BRITISH VIRGIN ISLANDS

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

Claim No. BVIHCV2009/0195

CLEARLIE TODMAN-BROWN

Claimant

-and-

MELVIN RYMER d/b/a MELVIN RYMER ARCHITECT INC.

Defendant

Appearances:

Dr. Joseph S. Archibald QC and Ms. Michelle I. Worrell of JS Archibald & Co. for the Claimant
Mr. John Carrington and Ms. Mishka Jacobs of McW. Todman & Co. for the Defendant

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2010: October 20, 21
2010: November 08, 18, 24[1]
2011: May 11

Building contract to construct a building for house / rental units / business office – Whether the contract was an entire contract – Variations by the owner – Contractor ran out of funds due to variations – Contractor did not request specific additional funds for variations

Breach of contract – Contractor abandoned site when works were incomplete - Failure to complete by estimated completion date – Whether repudiatory breach by owner's inability or refusal to pay – Whether repudiatory breach by contractor's abandonment of works – Whether breach by contractor's misrepresentation of the stages of work or monies expended on the project

Negligence – Whether contractor failed to carry out works in a good and workmanlike manner – Negligence causing financial loss

Measure of damages – assessment of damages – mitigation of damages

The claimant desired a building to serve as her house, an office for her business and residential apartment units. In May 2007, she entered into a written contract with the defendant contractor to construct the building as specified in the design approved by the planning authority for the sum of

[1] Written submissions pursuant to Order of Court dated 21 October 2010.

$700,500. The claimant had obtained a loan from the bank which was paid in installments at various stages of the work. The contract provided for the retention of 5% of the contract sum until the final stage was complete. A total of $677,600 was drawn down by the contractor between June 2007 and November 2008. The estimated completion date was 31 March 2008.

The claimant directly or indirectly authorized the variations to the plan. The building was not finished in December 2008 as the defendant abandoned it when the funds ran out on him due to major variations to the building.

There was an exchange of correspondence between the parties wherein the claimant demanded a new completion date from the defendant and pointed out the financial hardship caused by the failure to complete as planned. The defendant responded alleging that the failure to complete was the result of the claimant's numerous variations, inability to make up her mind and her deduction of sums from the draw down to make her mortgage payments.

The claimant brought these proceedings seeking damages for breach of contract for the defendant's abandonment of the works, alleging defective works, and breach of other contractual duties. The defendant denied being in breach stating that the breach was caused by the claimant's inability or refusal to pay for changes to the plan as stipulated by the contract. In the alternative, he argued that he had determined the contract in accordance with its terms. The defendant denied that the works were defective. They were merely incomplete.

HELD:

(1) There was an entire contract to construct the house for the fixed price stated in the contract which provided for payment by installments. After the final draw down in November 2008, there was an obligation on the defendant to complete the house.

(2) The effect of clause 9 "*the costs of any changes to the Plan by the Owner, in a manner that will cause an increase in the Estimate will be borne by the Owner*" is that the defendant was obligated to construct the house in accordance with the approved plan and any variations accepted under this clause for the contract sum. During or upon completion of the house, he would be entitled to recover an agreed sum; in default of agreement, a reasonable sum for increased costs above the contract price resulting from the changes to the approved plan: see Halsbury's Laws of England, 4th ed. Vol. 4, paras. 1227 and 1178.

(3) There was no breach occasioned by failure to complete by the estimated completion date because there was no provision in the building contract making time of the essence, nor did the claimant give notice to make time of the essence. In light of the variations, the claimant could not insist on completion by the estimated completion date, but only on completion within a reasonable time: Holme v Guppy (1838) 3 M & W 387; Charles Rickards Ltd v Oppenheim [1950] 1 K.B. 616.

(4) The claimant did not repudiate the contract by her 'inability and/or refusal to pay. The claimant would have been liable to pay the additional costs upon the request of the

defendant. However, the defendant never requested a specific sum of money therefore her obligation to pay never arose.

(5) The defendant did not terminate the contract under clause 17. The words "*I would welcome an amicable exit from the contract*" are ambiguous.

(6) The definition of "defective work" is "work which fails to comply with the express descriptions or requirements of the contract, including very importantly, any drawings or specifications, together with any implied terms as to quality, workmanship, performance or design": Hudson op cit para. 5-025. In light of the approval of the structure as built by the Building Authority, the absence of any actual structural testing, and the ability to remedy any existing concerns during the completion of the project, a finding of defective works at this stage would be premature: Kaye Ltd. Hosier & Dickinson [1972] 1 WLR 146, 165E-G followed.

(7) The value of the works on site is not less than the sum paid to the defendant. The claimant is entitled to recover the costs of completion less the unpaid amount of the contract sum: Mertens v Home Freeholds Co. [1921] 2 KB 526, CA applied.

(8) The defendant is liable from the date of the breach for consequential losses "naturally arising from the breach itself", and those losses that could reasonably be foreseen as a probable result of the breach where he had actual or imputed knowledge of special circumstances. Hadley v Baxendale (1854) 9 Ex 341, 354 applied.

JUDGMENT

Introduction

[1] HARIPRASHAD-CHARLES J: This dispute arose out of a building contract. Mrs. Clearlie Todman-Brown ("the claimant") wanted to build her dream house. She needed someone to draw the plans for it. She turned to her good friend of many years, Melvin Rymer ("the defendant") who is an architect and a building contractor by profession. The defendant designed the plans of the house but he had no intention to build it. The claimant relied on him to find her a good building contractor. They both chose Mr. Arthur Corion. For reasons which will become evident later, the defendant re-entered the picture. He agreed to build the claimant's house. The project did not go as planned. The house is incomplete and uninhabitable. These former friends are now before the court.

Background facts

[2] Before I attempt to deal with the issues of law raised in this claim, it is important that I rehearse some background facts. Most of what I now outline reflects uncontradicted and

unchallenged evidence of the parties. To the extent that there is a departure from any agreed facts, then what is expressed must be taken as positive findings of fact made by me.

[3] On or about October 2005, the defendant designed the plans for the construction of a 3-storey house on the claimant's land. He submitted the plans for approval to the Development Control Authority. The plans were approved on 17 February 2006.

[4] As the defendant did not have the time to build the claimant's house, he introduced her to Mr. Corion. After the claimant viewed one of Mr. Corion's projects, she and the defendant (collectively referred to as "the parties") agreed that Mr. Corion would be the main contractor.

[5] On or about October 2006, the claimant received from Mr. Vaughn Williams, an estimator, designer and draughtsman, (who normally renders services to Mr. Corion's projects), a document of 23 pages together with a single sheet invoice, disclosing a grand total estimate of $743,542.35 for construction of the building by Mr. Corion. With those estimates, the claimant secured a loan from the National Bank of the Virgin Islands to finance the construction. In a commitment letter dated 4 April 2007, the bank confirmed its approval of a loan of $782,750 to assist her with the refinancing of a previous loan with Scotiabank and some other miscellaneous expenditure leaving a sum of $700,500 available for the construction of the house.

