EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. BVIHCV2011/042

BETWEEN:

ANTHONY BRAMBLE dba TROPICAL CONSTRUCTION

Claimant

And

ANGELA BURNS

Defendant

Appearances:

J.S. Archibald QC and Patricia Archibald-Bowers for the Claimant
Me Menelick Miller of Farara Kerins for the Defendant

2014: 25th September

JUDGMENT

[1] **Ellis, J:** By Further Amended Claim Form filed on 4th August 2011, the Claimant sought the following relief against the Defendant herein:

i. Payment of the sum of $45,509.20 in respect of arrears owed by the Defendant to the Claimant;

ii. The return of construction equipment and materials or $23,550.00 being the value and damages;

iii. The sum of $68,245.60 in respect of future losses owed by the Defendant to the Claimant;

iv. Damages;

v. Interest;

vi. Costs; and

vii. Such further and other relief as this Honourable Court deems just.

[2] This Further Amended Statement of Claim sets out the Claimant's case. He contends that by fixed price construction contract dated 31 May 2010, he agreed to carry out construction on the property registered as Block 3440B Parcel 280, East End Registration Section of a basement level floor plan for a price of $233,111.50 which sum was payable in instalments (drawdowns) and in advance of each of the 4 phases of the project.

[3] Pursuant to the contract, works commenced on or about 15th June 2010 and in accordance with the terms of the contract, the Claimant was to use all reasonable efforts to complete the works within 9 months of the signing of the Contract (barring the Defendant's failure to make construction payments, acts of governmental authorities, force majeure or any similar causes not within the Claimant's control). In furtherance of this, the Claimant carried onto the property construction materials and equipment owned by him which were required to carry out the said construction work.

[4] On or about 16th September 2010, the Defendant sought to terminate the contract. The Claimant contends such termination was wrongful and in breach of the contract. He claims that he suffered loss and damage as a result of this breach including unpaid monies for the third drawdown as well as loss of future monies for deprivation of doing work stipulated in the contract.

[5] The Claimant also contends that notwithstanding that the Parties agreed that he would be able to remove and recover his construction equipment and materials following this purported determination of the contract, he was unable to enter the property as it was chained off. He was subsequently informed by the Defendant that she had disposed of the said construction equipment and materials. He contends that the equipment and materials were not returned and that as a result

he has suffered loss and damage in the amount of $23,550.60. He also claims loss of use of the equipment and materials since 2nd November 2010.

[6] In a Defence filed on 31st August 2011, the Defendant does not deny the details of the contract which was agreed between the Parties. She states that this agreement was made partly orally and partly in writing which is evidenced in the construction agreement dated 31st May 2010.

[7] This Claim is opposed by the Defendant who contends that in breach of the express and/or implied terms of the agreement, the Claimant refused to communicate at all or in a timely manner; failed to keep her abreast of the progress of the works; failed to provide proof of costs; and failed to act as the principal in supervising the works. The Defendant asserts that the following terms must be implied into the contract:

i. The works were to be carried out with reasonable skill and expertise and in the shortest possible time and/or at the lowest possible costs to the Defendant;
ii. At all material times the term of 9 months was a long stop for completion;
iii. She would be kept abreast of the progress of the works and be provided with proof of the costs arising therefrom;
iv. That the Claimant would personally be responsible for carrying out or supervising the construction works.

[8] The Defendant contended that the works actually began on 7th June 2010 when clearing and excavation commenced. She contended however that the Claimant failed to carry out the work within a reasonable time. In support of this contention, the Defendant posited that the work which was spread over approximately 4 months could have been done in a much shorter time and that she was obliged to make repeated demands to the Claimant to carry out and complete the works.

[9] On the 16th September 2010, the Defendant claims that she wrote to the Claimant terminating the contract on the basis that she considered the progress of the

works to be too slow and that completion could have been effected within 4 months of the contract date.

[10] Although she freely admitted that construction equipment was taken unto the site, she put the Claimant to strict proof as to the nature and the value of the said equipment. She contended that by letters dated 23rd November 2010 and 7th February 2011, she wrote to the Claimant requesting the removal of the equipment from her property. The Claimant having not complied by 11th February, the Defendant concluded that this constituted an unlawful use of her property and/or trespass on it and she took steps to remove the same.

[11] The Defendant stated that due the breakdown of the contractual relationship, a meeting was convened between the Parties on 26th September 2010 in accordance with clause 8 of the Agreement. Mr Courtney De Castro purported to act as a Mediator and the Defendant contended that at that meeting, the Parties expressly agreed to bring their business relationship to a close at the end of the current phase of the project, i.e. the second phase.

[12] The Defendant also contends that during that meeting, it was also agreed that the Claimant would continue the works falling within second phase of the agreement because he would have already been in receipt of monies paid to him in advance to complete that phase[1]. The Defendant contends that the Claimant continued to work until on or about 2nd November 2010 when the works under the second phase of the agreement were completed. The Defendant contends that this was contrary to the express representation by the Claimant that the second phase was projected to be completed on or about 30th September 2010.

[1] He had already been paid two instalments under Clauses 6 (a) and (b) of the contract and was owed the instalments in clauses 6 (c) and (d) in the amount of $45,409.20 and $68,245.60.

[13] Notwithstanding this earlier agreement, by letter dated 1st October 2012, the Claimant's wife wrote to the Defendant indicating the Claimant's intention to continue to work past the completion of the second stage of the agreement. The letter sets out the following terms: "*We did indicate to you at said meeting that you will be receiving a letter from the company on the decision made then. We are informing you that contrary to our conversation, we will continue to construct said dwelling in accordance with contract signed and accepted by the National Bank of the Virgin Islands on 31st May 2010. It is the intention of the company to complete said project*."

[14] The Defendant's case is that by this time, the original agreement of 31st May 2010 had come to an end and could no longer be relied upon by the Claimant. Following the completion of the second stage of the works, the Defendant contends that there was no agreement subsisting herself and the Claimant. The Defendant retained the services of a new contractor to complete the works and erected a barrier on the property on 7th December 2010 with the intention of protecting the property rather than specifically to restrict the Claimant's access to the Property.

[15] The Claimant responded in a Reply which was filed on 16th September 2011. He denied that the Agreement between the Parties was partially oral and written. His case is that the agreement is only memorialised in the written construction agreement dated 31st May 2010 which was prepared by him and duly executed by the Defendant. The Defendant concedes that it was an implied term of the contract that the works would be carried out with reasonable care and expertise, but he joins issue on all of the other alleged terms implied by the Defendant.

[16] Moreover and in any event, he contends that at all times he kept the Defendant abreast of the progress of the works and provided proof of the costs arising therefrom. He also contends that he was in fact the principal responsible for supervising the works.

[17] The Claimant agrees that the agreed time for the completion of the entire project was 9 months and he contends that the works were being carried out in a timely manner (as evidence by a letter from the lender Bank). He attributed any delay in completing the second phase of the works by the projected date to inclement weather.

[18] With regard to the meeting of 26th September 2010, the Claimant denies that there was any agreement for the Parties to go their separate ways after completion of the second phase of the contract. In fact, he contends that the letter of 1st October 2010 clearly stated his position that the decision had been made to continue to complete the project. The Claimant's position is that the contract was never terminated.

[19] The Claimant does not deny that he received the Defendant's letters in which she demanded the removal of his equipment from her property, but he contended that he was hampered in such removal by the chain erected by the Claimant which prevented his access to the equipment and materials. In these premises, he denies that there was any unlawful use or trespass of the Claimant's property.

[20] At the trial, the Claimant gave evidence on his own behalf and called two other witnesses. The Defendant also gave evidence and called two other witnesses in support of her case.

CLAIMANT'S EVIDENCE

[21] In his witness statement filed on 30th April 2012, the Claimant describes himself as one of the directors of the "Tropical Construction Company". He stated that this Company entered into a contract with the Defendant for the construction of a basement at her residence in East End. The estimated time for completion of the project was 9 months. He stated however that at the time of execution of the agreement, he explained to the Defendant that although the completion time is

stipulated as 9 months, the project may be completed prior to this taking into account the weather and any unforeseen problems as the project was being carried out during the hurricane season.

