IN THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV2009/0558

BETWEEN:

FELIX HIPPOLYTE

Claimant

and

(1) DAVIDSON DELSOL
(2) JACQUELINE ANGELA DELSOL

Defendants

Appearances:
Ms. Maureen John for the Claimant.
Ms. Leandra Verneuil for the Defendants.

2011: January 24th & 24th,
2013: March 11th.

JUDGMENT

[1] WILKINSON J.: The Claimant filed his fixed date claim form and statement of claim on June 16th 2009, alleging breach of a construction contract by the termination of his services on November 3rd 2008. The Defendants filed their defence and counterclaim on October 9th 2009, alleging breach of the same contract. The Claimant filed a reply to defence and defence to the counterclaim on November 9th 2009. The relief sought by the Claimant was:

i. the sum of $87,150.00 representing the balance due under the agreements for the completed Work;
ii. the sum of $10,000.00 representing the retention held by the Defendants on the first phase of construction;
iii. the sum of $78,000.00 representing damages for breach of contract;

iv. the sum of $500.00 being the cost for the valuation report;
v. any other order as the Court deems just in the circumstances;
vi. further or other relief;
vii. interest on all sums awarded to the Claimant;
viii. costs.

The relief sought by the Defendants in their counterclaim was:

i. special damages;
ii. general damages;
iii. interest;
iv. costs.

{2} At the start of the trial, Counsel for the Defendants sought leave that the documents identified and exhibited to the First Defendant's witness statement filed December 7th 2010, be referred as the Defendants' documents were not included in the trial bundle. Counsel for the Claimant said that the Claimant had no objection to the leave being sought. Leave was granted.

Issue

[3] The sole issue is whether either or both Parties breached the construction contract.

Evidence

[4] The Court has observed that the witness statements of both Parties contain hearsay statements to which neither of the Parties took objection. The Court reminds Counsel of the hearsay provisions in the Evidence Act sections 48 et seq. The Court will disregard all hearsay evidence set out in the witness statements.

[5] The Claimant is a building contractor. The Defendants are husband and wife, they reside at the United Kingdom, the First Defendant is an electrical inspector. There was executed between the Claimant and the Defendants a construction contract to build for $800,000.00 according to plans annexed and drawn by draftsman, Mr. Sam Benjamin and approved by the Physical Planning Department on the Defendants' land situate at Savannes Bay, Vieux Fort, a house comprising of 4 bedrooms, 3 bathrooms, 1 powder room, living room, kitchen, dining room, 4 balconies, a gym room and a 2 bedroom

apartment in the downstairs. The area of the main floor was to be 4,350 square feet and the apartment 1000 square feet. The land was not flat. The Claimant said that the contract was also amended by oral terms however, there was no evidence of what was comprised in any of the oral terms.

[6] The contract price was arrived at pursuant to a cost estimate prepared by Mr. Richard Samy at April 2nd 2008.

[7] At April 28th 2008, the Second Defendant on behalf of the Defendants paid to the Claimant $25,000.00 against phase 1 stage 1, construction of the substructure.

[8] The Court was given sight of several of the construction plans and these included approved original plans, approved amended plans and plans drawn to illustrate the concrete slab eventually built by the Claimant. The evidence was that the Claimant also received electrical plans. Neither the approved original nor the approved amended plans made provision for the opening for the steps/staircase which became an issue.

[9] It was agreed that there was no topography plan prepared or delivered to the Claimant. Mr. Benjamin said that normally a site visit would have been a condition precedent to assess the topography before drawing the plans, however from his employer, the Government of Saint Lucia, he had resources available to him which provided information on the topography, contour lines and photographs of the area. He also said that another reason he did not visit the land was because it was not debushed by the Defendants.

[10] The Claimant's and Defendants' copies of the General Conditions of Contract bore several unexplained discrepancies.

[11] The Claimant only provided the Court with a copy of the General Conditions of Contract, and the Defendants presented the Court with the page bearing execution of the contract and the General Conditions of Contract. From the Defendants' page of the contract showing execution, the Court observed that the contract was executed on April 27th 2008, by the Claimant and the Second

Defendant and at June 4th 2008 by the First Defendant. The contract sum was stated on the execution page to be $800,000.00. On the Defendants' execution page there was stated to be incorporated in the contract two (2) attachments namely (i) General Conditions of Contract and (ii) drawings and specifications. Time was to be of the essence according to paragraph B of the General Conditions of Contract.

[12] According to the execution page, construction was to commence on or before April 28th 2008, and be completed no later than May 28th 2009. The Claimant said that the contract was extended to eighteen (18) months but produced nothing in writing i.e. a change order to support this statement.

