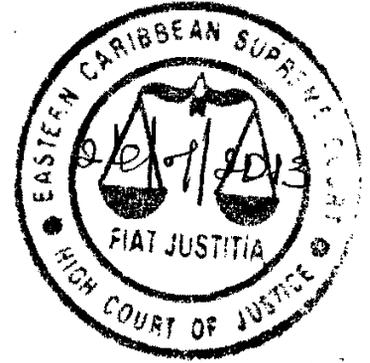


**ST VINCENT AND THE GRENADINES
THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE (CIVIL)**



CLAIM NO SVGHCV2010/0250

BETWEEN:

**[1] PATSY ISAACS
[2] AMOS ISAACS**

Claimants

AND

**ANDRE C BROWNE
of ANDRE C BROWNE BUILDING SERVICE**

Defendant

Appearances

On the written submissions of
Ms Patina D.S. Knights for the Claimant

.....
2013: May 9: July 26
.....

JUDGMENT ON ASSESSMENT OF DAMAGES

INTRODUCTION AND BRIEF BACKGROUND

- [1] **LANNS, M:** This is an assessment of damages in a claim for breach of a construction contract.
- [2] By Amended Claim Form and Statement of Claim filed in October 2010, the Claimants Patsy Isaacs and Amos Isaacs brought an action for damages against the Defendant for his failure to complete a two-storey dwelling house at Pembroke within the time stipulated in the Agreement between them, despite several extensions of time within which to complete. The sum claimed was itemized in the Statement of Claim and in the affidavit of Mr Isaacs, in support of the application for assessment of damages. Several documents including the building plan and estimates, the building contract, letters, invoices, receipts of payments, expert's reports, were attached to Mr Isaac's affidavit as exhibits.

- [3] No Defence having been filed by or on behalf of the Defendant, on 30th November 2010, the Claimant requested and obtained a Judgment in Default of Defence against the Defendant. The Judgment was entered in December 2010 for the amount of \$181,605.25 inclusive of costs, court fees and interest.
- [4] The Defendant applied unsuccessfully, to the Master for an order setting aside the Default Judgment. On appeal to the Court of Appeal, it was ordered by consent that the Defendant admitted liability, and the matter was remitted to the High Court for directions to facilitate assessment of damages. On 26th February 2013, Master Taylor-Alexander issued directions on the assessment but only the Claimant complied. On the date fixed for hearing of the assessment of damages, Mr Sten Sargeant who appeared for the Defendant indicated to the Court that he was unable to contact the Defendant in order to comply with the Master's directions. This assessment is therefore considered on the evidence and written submissions of the Claimants only.

SPECIAL DAMAGES

- [5] The Claimants claims special damages in the sum of \$2,760.00 for the professional services of Mr Edric Lewis, a Quantity Surveyor. They produce an Invoice instead of a receipt. Special damages consist of out of pocket expenses. They must be pleaded and strictly proven. An invoice is not a receipt. Nevertheless, it shows an obligation on the part of the claimant to pay the sum claimed therein. Furthermore, the sum of \$2,760.00 was pleaded, though not strictly proven by way of a receipt. The case of **Greer v Alstons Engineering Sales and Services Ltd** (2003) 63 WIR 388, paragraphs 7, 8 and 9 is authority for the view that notwithstanding the fact that the Claimant cannot prove certain items of special damages, he may still be awarded a nominal sum that is not out of scale. As there is no challenge to this claim, and on the authority of **Greer v Alstons Engineering Sales and Services Ltd**, I award the Claimant the sum of \$2760.00 as special damages. I am of the view that the sum claimed is reasonable.

GENERAL DAMAGES

[6] Learned Counsel for the Claimants (Ms Knights) in her submissions suggested a figure of \$195,229.28 as general damages broken down as follows:

- (i) \$39,000.00 (being sums paid to the Defendant in the amount of \$344,000 less contractual cost to build the house being \$305,000);
- (ii) \$134,529.28 (being the monies needed to complete the house);
- (iii) \$11,700.00 being cost of repairs;
- (iv) \$4000.00 for delay;
- (v) \$6000 for inconvenience and discomfort.