[6] As the claimant knew the defendant to be a building contractor, she began discussions with him regarding to the construction of the house. She disclosed to him the written estimate of Mr. Williams, the approval of $743,542.25 by the bank and that she was seeking to have Mr. Corion build her house for that price.

[7] However, after some discussions, the parties agreed that the defendant instead would build the house. On 31 May 2007, they entered into a written agreement called "Contract To Construct Building" ("the building contract") whereby the defendant agreed to construct a (3) storey- 4 unit house for $700,500 within 10 months "in accordance with the design set

out in the approved Architectural Plan No. D37/06" ('the approved plan"). The defendant drafted the building contract.

[8] The defendant also prepared an estimate referred to as a Construction Drawdown Schedule dated 10 August 2007[2] ("the Drawdown Schedule"). The first draw down took place on 6 June 2007. Immediately after the first draw down, the defendant started the construction of the house. It is not disputed that the sum of $677,600 was drawn down from the loan sums between 2007 and 2008 with the last draw down taking place in November 2008. The Drawdown Schedule made provision for the draw downs to correlate with the stages of work.

[9] Clause 8 of the building contract provides that "construction will commence on or before 31 May 2007 and the estimated time of completion of the house is ten months after the commencement of construction." Thus, the estimated date of completion was March 2008.

[10] However, during the course of construction, the claimant caused a number of changes to the initial design[3] making it unrealistic for the house to be completed by March 2008.

[11] On 14 January 2009, the claimant wrote to the defendant. In her letter she highlighted the lengthy delay in completion and demanded a new estimated completion date and a detailed plan for completion. She also acknowledged the defendant's request for "additional funds" to complete the house which she considered to be most unconscionable. She stated that "any request for further sums cannot be addressed before you complete your obligations under the Contract" as she had spoken to the bank and they reminded her of the building contract.

[12] The claimant also drew the defendant's attention to the economic hardship she was facing as a result of the failure to complete and requested a written response by 23 January 2009. She stated her expectation that she should be involved in the selection of all fixtures regarding the finishing of the house. The defendant did not respond. The claimant delivered a follow-up letter on 26 January 2009.

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[2] See Tab. 2, Exhibit 7 of the Trial Bundle filed on 13 October 2010.

[3] Clause 9 of the Contract To Construct Building provides that "the costs of any changes to the Plan by the Owner, in a manner that will cause an increase to the Estimate will be borne by the Owner.

[13] The defendant responded in a letter dated 31 January 2009. He identified three reasons for the delay namely: (1) the claimant's request for changes to the approved plan; (2) her receipt of funds from the draw down and (3) her inability to make up her mind. He wrote "I would welcome an amicable exit from the contract which has turned out to be my biggest nightmare"[4] but he offered to sit down with the claimant and the bank to discuss the best way forward.

[14] The claimant did not respond to his letter. Instead, on 28 May 2009, she instituted these proceedings against the defendant claiming damages for breach of contract and damages for negligence arising out of the defendant's failure to complete the house. Up until the date of this trial, the house remained incomplete and not fit to live in. No further construction has been undertaken by the defendant or anyone else.

The evidence

[15] The claimant testified and called two expert witnesses to testify on her behalf. The defendant also testified. He called one expert witness to testify on his behalf.

[16] According to the claimant, she relied on the defendant's good judgment and expertise to build her house for $700,500. She denied that she entered into the contract on the basis that funds were "tight" and she would have to compromise. She denied requesting any changes to the approved plan, asserting that she had merely mentioned, in passing to the defendant, comments made by an officer at the bank and a realtor that an additional rental unit and a bigger porch would increase the property's rental income potential. She said because she and the defendant were good friends, she left everything in his hands to decide what could and could not be done on the project. She also alleged that the defendant was fully aware of her preferences in materials and design and that any changes to the finishings that were requested resulted from his failure to accede to her prior specifications or failure to consult. Finally, she agreed that the defendant gave her $29,500 towards her mortgage payments but denied that these were from the draw down monies, stating instead that the monies were a personal loan from him.

[4] Page 6 of Defendant's letter –Tab 2, Exhibit 11.

[17] The defendant's case is that the claimant approached him because other contractors were charging her over a million dollars to construct the house but she only qualified for $700,500 from the bank. He testified that, notwithstanding the true cost to construct the house, he and the claimant sat down and came up with a reasonable plan to complete the project. He insisted that he and the claimant agreed that she would be required to make several financial compromises on the project as the budget was very tight. It was on that basis that they entered into the building contract.

[18] The defendant denied that he abandoned the job or that the failure to complete the house was due to his breach of the building contract. Instead, he averred that the sums actually expended on the project were diminished by $29,500 because of the claimant's demands for payment from the draw down monies to pay her mortgage. In addition, he testified that the claimant requested several changes to the approved plan thereby increasing floor plan including raising the floor level, increasing the number of decorative columns, changing the configuration of the kitchens, altering the design of the stairways, changing the tiles, cabinetry and closet doors and changing the roofing designs. He alleged that these major changes increased the cost and the claimant failed to make extra payments as is provided for in clause 9 of the building contract thereby causing him not to have sufficient funds to complete the house.

[19] The defendant next averred that it was the claimant who breached clause 9 by not providing the funds for the various additional works and/or material that she requested, and by her action, she did not permit him to complete the works.[5]

[20] The defendant also denied that he failed neglected and/or refused to complete the building works in a good workmanlike manner and/or that the building works executed by him were inadequate and/or defective.[6]

[21] Overall, I found both the claimant and the defendant to be witnesses of truth in so far as their evidence did not conflict. I believed the claimant when she testified that given her relationship with the defendant, she relied on his good judgment and expertise to build a

[5] See paragraph 14 of the Defence filed on 7 September 2009.
[6] Ibid, paragraph 17.

nice house for her. However, I did not believe that she would idly sit by and allow the defendant to make substantial modifications to the layout and design of her house without her expressed consent. I find her to be a highly intelligent and determined woman who knew full well exactly what she wanted when it came to her dream house. To the extent that her evidence conflicts with that of the defendant in respect of the variations, I prefer the defendant's evidence.

[22] Now to the defendant. I did not believe him when he stated that the claimant approached him because other contractors were charging her over a million dollars to construct the house. In fact, the evidence is that when the claimant wanted to build her house, she obtained an estimate from Mr. Williams who, it appears, worked in concert with Mr. Corion. I believe that although Mr. Williams prepared the estimate, the amount of $743,542.35 was what Mr. Corion was prepared to accept to build the house. I believe the claimant when she testified that the defendant re-entered the picture when she made certain disclosures to him.