[22] The Defendant also stated that in a subsequent meeting at which his wife, June Bramble and the Defendant were present, he introduced the Defendant to his employee, Mr Everton Henry and went over the construction plans in detail. Work commenced thereafter. However, problems commenced when the Defendant began to ask for all receipts generated in connection with the project. The Claimant refused to comply, explaining that the cheques were being made to Tropical Construction and not the Defendant. He also reminded her that she had been provided with an estimate for the project which provided a breakdown of the costs. The Claimant states that after several communications on this issue, the Defendant ceased direct contact with him and instead communicated with his wife and with Mr Everton Henry.

[23] He stated that Mr Henry gave the Defendant daily up-to-date reports of the progress of the project and that all of her concerns were dealt with. Notwithstanding this, the Defendant began to complain that there were not sufficient workmen on the site and that they were not working fast enough. The Claimant stated that the Defendant based this assessment on the advice which she received from third parties who she brought on to the site after his workmen had departed.

[24] The Claimant conceded that there were delays in the project, but he attributed this to the heavy rains which shut down the Government and disrupted access to the property (1 week delay) and the high winds which blew a projectile through the Defendant's neighbour's front door which had to be replaced (1 week delay) . He also indicated that there was a further delay of 1 week because of the local carnival celebrations.

[25] The Claimant's evidence is that as a result of the difficulties in the contractual relationship, the Defendant insisted on a meeting with a mediator. This meeting was convened at the Digicel Corporate Office, but it soon became clear that the purported mediator, Mr De Castro was actually the Defendant's project manager. The Claimant states that his wife refused to participate in the meeting because Mr De Castro was not a court appointed mediator.

[26] The Claimant's evidence is that the Defendant then indicated that unless they complied with her request regarding the provision of receipts and regular meetings, she would terminate the contract after the second drawdown. He stated that it was his wife who told the Defendant that if that was her intention then they would seek legal advice. He also stated that his wife asked the Defendant to put her request in writing which she later did. After seeking legal advice, the Claimant stated that his wife wrote to the Defendant informing her that they would continue to complete the works because there was a binding contract between them.

[27] Following this, the Defendant told them that they would be off the job unless they met the terms which she dictated. After the second drawdown, the Defendant informed the Claimant that their services were no longer required and that she would not be requesting a third drawdown.

[28] By this time, the Claimant stated that the project was ahead of schedule because they had put some of their own funds into the project and were working in good faith. The structure was in place and the major part of the plumbing and electrical work was done. What remained to be done were the plastering of the building, tiling, painting, and installation of fixtures, windows, doors and cupboards.

[29] The Claimant stated he was informed by Mr. Henry that he could not access the site because it had been barred. No further work could be done because of this. Later, when he attempted to retrieve his equipment from the Defendant's property it was chained off and she claimed to have no knowledge of the equipment.

However, during a subsequent mediation meeting when the subject was raised, he stated that the mediator asked them to leave the room and spoke to the Defendant and her attorney. The Claimant was later informed that the Defendant would make no further comment at that time but would get back to them. It was during another aborted mediation that the Defendant indicated that she knew where some of the equipment was.

[30] The Claimant stated that there are outstanding bills from this project that have to be paid and that they were unable to take on other projects as they no longer had access to their equipment.

[31] The Claimant also gave sworn oral evidence during which he was cross-examined on a number of material points. He testified that he was a contractor with 10 years' experience and he described the project in question as being a straightforward one. He confirmed that the maximum completion time for the contract was 9 months. He indicated that this was term set out in the written contract and that he also confirmed this orally to the Defendant. Contrary to his witness statement, he denied that he ever told the Defendant that the project could be completed prior to the 9 months' time frame. He denied that this was ever a term of the agreement but stated it was just something that he would try to do.

[32] The Claimant testified that after work commenced, the Defendant was in frequent contact with him. By June 2010, the Claimant confirmed that the Defendant began to insist on being provided with receipts. He informed her that they had a signed contract with no overhead profit so that the receipts belonged to the "Company". As a result, the Defendant began to communicate less with him and more with his wife who he described as a director of the "Company". He denied however that this was because he became fed up with her and stopped answering his phone.

[33] The Claimant agreed that there came a time when the relationship with the Defendant broke down because she was not getting receipts. He testified that he

was approached by the Defendant who suggested mediation. Counsel for the Defendant referred the Claimant to a copy of an emailed message between Mrs. June Bramble and the Defendant dated 21st September 2010 in which the Defendant indicated that she had contacted a court appointed mediator who was willing to hear the case. The message also indicated when "she" (*the mediator*) would be available. The Claimant testified that he could not recall this correspondence.

[34] While he recalled attending a meeting on 26th September 2010, he stated that it was not mediation because there was no mediator present. According to him, Mr De Castro introduced himself as a project manager and at no point during the mediation did he describe himself as a mediator. He also denied that Mr De Castro informed him that any agreement reached in the meeting would be legally binding. The Claimant testified that although he was present throughout the meeting, Mr De Castro left before the meeting commenced because Mrs Bramble refused to continue to participate in the meeting in his presence.

[35] He agreed that as at the date of that meeting, he had received the drawdown for the second phase and he said that he was in the process of completing the second phase and beyond. On re-examination, he clarified that he had in fact commenced the third phase of the project.

[36] The Claimant also denied that he agreed to hand over the project to the Defendant after the completion of the second phase. Instead, his evidence is that he informed her that he would decide on a course after he had discussed the matter with his attorneys. He testified that the contract had not come to an end and based on what had occurred, he felt that there was no reason to change that position.

[37] Counsel for the Defendant also put the letter dated 1st October 2010 to the Defendant. Although he acknowledged his wife's signature on the letter, he claimed that he could not recall having seen it. Having read paragraph 3 of the

letter in which Mrs Bramble stated that: "*We did indicate to you at said meeting that you will be receiving a letter from the company on the decision made then. We are hereby informing you that contrary to our conversation, we will continue to construct said dwelling in accordance with contract signed and accepted by the National Bank of the Virgin Islands on 31st May 2010. It is the intention of the company to complete the said project*", the Claimant denied that he had changed his mind or had reneged on his agreement that the contract would terminate after completion of the second phase of the project.

[38] Notwithstanding his earlier want of recall, the Claimant later told the Court that it became necessary to write this letter because the Defendant wanted them off the site and they had to do something in writing. He reiterated that there was a written binding contract which could not be terminated in the way the Claimant proposed.

[39] With regard to the missing equipment and materials, the Claimant conceded that between November 2010 and February 2011, the Defendant had repeatedly requested that he remove his equipment. These requests were made orally and in writing but were ignored by him. He agreed that he had received the letter of 21st November 2010 which made it clear that the Defendant wanted him to collect his property. He also acknowledged the correspondence from the Defendant dated 7th February 2011 which gave him until 11th February 2011 to remove his property from the site. He testified that he could not recall the exact time when the Claimant was contacted but he told the Court that some discussions were held after he received that letter.

[40] The Claimant reiterated that because he was without his equipment, he was hampered in carrying out other jobs. However, he provided no specific details of these jobs and he told the Court that he made no effort to source or purchase replacement equipment. In respect of the materials left on the site, he conceded that these (including lumber which had been brought to the site before the commencement of the works) had been purchased for the project and that he had

received payments for their purchase in phases 1 and 2 of the project. He denied that he used the Defendant's property as a dump site to store his equipment and other items not directly related to the construction.

[41] He agreed that following the meeting of 26th September 2010 and the letter of 1st October 2010, his wife contacted the lender bank demanding the drawdown for the third phase of the project. He stated that this was done in to complete the project. He indicated that prior to doing this, he did not consult the Defendant although he was well aware of her position regarding the determination of the contract.

[42] When he was re-examined, the Claimant stated that when they received the Defendant's letter of 1st October 2010, he was still working on the site. He stated that they completed work around 3rd October 2010 and that he could not recall being on the site after November 26th 2010.

[43] Mrs June Bramble, the Claimant's wife then gave evidence in support of the Claimant. In her witness statement filed on 30th April 2010, she corroborated much of the Claimant's evidence. She asserted that she is one of the directors of the "company", Tropical Construction and the she prepared all correspondence on behalf of the Company. She averred that after work commenced on the project, they received numerous emails from the Defendant about her concerns and that these concerns were all dealt with *accordingly*.