[13] Under the General Conditions of Contract at paragraph C the work was broken down into phases which included substructure, superstructure, external walls and so forth. To each phase was attached a cost and this cost was broken down into three (3) stage payments of twenty (20) percent for down payment before each phase commenced, thirty (30) percent when fifty (50) percent of the phase was completed, and a further forty five (45) percent when the phase was completed. The remaining five (5) percent of the payment at each phase was to be withheld by the Defendants until completion of the building on the completion date.

[14] The Court has observed differences between some parts of paragraph C of both the Claimant and Defendant's copy of the contract. For example in the Claimant's copy of the contract at phase 1 substructure shows a breakdown of $25,000.00 for 20 percent, $38,000.00 for 30 percent, and $56,000.00 for 45 percent with total payment being $126,000.00 (including 5 percent retention). The Defendants' copy of the contract at phase 1 substructure shows no breakdown of stage payments only a total of $126,000.00; the Claimant's copy of the contract at phase 2 superstructure shows a breakdown of $30,000.00 for 20 percent, $46,000.00 for 30 percent, and $68,000.00 for 45 percent with a total payment being $153,000.00 (including 5 percent retention); the Defendants copy of the contract at phase 2 superstructure shows no breakdown of the stage payments only a total of $153,000.00. A further

difference observed by the Court is that the Defendants Contract under the breakdown of payments for the stages had a further schedule setting out the time to be taken to complete each stage and so the substructure was to take one (1) month, and the superstructure two (2) months. The Claimant's copy of the Contract had no such provisions.

[15] The Court also observed that while the schedule outlined above in both Parties' copies of the contract at the top of the table of breakdown spoke of a retention of five (5) percent, the Claimant's copy had an additional paragraph not seen in the Defendants' contract which read:

> "The Owner will pay the Claimant 90% of the above referenced Progress staged Payments with remaining 10 % being held back by the Owner until completion of the Work on the Completion Date. Staged payments will be due 1 month after contractor's invoice & confirmation that progress stage has been completed to specifications and drawings listed in Part A by Inspector appointed by (O)owner (client)."

The Defendants' Contract also provided for a further matter not seen in the Claimant's contract. Under the matter of phases and stage payments it provided:

> "Materials to be supplied By Owner
>
> 1. Tiles for floor & wall
> 2. Windows
> 3. Doors external & internal (handles & locks for internal doors only)
> 4. Paint (internal & external)
> 5. Electrical accessories (sockets, switches 7 light fittings)
> 6. Sanitary fittings (toilets, showers, bath, taps, sinks)
> 7. Kitchen cupboards"

The matters for consideration not having gone beyond discussion of phases 1 and 2, the other stages are not relevant.

[16] Other relevant provisions of the General Conditions of Contract are:

> "E. CONTRACTORS RESPONSIBILITIES. The Contractor will supervise and be solely responsible for all construction means, methods, techniques and procedures for the Work. Unless specifically agreed in writing, the Contractor will provide and pay for all labour, materials, equipment, tools, construction equipment & machinery,

transportation & other facilities & services necessary for execution and completion of the Work. If this Contract is for the new construction of an entire building/structure, the Contractor will also provide water, heat, electricity & utilities necessary to the Project…

The Contractor warrants that all of the materials used in performing the Work will be new unless otherwise specified and that all Work will be of good quality and in conformance with applicable building codes and laws….

G. CHANGE ORDERS. Subject to The Proposal, Part A & Part B, the Work, Contract Price and completion Date may be modified only by a properly executed Change Order. All Change Orders must be signed by the Owner and the Contractor to be binding upon the parties." (My emphasis)

"H.QUALITY OF WORK. The Contractor will carry out the Work according to the drawings, specifications and other documents that comprise this Contract. Upon substantial completion of the Work, all Work that in the Owner's reasonable opinion is not yet complete or which fails to meet Contract requirements will be specified in a punchlist/snagging executed by the Owner and the Contractor and will be promptly corrected by the Contractor, and all costs or damages to the other portions of the Project resulting from such defective work or correction thereof will be paid by the Contractor. If the Contractor does not make such corrections to the Work, the Owner may do so at the expense and for the account of the Contractor…(My emphasis)

L. DEFAULTS. If the Owner fails to make any required payment for a period of 60 days after it is due, the Contractor may upon 2 additional days' written notice to the Owner terminate the Contract and recover from the Owner payment for all Work performed but not for materials furnished to the Project and not for the use of all construction equipment and machinery in the performance of the Work.

If the Contractor
(1)…(2)… (3) Fails to supply sufficient skilled workers or suitable materials or equipment for the Project…

The Owner may without prejudice to any other right or remedy the Owner might have by law giving the Contractor 7 days notice terminate the services of the Contractor, take possession of the Project and all materials thereon, and finish the Work by whatever method the Owner may deem expedient. In such case, the Contractor will not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the Contract Price exceeds all costs to the Owner of completing the Work exceed such unpaid balance, the Contractor will pay the difference to the Owner immediately upon the Owner's demand for such payment. The costs to the Owner of

> completing the Work will include (but not be limited to) any costs incurred in retaining another contractor or other subcontractors, any additional interest or fees which the Owner must pay by reason of a delay in completion of the Work, reasonable attorneys' fees & expenses, and any other damages, costs & expenses the Owner may incur by reason of completing the Work or any delay thereof. The obligations of the parties to pay each other, if any, pursuant to this paragraph shall survive termination of the Contract."