[23] The defendant testified that he and the claimant agreed that she would be required to make several financial compromises to the project as the budget was very tight and on that basis, they entered into the contract. In my opinion, the simplest thing for him to do was to insert such a clause in the contract. I am afraid that I do not believe him. I must also say that I found the defendant to be somewhat unsophisticated in his approach to business. First of all, he was unable to produce any invoice to show the materials which he ordered in respect of this project. Secondly, when the claimant caused changes to the approved plan, it was his duty to enter into a variation agreement, whether orally or in writing, stipulating the increased cost associated with the variations. Up to this day, he cannot put a dollar figure to the variations.

[24] Having dissected the evidence, these are my factual findings:

1. The building contract provided for the construction of a 4-unit building The reference to "four units" in the contract is a reference to the approved plans and the fourth unit refers to the area on the ground floor or pool section which was designed to house a

bathroom, the pump room, the pool deck and the storage area. This unit, as built, includes a little office and another living quarters comprising a bedroom, a kitchen, a closet and a bathroom. The building grew in size from approximately 5,000 square feet as designed to approximately 7,700 square feet as built[7]- an increase of approximately 44%.

2. The claimant either directly or indirectly approved/authorized the changes to the construction in accordance with the approved plan by accepting the recommendation by the bank that there should be another residential unit on the lowest level; recommending the extension of the porches with the hope of achieving better rentals; recommendation of designs for internal staircases and request for pantries and dishwashers in the kitchens.

3. The defendant stopped work on the project in December 2008 because of lack of funds. The lack of funds was due to the increased costs associated with the variations to the house which the claimant tacitly or expressly authorized.

4. The defendant never quantified the cost of these variations for the claimant. He never provided a bill for the variations or requested payment of a specific dollar amount from the claimant.

Expert Evidence

[25] As mentioned earlier, the claimant called two expert witnesses. The first expert witness to testify on her behalf was Mr. Christopher Conway, a civil engineer with over 27 years experience. Mr. Conway was asked to provide an expert report to assist the Court in assessing the costs that are likely to be incurred by the claimant in relation to completing her house. In his inspection of the building, he prepared a structural report which formed the basis of the estimates for the cost to complete the works. In his evidence, he made a multitude of criticisms of the house design and plans.

[7] (see page 26 of transcript Mr. Sattaur: Total Gross Enclosed Area increased from 4993 to 7724).

[26] In addition, Mr. Conway presented the results of his site inspection[8] and his recommendations.[9] He conducted a 2-hour visual structural inspection and recommended that a full structure design be carried out on the actual structure built, the concrete be tested and full structural calculations be undertaken to establish the stability of the actual build. Upon completion of this, the repairs to the defects can then be undertaken. He indicated a number of areas where the house could experience potential future cracking or other problems, though not necessarily fail[10] and made recommendations for addressing those issues. He also made recommendations in order to correct existing cracks and other problems.

[27] I found Mr. Conway's evidence to be rather unhelpful for two reasons. First, I accept the submission of learned Counsel for the defendant, Mr. Carrington that the defendant is being sued in his capacity as contractor for breach of the building contract, and not in his capacity as architect for the design work previously done. Since the building contract does not address any issue of design, criticisms of the designs by Mr. Conway are irrelevant for purposes of this trial. Secondly, his evidence of alleged defects is premature as the building is not yet complete. If these alleged defects persist after the house is finished, then that will be another issue.

[28] The next expert witness for the claimant was Mr. Kevin Drysdale, a Chartered Quantity Surveyor with over 28 years experience. He is currently employed by BCQS Limited, a local building consulting firm. He also prepared an expert report with the hope of assisting the Court in assessing the costs that are likely to be incurred by the claimant in relation to completing her house.[11] In compiling his report, Mr. Drysdale relied on Mr. Conway's structural report.[12] A moment ago, I opined that Mr. Conway's report was unhelpful.

[29] Mr. Drysdale was asked to comment on the estimate given by Mr. Abdool Sattaur, the expert witness for the defendant. In his opinion, Mr. Sattaur's estimate was too simple. To arrive at an estimate for the cost per sq. ft. rate, Mr. Drysdale subtracted the cost of the

[8] See pages 11 to 18 of Expert Report of Christopher Conway filed on 9 June 2010.
[9] Ibid, pages 16 – 19.
[10] See, for example, paras. 3, 5, 11, 13, 14, 15, 20, 21, 22, 25, 26, 28, 29.
[11] Exhibit "KD 2".
[12] Exhibit "KD 3."

original cistern at the BCQS rate of $2/gallon ($122,574) from the contract price of $700,500 leaving the defendant with a net cost of $557,926 to complete the house. He divided this by the original floor area - 4,993 sq. ft. to arrive at an estimated construction rate of $115.75 per sq. ft.

[30] Using the revised floor area of 7,724 sq. ft., Mr. Drysdale estimated the net cost to construct the redesigned house to be $894,053. Then adding back the revised cistern at $2/gallon (33,840 gal. x $2/gal = $67,680) the total cost of the revised project (at the time of construction) would have been $961,733.

[31] Accepting that only 60.23% of the work had been completed, Mr. Drysdale calculated the estimated value of the works on site to be $579,251.79. He said that this figure suggested an overpayment of $98,348.21 by the claimant since she had paid $677,600 for the works presently on site.

[32] Mr. Drysdale confirmed that his instructions had been to provide an estimate of the cost to complete the works using a third-party contractor. He opined that a reasonable estimate of cost for the works required to complete the house is $1,116,250 summarised as follows:

Structural works (budget for repairs identified by structural engineer)	$430,250.00
Building Works (to complete to finish as per the drawings & claimant)	$540,000.00
Preliminaries (cost of mobilization at 15% of gross)	$146,000.00

[33] If I understood Mr. Drysdale well, he suggested that an estimate of the *additional* cost to the claimant, to complete the works on site (as a result of the abandonment of the works) may be calculated as follows:

Estimated value of work on site	$579,251.79
PLUS estimated cost to complete works	$1,116,250.00 (at present day)
TOTAL ESTIMATE	$1,695,501.79
MINUS Estimated cost to build revised plan	$961,733.00 (at time of construction)
Additional cost to Claimant	$733,768.79

[34] In cross-examination, Mr. Drysdale agreed that the BCQS average pricing rate for construction during 2007 and 2008 was around $185.67 per sq. ft. Using this average rate, the cost to construct the claimant's house at the original size of 4,754 sq. ft. would have been approximately $883,000 and he would have recommended this sum as a realistic project budget. At the revised size of 7,724 sq. ft. the estimated cost to construct would have been in the range of one and a half million dollars ($1,434,115.08). Mr. Drysdale agreed that 60.23% of this figure would have been considerably more than $579,000 which he suggested as the estimated value of the works on site (if calculated would be $832,117).