[44] She stated during the course of the project there were delays or setbacks due to public holidays and rainy weather. During that time, the Defendant complained that the work was progressing too slowly. As a result, she convened a meeting during which the Defendant indicated that she wished to have her property back at the end of the second phase. According to Mrs. Bramble, she indicated that they would provide their response in writing.

[45] After a period of time, she received an email from the Defendant indicating that the Claimant must remove all materials and equipment from her property by a specific

deadline. She was later informed by Mr. Henry that they were unable to proceed to the property to carry out further work because the property was then fenced and barred. At that time, the second phase of the project was completed.

[46] Mrs Bramble testified that she then contacted her attorneys who advised her to respond to the Defendant giving her a date and time when the equipment would be removed from the property. However, they later attempted to retrieve the property, they were prevented from doing so as there was a chain across the entrance to the property.

[47] When she was cross-examined, she told the Court that the term of 9 months was the maximum time it would take to complete the project. She denied that she told to the Claimant that the project could be completed sooner. In fact, her evidence is that she continually reminded the Defendant that the contract was for 9 months.

[48] She confirmed that after signing the contract, the Defendant began to contact her regarding receipts. When she was questioned about the breakdown in communication between the Defendant and Mr Bramble, Mrs Bramble's evidence became quite cagey. She first indicated that she could not speak to this and later she stated that she could not recall when the breakdown occurred.

[49] Mrs Bramble testified that sometime in September 2010, the Defendant contacted her about mediation and she responded by asking her to identify a court appointed mediator. The Defendant then told her that it was not a mediation but rather a meeting with a project manager. She denied that the Defendant made it clear that the purpose of the meeting was to mediate their dispute.

[50] When Mrs Bramble was referred to Clause 8 of the contract, she explained that this clause was necessary because not all parties see eye to eye and it would be best to settle by mediation before going to court. Mrs Bramble agreed that when she was approached by the Defendant, court proceedings had not commenced. She could not explain how a mediator could be appointed by a court in the

absence of an extant legal proceeding. Despite protracted examination by Counsel for the Defendant, Mrs Bramble reiterated that when she read the Defendant's emailed message of 21st September, she felt that she was attending a meeting rather than a mediation because she did not know the identity of the court appointed mediator.

[51] Mrs Bramble also testified that during the meeting, her husband, Mr Henry, the Defendant and Mr De Castro were present. She denied that Mr De Castro was introduced as the mediator or that he informed them that any agreement which they reached would be binding. She stated that when she arrived at the meeting, she was puzzled by Mr. De Castro's presence and when she enquired, the Defendant told her that he was a project manager hired by her. She denied Counsel's suggestion that she had been told in no uncertain terms that Mr De Castro was a project manager by profession who had been retained as a mediator in the matter. She repeated that she was not aware that he was a mediator.

[52] She denied that she agreed to terminate the contract after the completion of the second stage of the contract. When she was referred to the letter of 1st October 2010, she acknowledged the same and agreed that she had signed it. However, she denied that the letter indicated that a decision had been made at the 26th September 2010 meeting to terminate the contract after the second phase. She testified that she never indicated to the Defendant that they would stop work on the project.

[53] She testified that they continued to work on the project after that date and when Counsel enquired as to the date when they completed the second phase, Mrs Bramble responded that she thought it was 2nd November 2010. She also told the Court that the contract was divided into 4 stages. When work ceased on 2nd November 2010, they were at the second stage of the contract and they were on schedule to complete within the contracted time.

[54] She agreed that she had been contacted by the Defendant regarding the removal of the equipment and materials from the property. She also agreed that between December 2010 and 11th February 2011, no efforts were made to retrieve them. Rather, she testified that she passed the Defendant's letters to her attorneys. However, she could not recall whether her attorneys responded to the Defendant. When she was questioned by the Court, Mrs Bramble indicated that she did not respond to the Defendant's letters because she had been instructed by her attorneys to bring in the letters to them. She further stated that they did not collect the equipment and material on the advice of their attorneys who advised them that they must leave the equipment on the property.

[55] The Claimant's final witness was Mr Everton Henry who in his witness statement told the Court that he had been employed to assist in the construction of the Defendant's home. He stated that he was the supervisor of the excavation and the employee who laid out the building and who carried out the construction.

[56] He stated that the Defendant visited the site almost every day and that he explained the ground work and responded to her questions. He described their relationship as a good one and he indicated that when the Defendant requested receipts, he referred her to the Claimant. He also asserted that the Defendant never told him that she had any problems with the building, neither did she ever complain about the length of time for completion.

[57] Mr Henry averred that after the second phase of the work had been completed, he was unable to continue working as the Defendant's property had been fenced and barred. He recalled seeing the mixer, water container and other stuff inside the barrier but he did not remove the same.

[58] He stated that sometime later, the Defendant asked him to remove their property; otherwise, she would put it on the road and would not be held responsible. He

informed her that she needed to speak to Mr Bramble. He related this conversation to the Claimant who told him that he would be seeking legal advice.

[59] He also told the Court that when he finally went on the site to collect the equipment, there was a chain across the property preventing access to the site and all of the equipment and materials had been removed. He later had a conversation with one "Yellow" who informed him that he took some of the jacks while some of the other materials were taken by other workers. When he was re-examined, he confirmed that he never received the concrete mixer (valued at $6,000.00) which had been left on the property and which belonged to him.

[60] During his oral testimony, Mr Henry testified that in September 2010, the project was on schedule and would have been completed by November 2010. He stated that for a house of that size only 4 – 5 months construction time was required. He agreed that there were delays cause by the Festival celebrations and a hurricane but despite this, he stated that the works would have been completed by November 2010.

[61] Although Mr Henry recalled attending a meeting with Mr De Castro, he could not recall very much about it. He could not recall how long it lasted, whether he was present throughout or how the meeting concluded. But he could not recall whether Mr De Castro made any statements prior to leaving the meeting or whether the Parties had agreed to terminate the contract following the second phase. Nevertheless, he recalled that Mr De Castro left of the meeting at an early stage.

[62] He testified that following that meeting, he returned to the site (no specific date mentioned) to carry out works but found that there was a barrier which prevented access to the property. When it was suggested to him that he continued to work on the project up until November 2010, he indicated that he could not do so because there was a barricade which prevented him from entering the property.

DEFENDANT'S EVIDENCE

[63] In her witness statement filed on 24th April 2012, the Defendant averred that the term of completion had been mandated by her bankers who had indicated that they were willing to give a construction loan for up to a 9 month term. Notwithstanding this, she stated that it was a clear understanding between Mr Bramble and herself that the house would be completed by her birthday in November 2010.

[64] She confirmed that at the start of the project, Mr Bramble arranged a meeting on site with Mr Everton Henry and his wife. According to the Defendant, she was informed that Mr Henry would be the builder but it was her expectation that her interaction would be with Mr Bramble who negotiated the contract with her. However, this was the first and only time that she ever saw either of the Brambles on the site.

[65] Three months after the project commenced, she began to express some serious concerns. When seeking updates on the progress of the works, she was unable to reach Mr Bramble by phone. When she finally did reach him, his wife informed her that Mr Bramble does not talk much and that she should liaise with her instead. Although this was completely at variance with her pleadings, the Defendant's evidence is that she had no problems with this because she simply wanted to have her house built.

[66] The Defendant also stated that she did not receive the expected financial updates on the project. Her request for receipts (evidencing the money spent) was flatly refused. She stated that Mrs Bramble also flatly refused to provide an expected finish date for the project despite the fact that construction was not progressing to her satisfaction. In addition, her request to hire additional workmen in order to expedite the project was also rejected. The Defendant stated that this caused her great irritation because she had been consulting with several third parties and had developed an uneasy feeling that the project was on a "go slow". She was forced

to communicate this concern to the Brambles via email because Mr Bramble was no longer answering her calls and messages.

[67] After it became clear that they were at a stalemate, the Defendant stated that she wrote to Mrs Bramble on 16th September 2010 seeking a termination at the end of the second phase. She stated that the Claimant responded by threatening to sue. She reminded Mrs Bramble of the contractual terms which mandated mediation and they agreed that she would make the necessary arrangements.