[7] In support of her submissions counsel cited the following authorities:

- (1) **Hadley v Baxendale (1854) 9 Ex 341**
- (2) **Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528;**
- (3) **Christopher Wheatley et al v Waterpoint Caribbean Houses Ltd, 2010, Claim No ANU HCV2010/0029;**
- (4) **Mertens v Home Freeholds Co, [1921] 2 KB 526**
- (5) **McGregor on Damages, 17th Edition, paragraph 26-003;**
- (6) **Clearlie Todman-Browne, Claim No BVIHCV2009/0195**

[8] I have considered the submissions by counsel and perused the authorities cited to me. In essence, the authorities establish among other things that

- (1) Where a party sustains a loss by reason of a breach of contract, he is so far as money can do it, be placed in the same position with regard to damages as if the contract had been performed;
- (2) Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties

at the time they made the contract as the probable result of the breach of it;
(Hadley Baxendale) supra

- (3) The governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do it, as if his rights had been observed;(Victoria Laundry), supra
- (4) A Claimant is entitled to general damages for the Defendant's breach in failing to carry out the works in a good and workmanlike manner, being the extent of the diminution in value of the work which the Defendant was contracted to do. A Claimant is also entitled to recover loss incurred by him by virtue of the Defendant's delay in completing the works; (Wheatley) supra
- (5) If a builder fails to complete the building by the time required by the contract the normal measure of damages should be the value of the use of he building during the period of delay, the value generally being taken as the rental value. (McGregor, 17th Ed) supra.
- (6) Damages are recoverable for inconvenience and discomfort. In addition to those losses "naturally arising from the breach itself" where the contractor has actual or imputed knowledge of special circumstances, he may also be found liable for any losses that could reasonably be foreseen as a probable result of the breach, It is sufficient if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (Clearie Todman-Browne) supra.

ISSUE

[9] The main issue for determination is what quantum of damages the Claimants are entitled to recover?

[10] This calls for a determination of three questions:-

- (i) What percentage of the project was completed at the time of breach of the contract?

- (ii) What was the amount of work left to be done?
- (iii) What was the sum (if any) spent on the completion/renovations after the breach of the contract?

WHAT AMOUNT OF WORK WAS COMPLETED?

The evidence

[11] Mr Isaacs swore to an affidavit in support of the assessment. At paragraph 11 thereof, Mr Isaacs stated "My wife and I obtained the services of a quantity surveyor to prepare a report on how much it would cost to complete the dwelling house. ... By report dated the 20th April 2010, Edric AR Lewis, Quantity Surveyor, detailed the cost of completion as \$134,529.28." A copy of the Report was exhibited as "A17" I am of the view that if this document was intended to be adduced in evidence, it should have been exhibited to an affidavit sworn by Mr Lewis. However, as no issue has been raised in respect of the irregularity, I need dwell on it.

[12] Mr Lewis' Report does not expressly detail the amount of work completed. However, he stated that the building is constructed in two levels, and that the structural frame is of reinforced concrete. Other construction trades applied include earthworks, concreting, masonry, carpentry, metalwork, painting and decoration. On the upper floor is floor there is family room, a common washroom, walk-in-closet and a patio. The lower floor possesses a foyer, a living room, a kitchen and dining area. An internal stairway connected the floors. Exterior spaces on this floor include a carport and an access porch. Burglar bars were installed.

According to the Report, Mr Lewis compared the constructed building to its initial design and found that its configuration was generally consistent to the design. There is no cracking to date in regards to the stability of the structure. This, Mr Lewis says offers some consolation. However, he found that there were notable variations/and omissions on the lower and upper levels.

WHAT AMOUNT OF WORK WAS LEFT TO BE COMPLETED?

Variations Omissions and Defects

- [13] The Report gives a detailed description of variations, omissions and defects observed during Mr Lewis' survey/examination of the subject property. As these are lengthy, a summary will suffice.