[35] The defendant called Mr. Sattaur, a Chartered Surveyor and Civil Engineer at Smiths Gore, to testify on his behalf. Mr. Sattaur was provided with the original approved plans and later, with a set of revised or "as built" plans showing the variations from the original. Mr. Sattaur then visited the site with the defendant and together they took measurements which enabled him to verify the accuracy of the revised or "as built" plans. This formed the basis of his report.

[36] Mr. Sattaur identified 10 major structural variations or changes to the project after comparing the approved and the revised plans.[13]

[37] Overall, he noted that the total gross enclosed area on all three levels increased approximately 35% from 4,993 sq. ft. in the approved plan to 7,724 sq. ft. in the revised plan. The total porch/deck area increased approximately 24% from 1,553 sq. ft. in the approved plan to 2,049 sq. ft. in the revised plan; meanwhile the total cistern area shrunk by 44% from 61,287 gallons to 33,840 gallons. Using the contract sum and the approved design size to obtain a pricing estimate of $140/sq. ft., Mr. Sattaur made a rough estimation that the additional sum required to complete the revised building at the time when it was under construction would have been $382,000. He estimated that to complete now using current costs would be roughly $431,000. In cross-examination, Mr. Sattaur

[13] See page 7 of Table A of Valuation Report of Abdool Sattaur.

agreed that the contract sum was not calculated on a square foot basis but was a lump sum.

[38] On a balance of probabilities, I accept Mr. Sattaur's evidence to that of the expert witnesses for the claimant. Mr. Drysdale's report is based on the structural report of Mr. Conway which identified architectural detects and premature findings. Therefore, his estimated cost of over one million dollars to complete the house is not only exaggerated but seems implausible in light of the fact that the contract price to build the entire house was $700,500. Whilst I accept that the contract sum may have undervalued the actual cost of the house, it is rather mind-boggling that 60.23 % of the house consumed $677,600 (which the defendant drew down) and the remaining 39.77% will require over $1,116,250, using a BCQS costing approach. Using Mr. Sattaur's evidence, Mr. Drysdale's evidence is that the cost of completion is at least $832,117.

[39] Mr. Sattaur's evidence and his figure seems more realistic and accords with what the claimant has particularized in her Statement of Claim as the estimated cost of completion – $422,000, an estimate given by Mr. James Todman, an independent contractor, which, unfortunately, could not have been relied upon because of the failure of Mr. Todman to attend court.

[40] I therefore accept Mr. Sattaur's evidence that 60.23% of the house is complete and that the estimated cost to complete the house is approximated $431,000.

The Issues

[41] Both Counsel identified a number of issues for determination. Some of them overlap. Broadly speaking, they may be reduced to the following:

1. Did the building contract come to an end due to the breach by the defendant abandoning the works or on account of the impossibility of performance arising from the claimant's inability to finance the balance of the construction?

2. Is the defendant liable for other breaches of contract?

3. Has any actual damage been established to give rise to liability for negligently constructed works or are all allegations of defects merely matters that could be expected to be rectified during the completion of construction?

4. Did the claimant fail to mitigate the damage?

5. If there was either a breach of contract by the defendant or breach of duty of care in carrying out the construction, what is the measure of damages?

Claim for breach of contract.

[42] Under this generic heading of claim for breach of contract, several sub-issues arise for consideration namely:

1. Whether the contract was an entire contract?

2. Whether the claimant requested or authorized variations to the approved plan and the valuation of these variations?

3. Whether the failure to complete the house by the contractual completion date amounted to a breach of contract? And

4. Did the contract come to an end due to the defendant's failure to complete the house or an account of the impossibility of performance arising out of the claimant's inability to finance the balance of the project?

Was contract an entire contract?

[43] Mr. Carrington submitted that the building contract states that the claimant [the Owner] desired the services of the defendant [Contractor] to construct her (3) storey - 4 unit building "in accordance with the design set out in the approved Architectural Plan No. D/37/06 and the Contractor agreed to construct the building in accordance with that plan and the construction costs estimate of $700,500."[14] Subsequently, the parties agreed that the contract price was to be paid by instalments in accordance with the Drawdown Schedule. According to learned Counsel, the effect of these two agreements is that the agreement between the parties cannot be construed as an entire contract. In support of

[14] See Clauses 2 and 3 of the Contract to Contract Building –Exhibit H5.

this submission, Mr. Carrington referred to the case of Hoenig v Isaacs.[15] Denning LJ [as he then was] had this to say:

> "…the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of specific work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions."

[44] A contract to carry out the whole of certain works in consideration of a fixed sum of money is an entire contract.[16] However, even where the contractor undertakes to construct works in consideration for a specified price made up of separate payments for each separate part of the works, the contract may be entire. An entire contract may provide for payment by instalment[17] or for what has been termed "milestone" payments which are payable at stated intervals or by reference to stages of the work.[18] Whether or not the contract is entire is a question of construction. A familiar instance is when the contract provides for progress payments to be made as the work proceeds, but retention money to be held until completion. Then entire performance is usually a condition precedent to payment of the retention money. However, a contractor is not entitled to the retention money until the work is entirely finished, without defects or omissions.

[45] In the present case, the combined effect of clauses 2, 3, 4, 11 and 12 together with the Drawdown Schedule is that there was an entire contract to construct the house for the fixed price stated in the building contract which made provision for payment by instalments. Having received the final draw down in November 2008, there was an obligation on the defendant to complete the house. He will only become entitled to the 5% retention money when the work is entirely finished without defects or omissions.

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[15] [1952] 2 All ER 176.
[16] Halsbury's Laws of England, Vol. 4, para. 1146.
[17] Halsbury's Laws of England, Vol. 4, para. 1148.
[18] Chitty on Contracts, 29th ed., para 37-131.

Variation clause and valuation of variations

[46] As mentioned earlier, I found as a fact that the claimant directly or indirectly authorized the variations to the plan. Clause 9 of the building contract provides that "*the costs of any changes to the Plan by the Owner, in a manner that will cause an increase in the Estimate will be borne by the Owner.*" However, the contract does not provide any machinery for the valuation or timing of the payment for variations.

[47] The learned authors of Halsbury's Laws of England state that where there is a variation clause but no machinery for ascertaining the value of the varied work, the parties will be bound by any agreement as to the price of the varied work and, in default of agreement, the employer must pay a reasonable sum.[19] In short, a variation clause entitles a contractor to recover monies for any alteration to the work in the approved plan.

[48] To my mind, the effect of clause 9 is that the defendant was obligated to construct the house in accordance with the approved plan and any variations accepted under this clause for the contract sum.[20] During or upon completion of the house, he would be entitled to recover an agreed sum; in default of agreement, a reasonable sum for increased costs above the contract price resulting from the changes to the approved plan.

