TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2009/028

BETWEEN:

[1] CHIVERTON CONSTRUCTION LIMITED
[2] JUNIOR CHIVERTON

Appellants

and

SCRUB ISLAND DEVELOPMENT GROUP LIMITED

Respondent

Before:

The Hon. Ola Mae Edwards — Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mr. Michael Gordon, QC — Justice of Appeal [Ag.]

Appearances:

Mrs. Helene- Anne Lewis and Mr. Garvin Simonette for the Appellant
Mrs. Willa Liburd-Tavernier and Ms. Glenis Potts for the Respondent

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2010: September 23;
2011: September 19.

Civil appeal – Breach of contract – Construction contract – Repudiation – Abandonment – Economic hardship – Change orders – Whether issuing unauthorized construction change directives which had 'no contractual effect' amounted to a breach of contract – Whether trial judge could have concluded that the contract had been abandoned by the appellant based on the evidence before him – Whether the respondent's 'termination letter' operated as a repudiatory breach of contract

In July 2006, the appellant, Chiverton Construction Limited ("Chiverton"), entered into a work and material contract with the respondent for the construction of five retaining walls at a marine development on Scrub Island. The respondent's construction manager was the Virgin Islands Project Management Company ("VIPM"). Substantial completion of the contractual work was to be achieved by 17th October 2006. However, construction was dogged by delay, and by September or October 2006, work had not yet started on three of the retaining walls and the other two were incomplete. At that same time, the respondent decided not to have Chiverton construct any of the three walls on which work had not yet started. Chiverton received notice of this change on 15th December 2006. By letters dated

12th and 14th December 2006 ("the omission letters") VIPM issued construction change directives to Chiverton, omitting from the project work to the value of $182,148.00 which included work on the three walls that had not yet been constructed. By letter dated 22nd December 2006, Chiverton wrote to VIPM stating that VIPM's conduct had caused it a loss of US$28,000.00, and announced its intention of making a claim. On 15th January 2007, VIPM wrote to Chiverton terminating its contract to construct the remainder of the retaining walls with immediate effect and barring Chiverton's access to Scrub Island. The reason cited was Chiverton's repeated refusal to "supply enough properly skilled workforce on the project to successfully complete the works."

Chiverton commenced proceedings in the court below for breach of contract. Its primary case was that the letter of 15th January 2007 ("the termination letter") operated as a repudiatory breach of contract which it accepted by a letter from its lawyers dated 19th March 2007. The learned trial judge held that the omission letters from VIPM did not evince an intention to no longer be bound by the contract; if anything, they affirmed the contract. In relation to the termination letter, the learned trial judge was of the view that Chiverton was unable to carry on performing under the contract and had been compelled, because of its economic circumstances, to abandon the contract. The learned trial judge further opined that Chiverton's declared intention of making a claim, stated in its letter of 22nd December, was yet further evidence of Chiverton treating the contract as at an end.

On appeal, Chiverton challenged several findings of fact made by the learned judge. Additionally, they appealed on grounds which included that (1) the learned judge erred in law in failing to award Chiverton damages for breach of contract having found that the omission letters were without contractual effect; and (2) the learned judge erred in embarking on quantum matters where the trial was expressly stated to be on liability.

Held: dismissing the appeal and ordering that submissions be filed on costs, that:

1. In any appeal which challenges a judge's findings of fact, the appellant has an uphill task. The judge has an opportunity of seeing and hearing the witnesses and a court of appeal will be slow to interfere with them. The judge's findings of fact were rationally explained. His findings were based on a particular assessment of the evidence and he could properly make such findings. The court of appeal cannot interfere with the judge's findings even if it were to take the view that by itself, it might have taken a different view of the evidence. There was adequate evidence to support the judge's findings. The learned judge did not misapprehend the facts or misdirect himself in law.

   Jervis and KST Investments Ltd. v Victor Skinner (Commonwealth of the Bahamas) [2011] UKPC 2 Stemson v AMP General Insurance (NZ) Ltd. New Zealand [2006] UKPC 30, Campbell v Royes (Jamaica) [2007] UKPC 66, Watt (or Thomas) v Thomas [1947] A.C. 484 applied.

2. The finding of 'no contractual effect' does not in law amount to a finding of breach of contract; it simply means that the purported action has no effect whatsoever on the contract. In the present case, it means that the letters were ineffective to

achieve omissions. The judge was mindful that in order for a communication or conduct to be repudiatory it must be such as to evince an intention not to be further bound by the contract, and since the letters purported to operate a contractual provision, albeit, improperly, affirmed the contract. As such the trial judge was correct in law in treating the purported construction change directives in respect of the omissions, as having no contractual effect, and not amounting to a repudiatory breach of contract.

Bysouth v Shire of Blackburn & Mitcham (No. 2) [1928] VLR 562, Woodar Investment Development Ltd v Wimpey Construction UK Ltd [1980] 1 All E.R. 571, Mohammed Jafari-Fini v Skillglass Ltd & Ors [2007] EWCA Civ 261, Concord Trust v The Law Debenture Trust Corpn plc [2005] 1 W.L.R. 1591 applied.

3. The court did not deal with issues relating to quantum. Rather, it only dealt with aspects of the contract and the parties' course of dealings as they relate to assisting it to determine the respondent's liability regarding the appellants' claim. As far as the court addressed or sought clarifications with regard to matters involving price payable for materials, discounts, payments for work completed, variations or change orders and overheads and profits (as claimed by the appellants) it was done with a view to assisting in determining liability and never as a measure of quantum.

