2005 and considering that prices of goods and services would have risen substantially since that date.

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[17] [1950] 2 ALL ER 859. See also Ashcroft v Curtin [1971] 3 All ER 1208, Thompson and others v Smiths Shiprepairers [1984] 1 All ER 881

[18] See Trial Bundle Vol. 3 at pages 295 – 296.

Cut Stone and trowel-tex

[82] The Court is of the view that there is no need to dwell on these items as the Claimant has denied any wrongful removal of such items. Indeed, there is no evidence to suggest such removal by the Claimant. What the Defendant contends does not amount to proof.

[83] This aspect of the counterclaim is therefore denied.

Rental Income

[84] The amount claimed is US$14,000. But as noted before, the Claimant contends that this "... nowhere in the evidence of the Defendant nor within the pleadings did he state that the Claimant had any prior knowledge of any such intentions to rent the premises. As a matter of fact, when asked, the Claimant admitted under cross examination that he and his family use the premises from time to time."

[85] The Court agrees and this aspect of the counterclaim is denied.

[86] The quantum awarded on the Defendant's counterclaim is therefore EC$30,000.00

ISSUE NO 8

The quantum of awards, interest and costs

[87] On its claim the Claimant was awarded US$60,346.97 while on his counterclaim the Defendant was awarded EC$30,000.

[88] The Claimant is awarded interest at 8% from 18th February, 2006 while the Defendant is awarded at the same rate from 3rd March 2006, up to the date of this judgment.

[89] Since the award to the Claimant is greater than that awarded to the Defendant, the award to the Defendant must be set off against the amount for which the Defendant is liable. Both the Claimant and the Defendant are entitled to costs on the 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 and sincere apology is tendered for the delay.

ORDER

[90] **IT IS HEREBY ORDERED AND DECLARED as follows:**

1. There was an agreement between the Claimant and the Defendant for certain renovation to be carried out on the Defendant's Villa. In so far as the terms are written they are confined to the nature of the renovations to be done which were subsequently varied by oral agreement between the parties.
2. The parties entered into a cost-plus 20% contract which is not unreasonable in all the circumstances.
3. The Defendant did request and authorize variations, alterations or extra work to be done outside the scope of the original agreement.
4. Subject to paragraph 5, the net cost of the extras is US$65,346.97.
5. The Claimant is entitled to recover all of the costs of the extras less a nominal reduction of US$5000.00 in view of the deficiencies admitted by the Claimant.
6. The Claimant did not discharge its obligations under the agreement and as such the Defendant was entitled to rescind the said agreement.
7. The Claimant is liable on the Defendants counterclaim in the amount of EC$30,000.00
8. Both the Claimant and the Defendant are entitled to interest at 8% from 15th February 2006 and 3rd March, 2006, respectively until the date of this judgment.
9. The award to the Defendant plus interest must be set off against the amount of which the Defendant is liable on the claim.

10. Both the Claimant and the Defendant are entitled to costs based on the awards in accordance with Part 65.5 of CPR 2000.

Errol L. Thomas
High Court Judge [Ag]