EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2012/0028

BETWEEN:

YATES ASSOCIATES CONSTRUCTION COMPANY LTD

Appellant

and

BLUE SAND INVESTMENTS LIMITED

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mde. Ola Mae Edwards	Justice of Appeal [Ag.]

Appearances:

Mr. Terrance Neale for the Appellant
Mr. Sydney Bennett, QC, with him, Ms. Anthea Smith for the Respondent

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2014: January 14;
2016: April 20.

Civil appeal – Building contract – Defective Construction – Appeal against trial judge's findings of fact – Approach of appellate court to trial judge's findings of fact – Expert evidence – Expert's duty to the court – Part 32 of the Civil Procedure Rules 2000

The appellant, Yates Associates Construction Company Ltd ("Yates"), entered into an oral agreement with the respondent, Blue Sand Investments Limited ("Blue Sand"), to construct a house/villa on Blue Sand's property at Virgin Gorda in accordance with architectural designs and drawings to be supplied by Blue Sand. During pre-contractual discussions, Ms. Christina Yates acted on behalf of Yates and Mrs. Lyn Hill, Mr. Frederick Hill (the "Hills") and Mr. Jon Nathanson ("Mr. Nathanson") acted on behalf of Blue Sand.

The parties relied on oral representations of persons acting on their behalf and on a written budget estimate of $2,542,151.70 ("the Budget") compiled by Yates. The budget was formulated on the basis of blueprints and drawings by Mr. Lyndon Massicott ("the

Massicott drawings"), which were prepared upon the instructions of Mr. Nathanson. Yates commenced work on the villa in April 2007. The Massicott drawings were subsequently adjusted to comply with Blue Sand's licence to own land and substantial variations were also required by Mr. Nathanson due to design changes requested by Blue Sand. These changes were made by Ms. Avaline Potter ("Ms. Potter"), acting on the instructions of Mr. Nathanson.

Yates began experiencing problems on the project very early in the construction; nevertheless, the villa was substantially completed in or around January 2010. Blue Sand by its director Mrs. Hill went into occupation in or about February 2010. A number of defects were found with the villa and they were brought to the attention of Yates. Yates remedied some of the defects but was not permitted to remedy others. In or about June 2010, Blue Sand asked Yates to cease all work on the villa and Yates complied.

Prior to this, Yates submitted an invoice to Blue Sand ("Certificate No. 13") totaling $260,837.36 for work done on the site up to that time. However, Yates was not paid and their subsequent attempts to obtain payment from Blue Sand were unsuccessful. Yates eventually instituted a claim against Blue Sand seeking $260,837.36 for payment under Certificate No. 13; $98,311.20 in respect of retention monies; and alternatively, payment on a quantum meriut for work done at Blue Sand's request.

Blue Sand admitted that items totaling $191,616.92 under Certificate No. 13 had been billed in accordance with the agreement and the sum was therefore due and payable to Yates. However, Blue Sand averred that it had already paid certain sums under the agreement and that Yates had been overpaid in the sum of $163,617.76 in respect of unilateral changes to the Budget prices on items in the Budget and it was therefore entitled to have that sum set off against the amount due under Certificate No. 13. Blue Sand also averred that there were sums claimed and unpaid under Certificate No. 13 which were in respect of items on which payment was not due. Additionally, Blue Sand counterclaimed for damages for defects in the sum of $1,104,747.67; and $90,160.00 for loss of rental income.

The trial judge noted that central to the issue of overpayment was whether Mr. Nathanson had real or ostensible authority to make design changes and order variations in the works and agree terms of payment on behalf of Blue Sand. She found that he did. She therefore concluded that variations that were made to the contract/agreement and that were paid for by Blue Sand were due to Mr. Nathanson's authorization, acting as agent for Blue Sand and/or on Blue Sand's consent and knowledge and that Blue Sand was not entitled to a refund of any such sums.

The learned trial judge then went on to make a number of other factual findings in relation to the sums claimed by Yates for items under Certificate No. 13 and defects in construction alleged by Blue Sand. She examined the specific issue of overpayment in in relation to each item under Certificate No. 13 and rejected Blue Sand's claim for overpayment. In relation to the remedying of defective construction works, the learned judge's findings were

mostly in favour of Blue Sand. She noted that although Yates accepted liability for some of the defects, it only proffered a global sum of $25,000.00 for remedying the defects and went on to hold that the costs of making good the defects found attributable to Yates were to be awarded and calculated on the values given in a report given by Mark Hodkinson. In respect of the retention monies, the learned judge found that it could be readily implied that the parties intended to make provision for some form of retention and a reasonable defects liability period. The judge found that a period of 6 months to remedy the defects was reasonable and that Yates had done little to do so and that Blue Sand's action in seeking alternative solutions was not unreasonable. In relation to the loss of rental income, the judge found that Blue Sand did not establish that the villa was intended for rental and that Yates knew of this at the time they entered into the contract. Finally, the judge dismissed Yates' claim for miscellaneous charges under Certificate No. 13.