[49] In the alternative, clause 12 provides as follows:

> "Upon the request of the Contractor, payments for the balance of the Contract Sum will be made by the Owner to the Contractor in cleared funds in a timely manner. In the event that the Owner is late in providing funds at any given time causing a delay in the targeted date of completion of the Building, this fact would be taken into consideration in terms of an extension of time to complete without penalty to the Contractor."

[50] The claimant would have been liable to pay the additional costs upon the request of the defendant. However, the evidence is that the defendant never requested a specific sum of money from the claimant. Therefore, any obligation for the claimant to pay for the

[19] See paragraph 1227.
[20] Halsbury's Laws of England, 4th ed., Vol. 4, para-1178. If the contractor accepts an instruction purporting to require a variation under the contract and proceeds to execute it under the contract, it is submitted that he will not subsequently be able to argue that the varied work was outside the contract.

variations "in a timely manner" never arose. Even at the date of trial, the defendant was in no position to say to the Court what costs were associated with the variations.

Did the failure to complete by the contractual completion date amount to a breach of contract?

[51] Clause 8 of the building contract provides that construction was to commence on or before 31 May 2007 and "*the estimated time for completion of the Building is ten months after the commencement of construction*." It is not in dispute that construction was not completed in accordance with this estimate. However, there was no evidence that prior to the claimant's letter dated 14 January 2009 any issue arose between the parties concerning time for completion. The defendant's evidence on cross-examination was that he could not give a time for completion because of the constant changes requested by the claimant. He stressed this in his letter of 31 January 2009.

[52] In her evidence, the claimant did not address the issue that changes in the approved plan, which were highlighted by all the experts in their reports, would have resulted in the need for additional time to complete the project. In this regard, Mr. Carrington submitted that the time for completion of the house had been extended by implicit consent of the parties on account of the variations in the construction. He also submitted that the claimant could not, until a new termination date had been agreed, claim that the defendant has acted in breach of the agreement in relation to time of completion. Learned Counsel submitted that the contractor's obligation to complete the house for the specified sum was limited to constructing the building as designed in the approved plan [see Clauses 2 and 4]. However, the experts agree that the house as built is significantly larger than that in the approved plan.

[53] In Halsbury's Laws of England, Vol. 4, the learned authors state at para. 1180:

> "Where time is not of the essence of the contract but a date for completion is specified, the employer will be entitled to damages upon the contractor's default[21]. Where the contract is silent as to the date of completion, the contractor must

[21] Lucas v Godwin (1837) 3 Bing NC 737; Tidey v Mollett (1864) 16 CBNS 298.

> complete the work within a reasonable time[22]. If, by reason of a breach of contract or by reason of extra work ordered by him, the employer prevents the contractor from completing the work by the date fixed ... then unless the contract clearly provides that the contractor shall take the risk of prevention by such extra work, the employer cannot insist upon completion by the date fixed or within the period limited, but only for completion within a reasonable time.[23] The onus of proving that the delay has been caused by some act or breach of contract on the part of the employer is on the contractor [emphasis added].

[54] In the present case, there is no provision in the building contract making time of the essence. Neither did the claimant give notice to make time of the essence. I accepted the defendant's evidence that the claimant requested extra work to be done and as such, he could not give an estimated completion date. Further, it became impossible to do so because of the claimant's inability to make up her mind.

[55] Time will be "at large" where delay is caused by the employer and no machinery exists under the contract allowing the completion date to be re-fixed.[24] In light of the variations, the claimant cannot insist on completion by the estimated completion date, but only on completion within a reasonable time.

[56] In the present case, no argument was advanced as to what would have constituted a reasonable time for completion of the house. However, if the defendant had been put into funds in December 2008 to continue the revised project, I believe that a reasonable completion date would have been within six months of that date – essentially, by the date that the claim was filed, i.e. by 28 May 2009. I so find.

Was the contract breached by the defendant's abandonment of work or the claimant's inability to finance the project?

[57] A resolution of this issue lies primarily in the exchange of correspondence between the parties which took place in January 2009. The claimant alleged that the defendant left the site in December 2008. In his defence, the defendant denied this allegation. He averred that he had not been able to complete the house because the claimant did not provide the

[22] Startup v MacDonald (1843) 6 Man & G 593 at 611, per Rolfe B.
[23] Holme v Guppy (1838) 3 M & W 387; Charles Rickards Ltd v Oppenheim [1950] 1 K.B. 616.
[24] Chitty's on Contracts, 29th ed., Vol. 2, para. 37-112

additional funding to complete it. However, he never suggested that he left the site in January 2009, as he now alleges. I therefore prefer the claimant's evidence to his. When he left the site in December 2008, the house was only 60.23% complete and he had received the final draw down.

[58] In his letter of 31 January 2009, the defendant stated, "*I would welcome an amicable exit from the contract which has turned out to be my biggest nightmare. However, if you so desire, I am available to sit with you and the bank officers with a view of discussing the best way forward*."

[59] In his evidence, the defendant said that the claimant never responded to the offer he made in that letter. Learned Counsel Mr. Carrington argued that two issues arose from her failure to respond. First, the defendant stated his clear intention to terminate the contract by saying "*I would welcome an amicable exit from the contract*." Learned Counsel contended that clause 17 of the building contract permitted the defendant to terminate the contract without incurring any consequential obligations and secondly, the defendant confirmed that as of that date, he was still ready and willing to continue the project with the claimant.

[60] According to Mr. Carrington, the above is inconsistent with the defendant having abandoned the works at least one month prior to the date of the letter and consequently, the claimant has failed to prove the nub of her case, that is to say, that the defendant brought the contract to an end when he walked off the project in December 2008. Learned Counsel argued that on this discrete ground alone, the claim for breach of contract arising from abandonment of the work should fail. A moment ago, I found that the defendant left the site in December 2008. As such, this issue warrants no further elaboration.

[61] The defendant also contended that his letter of 31 January 2009 demonstrated that he intended to continue to perform the contract notwithstanding the hardship that it was causing him so the test of repudiation by the defendant cannot be satisfied. Counsel referred to the case of Grant et al v Phillip[25] to show that because of the claimant's inability to continue to fund the project in the future together with her refusal to meet with

[25] Claim No. ANUHCV1998/003 [unreported] –High Court of Justice, Antigua & Barbuda.

the defendant to determine the best way forward, those acts amounted to a repudiation of the contract by the claimant. He cited Hudson's Building and Engineering Contracts[26] in support of the principle that "a clear indication of refusal or inability to pay future instalments will amount to a repudiation."

[62] I return to the key issue. Did the defendant breach the contract when he left the site when only 60.23% of works were completed and he having collected the entire contract price less the 5% retention money?