[68] Mr De Castro agreed to be a mediator and a meeting was convened on 26th September 2010 during which the Defendant expressed her concerns and reiterated her request that the contract be terminated after the second phase. The Defendant's evidence is that both Mr and Mrs Bramble agreed to terminate after the second phase and Mrs Bramble promised to send a formal letter before the end of the week setting out the agreement reached to wit: that the Claimant would exit the site and hand over the project at the completion of phase 2 and that they would have no further obligations to each other.

[69] However a few days later, the Defendant received a letter which purported to recant on their agreement. This letter was rejected by the Defendant who had by then hired an alternative contractor (Mr. Garraway) to complete the contract.

[70] She later stated that prior to contracting Mr Garraway, there was no activity taking place on the site, as a result she sought to secure the property by erecting a chain fence across the entrance in an effort to deter interlopers. She was aware that some equipment including a wheelbarrow, saw, concrete mixer, a few jacks and a generator were left on the property along with a few pieces of plywood. On 23rd November 2010, she wrote the Claimants requesting their removal which was followed by another letter of 7th February 2011. In the letter, she indicated that if the property was not removed by 11th February 2011 at 4:00 p.m. then she would

dispose of the same. She received no response until well after the 11th February deadline.

[71] When she gave oral testimony, the Defendant's evidence was largely consistent with that of her witness statement. In examination in chief, she indicated that the agreement to mediate was set out in the email exchanges between Mrs Bramble and herself. In the email of 21st September 2010, Mrs Bramble agreed that the Defendant's would contact an arbitrator/mediator, and in her emailed response, Mrs Bramble indicated that she had contacted a "court appointed mediator". She later clarified to the Court that her intention was to contact someone who had merely been sanctioned by the court. She could not however, confirm that Mr De Castro was a court appointed mediator. She testified that she had never employed Mr De Castro to act as a project manager and she denied that she ever informed the Claimant or Mrs Bramble that Mr De Castro was the project manager on the project.

[72] She told the Court that she made it clear to the Brambles that they were attending a mediation. She also testified that the session lasted for about 1 hour and that Mr De Castro left about 45 minutes into the meeting prior to its conclusion. She could not say what documents he had in his possession, whether he took notes during the session or if he was paid for attending the meeting.

[73] When she was cross-examined, the Defendant agreed that there was no provision in the contract which required the Claimant to provide her with receipts or bills. She also agreed that the written contract provided a term of 9 months for completion and she conceded that this term was not preceded by the phrase "on or before". Although she insisted that there was an implied term that the project would be completed in the soonest possible time and at the lowest possible costs, she indicated that she expected the construction would be completed no later than 28th February 2011. She also conceded that she did not expect that the project would cost less than the contracted sum of $233,111.50.

[74] Notwithstanding these concessions, the Defendant testified that one of the reasons that she wanted to terminate the contract was because she had concluded that the project should have be completed within 4 months. She stated that she arrived at this conclusion after she conducted her own research and after speaking to third parties. She also stated that at some point, Mr Bramble told her that she could very well have the house completed by her birthday in November 2010. The Defendant told the Court that the Claimant failed to carry out the works within a reasonable time. It was her view that the Claimant should have carried out a lot more work by the time the contract came to an end. She stated that the Claimant did not use all reasonable efforts to carry out the works.

[75] The Defendant denied that she invented these concerns because she simply did not want to pay for the third and fourth phase under the contract. Instead, when she was questioned further, she listed the reasons why she terminated the contract. She stated that the main reasons were:

(i) the lack of accountability in terms of how her money was being spent (her request for receipts was categorically refused on the basis of company policy); and

(ii) the slow pace of the work (by the third month the project should have been in the third phase). In addition, she was concerned about

(iii) the fact that the workers employed on the project had not been vetted to determine their skill level or whether they were otherwise fit and proper employees;

(iv) her inability to properly discuss her concerns with the Claimant who stopped taking her calls and refused to schedule regular meetings; and

(v) the fact that both the Claimant and Mr Everton would refer her to each other when she expressed her concerns.

[76] She said that there was no resolution of these concerns. Out of desperation, she turned to Mrs Bramble who told her "*if that is how you feel, we will just give you back your project at the end of phase 2*". After this, the meeting ended when she

promised to write a letter crystallising what had been agreed. The Defendant stated that at no time did the Claimant indicate that he would need to seek legal advice.

[77] She also testified that although to a great extent she was satisfied with Mr Everton Henry, she had indicated to him that she was not pleased with the calibre of particular workmen on the job. She stated that Mr Henry was introduced as a partner in the business and the person who would be responsible for building the house. She could not recall that he was to act as supervisor on the project. In fact, she stated that she expected Mr Bramble to supervise because he represented himself to her as a contractor and in any event, he was the one with whom she contracted.

[78] She further testified that one month after the construction had ceased (November – December 2010), she regarded the equipment as having been abandoned. Initially, she denied that she agreed that Mr Garraway could take the equipment in lieu of payment or as partial payment. She explained that after taking legal advice, when the project came to an end and work was finished in March 2011, she asked Mr Garraway to clear the property. She indicated that she was not aware of how Mr Garraway disposed of the equipment and materials. By the time she received the correspondence from Mrs Bramble indicating that they would be coming to collect the equipment, it was too late. The equipment had already been removed in late February. However, when she was question further, the Defendant finally told the Court that Mr Garraway had informed her that there was some remedial work which needed to be done and which would increase the costs. When he inquired about the mixer, she recognised that the equipment would have some value and since she did not have the extra money to pay for those remedial works, she told him that he could have the equipment.

[79] The Defence's next witness was Mr Richard Courtney De Castro. He stated that he is an architect/ project manager of 25 years' experience. He provided 2 witness

statements. He averred that in late September 2010 he was contacted by the Defendant in connection with a dispute which she had with her contractor and he indicated that he was willing to act as a mediator between the Parties.

[80] When the meeting was eventually convened, the Brambles, Mr Everton Henry and the Defendant were present. He stated that before and during the mediation, he explained to all parties that any agreement reached at the mediation would be binding on the parties.

[81] He soon recognised that the mediation was somewhat hostile and that the Parties had arrived at an impasse. He noted that the Defendant was disgruntled about the pace of the work and insisted on getting a definite date for the completion of the project. The Defendant felt that there was not a substantial amount of work completed to show for the funds which had been disbursed to date. She felt that she was not getting value for money and she insisted on seeing receipts for the materials purchased for the project. Mr Bramble was unwilling to provide copies of those bills in order to justify the amount sought on the drawdown and he was also unwilling to provide a date for completion. Instead, he was firm that he would finish within the time set out in the construction agreement.

[82] He further stated that at the time of the mediation, the Claimant had made a request for drawdown for phase 3 of the project. His understanding was that the drawdown was sought in advance and that in fact the Claimant was then working on completing phase 2. He stated that prior to the meeting, he visited the site with the Defendant where he found the state of the works were as follows: (1) exterior and interior walls were up; (2) main floor slab completed; (3) steel in place for the columns; (4) the building was up to the ring beam stage; (5) there were insufficient materials to complete the next phase of construction although materials could have been off site.

[83] Mr De Castro's evidence is that when the Defendant asked to have her project back, Mrs Bramble eventually expressed her agreement to hand over the project upon completion of the second phase and she stated that she would put this in writing. He stated that when he left the meeting, it was his understanding that the Parties had agreed that the Claimant would complete the second stage and would hand over the project thereafter and that each side would walk away from each other. There was no discussion about payment of any further money.

[84] In his oral testimony, Mr De Castro stated that he is not a court appointed mediator but that he has acted as a mediator before. He denied that he was engaged on the construction contract or that he informed anyone at the meeting that he was a project manager or that anyone referred to him as such. When he was re-examined, he testified that at the beginning of the meeting, he clearly indicated what his role would be and referred to the mediation clause in the Agreement.

[85] He stated that as the meeting continued the Parties were eventually able to agree that the contract would be terminated and the project handed over to the Defendant.. Counsel for the Defendant questioned Mr De Castro at some length about the fact that there was no document signed by both Parties setting out any agreement reached during the meeting. He agreed that with his experience and in the hostile context any agreement reached should have been reduced into writing.