Both parties were dissatisfied with the learned trial judge's findings of fact, her apportionment of liability and her award as to damages and each filed a number of grounds of appeal against those factual findings.

Held: allowing Yate's appeal on all grounds save and except in relation to one finding of fact; dismissing Blue Sand's cross-appeal on all grounds except one; ordering that Yates is entitled to its claim for miscellaneous charges set out in Certificate No. 13; making the orders as set out at paragraph 137 of this judgment; and making the costs order as set out at paragraph 139 of this judgment, that:

1. An appellate court reviewing the findings of a trial judge on the printed evidence in relation to a question of fact tried by the judge without a jury and where there is no question of the judge misdirecting himself, should not interfere with the trial judge's decision unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion. In the circumstances, the appellate court may consider that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. However, either because the reasons given by the trial judge are unsatisfactory, or because it is clearly appears so from the evidence, an appellate court may be satisfied that the trial judge has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate court.

   Watt or Thomas v Thomas [1947] AC 484 applied; **In re B (A Child)(Care Proceedings: Threshold Criteria)** [2013] 1 WLR 1911 applied; **Assicurazioni Generali SpA v Arab Insurance Group (BSC)** [2002] EWCA Civ 1642 applied; **In re B (A Child)(Care Proceedings: Threshold Criteria)** [2013] 1 WLR 1911 applied; **Beacon Insurance company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 applied.

2. Appellate court restraint against interfering with findings of fact, unless compelled to do so, applies not only to findings of primary fact, but also to the evaluation of

those facts and inferences to be drawn from them. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses who have given oral evidence, and of the weight to be attached to their evidence, an appellate court has to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. It is only in exceptional circumstances that an appeal court is entitled to take a different view on credibility from that of the judge who has seen the witness, particularly when the judge has referred favourable to the demeanour of the witness concerned.

Central Bank of Ecuador and others v Conti Comp SA and others [2015] UKPC 11 applied; **Margaret Blackburn v James A.L. Bristol** GDAHCVAP2012/0019 (delivered 12th October 2015, unreported) applied; **Henderson v Foxworth Investments Limited and another** [2014] UKSC 41 applied; **In re B (A Child)(Care Proceedings: Threshold Criteria)** [2013] 1 WLR 1911 applied.

3. Where the trial judge fails to make proper use of the advantage he or she possesses in analyzing and carrying out an evaluation of the evidence, the judge's decision cannot stand if the decision does not comport with the evidence that was adduced. The critical question before an appellate court is whether there was evidence before the trial judge from which the judge could properly have reached the conclusions that he or she did or whether, on the evidence, the reliability of which it was for the judge to assess, that the judge was plainly wrong.

   Justus William v Evely Inglis SLUHCVAP2013/0032 (delivered 28th October 2015, unreported) applied; **Marie Makhoul v Cicely Foster et al** ANUHCVAP2009/0014 (delivered 23rd February 2015, unreported) applied; **Biogen Inc v Medeva plc** [1997] RPC 1, 45 applied; **Housen v Nikolaisen** applied [2002] 2 SCR 235; **Chiverton Construction Limited et al v Scrub Island Development Group Limited** BVIHCVAP2009/0028 (delivered 19th September 2011, unreported) applied.

4. In this case, the trial judge undoubtedly had the advantage of seeing and hearing the witnesses give their evidence. However in relation to Yates' claim, the trial judge made a number of factual findings which were not open to her on the evidence which was before her. There were clear inherent inconsistencies with a number of the trial judge's factual findings and these inconsistencies could not reasonably be explained or justified. In the circumstances, these factual findings made by the learned trial judge merited appellate intervention.

5. In relation to Blue Sand's counterclaim, the learned trial judge, in respect of most of her factual findings, made proper use of the advantage she had as the trial judge. The findings of fact made by the judge in favour of Yates were clearly open

to her on the evidence before her. Accordingly, the trial judge's findings could not be assailed.