[17] For the duration of the contract Mr. Tedburt Theobalds, the managing consultant of Theobalds & Associates and Mr. Dominic Mathurin of PROCTECH acted as the Claimant's advisors. Mr. Theobalds facilitated email communication between the Claimant and the Defendants. He also sent photographs from time to time of the construction site. Mr. Mathurin further in one of the undated PROTECH memos described himself as the project manager. Mr. Sam Benjamin the draftsman, said that he had never fully supervised the construction of a building and he would on the instructions from the Defendants from time to time visit the construction site and report to the Defendants his findings; he was identified by the Defendants as their inspector. The Claimant admitted to being only partially literate. He informed the Court that he could not read for example his witness statement but insisted that he could read plans and drawings for construction purposes. He had not told the Defendants of his illiteracy.

[18] Shortly after execution of the contract, the Claimant mobilized and commenced clearing the building site. Then, to everyone's surprise, it was found on the projected location of the house a watercourse running through it, huge boulders and a somewhat different gradient of slope than anticipated. The Claimant contacted the Defendants who in turn contacted Mr. Benjamin. A decision was made to change the location of the house by way of reorienting it and subsequently, a further decision was made to elevate it to road level so that the Defendants would have a view of the bay.

[19] Once again without a topography plan or any plan or drawings describing how and manner in which the Claimant was to establish the foundation on the land, the Claimant proceeded. According to Mr. Benjamin, the Claimant excavated the land in step formation. Mr. Benjamin expressed surprise at this

development and was of the view that the step formation was not necessary. The Claimant suggested that retainer walls were needed and Mr. Benjamin agreed that they were now necessary because of how the land had been excavated. The Defendants went along with Mr. Benjamin's recommendation for retainer walls.

[20] Following a series of discussions which involved at various points in time the Claimant, Defendants, Mr. Theobalds, Mr. Mathurin and Mr. Benjamin and a meeting of June 5th 2008, there was reduced to writing certain matters in an email dated June 6th 2008, prepared by the First Defendant and sent to Mr. Theobalds, Mr. Mathurin and Mr. Benjamin. From that email the Court cites only the relevant matters given the state of construction when the contract was terminated. The email read:

> "Dear Sirs,
>
> Please see points raised at the meeting on 5 June 2008.
>
> 1. Extra costs to be assessed for 2 x retaining walls, 3 x water drainage systems for retaining walls, waterproofing agent mix for render on retaining walls (taking into account that 2 x roads on original plan are no longer needed & back staircase is no longer needed? Bedrooms 2 & 3 have 4ft single window in each due to balconies being removed) will this effect ventilation of room;
>
> 2. Balconies removed from bedrooms 2 & 3 will now form L shaped balcony on bedroom 4 as discussed, leaving bathroom width gap from balcony of main bedroom so both balconies will have privacy, on ravine side of house balcony will go as far as bedroom No. 4 bathroom;
>
> 3. Bring bathroom area for bedrooms 2 & 3 in to make side of house facing lawyer flat, therefore making closet area in bedroom 2 smaller;
>
> 4. …,
>
> 5. Gap between columns where car will be parked in garage will be 13-16 ft. wide and go full length of house allowing for 2 cars to be parked at the same time;
>
> 6. …;

7. …'

8. …;

9. ….

10. Columns to be 10" square instead of 12" (verified by Sam Benjamin);

11. Stairs from garage to come up into living area next to dividing wall between bedroom 2 and kitchen area/utilities room staircase to be 4 ft wide allowance being given to my height 6'2" to allow for easy entry and exit of stairs (without feeling that I need to duck to miss ceiling/living area floor) gap shall not encroach on corridor walk way to kitchen;…

25. Opening in gym area to be allowed for so that when sitting in dining area and looking down corridor the door frame or doors to opening are not seen;…"

[21] Mr. Mathurin under PROTECH provided an (undated) estimate on which the heading read "ESTIMATES FOR THE PROPOSED RETAINING WALLS TIE BEAMS" with a breakdown of costs and total $64,320.00. There is agreement that there was to be deducted from this estimate the costs allotted for the two (2) roads which the original plan had shown would be required to access the house but which would no longer be necessary when the house was reoriented and moved up to road level.