4. The remedy of rectification of a contract is only available where the parties agree that the document does not carry out their true intention, or where one party is mistaken so as to be stopped from resisting rectification. It is not the function of the court to rectify an agreement merely because one party has been tough or successful in negotiations and the other has been unwise, missed a point or has failed to appreciate the likely consequences of the agreement.

Halbury's Laws of England Vol. 77 (2010) 5th Ed. para. (4) 57 applied.

JUDGMENT

[1] BAPTISTE, J.A.: This is an appeal from the judgment of Bannister J. dismissing a claim for breach of contract brought by Chiverton Construction Limited ("Chiverton") against Scrub Island Development Group ("the respondent").

Background

[2] In July 2006, Chiverton and the respondent entered into a work and material contract for the construction of five retaining walls at a marine development on

Scrub Island at a contract sum of $554,587.48. The respondent was carrying out the development through its agent Mainsail Development Group ("Mainsail"), a property developer, and Virgin Islands Project Management Company ("VIPM") a project management company. VIPM was the construction manager. The contract incorporated the American Institute of Architects ("AIA") General Conditions of the Contract for Construction, Manager-Adviser Edition (Document AIA201\CMA, 1992 Edition) ('the General Conditions'). Contractual work was to commence on 17th July 2006 and substantial completion was to be achieved by 17th October 2006. Construction was dogged by delay caused by various factors to the extent that in September or October 2006 work had not started on three of the walls and the other two were incomplete. At that same time the respondent decided not to construct any of the three remaining walls on which work had not started. Chiverton received notice of this change on 15th December 2006. By letters dated 12th and 14th December 2006 (the omission letters) VIPM issued construction change directives to Chiverton omitting from the project work to the value of $182,148.00. The excluded works included the three walls on which work had not started.

[3] By letter of 22nd December 2006 Chiverton wrote to VIPM accusing it of refusing to cut the footer for the second wall and also stating that VIPM's conduct had caused it a loss of US$28,000.00. Chiverton also announced its intention of making a claim. In its reply of 11th January 2007, VIPM explained that the footer for the second wall was not cut because of the need adequately to progress the first wall to allow another contractor to begin work in that area. The letter pointed out that the first wall was still not completed and that VIPM had instructed other contractors to carry out work unfinished by Chiverton. Bannister J. held that by 11th January 2007 replacement contractors had already been instructed.

[4] On 15th January 2007 VIPM wrote to Chiverton terminating its contract to construct the remainder of the retaining walls with immediate effect and barring Chiverton's access to Scrub Island. The reason cited was Chiverton's repeated refusal to "supply enough properly skilled workforce on the project to successfully complete

the works". Chiverton commenced proceedings for breach of contract. Its primary case was that the letter of 15th January 2007 operated as a repudiatory breach of contract which it accepted by a letter from its lawyers dated 19th March 2007.

Judgment below – findings

[5] Bannister J. confined the repudiatory claim to the two omission letters and the termination letter of 15th January 2007. With respect to the omission letters, Article 7.3 of the General Conditions dealt with construction change directives. Such directives had to be signed by each of the owner, construction manager and architect. Bannister J. found that the omission letters did not comply with Article 7.3.1 of the General Conditions since they were not signed by Mainsail or the architect so therefore, the omission letters, were without contractual effect. Further, they did not evince an intention not to be further bound by the contract; if anything, they affirmed the contract. The fact that the omission letters purported to operate a contractual provision which, if properly exercised, might have had the effect of making a very significant reduction in the amount of work outstanding did not affect the position.

[6] In addressing the issue of the termination letter of 15th January 2007 the judge expressed his finding as follows:

> "In my judgment the letter of 15th January 2007 is irrelevant. As I have already found, on 14th December 2006 Mr. Chiverton was telling Mr. McCarthy that unless he got paid he could put no more men back on the job. He told the court in answer to a question from Mrs. Tavernier that he would have restarted work once Chiverton had got some money and that everyone had trickled off the job because they had not been paid. It seems to me that this is the clearest evidence that Chiverton was unable to carry on performing under the contract and had been compelled because its economic circumstances had forced it to, to abandon the contract. That was the clear impression I got when Mr. Chiverton gave this evidence. He was candidly admitting that he had reached the end of the road with the contract, although he placed the blame for that on the developer, for underpaying Chiverton. Furthermore, it seems to me that Chiverton's declared intention, stated in its letter of 22nd December of making a claim, was yet further evidence of Chiverton treating the contract as at an end as far as performance by Chiverton was concerned. The developer, by Mr. Roberts' letter of 11th January 2007 had recognized and

> accepted that state of affairs. The letter of 15th January 2007 had no effect whatsoever, because in my judgment the contract had already come to an end before it was sent."

Challenges to factual findings

[7] Several findings of fact are being challenged. For present purposes I will consider the first four: (1) the respondent had not by its conduct repudiated the contract; (2) the respondent's letter dated 15th January 2007 terminating the contract was irrelevant and of no effect; (3) the appellant had not abandoned the contract and (4) the appellant's intention to make a claim as stated in its letter of 22nd December 2006 was evidence that the appellant was treating the contract as at an end.