6. Expert evidence must be considered together with all of the evidence which is before the court and which the judge has accepted. The judge must determine what weight to attach to the expert evidence. It is necessary for an expert to present the analytical process by which he or she reached the conclusion in the report. It is insufficient that an expert merely supplies his or her conclusion on a matter in issue between the parties. In this case, by Mr. Hodkinson's own admission, he was never provided with a copy of Part 32 of CPR 2000. Further, he was not advised that he ought to have certified at the end of his report that he had not in fact received instructions from any other source, other than what he had declared. Mr. Hodkinson relied on the report of experts who were not called as expert witnesses in the matter to provide his pricing quotation. Mr. Hodkinson was therefore in breach of a number of the mandatory provisions of Part 32 of CPR 2000. On this basis the learned trial judge ought not to have accepted Mr. Hodkinson's report and the costs of repairs therein or at the most she ought to have accorded very little weight to his report.

   Part 32 of the **Civil Procedure Rules 2000** applied; **Potomek Construction Limited v Zurich Securities Limited** [2004] 1 All ER (Comm) 672 distinguished.

JUDGMENT

Introduction

[1] **BLENMAN, JA**: This is a judgment of the majority of the Court. This is an appeal by Yates Associates Construction Company Ltd ("Yates") and a cross-appeal by Blue Sand Investments Limited ("Blue Sand") against the judgment of the learned trial judge in a building contract dispute. The legal consequences in this matter depend heavily on the facts, as such, it is necessary to set out the background facts in some detail.

Background Facts

[2] The following chronology of events is gleaned from undisputed facts in the court below or otherwise is to be treated as findings of fact made by the learned trial judge. In or around April 2007, Yates entered into an oral agreement with Blue

Sand to construct a house/villa on Blue Sand's property at Virgin Gorda delineated as Parcel 100 Block No. 5042A, in accordance with architectural designs and drawings to be supplied by Blue Sand. The pre-contractual discussions commenced in or around August 2006. The persons who acted on behalf of the respective companies in negotiating this contract were Ms. Christina Yates ("Ms. Yates") for Yates and Mrs. Lyn Hill ("Mrs. Hill"), her husband, Mr. Frederick Hill ("Mr. Hill") (together "the Hills") and Mr. Jon Nathanson ("Mr. Nathanson") (the Hills' New York based architect and friend) for Blue Sand. It is noteworthy that Mr. Nathanson was the main person communicating with Yates for and on behalf of the Hills.

[3] There appears to have been close and informal commercial relations between the parties, hence their reliance on oral representations of persons acting on behalf of the parties and on a written budget estimate of $2,542,151.70 ("the Budget") compiled by Yates between 27th December 2006 and 21st January 2007. The Budget was treated as the basis of the agreement together with the oral discussions and was formulated on the basis of blueprints and drawings prepared by Mr. Lyndon Massicott ("Mr. Massicott"), a civil engineer who was then employed by Yates, upon the instructions of Mr. Nathanson. These blueprints and drawings, 31 in total, took several months to prepare and for ease of reference are called "the Massicott drawings". Disputes relating to the Massicott drawings arose between the parties. No completion date was agreed upon; however, it was contemplated that the project would be completed within 18 months of the commencement of construction. Blue Sand paid an initial deposit of $250,000.00 and it was agreed that Yates would submit invoices at regular intervals for work done and payments would be made on the basis of these invoices once reviewed by Blue Sand. Blue Sand paid the first 12 certificates submitted to it and has to date paid some $3,041,018.10 on invoices submitted by Yates.

[4] In pursuance of their agreement, Yates commenced operations at the end of April 2007 prior to obtaining planning approval. The Massicott drawings were submitted to the Land Development Control Authority but were found not to be in line with Blue Sand's licence to own the land,[1] therefore, adjustments had to be made. In addition, Mr. Nathanson required substantial variations because of design changes requested by Blue Sand. The required changes to the blueprints and drawings were made by Ms. Avaline Potter ("Ms. Potter"), a local architect acting on the instructions of Mr. Nathanson. Ms. Potter subsequently invoiced Yates some $13,614.00 for her services. The final drawings were submitted to the Authority on 13th June 2007 by Yates and approved on 6th September 2007.

[5] The learned trial judge accepted as fact that Yates began experiencing difficulties on the project very early in the construction phase primarily due to Mr. Nathanson. Mr. Nathanson was described as an extremely difficult person to work with due to disagreements in construction methods and contradictory instructions. The relationship between Yates and Mr. Nathanson and the Hills deteriorated into mutual recrimination. In any event, the villa was substantially completed in or around January 2010. Blue Sand by its director Mrs. Hill went into occupation of the house in or around February 2010. A number of defects were found and brought to the attention of Yates. Yates expressed and was allowed to remedy some of the defects but was not permitted to remedy others. In or about June 2010, Blue Sand asked Yates to cease all work which Yates did on or about 20th June 2010.