[22] There was disagreement on whether the PROTECH estimate covered only the retaining walls or both the retaining walls and the additional height in columns required to bring the house up to road level. The Claimant said that it was agreed that he would be paid $30,000.00 for the retaining walls and $35,000.00 for the extra length in the columns required to bring the house up to road level, the Defendant on the other hand said that the Claimant had agreed to receive only $30,000.00 for both and that further the $30,000.00 was to be split into two (2) payments of $15,000.00 each and these were paid respectively on July 9th and 15th 2008.

[23] The Claimant proceeded with construction. While the building was being constructed, an amended set of plans stated to have incorporated in them

matters set out in email of June 6th 2008, were submitted by Mr. Benjamin to the Physical Planning Department, they were approved on July 18th 2008, and a copy delivered to the Claimant on July 21st 2008, by Mr. Benjamin.

[24] During the month of June 2008, the First Defendant visited the site on several occasions and on more than one occasion he expressed concern that the shape of the foundation and the columns were not being built in accordance with the plans and the matters set out in his email of June 6th 2008. The Claimant assured him that it would all come together and eventually be like it was shown on the plans.

[25] At July 25th 2008, Mr. Tedburt Theobalds wrote the Defendants as follows:

> "25th July 2008
> Mr. and Mrs. Davidson Delsol
> ….
>
> Dear Sir/Madam,
>
> Re: Proposed residence at Savannes Bay in the (Q)quarter of Vieux Fort.
> Completion Certificate:No.1
>
> | | |
> |---|---|
> | Amount of Contract: | $800,000.00 |
> | Amounts of drawdown | $25,000.00 (April) |
> | | $38,000.00 |
> | | $30,000.00* |
>
> We have visited the site and monitored ongoing works over the last three (3) months. We are satisfied with the quality and progress of work to date.
>
> We have noted that there has been a variation to the project and that this has been adequately taken care of with the payment of $30,000.00* towards the cost of the retaining wall.
>
> The project is now entering the second phase (superstructure) as the first phase (substructure) is now complete.
>
> To ensure continuity and completion on schedule the final disbursement of $56,000.00 is now recommended for the substructure phase.

> We do have an observation as regards the safety of the workers on the site and we have discussed this with the Contractor Mr. Felix Hippolyte.
>
> We are aware that no provision was made for scaffolding or that it was over-looked in the earlier discussions. The cost for this is $6000.00 and it would be good if this aspect could be looked into at the earliest.
>
> Attached are photographs of work completed to date.
>
> As customary, should you have queries feel free to contact me at …
>
> Yours sincerely,
> THEOBALDS & ASSOCIATES"

[26] The Claimant paid the $56,000.00 demanded at July 25th 2008.

[27] At September 23rd 2008, Mr. Theobalds sent the Defendants some more photographs. The photographs showed the Defendants the steelwork and framework for the concrete slab. The First Defendant saw in the framework, the opening for the staircase, the positioning of the electrical conduits, shape of the balconies, the layout for the kitchen and hallway. What he saw concerned him as he interpreted the framework as showing that the staircase was in the incorrect position, the balconies were in the wrong shape, the layout of the kitchen and hallway also appeared incorrect,

[28] Following receipt of the photographs, the First Defendant emailed both Mr. Theobalds and Mr. Benjamin with his concerns before the concrete was poured. On September 30th 2008, by email the First Defendant requested Mr. Benjamin to visit the site.

[29] Mr. Benjamin visited the construction site and on pointing out to the Claimant discrepancies between the drawings and the construction, he was told by the Claimant that there had been further changes agreed between the Claimant and the First Defendant. Mr. Benjamin said that he was not given the details of any further changes.

[30] At October 5th 2008, Mr. Theobalds sent the Defendants another set of photographs via email. The photographs showed that the concrete had been poured, and thus the floor slab was made. The First Defendant telephoned the

Claimant demanding correction and threatening not to pay any further money until the slab was in accordance with the plans and the staircase opening in its correct position. The Claimant asked for the phase 2 stage 2 payment - superstructure. The Claimant also said to him that he needed money to pay the concrete supplier and in response the First Defendant promised to send this money after the Claimant gave an assurance that the defects raised would be corrected.

[31] The First Defendant issued instructions to Mr. Benjamin to see if he could draw a plan combining the matters of the amended plan and the concrete slab as it was (the 3rd set of plans). Mr. Benjamin prepared the plans requested and submitted them to the Defendants.

[32] The First Defendant travelled to Saint Lucia on October 17th 2008, and on October 18th 2008, met with the Claimant and Mr. Theobalds at the construction site. At that meeting he pointed out what he perceived to be inaccuracies between the amended drawings and the concrete slab and these included (a) the orientation of the building was not accordance with the revised drawings, (b) the size of the building was not in accordance with the revised drawings, (c) the opening for the staircase was in the wrong place, (d) the balconies were the wrong sizes and shapes, (e) the electrical conduits were in the wrong positions for all the walls, (f) the apartment floor/garage floor concrete was not completed however, the scaffolding and the shuttering were in place. There is dispute in the evidence of the Claimant and First Defendant as to whether they on that day arrived at an agreement that the Claimant would correct the defects before proceeding with the construction.