[8] To the extent that Chiverton seeks to challenge findings of fact it undoubtedly faces a serious hurdle. As stated by the Privy Council in Jervis and KST Investments Ltd v Victor Skinner[1] "[i]n any appeal which challenges a judge's findings of fact the appellant has an uphill task. The judge has had the opportunity of seeing and hearing the witnesses and the authorities show that a court of appeal will be very slow to interfere with them. In Stemson v AMP General Insurance (NZ) Ltd.,[2] Lord Hope said at paragraph 12:

> "…an appellate court is constrained when considering findings of fact made by a trial judge, for the reasons identified by Tipping J. in Rae v International Insurance Brokers (Nelson Marlborough) Ltd [1998] 3 NZLR 190, 198 where he said:
> 'Appellants often wish to treat appeals as retrials on matters of fact. Counsel must, of course, be faithful to their instructions, but they have a duty to make it plain to their clients that the ambit of an appeal on fact is very narrow. Any tendency or wish to engage in a general factual retrial must be firmly resisted. The court will not reverse a factual finding unless compelling grounds are shown for doing so.'"

[9] In Campbell v Royes[3] Lord Neuberger said at paragraph 18:

> "When it comes to findings of primary fact or drawing instances [inferences] from primary fact, it is well established that an appellate

[1] (Commonwealth of the Bahamas) [2011] UKPC 2 at para 9.
[2] New Zealand [2006] UKPC 30.
[3] (Jamaica) [2007] UKPC 66.

tribunal should be slow to interfere with the findings made of a first instance tribunal."

[10] In Watt (or Thomas) v Thomas[4] Lord Thankerton said:

> "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion;
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> …
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> The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question."

[11] Mr. Simonette argued that the finding of abandonment was against the weight of evidence in two respects. Firstly, the judge wrongly construed Chiverton's letter of 22nd December 2006, which gave notice of an intention to launch a claim as amounting to notice of treating the contract as at end as opposed to a lawful contractual notice of a claim pursuant to Article 4.7 of the contract. Secondly, the learned judge wrongly ignored the allegation of abandonment, which had been repeatedly denied by the appellant's managing director. Mr. Simonette submitted that the learned judge's finding that Chiverton had abandoned the contract was contradictory to his acceptance of Mr. Chiverton's evidence that he had informed VIPM that the appellant "could not put more men back on the job unless he got paid". It is also contradictory to his finding that "economic circumstances (non-payment) had compelled the appellant to "abandon the contract".

[4] [1947] A.C. 484 at 487 and 488.

[12] Mrs. Tavernier argued that the appellant must show that the judge's conclusion that the appellant had abandoned the contract was based on a misapprehension of the facts, a mistake of law, or is otherwise outside the generous ambit within which a reasonable disagreement is possible. Mrs. Tavernier submitted that the judge's findings were within his discretion to make and there was no ground for the appellate court to review the evidence and substitute its own conclusion for that of the trial judge.

Grounds of Appeal – Termination

[13] I will first consider the grounds of appeal relating to the judge's finding on the claim relating to the termination of the contract. These are grounds of appeal (a), and (c) to (h).

a. The Learned Judge erred in law in finding that the respondent's letter dated 15th January 2007 purporting to terminate the contract between the appellant and the respondent was not a repudiatory breach of contract entitling the appellant to damages.

c. The Learned Judge erred in law and in fact in finding that the respondent had not, by its conduct, repudiated the contract having found that: (i) the respondent's letter dated 11th January 2007 was written by the respondent in an attempt to avoid any suggestion that it was repudiating the contract; (ii) the effect of the said letter dated 11th January 2007, was that the appellant was being told not to return and that the work which it had done to date was to be completed by others; and (iii) replacement contractors had been instructed by said 11th January 2007.

d. The Learned Judge accordingly misdirected himself in law on the true meaning and effect of the appellant's acceptance of the respondent's repudiation of contract set out in its Attorney's letter dated 19th March 2007.

e. The Learned Judge misdirected himself in law in holding that it was not necessary to resolve the legal status of the termination clause of the contract and in failing to analyse properly or at all the provisions of the said termination clause as purportedly operated by the respondent.

f. The Learned Judge misdirected himself both in law and in fact in holding that the respondent's letter dated 15th January 2007 was irrelevant and of no effect.

g. The Learned Judge erred both in law and in fact in finding against the weight of the evidence that the appellant had abandoned the contract and that such abandonment had been accepted by the respondent by its letter dated 11th January 2007.

h. The Learned Judge misdirected himself both in law and in fact in finding that the appellant's intention of making a claim as stated in its letter dated 22nd December 2006 was evidence that the appellant was treating the contract as at an end as opposed to exercising its contractual rights to make a claim.

[14] The appellants say that the respondent acted unlawfully by either repudiating, unlawfully terminating, wrongfully exercising the forfeiture provisions of, or preventing the appellant from performing the contract. The appellants primarily submit that the learned judge acted under a mistake of law in finding that the respondent did not repudiate the contract, because the judge erred in fact in finding that the appellant had previously abandoned the contract, and this abandonment was accepted by the respondent. Mrs. Tavernier states that the appellants' submissions on the judge's findings with regard to: (a) the respondent's letters of 11th January 2007 and 15th January 2007; (b) the appellants' purported acceptance of repudiation, by its attorney's letter of March 19, 2007; and (c) the judge's decision that it was unnecessary to resolve the legal status of the termination clause follow on from that primary submission. Mrs. Tavernier contends that the appellants must show that the judge's conclusion that the

appellant abandoned the contract, was based on a misapprehension of the facts, a mistake of law, or is otherwise outside the generous ambit within which a reasonable disagreement is possible.

[15] The appellant argues that the judge's finding on abandonment was against the weight of the evidence in 2 regards – firstly in the judge's construction of the appellants' letter of 22nd December 2006 and secondly because the appellant submits that the judge wrongly ignored that the allegation of abandonment had been repeatedly denied by the appellants' managing director, Mr. Junior Chiverton, under cross-examination.