[6] Prior to that, on or about 31st December 2009, Yates had submitted an invoice to Blue Sand marked "Payment Certificate No. 13" ("Certificate No. 13") totalling $260,837.36 for work done on the site to date. They were not paid. On 7th July 2010, in an exercise in futility, Yates wrote to Blue Sand requesting payment. On

[1] Blue Sand was granted a Non-Belonger's licence to own the land.

22nd July 2010, Yates' attorneys wrote to Blue Sand again requesting payment. Blue Sand's attorney responded with a holding letter on 6th August 2010. On 6th September 2010, Blue Sand's lawyers requested the return of all keys which Yates attended to on like date. No monies were forthcoming for the payment of Certificate No. 13.

[7] On 20th September 2010 Yates instituted a claim against Blue Sand seeking $374,148.56 being sums allegedly due under the contract; with specificity:

(i) $260,837.36 claimed under payment Certificate No. 13;

(ii) $98,311.20 in respect of retention monies;

(iii) $15,000.00 in respect of design changes (this claim was abandoned by Yates);

(iv) Alternatively, payment on a quantum meriut for work done at Blue Sand's request.

[8] Blue Sand admitted that of the $260,837.36 claimed under Certificate No. 13, items totalling $191,616.92 had been billed in accordance with the agreement and that that sum was therefore due and payable to Yates. In addition, Blue Sand averred that it had already paid certain sums under the agreement and that it had overpaid Yates and therefore it was entitled to recover such payments as monies had and received by Yates or alternatively on the basis of unjust enrichment. The payments amounted to $163,617.76 and Blue Sand claimed to be entitled to set off that sum against the amount due under Certificate No. 13. Blue Sand also contended that Yates had invoiced them under Certificate No. 13 for monies which had not in fact fallen due and denied that these sums claimed by Yates were or are due and owing.

[9] Blue Sand counterclaimed for defective construction works and overpayment to Yates as follows:

(i) the sum of $1,104,747.67 in respect of remedial works on the house;

(ii) the sum of $163,617.76 in respect of overpayments under Certificate No. 13; and

(iii) the sum of $90,160.00 in respect of rental income.

[10] I propose to treat with the judgment below in some detail.

The Judgment in the Court Below

[11] The learned trial judge found that the main issues for determination were:

(i) Whether Yates was entitled to recover from Blue Sand the sum of $260,837.36 in respect of Certificate No. 13 for work done under the contract or on a quantum meruit basis for work done;

(ii) Whether Yates was entitled to be paid $98,311.20 for the retention monies;

(iii) Whether Blue Sand was entitled to set off against any sums found to be due and owing to Yates monies allegedly overpaid to Yates ($163,617.76) under Certificate No. 13;

(iv) Whether Yates was liable in damages to Blue Sand for the sum of $1,104,747.67 for the costs of remedying defective construction works;

(v) Whether Yates was liable to Blue Sand for loss of rental income of $90,160.00; and

(vi) Whether interest at a commercial rate was payable on any sums found to be due and owing.

[12] I shall turn now to each of the issues identified by the learned trial judge.

Whether Yates was entitled to recover from Blue Sand the sum of $260,837.36 in respect of Certificate No. 13 for work done under the contract or on a quantum meruit basis for work done

[13] The learned trial judge noted[2] Blue Sand's admittance of the sum of $191,616.92 due and payable to Yates. With respect to the balance of the monies, she went on to specifically examine the claims made by Blue Sand regarding the issue of overpayment.

[14] The learned trial judge stated[3] that central to the issue of overpaying was the issue of whether Mr. Nathanson had real or ostensible authority to make design changes and order variations in the works and agreed terms of payment on behalf of Blue Sand. Significantly, the learned trial judge found that Blue Sand had left all owner decisions to Mr. Nathanson. She found[4] that Blue Sand held out Mr. Nathanson as their representative to make all decisions relating to all aspects of the project and that Yates was entitled to so rely and act on all such instructions and representations. The learned trial judge found that the scope of his authority exceeded the usual scope of authority of architects implied at law. In short, Mr. Nathanson 'was clothe[d] by Blue Sand with ostensible authority to act on their behalf on all aspects of the project including making variations, agreement prices and contracting with third parties'.[5] As such, variations that were made to the contract and were paid for by Blue Sand were due to Mr. Nathanson's

[2] At para. 21 of the judgment.
[3] At para. 30 of the judgment.
[4] At para 34 of the judgment.
[5] Ibid.

authorization, acting as agent for Blue Sand and/or on Blue Sand's consent and knowledge. Blue Sand was therefore not entitled to a refund of any such sums.