[33] On October 18th 2008, the Claimant, the First Defendant and Mr. Sam Benjamin visited the construction site. They all agreed that the concrete slab when measured was found to be 4,610 square feet, the plans called for 4,350 square feet, a net difference of 260 square feet. There was confusion from both Parties in explaining the difference. The Claimant at one point said that reorienting the building would lead to this increase in square feet and then under cross-examination he said that nothing in the email list of variations would make a change in the size of the floor slab, the Defendant on the other

hand said that the adjustments that he had asked for would have increased the square feet but not to tune of 260 square feet. Mr. Benjamin said that the requested changes of re-orienting, relocating, and raising the building together with removal of the balconies on bedrooms 2 and 3 and addition of an "L" shaped balcony on bedroom 4 would not have increased the square feet of the building if done in accordance with the plans.

[34] On October 21st 2008, the Claimant, the First Defendant and Mr. Benjamin met at the construction site. They discussed the floor slab and its failure to reconcile with the amended plans, they tried to traced the slab with a view to setting out the matters described in the plans. Mr. Benjamin agreed that certain of the discrepancies between the slab and the plans had to be rectified before construction could proceed. The First Defendant said that he did not want to rip up the conduits or break the floor slab as both would result in extra financial costs to the Defendants. There was a discrepancy as to the discussions which ensued about correction of the defects and payment of monies alleged by the Claimant to be due and owing.

[35] At October 23rd 2008, the Defendants wrote a letter to the Claimant. The copy of the letter in the Claimant's bundle (signed letter) varied slightly from the unsigned copy of the letter in the Defendants' bundle. The signed copy of the letter said:

> "Mr. Felix Hippolyte
> …
>
> Re: Savannes Bay Proposed Residence For Davidson & Jacqueline Delsol.
>
> Dear Mr. Hippolyte.
>
> Following site visits to the above mentioned profect (project), it was apparent that you were not following issued drawings, which has caused serious financial implications, delays & complications to the project.
>
> The site visit and discussions unveiled the following issues:
>
> 1. The size of the building is not as illustrated on the drawings approved by the DCA.

2. The electrical installation points have not been positioned as outlined on the issued drawings.
3. The staircase has been wrongly positioned.
4. The balconies/verandas have been wrongly placed, sized, also the shape has altered drastically.
5. The proposed corridor has been repositioned to an alternative position in the building and been made to be an abnormal size of 10 ft. in width.
6. Informed us that the substructure work is completed however this is far from the case & accepted monies for superstructure work which has not started.

The effect of the above issues has resulted in a vastly different structure in size and orientation, to the extent that the total cost of the build has now escalated beyond the original budget.

It is incumbent on us, to draw these issues & concerns to your attention as these defects have to be corrected at your own cost before any further payments are made. (See reference to section H of the contract signed by yourself & witnessed by Theobalds).

Could you please kindly respond in seven (7) days to the above observations & recommendations, failing which we will have no option but to make alternative arrangements to rectify the above and decide on how best to proceed with the project.

Yours sincerely,"
……(signed)…..

There was no response to the Defendants' letter from the Claimant within the 7 days stipulated. At November 3rd 2008, the Defendants terminated the contract by letter. Again the Court has noted minor differences between the signed copy of the letter exhibited by the Claimant and the unsigned copy of the letter exhibited by the Defendants. The signed letter said:

"Dear Mr. Hippolyte,

This serves to inform you that your services on the construction (of) my project at Savannes in the Quarter of Vieux Fort will no longer be needed and as such is terminated. After careful examination of the project and a thorough review of the situation which existed during the construction period, lead me to the realization that plans were not progressing according to our initial agreed contract.

Foremost, is my dissatisfaction in the fact that despite the provision of a blueprint you modified and altered aspects of the building without informed consent from me the employer. This action highlighted the fact that the information you relayed to me were (was) false with

regards to the progress of the construction phases. Consequently, it necessitated that funds be dispersed and used on aspects of the project where it was not intended to be used. This has seriously affected the allocation of funds intended for specific phases during the construction period and consequently will affect the total estimated and budgeted cost of completing the overall construction of the building. These actions have made the possibility of a continued contract difficult since it has illuminated several points in which I stand to be disadvantaged.

In light of the facts noted above I am terminating the contract which we currently have.

Please can you remove your tools from site at the earliest.

Respectfully Your(s)
….(signed)…..

Mr. David Delsol
Proprietor."

The First Defendant under cross-examination added that termination was also brought about by the Claimant's failure to supply labour to work on the building.