[16] Mrs. Tavernier submits that the judge's findings were within the discretion of the judge to make, and there is no ground for asking this appellate body to review the evidence and substitute its own conclusion for that of the trial judge. Mr. Justice Bannister's finding was that the appellant had abandoned the work and the respondent had accepted this state of affairs. The judge is entitled, even obliged, to determine whether the facts amounted in law, to an abandonment of the contract, regardless of how any party may characterize in testimony.

Analysis

[17] The critical question is whether the trial judge could properly have arrived at the conclusion that he did based on the evidence before him; or whether, based on the available evidence, the reliability and credibility of which he had to assess, he was plainly wrong. One has to bear in mind that the assessment of evidence and the acceptance or rejection of any part of the evidence are matters for the trial judge. The trial judge's conclusions of primary fact were informed largely from the view he formed of the oral evidence of the witnesses and also from an analysis of the documents.

[18] The judge did not base his finding of abandonment on the letter of 22nd December 2006; he characterized that letter as simply providing additional support for his conclusion. His conclusion was based on Mr. Chiverton's evidence (which was

accepted in preference to that of Mr. McCarthy for the Defendant/Respondent) in which he candidly admitted that he could put no more men back on the job and had reached the end of the road with the contract. The judge found that the appellants' economic circumstances, for which the appellant blamed the developer, had forced it to abandon the contract. The judge, however, did not find any evidence that the appellant had been underpaid. He found that the appellant had been paid for all agreed valuations, that the appellant had been properly paid in respect of all change orders, that it had not been proven that any additional labour and materials as yet unclaimed for was due to the appellant in respect of the increase in height to the first retaining wall from 8 feet to 12 feet as pleaded, and that no additional payment for overheads and profit was due to the appellant in respect of change orders. The judge did find that the economic straits faced by the appellant were contributed to by the structure of the contract, and by various delays for which the respondent was responsible. The judge therefore gave judgment for the appellant on its claim for delay, which is proceeding to assessment.

[19] Unlike the Court of Appeal, the trial judge had the great advantage of seeing the witnesses give their evidence and was well placed to assess their credibility. The judge was able to do so against the available documentary evidence. In that situation, the Court of Appeal would undoubtedly pay deference to the judge's factual findings and his inferences from primary facts. He had "a greater feel for the atmosphere of the trial and matters such as that". The judge's findings of fact were rationally explained. His findings were based on a particular assessment of the evidence and he could properly make such findings. It cannot be said that the judge was plainly wrong more so as his conclusions depended to a large extent upon the view he formed of Mr. Chiverton's evidence. In the premises this court cannot interfere with the judge's findings even if it were to take the view that by itself, it might have taken a different view of the evidence. In my view there was adequate evidence to support the judge's finding and I agree with them. I agree with the process of reasoning which led the trial judge to make his finding.

Further, the learned judge did not misapprehend the facts or misdirect himself in law. In the circumstances, grounds of appeal (a) and (c) to (h) must fail.

Grounds of Appeal: (b) and (i) – The Omission Letters

[20] Ground (b) asserts that the learned judge erred in law in finding that the respondent's letter dated 15 January, 2007 purporting to terminate the contract between the appellant and the respondent was not a repudiatory breach of contract entitling the appellant to damages.

[21] Ground (i) contends that having found that the respondent's letters dated 12th and 14th December 2006 were without contractual effect, the learned judge erred in law in failing to award the appellant damages for breach of contract.

[22] The appellants' ground (i) of appeal asserts that the judge erred in law in not awarding the appellant damages for breach of contract having found that the respondent's letters dated 12th and 14th December 2006, were without contractual effect. The factual background of the omission letters is that the contract provided for omissions to be effected by a construction change directive, which requires the countersignature of the architect. The architect did not sign the omission letters and as such they failed to comply with the contractual conditions. These elements of the contract were omitted from the project altogether, and as such were never built. The appellant pleaded that this was a repudiatory breach of contract.

[23] Bannister J. found as a fact that the respondent's construction manager had no power on its own and by itself to impose changes through the mechanism of construction change directives. The omission letters were therefore unauthorized, and he found that these communications were without contractual effect.

[24] The finding of 'no contractual effect' does not in law amount to a finding of breach of contract. The leading authority in this regard is the House of Lords case of Concord Trust v The Law Debenture Trust Corpn plc.[5] In that case

[5] [2005] 1 W.L.R. 1591.

bondholders sought to compel a trustee to serve a notice of acceleration consequent on the trustee's determination of an event of default. The trustee sought an indemnity of GBP 1 billion, on the basis that it was at risk of a claim for damages for breach of contract in that amount, as the issuer had notified the trustee that it would view any such notice as invalid as the contractual preconditions for the same would not have been met, and their potential loss would approach that figure. In the judgment, Lord Scott of Foscote considered whether an invalid notice of acceleration would amount to a breach of contract, and stated –

> "*Breach of contract.* The act that would have to constitute the breach of contract is the giving of an invalid notice of acceleration, or, perhaps, having regard to the claims apparently made in the arbitration, the unjustified assertion of the occurrence of an event of default. There is nowhere in the trust deed any express undertaking by the trustee not to do either of those things. So a suitable implied term would have to be read into the trust deed.
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> … [A] term will be implied if it is necessary to give business efficacy to the contract. … The proposed implied term cannot satisfy this test. The trust Deed works perfectly well without the implied term. It is open to Elektrim to challenge the existence of an alleged event of default or the validity of a notice of acceleration. If the challenge succeeds neither the alleged event nor the invalid notice will be of any contractual significance… [i]t is not reasonably arguable that the unjustified assertion by the trustee of an event of default or the giving by the trustee of an invalid notice of acceleration exposes the trustee to the risk of being found liable in damages for breach of contract."[6]