[15] I will now go on to indicate the judge's ruling in relation to each item under Certificate No. 13 as she examined the specific issues of overpayment in a detailed manner.

Ms. Potter's fees

[16] The first item of alleged overpayment was Ms. Potter's fees. The contract had provided for $10,000.00 for blueprints, drafting and engineering. Yates later billed Blue Sand $14,975.00 which included a 10% markup by Yates. Ms. Yates testified that the revisions made by Ms. Potter were as a result of substantial design changes that were requested by Mr. Nathanson acting on behalf of Blue Sand. Ms. Potter's evidence supported this. The learned trial judge accepted this and found Yates' evidence to be eminently more credible and was supported by documentary evidence. The learned trial judge rejected Mr. Nathanson's contention that the changes were necessary because of Mr. Massicott's "incompetence" and stated that 'Mr. Nathanson's demeanour in court helped no doubt by the fact that he did not appear in person did little to refute the poor impression formed of him from his correspondence and in short I put small store on his testimony throughout this case'.[6] She accordingly found that Blue Sand was liable to pay Ms. Potter's fees and was not entitled to a refund or set off for that sum.

[17] Blue Sand had taken objection with the markup fee implemented by Yates. In this regard, the learned trial judge noted that there was no separate item for contractor's fees or profit and said 'it must follow, unless Yates [was] building **gratis**…the parties agreed on fees or profit for Yates and…as Ms. Yates testified

[6] At para. 25 of the judgment.

these were built into the Budget prices'.[7] She accepted the evidence of Ms. Yates that the markup was agreed or alternatively it was customary or notorious in the trade in the BVI and was to be treated as a term implied by custom into the contract. The learned trial judge commented at paragraph 28 of the judgment "[t]hat this custom is a notorious one is supported by the report of Mr. Hodkinson, who made such an allowance in his report…It is telling that neither party took issue with him on that. I add that on the whole this contract can be regarded as a costs plus percentage contract…".

Backfill and compact area

[18] The Budget provided for an "allowance" of $1,000.00 for backfill and compact area. Yates subsequently invoiced for $6,789.18. The learned trial judge stated that the Budget did not define the term "allowance" and went on to consider the parties' understanding of that term from their evidence. The learned trial judge found that in the context of the case, the parties intended "allowance" to signify that the actual scope of work and the accompanying costs were not known at that stage and thus the costs estimated would be subject to change. The learned trial judge relied on Ms. Yates' evidence and found that what was actually done was far different from the work described in the allowance and that this significant change in the scope of work was authorised by Mr. Nathanson and in those circumstances the parties could be deemed to have agreed to pay more for it. She therefore rejected Blue Sand's contention that even if the word "allowance" was used, it signified nothing as the Budget was an offer which Blue Sand had accepted and thus its terms became contractually binding and therefore could not be varied unilaterally.

Pool foundations and back room foundations; Walls

[7] At para 28 of the judgment.

[19] The learned trial judge accepted Ms. Yates' evidence that it was necessary to raise the pool slab due to Mr. Nathanson's faulty design. She stated that she found 'the evidence of Ms. Yates more credible and therefore Blue Sand is liable for that amount'.[8] Regarding the walls, the Budget provided for block work to be billed at $22.00 per square foot. However, Yates billed at $26.00 per square foot. The learned trial judge found[9] that this was not an allowance and went on to reason that the wall was not in the original scope of the project as encompassed by the Budget. This was a change requested by Mr. Nathanson. The learned trial judge accepted the evidence of Ms. Yates and Mr. Dwite Flax ("Mr. Flax")[10] that the reason the wall was built was to protect the neighbouring property of Mr. Flax as a result of Mr. Nathanson changing the layout of the driveway. Mr. Flax permitted the wall to be built on the basis that he be allowed to supply the concrete and do the excavation. The learned trial judge held[11] that the different rates charged reflected the charges imposed by Mr. Flax which exceeded the Budget rate and that the arrangements made by Mr. Nathanson acting as Blue Sand's agent with Mr. Flax superseded the Budget. She therefore held that Blue Sand's claim for overpayment on that issue failed.