[86] Mr. De Castro also testified he was present for about 1 hour, during which time the Defendant and Mrs Bramble did most of the talking. Initially, he stated that he could not recall Mr Bramble saying anything during the meeting but he later stated that he might have heard Mr Bramble saying that he would be able to finish the project within the time set out in the agreement.

[87] He disagreed that he said nothing during the meeting, but he confirmed that he was the first person to leave and that he left before the meeting was finished. He could not recall being asked to leave the meeting but he agreed that the

commencement of the meeting there were discussions about his role. He described the Parties as neutral by the time the meeting ended.

[88] The last witness for the Defence was Mr Roy Garraway, the professional contractor who was hired by the Defendant to complete the project after the second phase. His evidence was relevant only in regard to the disposal of the equipment and materials which were left on the Defendant's property by the Claimant. In his witness statement, he stated that he commenced work on the site in January 2011 and at that time the building was incomplete. He confirmed that he had to do some remedial work to correct certain errors. This included adjusting the level of the porch to ensure that it was not flush with the invert level of the door. He also had to rectify some plumbing and electrical issues which included running new pipes.

[89] He also stated that when he went on the site to commence work, there were a few pieces of equipment. He recalled a gas generator, cement mixer, around 50 jacks and some old materials which were of no use. There was also an old shed. His evidence is that the mixer and jacks were given to him by the Defendant as partial payment for the remedial works which had not been budgeted for in the bill of quantities. He stated that the mixer was not in working order but he eventually repaired it. He was not aware of what happened to the generator. Finally, he stated that the old materials were dumped during the clean-up process.

[90] At some pains, Counsel for the Claimant examined Mr Garraway about the equipment and materials which he found on the property. Mr Garraway testified that the following items were found or seen on the property: (1) about 50 jacks; (2) concrete mixer; (3) less than 20 old plywood forms; (4) generator; (5) 50 (rather than 535) scattered flat shoes; (6) sledge/heavy hammer; (7) work shed which had to be broken down; (8) 600 gallon water tank; (9) broken shovel; (10) broken down wheelbarrow; and (11) igloo.

[91] He stated that the value of these items would be roughly $5000.00. He also testified that the Defendant had told him that she had been trying to get the Defendants to remove the equipment for some time. He stated that he used his own equipment to complete the projects but the equipment and materials found at the site were used to set off the cost of the remedial works.

[92] Mr Garraway either denied or claimed to have no knowledge of the following items: (1) electric vibrator; (2) bundle of ½ inch steel; (3) pickaxes; (4) ripping bars; (5) large support ties/ single shoe; (6) galvanise; and (7) spare wheel for F150 truck.

[93] Finally, he stated that using a work force of at least 5 – 6 men on site he was able to complete the contract in about 1 ½ months at cost of $107,000.

COURT'S ANALYSIS AND CONCLUSIONS

[94] The starting point for Court in assessing the relative legal positions of the Parties is the Construction Agreement dated 31st May 2010 and signed by both the Claimant and the Defendant. That Agreement provides the legal context of the relationship between the Parties and ultimately, the resolution of this Claim will depend on the interpretation and construction of its terms.

[95] In the absence of fraud or mistake, the Parties are bound by the terms of the written agreement which they have signed. By signing the document, each party has represented to the other that they have made themselves acquainted with its contents and assented to them.[2] The agreed terms of the contract therefore evidence the intentions and expectations of the Parties and where a contract is made wholly in writing, evidence is not generally admissible to add to, vary or contradict the written terms[3].

[2] Harris v Great Western Rly Co. (1896) 1 Q.B.D. 515 at 530, per Lord Blackburn

[3] Jacobs v Batavia and General Plantations Ltd [1924] 1 Ch. 287

[96] The justification of this rule of interpretation (now familiarly termed the Parole Evidence Rule) is the need to promote certainty. In Shore v Wilson[4], Tindal CJ put it this way:

> *" If it were otherwise , no lawyer would be safe in advising upon the construction or a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if at some future period, parole evidence of the particular meaning which the party affixed to his words or of his secret intention in making the instrument or of the objects he meant to take benefit under it might be set up to contradict or vary the plain language of the instrument itself."*

[97] As with any rule however, there are exceptions[5]. The courts have expounded on such exceptions and it is now well settled that unless a contract contains an "entire agreement" clause, evidence is admissible to show that the writing was not intended to be the entire contract between the parties. This imposes a burden on the party alleging that the written document does not represent the full contract, to counter the presumption that it does.[6] It is also an exception that unless a contract contains an "entire agreement" clause, evidence is admissible to prove a collateral agreement. However, a distinction must be drawn between an agreement which adds to the written agreement and one which contradicts it.[7]

[98] In the case at bar however, Clause 9 of the Agreement provides as follows:

> *"This Agreement constitutes the entire agreement between the parties with respect to the Property and the Owner hereby agrees that she is not entering into this agreement upon the reliance of any statement or other representation otherwise not contained herein."*

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[4] (1842) 9 Cl. & F. 355

[5] There are some other exceptions which are less relevant. Evidence is admissible to identify the parties, subject matter and additional consideration of a contract. It is also admissible to prove custom and where it is sought to challenge the validity of the contract e.g. by claiming rectification or mistake or misrepresentation.

[6] Gillespie v Cheney Egar &Co. [1896] 2 Q.B. 59

[7] Lynsar v National Bank of New Zealand [1935] N. Z. L. R. 129

[99] In the Court's view, this is critical contractual provision presents "an insuperable hurdle"[8] to any allegation that the contract was partly contained in statements which were not recorded in the contract. In Inntrepreneur Pub Co v East Crown Ltd[9], the learned Lightman J made the following observation:

> *"The purpose of an entire agreement clause is to preclude a party to a written agreement from thrashing through the undergrowth and finding in the course of negotiations some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the collateral warranty inadmissible in evidence as is suggested in Chitty on Contract 28th ed. Vol. 1 para 12–102: it is to denude what would otherwise constitute a collateral warranty of legal effect."*

[100] In light of this established legal principle, the Court cannot accept the Defendant's contention that the agreement between the Parties was made partly orally and partly in writing. This is especially so, where there are express terms which directly conflict with the oral agreement which is alleged to have been made.

[101] Clause 2 of the Agreement expressly provides as follows:

> *"The Contractor shall use all reasonable efforts to complete the construction works upon signing of this agreement and completion in 9*

[8] McGrath v Shah (9187) 57 R. & C.R. 452

[9] [2000] 2 Lloyd's Rep 611 at 614; and see Deepak Fertilizers and Petrochemical Corporation v Davy McKee [1998] 2 Lloyds Rep 140, 138, affirmed [1999] 1 Lloyds Rep 387

months' time thereafter provided however, that the delays caused by the Owners' failure to make construction payments in accordance with Appendix I of this Agreement, act of governmental authorities (including delays in any permitting process), force majeure, or any other similar causes not within the Contractor's control which are sufficient to constitute an impossibility of performance or a frustration of purpose of delay outside the control of the Contractor shall be added to the period."

[102] Clause 4 of the Agreement expressly provides that;

> *"The Contractor agrees that they will at all times ensure appropriate supervision of all construction works …"*

[103] The Defendant's contention is that notwithstanding this unambiguous contractual provision, the actual agreement between the Parties is that (1) the subject matter of the contract would have been completed and handed within 4 – 5 rather than 9 months, i.e. by November 2010 and (2) that Mr Bramble would personally supervise the project rather than merely ensure that there was appropriate supervision of all construction works.

[104] In the Court's view, the entire agreement clause precludes the Defendant from relying on the collateral representations or terms in order to underpin or justify her desire to terminate the Agreement. It is clear that the purported collateral terms are in direct conflict with the express provisions of the Agreement. Having carefully reviewed the evidence, the Court is not satisfied that there was any agreement - collateral or otherwise, that Mr Bramble would personally carry out or supervise the works. Although this may well have been the Defendant's impression, this would not without more make it a legally enforceable or binding agreement.

[105] Additionally, while there is some evidence that the Claimant's and/or Mr Henry may have intimated that the project could be delivered earlier than the prescribed time, such representations would not in the Court's view override what had been expressly agreed between the Parties.