[25] In short, a finding of no contractual effect means that the purported action has no effect whatsoever on the contract. In the present case, it means that the letters were ineffective to achieve the omissions – hence the judge referring to them as having "purported to remove" certain works from the contract. Further support for this view is found in the case of Mohammed Jafari-Fini v Skillglass Ltd & Ors[7] where it was claimed that the defendants repudiated the contract by serving a

[6] Ibid at p. 1601 paras. 36 and 37.
[7] [2007] EWCA Civ 261.

notice of default, during a period where the contract provided that no such notice could be served unless the event constituted a "Major Default". In considering the effect of an unauthorized notice of default Moore-Bick LJ stated –

> "This submission raises the question whether on the true construction of the agreement the service of an unauthorized notice of default would constitute a breach of contract at all… If a notice of default is given before one of the stipulated events has occurred the notice is simply invalid and of no effect… I am satisfied that Skillglass was not under a positive obligation to refrain from giving an unauthorized notice; any such notice was simply invalid and ineffective. It follows that, even if there was no Major Default, Skillglass did not in my view commit a breach of the Facility Agreement that was capable of discharging PAL from its obligations."[8]

[26] In coming to this decision, Moore-Bick LJ followed the Concord case. Mrs. Tavernier submitted, and I agree, that the judgments in both cases emphasized that unless there was a positive obligation to refrain from serving unauthorized notices, to do so would not constitute a breach of contract. By analogy unless there was a positive obligation on the respondent to refrain from issuing unauthorized construction change directives, to have done so did not constitute a breach of the contract. The judge was mindful that in order for a communication or conduct to be repudiatory it must be such as to evince an intention not to be further bound by the contract,[9] and since the letters purported to operate a contractual provision, albeit improperly, they affirmed the contract. Full support for that position is found in the House of Lords case Woodar Investment Development Ltd v Wimpey Construction UK Ltd,[10] where the purchaser under a contract for sale sought to operate a contractual provision for rescission in the event of a governmental authority commencing compulsory acquisition procedures over the property or any part of it. The purchaser had been aware of such procedures being in train at the time of contracting. It was held that the compulsory acquisition did not "commence" within the meaning of the provision, and the purchaser's notice was therefore wrong in law. However, the House of Lords held that this was not a repudiatory breach. Lord Wilberforce stated –

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[8] Ibid at paras 113 and 118.
[9] Para. 46 of the judgment.
[10] [1980] 1 All E.R. 571.

> "… in considering whether there has been a repudiation by one party, it is necessary to look at his conduct as a whole. Does this indicate an intention to abandon and to refuse performance of the contract? In the present case, without taking Wimpey's conduct generally into account, Woodar's contention, that Wimpey had repudiated, would be a difficult one. So far from repudiating the contract, Wimpey were relying on it and invoking one of its provisions, to which both parties had given their consent. And unless the invocation of that provision were totally abusive, or lacking in good faith, (neither of which is contended for), the fact that it has proved to be wrong in law cannot turn it into a repudiation …
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> … [I]t would be a regrettable development of the law of contract to hold that a party who bona fide relies on an express stipulation in a contract in order to rescind or terminate a contract should, by that fact alone, be treated as having repudiated his contractual obligations if he turns out to be mistaken as to his rights. Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations. To uphold Woodar's contentions in this case would represent an undesirable contention of the doctrine."[11]

[27] The case of Bysouth v Shire of Blackburn & Mitcham (No. 2)[12] is also instructive. The defendant issued a notice of termination to the claimant, on grounds consistent with the contractual power of termination for willful breach[13] although it was not certified by the engineer, as required by the contractual provision.[14] It was found that the notice nevertheless was not a repudiation of the contract (and could not be as it was an invocation of its terms).[15] This is the precise situation which arises in the present case. As such, Bannister J. was correct in law in treating the purported construction change directives in respect of the omissions, as having no contractual effect, and not amounting to a repudiatory breach of contract.

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[11] Ibid at pages 574, 576.
[12] [1928] VLR 562.
[13] Ibid per Irvine, C.J. at 570, Lowe, J at 581-582.
[14] Ibid per Irvine, C.J. at 570.
[15] Ibid per lowe, J at 581 expressing the view that a purported determination pursuant to the contract itself "cannot possibly be a repudiation or renunciation of the contract – the one is the antithesis of the other". It was also held that the purported contractual determination, though invalid, was capable of amounting to an acceptance of the claimant's repudiation at common law – per Lowe, at 583.

Grounds (j) and (k)

[28] Ground (j) alleges that the learned judge erred both in law and in fact in failing to appreciate that the valuations/payment certificates issued under the contract were interim in nature and not in full and final settlement of sums due and owing to the contractor which could only be arrived at upon a re-measurement of the works and the drawing of a Final Account.

[29] The complaint in ground (k) is that the learned judge misdirected himself both in law and in fact in finding that Certificates for Payment issued by the respondent and signed by the appellant were in full and final settlement and conclusive of the monies payable to the appellant whether in connection with the original contract works, additional works, or work the subject of change orders and that accordingly no additional payment was due to the appellant for labour, materials, overheads and profit in respect of same whereas the contractual code for payment anticipated interim progress payments with a final payment at the end of the contract following final inspection, review and acceptance of the works which contemplated the final measurement of the work.