Footings

[20] Concerning the footings, the learned trial judge accepted[12] Ms. Yates' evidence that the change in price[13] was due to the fact that this was additional work in respect of Mr. Flax's wall and that it was more expensive as it was more labour intensive. The learned trial judge deemed the increase in the costs reasonable and dismissed that part of Blue Sand's claim.

Top Beam; Excavation; Columns; Termite treatment for foundation

[8] At para. 41 of the judgment.
[9] At paras. 42 – 43 of the judgment.
[10] Mr. Flax is the owner of the neighbouring property.
[11] At para. 43 of the judgment.
[12] At para. 44 of the judgment.
[13] Yates had initially charged $23.60 to cast footings but later billed at $28.00 per square foot.

[21] Blue Sand claimed that it overpaid monies for the top beam. The learned trial judge considered the course of dealings between the parties and the manner in which the project was carried out and held that it was 'inconceivable that such a change would have been made without the eagle eyes of Mr. Nathanson seeing it and him agreeing to it and to the resultant increase in costs'.[14] In relation to the claim of overpayment for the excavation, the learned trial judge found[15] that the change in price was due to the agreement made by Mr. Nathanson with Mr. Flax which change reflected Mr. Flax's charge plus a 15% markup. The learned trial judge accepted[16] Yates' evidence regarding the issue of overpayment for the columns and also accepted their evidence in relation to the termite treatment for the foundation. In this regard, she found that Yates had paid the BVI Pest Control for the termite treatment for the foundation and held that Blue Sand must reimburse Yates for the monies paid on their behalf.

Tile work; Windows and doors

[22] The learned trial judge pointed out that it was undisputed that Blue Sand had requested that the particular tile which was described in the Budget price be changed to Chinese stone. Yates' evidence was that Chinese stone was substantially more difficult to work with. The learned trial judge accepted this evidence and found that the parties knew the significance of the change and could not have intended the contract price to apply or that there be no additional charge. As no price had been agreed on 'it [was] to be implied that work was to be billed at a reasonable price'.[17] The price charged was deemed reasonable by the learned trial judge after having accepted Ms. Yates' evidence in relation to same. Regarding the claim of overcharge for the windows and doors, the learned trial judge concluded that the price charged was reasonable in all the circumstances as

[14] At para. 45 of the judgment.
[15] At para. 46 of the judgment.
[16] At paras. 47 – 48 of the judgment.
[17] At para. 49 of the judgment.

the reason proffered for the increase was that Blue Sand requested custom made articles and the extra work far exceeded what was anticipated in the Budget.

Overcharge in respect of the 15% mark up on materials supplied by owner

[23] The learned trial judge rejected Blue Sand's claim for the overcharge in respect of the 15% markup on materials supplied by owner for the same reason she dismissed the claim for the markup regarding Ms. Potter. She found it prudent to highlight that 'after issue was taken with the charge by Blue Sand that the parties negotiated and as a result Yates agreed to reduced [*sic*] their markup on those specific materials to 10% which Blue Sand paid'.[18] The learned trial judge then stated that Blue Sand could not seek to upset the arrangement as they must be taken to have been aware of their rights when they disputed the charge and later compromised it.

Whether Yates was liable in damages to Blue Sand for the sum of $1,104,747.37 for the costs of remedying defective construction works (roof, pool and other defects)

[24] The learned trial judge examined Blue Sand's claim for damages for remedial works. She noted[19] that Ms. Yates in her oral evidence accepted liability for defects and found[20] that Yates did not hold themselves out as being able to supply structural engineering expertise on the project but that they held themselves out as being able to construct the villa to design and to prevailing industry standards and that Blue Sand relied on them to so build. One such defective work was concerning the roof. The learned trial judge held that Richard Taylor ("Mr. Taylor") found defects in the roof structure which would lead to leaks and the failure of the roof as it could not sustain design specified hurricane winds and that inadequacy of counter flashing was a major cause of leaks as found by Mr. Taylor. The

[18] At para. 53 of the judgment.
[19] At para. 58 of the judgment.
[20] At paras. 63 – 64 of the judgment.

learned trial trial judge accepted Ms. Yates' version of events that Mr. Nathanson specifically did not want counter flashings as they conflicted with his design. After reviewing the evidence, the learned judge concluded 'the roof design was primarily that of Yates and…they had a duty to ensure that the roof/roofs constructed were fit for the purpose. They failed to do so.'[21] She however went on to find[22] that part of the reason for the leaks and the structural failure of the roof was Mr. Nathanson's instructions, as Blue Sand's agent, regarding the roof. Therefore, Yates in complying with his instructions cannot be expected to be responsible for the entire costs of putting matters right. The learned trial judge stated that in light of this, it would be fair that Yates pay three-quarters of the costs of remedying the roof subject to her findings on opportunity given to Yates to remedy the defects.[23]