[106] According to general principles of contractual interpretation, where a contract provided for the performance of an act within a certain number of months, the period expires on the day of the month bearing the same number as the date in which the period begins or, if there is no such day on the last day of the month. The court in Dodds v Walker [10] referred to this principle of interpretation as the "corresponding date rule".

[107] Given the precise wording in Clause 2 of the Agreement, this rule must be applied with the rule of interpretation which prescribes that where a person is required to perform to act "within" a certain period, the act may be performed up to the last moment of the last day of that period. In Manorlike Ltd v Le Vitas Travel Agency and Consultancy Services Ltd. [1986] 1 All. E.R. 573, Kerr LJ stated the position thusly:

> "If a person is required to do something within a week, or in a week, he has the full week to do it, as it seems to me, including the last moment of that week, and he is not required to complete the task in less than a week. To construe this wording of this notice so that it connotes a period of less than three months, because permission must be given "within" three months with a consequent failure to allow a full period of three months, appears to me to strain the language in a hair-splitting and wholly artificial manner."

[108] It follows that (all things being equal), the Project which is the subject matter of the Agreement should have been completed in February 2011.

[109] In written submissions, Counsel for the Claimant applied what he termed "an objective test" regarding the formation of the contract. He argued that it is apparent from the evidence that there was a meeting of the minds both orally and in written and it was the mutual intention of the Parties to be bound that way. In support, he cited the authority of Smith v Hughes (1871) 6 QB 597 where Blackburn J stated that:

[10] [1980] 1 W.L.R. 1061

> *"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."*

The Defendant then cited the Defendant's consistent calls for the project to progress at an advance pace as demonstrating behaviour/conduct which would override the express term in the contract.

[110] However in the Court's view, the passage in Smith v Hughes merely shows that in a case where the formation of a contract is in issue, the actual intention and understanding of the recipient of the offer is relevant. Once it has been established that a contract has been formed however, the actual intentions of the parties as to the meaning or effect of the contract must be determined from the express terms of the contract and from established rules of contractual interpretation. Having regard to the totality of the evidence, the Court is unable to conclude it was the mutual intention of the Parties that either of these clauses was intended to be an enforceable warranty.

Implied terms

[111] The Defendant also contended that the Claimant breached several implied terms and that such breaches warranted an abridgment or termination of the Agreement. These terms included:

i. The works were to be carried out with reasonable skill and expertise and in the shortest possible time and/or at the lowest possible costs to the Defendant.

ii. At all material times the term of 9 months was a long stop for completion.

iii. She would be kept abreast of the progress of the works and be provided with proof of the costs arising therefrom.

iv. That the Claimant would personally be responsible for carrying out or supervising the construction works.

[112] Generally, there is a presumption against implying terms into written contracts. The more detailed and apparently complete the contract, the stronger the presumption.[11] When called upon to imply a contractual term into a contract, the proper approach of a court is that described by Cockburn CJ in Churchward v R[12] where he stated:

> *"…where a contract is silent, the court or jury who are called upon to imply an obligation on the other side which does not appear in the terms of the contract must take great care that they do not make the contract speak where it was intentionally silent and above all that they do not make it speak entirely contrary to what, as may be gathered from the whole terms and tenor of the contract was the intention of the parties."*

[113] The presumption against adding terms is stronger where the contract is a written contract which represents an apparently complete bargain between the parties[13]. The more detailed and comprehensive the contract, the less ground there is for supposing that the parties have failed to address their minds to a particular issue. Where, however, the bargain is obviously not complete, the court is less reluctant to supply the missing terms.

[114] The implication of a term into a contract depends on the presumed rather than the actual intention of the parties. In some cases, the intention is collected merely from the express words of the contract and the surrounding circumstances; in others, it is collected from the nature of the legal relationship into which the parties have entered. However, in order for a term to be implied the following conditions must be fulfilled: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that it goes without saying; (4) it

[11] Aspdin v Austin (1844) 5 Q.B 671
[12] (1865) L.R. 1 Q. B. 173 at 195
[13] Duke of Westminster v Guild [1985] Q.B. 688 at 698

must be capable of clear expression; and (5) it must not contradict any express term of the contract.[14]

[115] For the reasons which have already been indicated herein, the Court finds that purported implied terms at (ii) and (iv) are not collateral to the Agreement. Moreover, because the implication of a term rests upon the presumed rather than the actual intention of the parties, the Court finds that it is unlikely that they would have intended to incorporate by implication a term which is inconsistent with a term they incorporated expressly.

[116] In Lynch v Thorne[15], the Court held that where a building contract specified a particular method of building which turned out to be defective, there was no room for a general implied term requiring the building to be constructed so as to be fit for human habitation when completed. Other cases have since taken the principle further, holding that the court will not imply further terms in relation to the same subject matter, even if the implied term would not actually conflict with express terms.

[117] It follows that the first step for a Court is to compare the term or condition which the Defendant seeks to imply, with the express provisions of the contract, and with the intention of the parties as gathered from those provisions in order to ascertain whether there is any inconsistency. Having conducted this comparison, this Court is satisfied that the purported implied terms at (ii) and (iv) are inconsistent with the express provisions of clause 2 and 4 of the Agreement and cannot be implied into the contract. It follows that the Defendant could not rely on a purported breach of the same to justify the termination of the contract.

[14] B.P. Refinery (Westernport) Pty Ltd. v Shore of Hastings (1978) 52 A.L.J.R. 20
[15] [1956] 1 W.L.R. 303

[118] With respect to purported implied term in the second half of (i) which contemplates that the contract be completed in the shortest possible time and/or at the lowest possible cost to the Defendant, the same principles apply.

[119] Indeed, recent judicial authority now makes it clear that it is the contractor's obligation to finish by the completion date and it is up to him to organise his work as he sees fit. If the contractor feels that he can leave all the work to the last month and complete on time then, despite the concern of the anxiously watching client, he may do so. If the client wishes to impose some other obligation then, there needs to be an express term to that effect. Multiplex Constructions UC Ltd v Cleveland Bridge UK Ltd [2006] EWHC 1341 (TCC)

[120] Having entered into an agreement with express terms regulating the term of the agreement and the contract price, the Defendant has advanced no cogent legal or other basis upon these terms could be implied.

[121] With respect to the first half of the purported term in (i) which contemplates that "*the works were to be carried out with reasonable skill*", the Court is satisfied that this clause meets all of the criteria for implication. However, the evidence before the Court is that the Defendant's dissatisfaction was not predicated on any lack of skill in the carrying out of the works. While there is some evidence from Mr Garraway and Defendant that remedial works were necessary (porch, electrical and plumbing), it is quite clear that these issues would have come to light after the Agreement between the Parties had essentially been terminated.

[122] In respect of the remaining term (iii), in which the Defendant asks the Court to imply that she would be kept abreast of the progress of the works and be provided with proof of the costs arising therefrom, the position is not as clear. Given that this Agreement sets out what is essentially a fixed term contract, there would typically be no obligation on the part of Defendant to show his costs unless there is a contractual provision expressly requiring him to do so. In the circumstances, it

could not have been the presumed intention of the parties that this term should be implied. If the Parties had intended for this provision to govern their relationship, then a specific and express clause should have been included or alternatively, the Parties should have entered into a cost-plus or cost reimbursement arrangement.

[123] In the same way, the Parties failed to expressly mandate the convening of regular meetings between the Claimant and the Defendant to update on progress and to discuss matters relating to the agreement. Industry practitioners have long recognised the benefits of such a clause to maintaining the relationship of mutual trust and confidence between contractor and client. Best practice dictates that it is a good practice to hold regular update meetings with the client so as to ensure that any issues, risks or problems are identified and fixed as early as possible in the project.

[124] The Court has no doubt that the relationship between these Parties broke down as a direct result of lack of communication, trust and confidence between the Parties. By failing or refusing to communicate with the Defendant in a timely and effective manner, the Claimant did little to assist in the breakdown of the relationship. It is readily apparent to the Court that the Claimant does not comprehend the legal and personal capacity with which he entered into this agreement. He repeatedly referred to Tropical Construction as an incorporated entity with "directors" when there was no such evidence before the Court. Unfortunately, his advisors did not appear to have alleviated this difficulty.