[36] At November 14th 2008, Mr. Felix wrote the Defendants a letter demanding $87,150.00. The letter said: -

"Davidson Delsol
London/England

Date: November 14, 2008

Re: Construction of Reinforced Concrete Structure at Savannes Bay

I wish to bring to your attention that you have not made payments for the construction of the Floor represented as the super structure on the contract document. It is more than days 40 ago the super-structure was completed and therefore 95 % of the sum allocated for the super-structure should (have) been paid last month.

Base(d) on our contractual arrangements, I should have been paid $301,150.00 but I have only received $214,000.00. This can be verified with by the project officers (Sam and Theobalds)…".

The Defendants did not respond to the Claimant's letter.

[37] At November 7th 2008, Mr. Theobalds sent to the Defendants via email photographs of all the framework, scaffolding and plywood sheets stacked at the bottom of the construction. There followed the Claimant's Counsel's demand letter dated January 8th 2009, which claimed substantially the same matters as his claim now under consideration.

[38] Mr. Mathurin under PROTECT letterhead wrote to the Claimant and the Defendants a memo (undated) which read:

> " RE:CONSTRUCTION OF RESIDENCE AT SAVANNES BAY
>
> I wish to bring to the attention of the contracting parties that there exists a fundamental error in the terminology or nomenclature as used in the stage payment schedule as per the contract. I do not wish to act as mediator or prejudice the final settlement of the impasse between the parties but offer this correction that will allow the contracting parties to come to an amicable settlement.
>
> I did read the termination letter and find that the error in terminology/nomenclature as used in the outline of the stage payments has created a misunderstanding between the contracting parties. I am of the opinion that (that) if this (is) corrected the contracting parties will better understand the status.
>
> At this juncture I wish to draw to the attention of the contracting parties that the stage payment schedule as outlined in Section C should be corrected to the following:

Stage Payment	20% payment of stage	+30% = 50% payment stage	+45% + 95% of payment stage	+5% = 100% of payment stage
Sub-Structure	$25,000.00	$38,000.00	$56,000.00	$126,000.00
Super-Structure				
2.Floor	$30,000.00	$46,000.00	$68,000.00	$153,000.00
3.External walls	$13,000.00	$18,000.00	$28,000.00	$63,000.00
4.Internal walls/partitioning	$12,000.00	$18,000.00	$26,000.00	$59,000.00
5.Roof, guttering and down pipes	$23,000.00	$35,000.00	$55,000.00	$115,000.00
6 Stairs and railing	As per contract			

The Defendants did not respond to Mr. Mathurin's memo.

[39] In relation to the payments made to the Claimant both the Claimant and the First Defendant gave contradicting evidence.

[40] The Claimant said that he received a total of $214,000.00 inclusive of $6000.00 for scaffolding per the request of Mr. Theobalds, $30,000.00 for the retaining walls, and $35,000.00 for raising the columns to bring the house up to road level, and this being so, he had only received for work done pursuant to phase 1 – substructure and phase 2 superstructure $143,000.00 instead of the $250,479 due to him.

[41] Under cross-examination on the breakdown of payments received the Claimant initially said that on execution he was paid $15,000.00 by the Second Defendant but subsequently under further cross-examination he corrected himself and agreed that he had been paid $25,000.00 on execution of the contract at April 28th 2008. He further agreed under cross-examination that there was a 2nd payment of $38,000.00, a 3rd payment of $56,000.00, a 4th payment of $30,000.00 to start phase 2 superstructure, a 5th payment of $35,000.00 instead of the $46,000.00 claimed (PROTECT request), a 6th payment of $30,000.00 towards the retainer walls, and a 7th payment of $35,000.00 towards the columns to raise the house. The Court calculates the total of these payments to be $249,000.00.

[42] The First Defendant said in his evidence in chief that the Defendants paid the Claimant the 1st phase stage payment of 20 percent - $25,000.00 on April 28th 2008, 1st phase stage payment of 50 percent -$38,000.00 on June 13th 2008, 1st phase stage payment of 95 percent - $56, 000.00 on July 25th 2008, 2nd phase stage payment of 20 percent - $30,000.00 on August 29th 2008, for the scaffolding $6000.00 on August 29th 2008, 2nd phase stage payment - $35,000.00, against the variation to bring the house to road level a first payment of $15,000.00 on July 9th 2008, and against the variation to bring the house to road level a second payment of $15,000.00 on July 15th 2008. The Court calculates the total of these payments to be $220,000.00.

[43] The Claimant expressed the view that the Defendants did not afford him a reasonable opportunity to remedy any defects. He was of the view that the Defendants well knew that he could not respond to them within seven (7) days and they deliberately frustrated his performance of the contract. They were his employers and he simply followed their instructions.