[25] The learned trial judge found that the most likely cause for the leaking of the pool was the incorrect placement of the skimmer which position she found was specifically directed by Mr. Nathanson to meet his design concepts. She attached no liability to Yates for this but went on to find that Yates was responsible for replacing the Diamond Brite in the pool.[24]

[26] Concerning the other defects identified by Blue Sand, the learned trial judge accepted that most of the defects were proved by the evidence of Mrs. Hill. She noted that albeit Yates accepted liability for the defects, it did not proffer any figures for remedying the defects except a global sum of $25,000.00 and held[25] that the costs of making good the defects found attributable to Yates were to be awarded and calculated on the values given by Mr. Mark Hodkinson.

[21] At para. 72 of the judgment.
[22] At para. 73 of the judgment.
[23] Ibid.
[24] At para. 74 of the judgment.
[25] Ibid.

Whether Blue Sand was entitled to set off against any sums found to be due and owing to Yates, monies allegedly overpaid to Yates ($163,627.76) under Certificate No. 13

[27] On this issue, the learned trial judge held[26] that Blue Sand can only recover for costs resulting from defects which she found Yates responsible for.

Whether Yates was entitled to be paid $98,311.20 for the retention monies

[28] The learned trial judge correctly identified that in law retention monies only become due and payable if the period agreed upon for remedying defects has expired and there are no defects. The learned trial judge noted that the contract did not have any express terms on a defects liability period. She held[27] that having regard to the scope of the project and the course of dealing between the parties, in particular, that Yates allowed for retention monies by not billing for a percentage of work that was done at the time, it could be readily implied that they intended to make provision for some form of retention and a reasonable defects liability period. The learned trial judge relied on Mr. Hodkinson's report which specified that a reasonable period would be between 6 and 12 months.[28] In the circumstances of this case, she considered that a reasonable period would be 'about 9 months'.[29] Curiously, the learned trial judge went on to find that a period of 6 months to remedy the defects was reasonable. She found that between the period of January to June 2010 Yates had addressed very few of the problems identified by Mrs. Hill. Blue Sand 'called a halt in June 2010'.[30] This, the learned trial judge found, was clearly done on the basis that Blue Sand had lost all faith in Yates' ability to remedy the defects. Blue Sand's action in seeking alternative solutions was therefore not unreasonable as Yates was given an opportunity to remedy defects, however, it failed to do so.

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[26] At para. 82 of the judgment.
[27] At para. 85 of the judgment.
[28] At para. 88 of the judgment.
[29] At para. 85 of the judgment.
[30] At para. 88 of the judgment.

Whether Yates was liable to Blue Sand for loss of rental income of $90,160.00

[29] Regarding the rental income claim against Yates, the learned trial judge found[31] that Blue Sand did not establish that the villa was intended for rental and that Yates knew of this at the time they entered into the contract. Further, the planning permission granted to Blue Sand was stated as residential and the non-belonger's license under which Blue Sand was granted permission to own the land by the Government made no mention of use for rental purposes. Yates was privy to these documents. The learned trial judge also took judicial notice[32] of the fact that the Government grants licences to aliens to own land for a specific purpose as set out in the license and that an owner so licensed cannot lawfully change that purpose without the express permission of the Government.

Whether interest at a commercial rate was payable on any sum found to be due and owing

[30] On the claim for interest, the learned trial judge stated that the contract was silent on interest and held[33] that common law does not imply an intention to pay interest on monies due and owing under a contract or on damages arising for breach and no such intention can be inferred from the circumstances; therefore, neither party had a right to interest.

[31] Finally, the learned trial judge dismissed Yates' claimed for miscellaneous charges under Certificate No. 13 and awarded each side prescribed costs.[34]

The Appeal

[31] At para. 89 of the judgment.
[32] At para. 90 of the judgment.
[33] At para. 94 of the judgment.
[34] At paras. 92 and 96 of the judgment.