[30] It must be pointed out that the appellant made no claim for re-measurement of the works and preparation of a Final Account and for payment of any amounts found to be due and owing under such Final Account. As such, this matter was not put before Bannister J. As such, no appeal can lie in this regard. Further, the findings asserted under these grounds of appeal do not appear in the judgment expressly or by inference.

[31] The appellants' claim was for repudiatory breach of contract. At paragraph 19 of its Statement of Case the appellant pleaded that its quantity surveyors had prepared a Final Account valuing its work at $271,197.49, and averred that the respondent had only paid the appellant a sum in the region of $80,000.00. The appellant therefore claimed at paragraphs 21 to 23 that –

> "21. By their conduct set out at paragraphs 10 to 20 thereof the Defendant by its agent, Mainsail and VIPM, has evinced an

intention no longer to be bound by the contract and it has repudiated the same.

22. The First Claimant, as it was entitled to do accepted the Defendant's repudiation by letters dated 20th March 2007.

23. By reason of the foregoing the Claimant has lost the benefit of the contract and lost the revenue it would otherwise have received under it and has thereby suffered loss and damage and incurred loss and expense."

[32] In the particulars to paragraph 23 of its Statement of Case, the appellant then specified the loss and expense arising from the repudiation as amounting to $414,272.05, and claimed payment of this sum or, in the alternative, damages for breach of contract.[16]

[33] Bannister J. found that the respondent did not repudiate the contract, and that the entirety of the appellants' contract claim, save for delay, failed. He also found (though not specifically in relation to this pleading, although it is equally applicable) that" … Chiverton by its conduct clearly affirmed the contract by continuing to work for a substantial time after even the latest of these matters of complaint had occurred … [and] that the claim that the developer repudiated the contract must be confined to the two omission letters and the termination letter of 15th January 2007".[17] In this regard it is to be noted that the appellants' plea (at the said paragraph 19) was based on a purported "Final Account" prepared by the appellants' quantity surveyors appearing as CCL-5 to the appellants' Statement of Case, and that the quantity surveyor explains in his report that his calculations were based on Valuation #4 and discussions with Mr. Chiverton.[18] Importantly, subsequent to that Valuation #4 the appellant agreed another Valuation #5 with the respondent.[19] It is common ground between the parties that the appellant also accepted payment for all of Valuations 1 through 5.

[16] Record of Appeal Vol. 4, pages 623-624, and 629.
[17] See para. 34 of the judgment.
[18] Record of Apeal Vol. 7, pages 1177-1178, paras 7-9.
[19] Record of Appeal Vol. 5 page 969.

[34] There is no other claim, separate from the claim of repudiatory breach, in respect of the value of the works. The evidence supports the judge's finding on repudiation and this finding is correct as a matter of law. These grounds of appeal must fail.

Grounds (l) and (n) – Change Orders (including transportation)

[35] Ground (l) states that the learned judge misdirected himself in fact in his analysis of whether money was due and owing to the appellant for change orders in respect of the first retaining wall and in finding that no additional payment in respect of labour, materials, overheads and profit is due from the respondent in respect of the said change orders.

[36] Ground (n) alleges that the learned judge erred both in law and in fact in failing to award the appellant compensation for transport on equitable principles against the weight of the evidence given at the trial by Jonathan McCarthy on behalf of the respondent that transport is a cost of the contractor which is ordinarily recoverable and ordinarily included in the Bill of Quantities for Preliminaries.

[37] The appellants assert that the learned judge misdirected himself in fact in whether there were amounts due and owing by the respondent, and that the judge's findings embarked on matters of quantum. The respondent submits that the judge made findings of fact as to whether there were any amounts due and owing and that this is a matter of liability. The appellants did not call expert evidence as to these factual matters at trial and left this to the discretion of the judge.[20] When Bannister J. at the end of trial proposed to deliver his judgment on liability alone, the appellants did not ask for the expert report prepared on its behalf to be admitted into evidence.

[38] The respondent's primary submission is that the appellants' claim in relation to these change orders was for special damages, or in the alternative general damages, for repudiatory breach of contract. The learned judge having correctly

[20] Record of Appeal Vol 1 page 38 line 15 to page 39 line 15.

found that there was no repudiation, these grounds of appeal must fail. There was no independent claim for underpayment.[21]

[39] However, if a claim in this regard, though not specifically set out, arose from the pleadings, the appellants would have had to satisfy the judge on the balance of probabilities that there was in fact, some amount due and owing.

[40] The appellants pleaded that during the contract certain change orders were made which the appellant duly performed and for which it is entitled to be paid but the respondents have failed and/or refused to pay. The appellants therefore claimed that the respondent's failure amounted to a repudiatory breach of contract. These were listed as –

(1) Change Orders as per Valuation #4 $11,382.91;
(2) Transport of labour from Virgin Gorda $20,000.00;
(3) Additional 4 feet added to 12' high wall – rebar and formwork for 180' length of wall $19,062.91; and
(4) Profits and overheads on the foregoing $7,566.87.

[41] A review of the judge's specific findings on these matters is instructive. Bannister J. made the following findings –

(1) Change Orders – "I am satisfied that payment was properly made and agreed by signature of Mr. Chiverton in respect of all change orders (in a total sum of US$11,382.91)". This finding is amply supported by the evidence. Valuation #4 certifies this amount for the change orders, which forms part of a Gross Valuation of $136,275.94, and after contractual deductions the "Payment due by 13th October 2006" amount to $34,426.23. The Valuation was agreed and signed by the

[21] See in this regard the observations of the Court to be found at the Record of Appeal Vol 2 page 363 lines 5-8.

appellant. The respondent's cancelled cheque in the amount of $34,426.23 appears at page 1000 of Volume 5 of the Record.