[44] The Claimant in support of his claim against the Defendants commissioned and presented to the Court, a valuation report prepared by Mr. Richard R. Samy, quantity surveyor, the same gentleman who calculated the construction costs for the contract. The report was prepared at May 8th 2009. In his report Mr. Sammy said:

> "May 8, 2009
> Mr. Felix Hippolyte
> …
>
> Valuation of Property – Located at Savannes in the Quarter of Vieux Fort as at 4th May 2009
>
> Introduction/Background
>
> I confirm having visited the aforementioned site and conducted visual inspection did all necessary market research and analysis. I hereby submit below, my valuation of the property at Savannes in the Quarter of Vieux Fort, as per your request.
>
> Based upon this valuation in my professional opinion, the market value of the freehold estate for Legal purposes of the subject property as of May 4, 2009, subject to assumptions and limiting conditions stated within is:
>
> Open Market Value - $301,344.00
>
> Definition of Market & Force Sale Values:
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> Market Value is defined as the best price at which an interest in property should bring in a competitive market under all conditions requisite to a fair sale, by buyer and seller each one acting prudent and knowledgeably, assuming the price is not affected by undue stimulus. (My emphasis)
>
> A forced sale value is the open market value …
>
> 1. Purpose/Instruction

> I have conducted this valuation exercise as requested by Mr. Felix Hippolyte, in order to assess the current open market value of the said property. This report should therefore not be put to any other uses… (My emphasis)
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> 7. Construction/Layout (Existing Structure)
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> Generally the structure is constructed of concrete with three sets of retaining concrete block walls reinforced and all cores filled with concrete…"

[45] The Claimant in addition to providing the Court with Mr. Samy's valuation said that he is entitled to $10,750.00 this being the 5 percent retention owed to him on phase 1 – the substructure, $87,150.00 for work executed, $500.00 paid to Mr. Samy for the valuation report, and $78,000.00 this being loss of income at wages of $250.00 per day which he would have earned had the contract run its course of eighteen (18) months.

[46] The First Defendant agreed under cross-examination that there was not prepared pursuant to the contract a punch/snagging list.

[47] The Defendants are claiming costs arising from the Claimant's mistakes and these costs include: (a) a return flight to St. Lucia for both Defendants; (b) renting accommodation whilst at Saint Lucia to manage completion of the construction of their house;(c) utilities and food whilst at Saint Lucia; (d) travel costs to and from the construction site; (e) additional building materials required; (f) loss of wages whilst at Saint Lucia; (g) labour costs to correct the defects found on the project; and (h) the value of the pound to dollar because the delay in construction would increase their total cost .1. There were no figures provided to the Court to support these claims either in the Defendants' witness statement or at trial and nor was there documentary evidence.

Findings and analysis:

[48] The Court believes that both the Claimant and the Defendants started this transaction with trust and faith in each other but as with so many building contracts when all the parts are not in place to commence construction, and the parties don't adhere to their own commitments within the contract there is

a breakdown and each ends up blaming the other and very disappointed in each other.

[49] At the outset the Court must state that Mr. Samy's valuation prepared at May 8th 2009, could not assist the Court. It is a valuation premised on "Open Market Value". This premise is incorrect. Indeed Mr. Samy's report supports the Court's view by his very definition of "Open Market Value". The matter between the Claimant and the Defendants is not a sale of the Defendants' property and so a valuation based on an "Open Market Value" premise has no bearing in this matter. What was required was a review of the plans and any other agreements connected therewith so as to ensure that the Defendants were only due to pay what was contracted for, and then the work was to be costed by the prices stated in the contract to arrive at what might be reasonably due to the Claimant.

[50] The Claimant held himself out as a professional building contractor able to undertake with the use of plans, drawings and specifications construction of a house costing $800,000.00, a considerable sum of money and so with that went certain responsibilities. The Defendants never held themselves out as experts in construction and so this was the reason they contracted with the Claimant to build their house. The Claimant sort to put himself in the role of employee but the Court is afraid that the contract ascribes to him a bigger role than that. Indeed for example there could be no variation of the contract without his signature. The Court therefore rejects the Claimant's statement that the Defendants were his employer and he was a mere employee in the traditional sense of the word who was simply following instructions.

[51] This brings us to what the Court believes is the starting point in the breakdown of the execution of the Work and relationship, the lack of plans. From the evidence it is clear that a topography plan of the land would have averted the surprise that the Claimant, Defendants and Mr. Benjamin experienced when the Claimant cleared the land and discovered boulders and a watercourse at the site where it had been designated that the house would be built. As a consequence of this failure to clear the land and prepare a topography plan setting out a detailed description of the features of the surface of the land, the

Claimant, the Defendants and Mr. Benjamin had to go back to "square one" in terms of deciding where to construct the house on the land. In the Court's experience a site visit and topography plans are prerequisites to good planning for construction. The Court finds that the Claimant must bear some responsibility and fault here too. The Claimant is a building contractor of many years' experience and surely as such it was his duty to ensure that he had all the plans necessary to start the construction, inclusive of a topography plan. Indeed the first paragraph of the General Conditions of Contract states that it is the Claimant's responsibility to check drawings and specifications and raise any issues of concern before the contract is signed. Further, clause H mandates that the Claimant was to carry out the construction according to plans, specifications and other documents comprised in the contact.