[63] The defendant answered this question in the negative. He alleged that it was the claimant's inability to continue to fund the project in the future coupled with her refusal to meet with him to determine the best way forward that gave rise to the impossibility of performance of the contract. I agree that, on cross-examination, the claimant deposed that she had no more money to give to the defendant and that the bank would not re-finance the project. However, in her letter to the defendant on 14 January 2009, she wrote:

> "When I communicated your request for additional funds to finish the building to the Bank's Management, they quickly pointed me to the existing contract between you and myself. Thus, any request for further sums cannot be addressed before you complete your obligations under the contract." [emphasis added]

[64] In my opinion, the above did not amount to her inability to continue to fund the project. If I understand well what she wrote, she was simply saying to the defendant, "get on with the work, complete my house and we will talk when you are finished." Regardless of what interpretation I put to the above, up to the date of trial, the defendant has failed to inform the claimant of the costs associated with the variations to the approved plan.

[65] The defendant insisted that there was a repudiatory breach of the contract by the claimant. Chitty on Contracts, at para. 37-214 states:

> "A failure by the employer to pay the contractor could amount to a repudiation, depending on the terms as to payment, and the circumstances of the refusal, but generally there is no general right to suspend work where payment is withheld

[26] Volume 1, 11th Edition, para. 4-221.

from the contractor at common law: Supermarl v Federated Homes Ltd (1981) 9 Con. LR 25; Channel Tunnel Group v Balfour Beatty [1992] QB 665."

[66] In Grant et al v Phillip, Thomas J. after reviewing the line of judicial authorities stated the principle concerning repudiatory breach at para 90 in the following terms:

> "1. Does the conduct of the Defendant indicate an intention not to perform the contract; and
>
> 2. Does the refusal by the Defendant to perform his contractual obligations where the matter goes to the root of the contract?"

[67] I am unable to find that there was a clear indication by the claimant of refusal or inability to continue to fund the project. It is also difficult to find that the defendant repudiated the contract since he was willing and ready to continue the project. However, it is clear that when the defendant abandoned the site in December 2008, the funds ran out on him due to major variations to the house. But, as a prudent contractor, he should have invoked clauses 9 and 12 of the building contract and specified a sum of money that will be required to complete the project. To beat around the bush is childish for a man who is a professional. In my opinion, the defendant acted incompetently.

[68] I now turn to clause 17 of the contract. It provides as follows:

> "If the Contractor or the Owner shall fail or be unable to complete this transaction in accordance with the terms of this Agreement, either the Contractor or the Owner may by notice in writing to the other party or his solicitors terminate this Agreement and each party shall be relieved from any further obligations under this Agreement."

[69] The defendant submitted that the words "*I would welcome an amicable exit from the contract*" entitled him to terminate it under clause 17 without incurring any consequential obligations." I am unable to find so. For the most part, the words are ambiguous. If the defendant had wished to terminate the contract, he simply could have said so. In addition, those words are followed by another group of words "*However, if you so desire, I am available to sit with you and the bank officers with a view of discussing the best way*

forward." The latter words evinced a clear intention to communicate and a willingness to continue.

[70] It is plain that the defendant had/has no intention of completing the house unless he is put in funds, funds which he had not specified. I believe that the defendant has not fully grasped the implications of the building contract which he himself drafted. In particular, he has misconstrued clause 9 which essentially provides that if the owner causes variations to the approved plan which will cause an increase in costs, the owner becomes liable. In an entire contract, such as this one, in accepting variations under it (which the defendant did), he would be entitled to recover an agreed sum to complete the construction of the house. In default of agreement, he would be entitled to a reasonable sum for increased costs above the contract price resulting from the changes to the approved plan. These are trite legal principles. The claimant would have been liable to pay for variations but she cannot be liable to pay unspecified sums of money.

[71] For all of these reasons, I find that the defendant should have continued with the project to completion. He breached the building contract when he abandoned the project in December 2008 when the building was incomplete and uninhabitable for the purposes for which it was intended.

Whether the defendant is liable for other breaches of contract?

[72] The claimant contended that the defendant misrepresented the extent of completion and /or costs of the building works. She asserted that he misrepresented the amounts of monies expended on the building works out of the monies obtained from the bank and that he failed to notify her or the bank of circumstances affecting the completion of the contract in breach of clause 16.

[73] At para. 22 of her witness statement, the claimant stated:

> "Under my agreement with the Bank I was obliged to request the Bank to do an appraisal to verify the state of the works at each stage before another drawdown, yet the monies were disbursed without completion of these works, so that the

> Defendant misrepresented to me the extent of completion of the work for the purpose of obtaining the drawdown of monies at various stages."

[74] At paras. 7- 8 of his witness statement, the defendant said:

> "The claimant and the Bank approved every draw down. Before each draw down, the bank would send its representative to the site to confirm each phase of the construction to ensure that the funds dispensed were justified or put into the project, and after being satisfied, the bank would issue the cheques payabe to me. The Claimant would go to the bank, sign the bank documents, pick up the cheque and give it to me. The procedure that the Claimant and I had with the draw downs were that she would type each draw down letter, I would go to her office where I would sign the letter and she would personally take the letters to the Bank. The Claimant would personally go to the bank, collect the funds and bring them to me when they were ready.
>
> It should be noted that prior to the bank issuing the funds, on completion of a phase, the Claimant would send a letter and prepare a report to the bank, the bank would then send an officer to the site to make sure that the funds were justified before issuing any further cheques."

[75] The claimant testified that she never saw the bank officer, Mr. Baptiste on the site. She denied knowledge of the bank's procedure (inspection before each draw down) and she denied being aware that the bank had to satisfy itself as to how the money was spent before it would allow the next draw down. She also stated that she never prepared a report for the bank as contained in paragraph 8 of the defendant's witness statement.

[76] Further, in her letter of 14 January 2009, the claimant stated:

> "I acknowledge your request for additional funds to complete the project but I view this as a most unconscionable request when many of the items that you received draw down monies for have not been completed. For instance, Phase 8 (100% of roof structure and finishing - $85,000); not only did you receive this amount but at the same time in March 2008 you received an additional $48,000 for other aspects of the project and was presented with a cheque totaling $133,000. Disappointingly, from last summer the roof has remained in the same state with the wood partially covered with black plastic sheeting and no galvalume to protect the roof from the elements and the many rainy seasons that the island experienced in 2008/2009."

[77] On a balance of probabilities, I accept the defendant's evidence that the bank made regular inspections and the claimant was fully involved during the currency of the project. Considering her involvement and the bank's inspections, the burden is on the claimant to prove, and she has failed to do so, that any misrepresentations were made to her or the bank regarding the extent of the completion of the works.

[78] In addition, none of the experts did a quantitative analysis or valuation of the materials in the structure or on the site. Mr. Drysdale's approach to valuing the works on site at $579,000 appears speculative. I do not accept that the claimant has overpaid the defendant. In fact, the evidence of the claimant's own expert, Mr. Drysdale, supports the defendant's case that the contract sum fell below the real cost of the project. Accordingly, there is no basis for a finding that the defendant misrepresented the amount of monies expended on the project.