(2) Transportation – "No claim can lie against the developer for this amount. It is a very unhappy situation, but the Court cannot mend the contract by providing for something, which could have been, but was not, included unless the omission is the result of equitable or actual fraud or mistake. Neither is pleaded, and there is no evidence to suggest that anything of the sort occurred."[22]

The respondent's case at first instance was that the contract specifically provided for the appellant to bear the cost of transportation.[23] It is clear from the evidence that the parties did not agree that the appellant would be compensated for the cost of chartering a vessel.[24] In essence the appellant asserts that the contract should be rectified, though this, again was not pleaded at first instance. However such a remedy is only available where the parties agree that the document does not carry out their true intention, or where one party is mistaken and the other sees and takes advantage of the mistake so as to be stopped from resisting rectification.[25] The authors of Halsbury's Laws of England point out that –

> "It is not the function of the court to rectify an agreement merely because one party has been tough or successful in negotiations and the other has been unwise, missed a point or has failed to appreciate the likely consequences of the agreement."[26]

(3) Additional 4 feet added to 12' high wall – "[a]lthough it appears that Chiverton has been credited with US$8,413.00 in respect of a concrete component for that work, there is no evidence that it has been paid for extra materials used for labour… it appears that by 27th November 2006 Chiverton had completed 66% only by value of the wall as original designed, leaving work and materials to a value of some US$43,000.00 uncompleted, it is difficult to see that any additional labour and materials as yet unclaimed for can be due in

[22] Para. 57 of the learned judge's judgment.
[23] Record of Appeal Volume 5 pages 782 par 24, and page 824 par 3.4.1.
[24] Evidence of Junior Chiverton – Record of Appeal Vol 1 page 153 line 5 to page 157 line 17.
[25] Halsbury's Laws of England Vol 77 (2010) 5th Edition par (4) 57 – Tab 10.
[26] Ibid.

respect of this wall from the developer to Chiverton, despite the design change to its height."[27]

The judge found as a fact that the contractor only completed approximately 2/3 of the original height of the wall and therefore could not make a claim to be compensated for additional labour and materials attributable to an increase in height, since the original work was not completed, far less the additional work that was required by the design change. This is supported by the documentary evidence as set out in Valuation #5 which was agreed by the parties and signed by the appellant.[28]

(4) Overheads and profit – "I should add that I am satisfied that no additional payment for overheads and profit is due from the developer to Chiverton in respect of the US$11,382.91 paid for the change orders down to 29th September 2006. The payment of those sums was plainly intended to be in full settlement for the additional work which they encompassed. Had Mr. Chiverton thought otherwise, he would not have countersigned the certificates under which they became payable."[29]

This is a finding of fact based on the documentary evidence, namely, the Certificates for Payment in respect of the Valuations which were signed by the appellant.

[42] The amount pleaded for the value of the change orders corresponds exactly with the amount certified by the respondent's construction manager.[30] The appellant did not plead that the change orders were undervalued, in fact, the appellant signed the valuations in which the change orders were quantified, and did not plead any mistake, fraud, or manifest error. Moreover, with particular reference to the change order for $11,382.91, at trial the appellants confirmed that payment

[27] Para. 55 of the learned Judge's judgment.
[28] The change order increasing the height is found at page 964 of the Record of Appeal; the relevant portion of Valuation #5 appears at page 974 of the Record "Retaining Wall Rear of D-G".
[29] Para. 56 of the learned judge's judgment.
[30] Certificate for Payment #5 – Record of Appeal Vol. 5 page 969.

had been received in full and this was no longer contested.[31] The appellants have failed to show any misdirection in fact in respect of its case as pleaded in respect of change orders.

[43] The appellant asserts for the first time in this appeal, at paragraph 82 of its Skeleton Argument, that although the respondent asserts that the appellant was paid $163,432.53 in respect of valuations for works the respondent's own documents reveal that only the sum of $87,383.59 had been paid, and that the judge should not have adjudicated on these issues as the trial was on liability only the learned judge was unassisted in complicated calculations by any expert evidence.

[44] The argument advanced by the appellant as to underpayment on the basis of the discrepancy between valuations of $163,432.53 and payment of $87,383.59 is unsustainable. Firstly, this claim was not made at first instance. Secondly, the re-amended defence at paragraph 34(a) makes it clear that both the contract sum and the valuations included the cost of owner supplied materials.[32] At paragraph 5 of his judgment, Bannister J. explained the nature of the contract including the supply of material by the respondent. He stated –

> "The total value of the materials delivered to the contractor during the period covered by each progress payment was then deducted from the amount of the progress payment."

[45] The last of the four agreed valuations[33] which was Valuation #5[34] clearly shows the line item for Gross Valuation as $163,432.53. It is also clearly shown immediately below this, the relevant contractual deductions and the resulting amount of money to be paid to the contractor as the line item "PAYMENT DUE BY…". The respondent's cancelled cheques and bank statements show payments which support the figure on each of the agreed valuations for such payments due.

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[31] Record of Appeal Volume 1 page 130 lines 4-7.
[32] See also the observations of the Court at the Record of Appeal Vol 2 page 346 line 12 to 347 line 9.
[33] The first certificate "Valuation #1" was not a valuation but an advance payment.
[34] Certificate for Payment #5 and the supporting valuations are found at the Record of Appeal Vol. 5 pages 969 and 973-974. See also Record of Appeal Vol 2 page 333 lines 22- line 10 p. 334 regarding the order of pages for Certificate #5 and the supporting valuation.