[52] Then came the second failure after the decision was made as to the new location of the house, the failure to prepare a plan detailing how the land was to be prepared for the new location of the house, whether the new location required the land to be excavated or not, if excavation was needed then the manner and to what extent. With no guidance of a plan, the Claimant according to Mr. Benjamin cut the land in step formation. Mr. Benjamin again expressed surprise that the land had been cut in step formation and in his opinion the step formation was unnecessary. From the evidence it was clear that there were no discussions held about how the land was to be dealt with to accommodate the new position of the house, and so the Claimant exercised his discretion. A discretion with cost implications for the Defendants in the form of the retainer walls..

[53] The Court is of the view that the Claimant pursuant to the contract was to build pursuant to plans and where plans were missing for any aspect of the construction, he ought to have insisted on receiving them and not simply used his discretion. At the end of the day, it was the Defendants' money that was being spent and so they had a right to know, review, take advice and agree or disagree with how the land was going to be excavated.

[54] The Court therefore finds that both the Claimant and the Defendants were negligent in proceeding to execute the contract when clearly all the requisite plans were not available and part of the contract.

[55] At the end of Mr. Benjamin's evidence, the Court was unclear as to Mr. Benjamin's role in the transaction besides that of draftsman of the plans. Mr. Benjamin seemed somewhat of a reluctant participant. He was a draftsman, who had prepared the plans for a house that the Defendants' desired to build. It would appear to the Court that he never took on the role of advising the Defendants of whether what they wanted was possible in the location on the land or how they could achieve it, since what the Court would have considered a basic prerequisite, a, visit to the land was not carried out. He sought to say the land was not debushed. It appears to the Court that before drawing plans it was incumbent upon him to suggest to the Defendants that the land needed to be debushed so that he could know the lay of the land. Without a visit to the land, ascertaining first the topography and other relevant matters such as the watercourse and huge boulders the Court can at best only describe the production of his plans as no more than that of the "cookie cutter" model/type. A dangerous position for the Defendants.

[56] The Court observed that the Defendants described Mr. Benjamin as their inspector but the Court was unclear as to what the details of that arrangement were with Mr. Benjamin post the drawing of the plans and getting them approved. The First Defendant said that they depended on him for advice but Mr. Benjamin said that he had never supervised the entire construction of a building, and he only visited the construction site upon the Defendants' request when they had a query, after the First Defendant saw matters of concern in the photographs sent to him by Mr. Theobalds. Further, although clause C Progress Stage payments provided that at completion of a stage, payments would be due at one (1) month after the Claimant's invoice and confirmation that the progress stage had been completed to specifications and drawings listed in Part A by the building inspector appointed by the Defendants, there was no evidence that Mr. Benjamin carried out this function.

[57] This brings the Court to the contract. The form of contract executed by the Claimant and Defendants is one known to the Court as a JCT building contract. The Court believes that given that the Claimant was illiterate unless he had strong support throughout and perhaps almost daily in terms of keeping the contract terms at the forefront of his mind, he was somewhat handicapped when he signed this JCT form of contract which can be quite complex at times albeit the present one was amended and is therefore a "watered-down" version. Then again the Defendants who as far as the Court understands were not similarly handicapped, they too failed to comply with the terms of the contract.

[58] The contract specifically provided at clause G for change orders, yet both the Claimant and Defendants sought to proceed in a manner contrary to what they had agreed and further, they now come to the Court to enforce their non-compliance with their contract. No reasons were given to the Court for the non-compliance with the requirement for executed change orders. The provision of clause G if it had been complied with would have removed all doubt as to what was agreed and disagreed as all matters would have been in writing and signed off by both Parties as variations to the contract.

[59] The Court is of the view that in the face of the Claimant and Defendants agreement to clause G that the Court cannot now order enforcement of any oral or written variations which are not in compliance with the clause i.e. by change order, for to do so would see the Court itself acting contrary to the Claimant's and Defendants' contract and it would find itself making a new contract for the Claimant and Defendants. This is not the Court's role. The Court's role is to enforce what the Parties had agreed to and it was executed change orders.

[60] As a result of the Court's position the alleged oral variations, the email of June 6th 2008, and the amended plans given to the Claimant must all be deemed to be invalid variations to the contract.

[61] The Court feels that in light of its position on non-compliance by both the Claimant and the Defendants that the best that the Court can do is strike out the Claimant's claim and the Defendants' counterclaim since both claims for monies due and damages sought arise directly from the purported amendments to the contract.

[62] Finally, the Court sincerely apologizes to Counsel and the Parties for the delay in delivering this decision.

Court's order:

1. The claim and counterclaim are struck out.
2. No order for costs.

Rosalyn E. Wilkinson
High Court Judge