The claim in negligence and/or breach of contract for defective works

[79] The claimant contended that the defendant is in breach of the clauses 5, 14 and 15 of the building contract in that he failed to carry out the works in a professional and workmanlike manner and excluded the claimant from involvement and decision-making. She also alleged that the works which were completed are defective because the defendant negligently failed to carry out the building works in a good and workmanlike manner.

[80] Clause 5 of the Contract states that "*the Contractor will carry out the construction of the Building in a professional and workmanlike manner*."

[81] Dr. Archibald QC submitted that the claimant's evidence proved that there are substantial defects in the construction of the building; as the evidence of her expert, Mr. Conway in respect of the existence and extent of the defects, is unchallenged. He submitted that the Court should accept Mr. Conway's unchallenged evidence.

[82] Mr. Carrington argued that no action in tort lies for damages to the sructure. Damages only lie where structure defect results in personal injury: Linklaters Business Services v Sir Robert McAlpine et al.[27]

[83] Mr. Carrington further argued that the claimant has failed to particularize any implied contractual terms breached by the defendant and it is unlikely that such terms would be implied in light of the express term in Clause 5: Lewison, The Interpretation of Contracts 2nd ed. 136-138. Thus he limited his argument to the duty stated in clause 5.

[84] I have previously accepted that the defendant is being sued for breach of the building contract, and not in his capacity as architect for the design work previously done. The building contract does not address any issue of design. Accordingly, any criticism of the designs made by Mr. Conway is irrelevant.

[85] In addition, the definition of "defective work" is "work which fails to comply with the express descriptions or requirements of the contract, including very importantly, any drawings or specifications, together with any implied terms as to quality, workmanship, performance or design." Hudson op cit para. 5-025.

[86] Mr. Carrington submitted that the evidence of Mr. Conway does not address whether the defendant's works are defective vis. a vis. the drawings. He further submitted that Mr. Conway's evidence is that he conducted no structural testing, and calculations would have to be made to establish the stability of the actual build. Accordingly, no structure defect has been established to date. In light of the inspection and approval of the plans and the construction by the Building Authority, the claimant has not proved that the premises are unsafe or defective and her claim is premature.

[87] Mr. Carrington further submitted that any works which were completed, but were defective vis-à-vis the approved plan, merely suffered from temporary disconformity which would have been corrected upon the completion of the construction: see Kaye Ltd. Hosier &

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[27] [2001] EWHC 1145.

Dickinson.[28] At best, Mr. Carrington submitted that the defendant committed no more than a temporary breach of contract. I agree entirely with Mr. Carrington's submissions. In light of the approval of the structure as built by the Building Authority, the absence of any actual structural testing, and the ability to remedy any existing concerns during the completion of the project, a finding of defective works at this stage would be premature.

Negligence causing financial loss

[88] The claimant pleaded that the defendant is liable for negligence in that he failed to allocate and expend monies on the building works in a manner to afford completion of the construction works as contemplated between the parties.

[89] On this issue, Dr. Archibald QC submitted that "*the defendant's admission under cross-examination that the contract work which he left was not habitable for any of the purposes of resident, rental or business which he had known of before commencing the works, was an admission that he was aware of his duty of care towards the claimant under the contract, and was in breach of that duty which resulted in damage to her as a person whose committed borrowed money relating to the contract was all drawn by the defendant who walked away from the works leaving her with an uninhabitable and leaking "white elephant" without any suggestion from him as to what money or approximate money or bills of quantities or otherwise he would or could propose to have the work "finished" or "done", and he is therefore liable in negligence*.[29]"

[90] According to Dr. Archibald QC, two questions reasonably arise namely:

1. Was the defendant negligent as a building contractor in mixing up the purchases of materials for the contract building at issue with other purchases for other buildings so much so that he was unable to indicate to the claimant or to the Court from documents or papers or his books what further monies or materials he required to finish the work?

2. Why was he not in a position, apart from his negligence in failing to substantially complete the building, to give a timely warning to the claimant at an early phase that he would require $x or approximately x$ or approximately x bills of quantities to complete the building so that she could count the cost?

[28] [1972] 1 WLR 146, 165E-G.
[29] See paragraph 14 of Written Submissions of Counsel for the Claimant.

[91] Dr. Archibald submitted that the answer to question (1) ought to be in the affirmative and to question (2); that the defendant kept no proper records of the building exercise under the contract as was the duty of a building contractor operating in a professional manner.

[92] Whilst I agree that the defendant failed to keep proper records of the building exercise, the claimant has provided no legal authority that such failure to keep proper records constitute negligence on the defendant's part. In any event, this allegation was not part of the claimant's pleaded case. She has pleaded that the defendant failed to allocate and expend monies on the building works in a manner to afford completion of the construction works *as contemplated between the parties*.

[93] This issue needs no further regurgitation. It is adequately dealt with under the sub-heading "whether the defendant is liable for other breaches of contract."

Ancillary issue

[94] An ancillary issue arose as to the amount of $29,500 which the defendant paid to the claimant. She has not denied the receipt of this sum of money. As such, even though no counterclaim has been filed in this claim, I believe that, in the interest of justice and the overriding objectives of the Civil Procedure Rules 2000, I should set it off from the final award of damages to the claimant.

Measure of damages

[95] I now come to the final question of the measure of damages. In her Statement of Claim, the claimant claims damages for loss of rental income, builder's risk insurance premiums, business rental, costs of completion, interest to be paid to the bank, and further interest to be paid to the bank on further borrowing.

[96] In her letter of 14 January 2009, the claimant stated:

> "Based on the expected completion date of the project (31st March 2008) I was left with no other choice but to commence the mortgage repayment to the bank in a timely fashion, effective April 2008. Upon qualifying for the mortgage, the bank took into consideration the rental income that could be realized from the completed units. Your failure to abide by our agreement has now posed an economic

> hardship on my ability to repay this mortgage, without this expected income. As I have previously communicated to you, I have had to deplete my savings in order to prematurely pay these unforeseen expenses related to this project, including Builder's Risk and affiliated insurances. To compound this further, I am now in a position where I am forced to pay monthly rent and mortgage obligations at the same time.
>
> Since my present financial woes are due primarily to your failure to complete the project as contracted, you are expected to be responsible for half the mortgage and the full amount of the Builder's Risk insurance until the project is completed; ($2,750.16 and $295.50) respectively on a monthly basis, commencing on 15th January 2009."

[97] It is my considered view that because the parties were close friends, the defendant knew from the inception that the claimant required the building to be used as her residence, rental of several apartments and also for a business place.