[125] Having heard the evidence and observed the Parties, the Court finds that the Claimant did in fact refuse to take the Defendant's calls and refused to meet with her. Instead, he repeatedly passed her off to his agents who were not party to the Agreement with the Defendant. Having entered into a contract with the Claimant, an unincorporated entity, the Court finds that it is would not be unreasonable for her to expect that he would cooperate and communicate with her and would not

conduct himself in a manner likely to destroy or seriously damage the relationship between them.

[126] It is within this context that Parties agreed to meet in September 2010 to discuss their devolving relationship. The Court having read and heard the evidence has no difficulty in concluding that this meeting was convened pursuant to Clause 8 of the Contract which provides that:

> *"This Agreement shall be governed by the laws of the Virgin Islands and each of the parties hereby irrevocably submits to the exclusive jurisdiction of the Virgin Islands court. However,* ***remediation*** *by .....(Engineer/Project manager) shall be the first course of action in the case of any disagreement."*

[127] Notwithstanding the apparent misnomer in the Clause, the Court is satisfied that both Parties were fully aware of the scope and intent of the meeting and were fully aware of the role to be played by Mr De Castro. Having reviewed the exchange of correspondence between the Parties, and having heard observed the witnesses, the Court is satisfied that the Claimant's witnesses were less than truthful in relating their understanding of the purpose meeting and role of Mr De Castro.

[128] In any event the importance of that meeting lies not in the role played by Mr De Castro or the designation/ label attached to the meeting but rather what agreement (if any) emerged therefrom and its impact on the existing contract between the Parties. In this regard, the Parties' positions are diametrically opposed.

[129] The Defendant contends that the Parties agreed to terminate the contract after completion of the second phase of the works with both sides mutually releasing any further obligation which they may have had to each other. On the other hand, the Claimant categorically denies this and contends that the Defendant wrongfully breached the contract, subsequently terminating the Agreement on 7th December 2010 when she restricted the Claimant's access to the site to carry out and complete the work.

Discharge by Agreement

[130] It follows that the Court must consider not only the Parties' evidence but also the legal principles governing the termination of a contract by mutual agreement. In that regard, the general legal principle is that an agreement by parties to an existing contract to extinguish the rights and obligations that have been created is itself a binding contract provided that it is either made under seal or supported by consideration. Consideration raises no difficulty if the contract to be extinguished is still executory, because in such a case each party agrees to release his rights under the contract in consideration of a similar release by the other. The discharge would therefore be bilateral because each party would surrender something of value.

[131] Moreover, the courts have concluded that a written contract may be rescinded by parol either expressly or by the parties entering into a parol contract which is entirely inconsistent with the written one, or inconsistent to the extent that it goes to the very root of it. This legal principle was applied in British and Beningtons Ltd. V North West Cachar Tea Co[16] which case considered the ratio in Hunt v. South Eastern Ry. Co.[17], Thornhill v. Neats[18] and Morris v. Baron & Co.[19] However, the position was perhaps best summarised by Lord Haldane in Morris v. Baron & Co. where he stated:

> *"Accordingly while a parol variation of a contract required to be in writing cannot be given in evidence, the very authorities which lay down this principle also lay down not less clearly that parol evidence is admissible to prove a total abandonment or rescission. Now there is no reason why this should not be done through the instrumentality of a new agreement which does not comply with the*

[16] [1923] AC 48 per Lord Sumner at page 68; applied in United Dominions Corporation (Jamaica) Ltd v Shoucair (1968) 12 WIR 510 and Jagdeo Sookraj v Buddhu v Samaroo (2004) 65 WIR 401
[17] (1875) 45 L. J. (Q. B.) 87
[18] 141 E.R. 1392
[19] [1918] A.C. 1

statutory formalities, just as readily as by any other mode of mutual assent by parol. What is, of course essential is that there should have been made manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which still leave it subsisting."

[132] In light of the defence advanced by the Defendant, it is clear that in order to succeed in his claim the Claimant must satisfy the Court on a balance of probabilities that there was no agreement reached between the Parties following the September 2010 meeting. In applying the balance of probability standard, the Court is guided by the dicta of Baroness Hale in the House of Lords decision Re B (Minors) 2008 EWCA Civ.282 and by Lord Nicholls in Re H (Minors) (Sexual Abuse: standard of proof)[20].

"The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. …Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation.

Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established."

[20] 1996 AC 563 at 586 D-H

[133] Having reviewed the witness statements of all the witnesses and after listening to their oral testimony and observing their demeanour in Court, the Court is satisfied on a balance of probabilities that the Parties did at the close of the meeting arrive at an agreement, the terms of which would have abrogated the Agreement at the completion of the second phase of the project. The Court has no doubt that the Defendant would have been a trying client for the Claimant and that mutual hostility and exasperation would have driven their agreement to bring an end to their relationship.

[134] The Court finds that the contents of the letter dated 1st October, 2010 to be unambiguous. The letter points to an earlier agreement reached during the meeting of September 2010 to mutually abrogate the Agreement. The Court found that both Mr and Mrs Bramble's evidence in this regard to be implausible and unreliable. The prevaricating evidence of Mr Bramble convinced the Court that he was not candid or truthful about his awareness of the letter and its contents. Further, it did not escape the Court's notice that Mr Henry, an acknowledged participant at the meeting could give no decisive evidence consistent with that of the Brambles.

[135] Further, given the letters clear intimation that "*We did indicate to you at said meeting that you will be receiving a letter from the company on the decision made then. We are hereby informing you that* ***contrary to our conversation, we will continue to construct said dwelling in accordance with contract signed****.",* the Court was not persuaded by the improbable construal advanced by Mr Bramble or his witnesses. This view was further reinforced by the letter dated 1st October 2010, from the Claimant's agent June Bramble to the Manager of the National Bank of the Virgin Islands in which she stated that " *The concerns raised by Ms Burns in relation to us turning over the project to her at the end of Phase II is very disconcerting. I* ***did indicate that we would do such, however on further consultation we have decided not to accede to her wishes as we are still bound by the contract of 31st May 2010*** ..." (Emphasis mine)

[136] Conversely, having had an opportunity to observe the demeanour of the Defendant, the Court is satisfied that she was sufficiently truthful in her responses. The Court was also persuaded that Mr De Castro was also a credible witness. While there may well be legitimate concerns with how he chose to conduct the purported mediation, this would not in the Court's view affect his credibility. His evidence as to the state of agreement at the time when he left the meeting is consistent with that of the Claimant and the Court has no doubt that is accurate.

[137] In the premises and applying equitable principles, the Claimant cannot recant on his previous agreement and purport to enforce the original obligations under the Contract.[21] The Court therefore concludes that the Contract was mutually terminated by agreement of the Parties on 26th September 2010. It follows that the Claimant cannot maintain that the Defendant wrongfully terminated and breached the contract. His claims for loss and damage as a result of this breach including unpaid monies for the third drawdown as well as loss of future monies for deprivation of doing work stipulated in the contract cannot be maintained and are accordingly dismissed.

Disposal of the Equipment and Materials

[138] In regard to the materials which the Claimant alleges were left on the property, the Defendant's evidence is that they would have been purchased through previous disbursements under the loan facility secured to finance the project. This evidence was untraversed by the Claimant during the course of these proceedings. On a balance of probabilities, the Court therefore accepts the Defendant's evidence and will dismiss the Claimant's claim in relation to the unused materials.

[21] Birmingham and District Land Co v London and North Western Rly Co (1888) 40 Ch. 268; Charles Rickards Ltd v Oppenheim [1950] 1 KB 616

[139] In so far as the equipment is concerned, the position is not as simple. It is clear from the evidence that in contemplation of the project, the Claimant brought several pieces of equipment onto the Property. This general fact is not disputed by the Defendant although the parties are not completely *ad idem* on the detail of inventory. It is also clear that in the wake of the meeting of 26th September 2010, and after completion of the second phase of the project and the determination of the contract, the equipment remained on the property.

[140] The Defendant argued that she considered that the property had been abandoned one month after the construction had ceased or between November – December 2010. Unfortunately, the Defendant's Counsel provided no legal authority expounding upon or justifying that conclusion or the subsequent actions taken by his client. This was indeed unfortunate given the potential legal exposure which she faced.