Lower level

- [14]
- (i) Omission of two internal columns in living room, linen closets at the common washroom entrance area and under the stairway;
 - (ii) Indent at foyer entrance area changed and wall separating the foyer and stairway omitted;
 - (iii) Defects in wall finishes, electrical fixtures;
 - (iv) Kitchen remains void of fittings and furnishings, sinks;
 - (v) Incomplete plumbing works in washroom; no sanitary appliances vanity fittings and the like;
 - (vi) Incomplete electrical works; no security bolts and timber trims in Living Room and Circulation Hall;
 - (vii) Incomplete electrical works in the laundry and guest rooms areas;
 - (viii) Incomplete masonry works in guest room No 2;
 - (ix) Incomplete wall and floor finishes, fittings and furnishings, plumbing works and sanitary appliances and electrical works in Common Washroom (Bath);
 - (x) Defects in wall finish requiring masonry plastering and paint decoration to the external wall of the foyer and stairs;
 - (xi) Absence of wall enclosure and rail for the foyer and stairs

Upper Level

- (i) Incomplete electrical works in the Living Room Stair Balcony Area; and Bedrooms 2 and 3;
- (ii) Tiling to wall floors in Common Washroom (Bath) remains incomplete Fittings and furnishings as well as sanitary appliances are yet to be fitted within this room.
- (iii) Unfixed electrical fittings in the Master bedroom;
- (iv) Incomplete wall and floor finishing, plumbing works, unfixed wired sockets; uninstalled fixtures and sanitary appliances in Master Washroom (Bath)
- (v) Absence of shelving and hanging rods; unfixed electrical light socket in the master Walk-in Closet.
- (vi) Master patio lacks tiling, and there is need for the completion and restoration of masonry and decorative finishes to the surrounding walls.
- (vii) There is no catchment system to collect, contain and discharge rain water from the roof of the building;
- (viii) Incomplete external wall finishes; base wall requires "first time" painting;

- (ix) Completion works required to the car port, front porch and pavement drainage;
- (x) Retaining wall yet to be built.
- (xi) Unauthorized omission of (i) linen closets in common areas; (ii) clothes closets within bedrooms; ((iii) two fluted columns in living area.
- (xii) General defects in the construction of the floor element and absence of adequate bat proofing to the roof of the building;
- (xiii) Persistent uneven appearance to the finish floor surfaces in several rooms.
- (xiv) Visible sagging to suspended floor slab requiring extensive remedial work to rectify this defect.

[15] Mr Lewis Report details the various costs associated with the defects, omissions and variations. He estimated the entire works to be done to be \$134,529.28. In arriving at this figure, he took into account the cost of material remaining on site.

DISCUSSION AND AWARDS

What is the sum actually spent on completion of the project

[16] The Court has no knowledge as to whether the Claimants have already completed the works left undone. I take it that they have not since no receipts or bills have been submitted showing any expense incurred in that regard. If in fact remedial works have been done, it would have been useful for the purposes of this assessment, to know exactly what amount was expended, since the figures submitted by Mr Lewis for cost of the incomplete works, omissions and defects, were only estimates. If in fact remedial works cost more or less, then in my opinion, that is a factor to be taken into account in the assessment of damages. In the absence of any evidence in this regard, the court does its best with what it has.

[17] I am satisfied that Mr Lewis' Report should be accepted. It is apparent from the Report (which was well prepared and well presented) that Mr Lewis is well qualified and well placed to carry out an analysis of the current status of the project and an appraisal of the works required to bringing the entire development property to a satisfactory level of functional completion. I accept the Report to be accurate and complete. Furthermore, the

Report stands unchallenged. I accordingly assess the cost of completion of the project at \$134, 529.28, and I award the Claimants that sum.

DELAY

- [18] Counsel for the Claimants submitted that damages ought to be awarded to the claimants for delayed completion of the project. In support her submission, Counsel referred to the case of **Christopher Wheatley** supra. In that case, Remy J awarded the Claimant \$7000.00 as general damages for delay from the agreed date of completion to the date of actual completion – i.e. 28 weeks at \$250 per week.