Assessment of Damages

[98] The basic principles applicable to an assessment of damages where a contractor fails to complete are well settled and are helpfully summarized by the learned authors of Keating's Building Contracts.[30] Generally, the party who sustains the loss by reason of breach of contract is to be placed, so far as money can do it, in the same situation as if his or her rights had been observed.[31] Where the contractor fails to complete, the measure of damages in the first instance is the difference between the contract price (if it has not yet been paid) and the amount it would actually cost the employer to complete the contract work substantially as it was originally intended, and in a reasonable manner, and at the earliest reasonable opportunity.[32]

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[30] See in particular **Keating's Building Contracts,** 4th ed. at p.144 – 151.
[31] **Victoria Laundry v Newman** [1949] 2 KB 528, 529; **Robinson v Harman** (1848) 1 Ex 850, 855.
[32] **Mertens v Home Freeholds Co.** [1921] 2 KB 526,CA. The classic example is Mertens v Home Freeholds Co where the contractor agreed to build a house in 1916 for £1,900. It was an unprofitable contract and he therefore deliberately delayed the work so that as a result the work was stopped by government decree. The earliest moment at which the employer could build was 1919 when it would have cost him £4,153 to complete. It was held that the employer could recover the difference between £4,153 and £1,900, plus £825 paid to the contractor, less £495 being the value of the work done by the contractor before he ceased work, making a total of £2,583.

[99] Damages are also recoverable under the heads of inconvenience and discomfort.[33] In addition to those losses "naturally arising from the breach itself", where the contractor has actual or imputed knowledge of special circumstances, he may also be found liable for any losses that could reasonably be foreseen as a probable result of the breach.[34] It is sufficient, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result.[35]

Mitigation of damages

[100] Finally, the award of damages as compensation is qualified by a principle, "which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."[36] But this "does not impose on the plaintiff an obligation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business."[37] Any gain resulting from the plaintiff's reasonable steps in mitigation must be balanced against the loss caused by the breach.[38] The onus of proof is on the defendant to prove any failure to mitigate.[39]

[101] On mitigation of damages, I agree with Learned Queen's Counsel Dr. Archibald that no pleading was advanced. In addition, this issue was not specifically or sufficiently put to the claimant when she was cross-examined. Neither did the defendant testify to this effect in any meaningful way. Accordingly, this issue fails.

Estimated cost of completion

[102] As I have already stated, I accept as correct the estimate of $431,000 as the cost to complete the house to a habitable state. A total of $677,600 of the contract sum has already been paid leaving $22,900 unpaid. This is the retention money. Considering the

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[33] **Bolton v Mahadeva** [1972] 1 WLR 1009 (CA); **King v Victor Parsons & Co** [1973] 1 WLR 29 (CA)
[34] **Hadley v Baxendale** (1854) 9 Ex 341, 354
[35] **A/B KarlshammsOljefabriker v Monarch** [1949] AC 196.
[36] **British Westinghouse v Underground Railways** [1912] AC 673, 689 (HL).
[37] *Ibid*., at 689.
[38] *Ibid*, at 691; **The World Beauty** [1970] P 144; **Pagnan (R) Fratelli v Corbisa Industrial** [1970] 1 WLR 1306 (CA).
[39] **British Westinghouse v Underground Railways** [1912] AC 673.

increased costs that would have been associated with the increased size of the house, I do not accept that the value of the works on site are less than the $677,600 paid to the defendant, as suggested by Mr. Drysdale. In fact, under cross-examination, Mr. Drysdale admitted that, using the BCQS rate, the works on site would value considerably more. Accordingly, under this head the claimant is entitled to recover the costs of completion minus the unpaid amount of the contract sum, $408,100.

Consequential losses

[103] The claimant seeks several heads of consequential loss from the expected date of completion. However, the defendant can only be held liable for consequential losses flowing from the date of breach.[40] Earlier in this judgment, I found that owing to the changes in the design, the defendant's failure to complete by the expected completion date of March 2008 was not a breach of contract. The defendant was only required to complete within a reasonable time which is by end of May 2009. The assessment of consequential damages shall be calculated as from that date to the date of this judgment[41] which is 23 ½ months.

Loss of Rental Income:

[104] The claimant seeks loss of rental income for 3 units at $2,500 per unit, a total of $7,500 per month from the intended completion date to present – 13 months: $97,500.00. This claim is disallowed, as the claimant has not produced any documentary evidence in the form of rental agreements, letters of intention or otherwise to substantiate this loss. While I accept that the defendant was aware of the intention to use the premises to generate rental income, the mere construction of an apartment provides no guarantee of the reception of the projected rental income.[42]

[40] Meyler v Boyd (1841) Arm M & O 173 (IR).
[41] Noble v Turtle Mountain Municipality (1905) 15 Man. LR 514 (Can.).
[42] Wheatley et al v Waterpoint Caribbean Homes, Claim No. ANUHCV2010/0029, March 9, 2011 [unreported]

Builder's Risk Insurance

[105] Clause 10 of the building contract states that the owner shall be liable for providing liability insurance during the period of the construction. The defendant should have been aware that a delay on his part would result in the continued expense of these premiums, so this loss is recoverable in the amount of $250 per month for 23 ½ months, $5,875.

Residential Apartment Rent

[106] This loss is recoverable. It is reasonable to contemplate that the claimant would have to pay for accommodation while her house remains unfinished. The claimant pays rent at $700 month – the defendant is liable for 23 ½ months – to a total of $16,450.

Commercial Rent

[107] Recovery under this head depends on whether the defendant was aware at the time of entering into the contract that the claimant was paying business rental and she expected this expense to cease upon completion of the building because she intended to use part of the building for her business operations. The claimant pleaded that "the defendant was aware of the claimant's intention to utilize the "storage room" portion of the building for accommodation since the defendant was subletting the premises rented for her business on main street at $500 per month, on the condition that he would take over the full rental of the premises once the claimant was able to relocate her business to the building under construction." At business rent of $350 per month, 23 ½ months would total $8,225 recoverable under this head.

Interest to the Bank

[108] This sum was not quantified so it is disallowed.

Interest to the bank on further borrowing required by completion:

[109] This head does not arise. In any event, the defendant may be the one to incur this expense.

[110] Total Damages awarded to the claimant are follows:

Cost of completion	$408,100
Residential Rent	$ 16,450
Business Rent	$ 8,225
Builder's Insurance	$ 5,875
TOTAL	$438,650

[111] With respect to the ancillary issue which arose, the parties have agreed that in the interest of justice, the Court should address it now. I am grateful for this assistance. As such, the total damages will be reduced by the amount of $29,500.

[112] In the premises, I will enter judgment for the claimant in the amount of $438,650 less $29,500 making a total award of $409,150 as damages for breach of contract. I will also award interest from the date of judgment to the date of payment along with prescribed costs of $61,515 and expert witnesses' fees of $5,475.

[113] Last but not least, I truly apologize for the inordinate delay in the delivery of this judgment.

Indra Hariprashad-Charles

High Court Judge