[46] The documentary and oral evidence presented enabled the learned judge to make findings of fact as to whether any liability existed for underpayment, which he was entitled to do. The appellant has failed to show any misdirection of fact in this regard.

Ground (m)

[47] Ground (m) states that having found that once the materials were incorporated in the measured works, the appellant was entitled to receive an 18.25% discount for the said materials, the learned judge misdirected himself in fact in finding that the prices charged to the appellant for materials actually included such discount without having the benefit of expert opinion evidence.

[48] Mrs. Tavernier submitted, firstly, that the appellant has never pleaded or claimed that it did not receive the requisite discount for materials. This was one of what the court referred to as a "mass of unpleaded complaints" raised for the first time at trial. At trial, for the first time, the appellant alleged that an applicable 10% discount on the price of materials had not been applied.[35]

[49] Secondly, Justice Bannister, QC did not make the finding asserted by this ground (m), that the appellant was entitled to receive an 18.25% discount. What the judge actually said appears at paragraph 5 of his judgment which reads –

> "It is fair to say that once materials were incorporated in the measured work, the contractor would receive an additional 18.25% (because for the purposes of the estimates the materials were given a markup of 10% and because an additional 7.5% of that figure was allowed in the estimate as part of the contractor's profit)."

[50] This was a finding of fact based on the judge's examination of the Estimates and Bills of Quantities, in conjunction with Mr. Jonathon McCarthy's oral evidence on re-examination.[36] His finding is therefore supported by the documentary evidence and not only by Mr. McCarthy's evidence, which oral evidence it was nevertheless

[35] Record of Appeal Vol. 2 page 356 line 4 to page 366 line 1.
[36] Record of Appeal Vol. 3 – pages 408-423.

well within the judge's discretion to accept. Further, appeals must be made against a judgment or an order and not against the reason whereby the judgment or order was made or against findings made along the way.[37] In any event, in light of the fact that there was no pleading, or claim made in this respect, this ground of appeal must fail.

Ground (o)

[51] Ground (o) states that notwithstanding that the trial was expressly stated to be on liability only the learned judge erred in law in embarking upon quantum matters which in the result was both wrong in law and in fact and which in any event requires the assistance of expert evidence on an assessment of damages.

[52] The matters in respect of which the appellant says that the judge embarked upon matters of quantum all relate to non-payment in respect of the work, particularly, change orders/variations, and increased costs attendant on delay/disruption. The appellant does not assert, and did not assert at trial, that expert opinion evidence was necessary to decide the question of liability for these matters.

[53] The respondent's principal submission is that the appellants' claim in relation to these matters was for repudiatory breach of contract. The claim for repudiatory breach of contract failed. This is a finding on liability. The judge's finding in this regard is correct in law and in fact.

[54] The court did not deal with issues relating to quantum. The court only dealt with aspects of the contract and the parties' course of dealings as they relate to assisting it to determine the respondent's liability regarding the appellants' claims.

[55] Quantum is the amount of damages due. Blacks' Law Dictionary Deluxe[38] defines quantum as the required, desired, or allowed amount; portion or share. The court has not (with the exception of personally to Mr. Chiverton for

[37] The White Book Service 2003, Civil Procedure Volume 1, Part 52.0.13, p. 1257 – Tab 11.
[38] 9th Ed. Tab 12.

defamation) dealt with the measure/value of damages due upon its findings of liability. As far as the court addressed or sought clarifications with regard to matters involving price payable for materials, discounts, payments for work completed, variations or change orders and overheads and profits (as claimed by the appellants) it was done with a view to assisting in determining liability and never as a measure of quantum.

[56] A review of the transcript, particularly in Volume 3 from the point of Mr. McCarthy's re-examination through to the closing submissions contradicts the appellants' position in this regard. In fact there are at least two areas in the transcript[39] where points which related to quantum were raised and the court dismissed it at the stage saying that it went to quantum evidencing clearly that its mind was not at that time addressed to quantum.

[57] Mrs. Tavernier submitted, and I agree, that so far as the judge considered the appellants' assertions relating to the issue of non-payment or underpayment, it was plainly necessary for him to determine whether any liability existed on any of the claimant's claim before the matter could proceed to assessment of quantum. The judge was entitled, to examine the evidence and to perform the simple arithmetical calculations needed to determine whether there was in fact liability for non-payment or underpayment.

[58] The essence of the judge's various findings on these matters is simply that the assertions and issues raised by the appellant as to non-payment, were not sustained by the evidence, and accordingly the respondent was not liable. This is a finding as to liability, not quantum.

[39] Record of Appeal Vol. 3, Pg. 530, lines 13-14 & Pg. 547, lines 8-11.

Conclusion

[59] The appeal is accordingly dismissed. There were other claims also between the parties before Bannister J. which resulted in Bannister J. awarding Chiverton damages for defamation, directing an inquiry as to damages for delay in the contract claim and ordering a further hearing on the question of costs. The general rule is that the unsuccessful party in the appeal pays the costs of the successful party but due to the uncertainty as to the outcome of the entire claim in the court below concerning costs, the parties are directed to file and serve written submissions on costs within 14 days from the date this judgment is served on them. The parties are to make written submissions on costs within 14 days.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal

I concur.

Michael Gordon, QC
Justice of Appeal [Ag.]