[141] What is clear is that in the circumstances which were described, the common law dictates that an involuntary bailment[22] would have been created. Although involuntary bailees do not voluntarily consent to holding, they still owe a duty of care to the owner of property. It is clear that a breach of the standard may result in liability under the tort of conversion.

[142] The law on abandonment and the rights and duties of involuntary bailees are a matter of common law and the Court found that the learning on Palmer on Bailment to be particularly useful. At paragraph 26 0121 of that text, "abandonment" is analysed as follows:

> *"The notion of abandonment may apply in two different senses to objects found by a non-owner: one colloquial and one juristic. In the first sense, a loser may abandon the search for a lost object, whether by reason of other claims on his*

[22] An involuntary bailment arises where a person, without their consent, finds themselves in possession of goods belonging to another party (for instance, where an owner of goods sends these goods to another party who does not request that these goods are sent).

time, or a belief that the place where the object has been lost is one where others are likely to find it and return it. The loser in that position does not resign any proprietary or possessory claims to the chattel, and when the chattel is found the ordinary rules apply: the law recognises the paramount claim of the owner and, subject to that, normally awards the goods to the person first in possession.

The second and more important is that of a divesting abandonment, where the finder comes upon a chattel that the owner has previously left or cast away with the intention of divesting himself not only of possession but also of ownership."

[143] Clearly, the Defendant's case must fall within the second category. The learned authors then go on to state:

"Despite some surviving doubt, the better opinion appears to be that divesting abandonment is a defence to conversion provided that a party entitled to do so has renounced possession and the immediate right to possession of the chattels in question. Clear evidence both of intention to abandon and of some physical act of relinquishment will be required and, given the element of strict liability in conversion as contrasted with the need for mens rea in crime, it would seem that a mere reasonable belief that abandonment had taken place would not suffice as a defence.

[144] The Court must therefore consider whether there has been both an intention to abandon and some physical act of relinquishment demonstrated on the part of the Claimant. In so considering, the Court must take into account the whole of the circumstances of the case. In the case at bar, the Court has considered the circumstances under which the equipment came on to the Defendant's property; as well as the devolving relationship between the Parties and the correspondence from the Claimant's agent indicating that he considered the Agreement to be in force and legally binding and expressing his intention to complete the project. The Court has also considered the value of the items.

[145] Bearing in mind that the ownership or right to possession of the equipment was never in doubt, the burden of proving abandonment as a defence to a claim in

conversion is on the Defendant and having considered all of the evidence, the Court concludes she has not discharged the burden of proving on a balance of probabilities that the Claimant abandoned whatever equipment remained on the property.

[146] Having considered the totality of the circumstances of this case, the Court has some difficulty in discerning how the Defendant could reasonably have come to the conclusion that the Claimant intended to abandon the equipment. In the Court's view, the context would have made it clear to the Defendant that the Claimant's lack of response stemmed from his legal position which would have been communicated to her[23]. The equipment remained uncollected no doubt to leverage that position and the Defendant would have been well aware of this.

[147] Having become an involuntary bailee[24], the Defendant should have sought advice as to her duty of care in the circumstances and/or how her obligations could be lawfully determined. Her advisors would no doubt have indicated to her that although at common law, the duty arising is much lower than in either bailment for reward or gratuitous bailment, there is a duty to abstain from wilful or reckless damage.[25] In this case, the Defendant would have been obliged to take proper care of the bailed property and surrender to the Claimant or dispose of the property in accordance with his instructions. They would have also advised her that the prohibition against the sale or disposal of the goods maintains as in the case of bailment for reward.

[148] No doubt, the Defendant's attorneys would have also advised her that the scope of the duty of the involuntary bailee to abstain from wilfully damaging the goods varies widely according to the circumstances of the bailment. There is some

23 Letter from JS Archibald and Co to the Defendant dated 23rd November 2010.
24 Palmer, *Bailment* (1991), p.677 defines it as "… a person whose possession of a chattel, although known to him and the result of circumstances of which he is aware, occurs through events over which he has no proper control and to which he has given no effective prior consent." Also, at p.436:"A possessor who has not … consented, but is nevertheless actually or constructively aware of the presence in his possession of goods belonging to another, will fall to be treated as an involuntary bailee."
25 Elvin & Powell ltd v Plummer Roddis Ltd (1933) 50 TLR 158

authority for the proposition that there can be no legitimate complaint against a bailee who acts in a manner which is considered "reasonable and proper" in all the circumstances [26] including the destruction of the goods if they have become a nuisance. Similarly, a bailee who acts with the object of either returning the goods or mitigating responsibility for them (whether by delivering them to the police) would also incur no liability to their owner. Unfortunately, neither of these circumstances arises here.

[149] Unlike other jurisdictions such as the United Kingdom, the remedies available to a involuntary bailee for uncollected goods remain ill-defined and without statutory foundation. In the United Kingdom, the Torts (Interference with Goods) Act 1977 gives the bailees a statutory power of sale in relation to bailor's goods provided the bailee gives the bailor notice in a prescribed form to collect the goods within a reasonable period of time. If the bailor does not collect, or give directions for delivery, then the bailee is entitled to sell the goods and must account to the owner for the sale of the proceeds after deducting the associated costs and sale expenses. From the evidence, it appears that the Defendant attempted to somewhat follow this framework. Unfortunately, this UK statute has no application in this Territory and cannot avail the Defendant.

[150] To summarise therefore, while it can be said that the law of bailment will apply when people are in possession of goods that remain uncollected, the remedies available to such a bailee are limited. Generally, at common law they do not extend to the sale or disposal of the goods. There are however, two narrow exceptions: (1) the principle of agency of necessity excuses the bailee from liability when there is an actual commercial necessity to dispose of the goods. The principle also applies where goods are deteriorating or otherwise losing value, but only if the loss is serious enough to constitute an emergency; (2) it has also been

26 Hiort v Bott (1874) LR Ex 86 at 91 per Cleasby B

suggested that a bailor who has abandoned all title and interest in the goods may permit the bailee to dispose of the goods at will.

[151] The Defendant has only advanced the latter exception as a defence to the Claim, and for the reasons which have already been set out, the Court is of the view that this cannot be maintained. Having considered the nature and value of the goods, the circumstances in which they have been deposited, the facilities at the Defendant's disposal, the readiness with which the goods could have been returned to the Claimant and the conduct of the Parties, in the Court's view the equipment could only be classified as merely "uncollected" rather than "abandoned" as that term is legally defined.

[152] In the premises and having advanced no other viable legal basis for her actions, the Court finds that the Defendant breached her common law obligations and converted the equipment by disposing of the same either in the setoff transaction with Mr Garraway or otherwise[27]. The Defendant is entitled to recover provable loss and damage.

Damages

[153] According the learned authors of Mac Gregor on Damages the normal measure of damages for conversion is the market value of the goods converted.[28] In this case, the burden of proof lay with the Claimant to prove the value of the goods as at the date of conversion. In discharging this burden, the Claimant put before a court a list of material and equipment left at the property along with manuscript notations of their value. The evidence of Mr Henry discloses that he provided these figures and he acknowledged that they reflected the replacement cost of each item. In the Court's view there is no basis to deviate from the normal measure of damages in this case. The Claimant having failed to establish the

[27] Anderson and Anderson v Earlanger [1980] C.L.Y. 133
[28] Hall v Barclay [1937] 3 All. E.R 620

value of the goods as at the date of conversion, the Court can only award a nominal sum of o $4500.00.[29]

[154] The Further Amended Statement of Claim also sets out claim for loss of use. However, other than the bare allegation, the Claimant advanced no cogent proof in support of this claim. Indeed this claim as pursued with a decided lack of enthusiasm and the Court is not satisfied on a balance of probabilities that there was any loss incurred by reason of contracts made with third parties or any expenditure incurred in hiring substitute equipment or otherwise. In the premises, the Court therefore denies this aspect of the Claim.

[155] It is therefore ordered as follows:

i. Judgment is entered for the Claimant in the sum of $4500.00.
ii. Interest on that said sum.
iii. All other claims for relief are dismissed.
iv. The Defendant shall pay the Claimant's costs in the sum of $1500.00.

Vicki Ann Ellis
High Court Judge

[29] Da Rocha-Afodu & Anr v Mortgage Express Ltd & Anr [2014] EWCA Civ 454