In the submissions, and in the supporting affidavit, the Claimant stated that the house remains incomplete to date. The agreed completion date was September 2009 and the building has not been completed.

I find that the Claimants are entitled to damages flowing from the delay in completion of the project. I accept that it would take about four months for completion. I assess the damages at \$250 per week for 16 weeks. This computes to \$4000.00. I award the Claimants that sum for delay.

INCONVENIENCE AND DISTRESS

- [19] The inconvenience experienced by the Claimants is explained at paragraphs 14, 15 and 16 of the affidavit Mr Isaacs:

“14. To date, my house remains incomplete as I am unable to hire another contractor to complete same as I have paid the Defendant all the monies due and I cannot afford to pay another contractor.”

“15. My wife and I have visited St Vincent on three occasions since the completion date of September 2009. ... and on each occasion we have had to stay with my wife’s sister at Lodge Village, as our house is incomplete and not habitable. On each visit I would pay my sister-in-law US\$100.00 for accommodating my wife and me.”

“16. At all material times my wife and I were building the dwelling so that we can return to St Vincent and enjoy our retirement. As a result of the failure by the Defendant to complete the dwelling within the time stipulated by the contract and

the further extended completion date of the 3rd September 2009, my wife and I have had to remain in the United States and incur further costs.”

[20] I have no doubt that the Claimants had been put to great inconvenience. Counsel submitted that in light of the inconvenience caused as a direct consequence of the breach of contract, the Claimants ought to be awarded a sum of \$6000.00 for inconvenience and distress. She refers to the case **Watts v Morrow** (1991) 54 BLR 86 wherein the Court awarded the sum of £750.00 for inconvenience and distress.

[21] In the case of **Colin Walters v Peter Crane and Eugenie Crane**, Nevis Civil Appeal No 11 of 2001, Saunders, JA stated at paragraph 39:

“The plain facts are that the house should have been completed by 24th November 1997, but it wasn't. The trial judge accepted that by the end of January 1998, it was substantially completed. The builder himself acknowledged that the Cranes lived in a state of inconvenience when they moved in. I agree that for the period between 24th November 1997 and 31st January, 1998 on the principle enunciated in **Watts v Morrow** (1991) 4 A.E.R, 937, the Cranes would be entitled to general damages for this inconvenience. I would award the sum of \$1000.00.”

[22] On the basis of the **Colin Walters** case, I award the Claimants the sum of \$5000.00 as general damages for inconvenience. I am of the view that this is reasonable when updated to today's dollars.

COSTS OF REPAIRS AND REMEDYING DEFECTS

[23] Mr Lewis provided an estimate under this head of claim. I accept the estimate as submitted and I award the Claimant the sum of \$11,000 for the cost of repairs and or remedying the defects

SUMS PAID IN EXCESS OF CONTRACTURAL SUM/INCREASED COSTS

[24] The Claimant claims the sum of \$39,000.00 representing the difference between sums paid to the Defendant (\$344,000 .00) less the contractual cost of \$305,000.00, to build the house, and has provided the receipt to that effect. I can see no basis not to award this amount. In the result, I award the Claimants the sum of \$39,000.00 being the sum paid in excess of the contractual sum. .

CONCLUSION

[25] The damages awarded to the Claimant are as follows

Professional Report	\$ 2,760.00
Cost of completion	\$ 134,529.28
Delay	\$ 4,000.00
Inconvenience	\$ 5,000.00
Cost of repairs and remedying defects	\$ <u>11,000.00</u>
TOTAL	\$ <u>196,289.28</u>

[26] The Claimant is also awarded interest at the rate of six per cent per annum from the date of assessment to the date of payment along with prescribed costs in the sum of \$16,221.70

[27] I am grateful to Counsel for the Claimant for her very helpful submissions and authorities.


Pearletta E Larins
Master