[32] Both parties are dissatisfied with the learned trial judge's findings of fact, her apportionment of liability and her award as to damages. Yates has filed 14 grounds of appeal whereas Blue Sand has filed 18 grounds of appeal in its counter notice.[35] Fortunately, most of the grounds relate to factual findings made by the learned trial judge. For the sake of convenience and with no disrespect intended to counsel, I propose to crystalize the grounds of appeal on Yates' appeal as follows:

(i) Whether the learned trial judge erred in concluding against the weight of the evidence in relation to the roof, pool, leaking windows, faulty coating on tower roof decks, faulty coating on the pods, faulty bathroom drains, cactus plant;

(ii) Whether the learned trial judge erred in concluding against the weight of the evidence regarding the costs of remedying the defective paint;

(iii) Whether the learned trial judge erred in concluding against the weight of the evidence that Yates did not prove the miscellaneous charges set out in Certificate No. 13;

(iv) Whether the learned trial judge erred in concluding against the weight of the evidence that Yates was given a reasonable opportunity to remedy the defects;

(v) Whether the learned trial judge erred in concluding that the costs of rectifying the sloping terrace should be on the basis of the costs set out in Mr. Hodkinson's expert report;

(vi) Whether the learned trial judge erred in relying on the expert reports.

[35] The grounds of appeal are very extensive and detailed and will not be reproduced in their entirety.

[33] In the same vein, Blue Sand's counter notice may be conveniently subsumed into the following issues:

(i) Whether the learned judge erred in finding that Mr. Nathanson was clothed with ostensible authority and so the overpayment was authorized;

(ii) Whether the learned trial judge erred in holding that the contract was a cost plus percentage contract;

(iii) Whether the learned trial judge erred in concluding that Blue Sand ought to reimburse Yates for monies paid for termite treatment for foundation;

(iv) Whether the learned trial judge erred in finding that Blue Sand was partly liable for the failure of the roof;

(v) Whether the learned trial judge erred in relation to her finding on the pool.

[34] I propose now to briefly address some of the relevant principles of law before dealing with the grounds of appeal in turn.

Analysis – Approach of Appellate Court to Findings of Fact

[35] The grounds of appeal and the submissions in this appeal give rise primarily to issues of fact. It is therefore useful to focus from the outset on the approach that an appellate court should take on an appeal from the findings of fact of a trial judge sitting without a jury.

[36] In **Watt or Thomas v Thomas**,[36] the locus classicus on an appeal against findings of fact and which is referred to in most of the other cases cited, Lord Thankerton stated that:

> "…the principle…is a simple one, and may be stated thus: I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. **The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court**."[37] (My emphasis).

[37] Lord Macmillan in that case underlined grounds for the appellate caveat:

> "The appellate court has before it only the printed record of the evidence. Were that the whole evidence it might be said that the appellate judges were entitled and qualified to reach their own conclusion upon the case. But it is only part of the evidence. What is lacking is evidence of the demeanor of the witnesses, their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial. This assistance the trial judge possesses in reaching his conclusion but it is not available to the appellate court. So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on questions of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistences and inaccuracies or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."[38]

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[36] [1947] AC 484.
[37] At pp. 487- 488.
[38] At pp. 490 - 491.

[38] To the extent that a challenge is made to a conclusion of fact arrived at by the court based on inferences drawn from the evidence, reference is made to the enunciations of Lord Hoffman in **Biogen Inc v Medeva plc**[39] where he stated:

> "... It is true that in *Benmax v Austin Motor Co Ltd* [1955] AC 370 ((1955) 72 RPC 39, 42), this House decided that, while the judge's findings of primary fact, particularly if founded upon an assessment of the credibility of witnesses, were virtually unassailable, an appellate court would be more ready to differ from the judge's evaluation of those facts by reference to some legal standard such as negligence or obviousness. In drawing this distinction, however, Viscount Simonds went on to observe, at page 374 that it was "subject only to the weight which should, as a matter of course, be given to the opinion of the learned judge". The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, la verite est dans une nuance), of which time and language do not permit exact impression, but which may play an important part in the judge's overall evaluation...".

[39] The law is well settled in relation to the approach an appellate court will take on an appeal against a trial judge's findings of fact. In **Central Bank of Ecuador and others v Conticorp SA and others**,[40] Lord Mance stated:

> "…any appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere. Some conclusions of fact are, however, not conclusions of primary fact, but involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ: see Assicurazioni Generali SpA v Arab Insurance Group (Practice Note) [2003] 1 WLR 577, paras 15-17, per Clarke LJ, cited with approval in Datec Electronics Holdings Ltd v United Parcels Service Ltd [2007] UKHL 23, [2007] 1 WLR 1325, para 46."

[39] [1997] RPC 1 at p. 45.
[40] [2015] UKPC 11 at para. 5.

[40] In **Margaret Blackburn v James A.L. Bristol**,[41] a judgment from this Court, Baptiste JA also reminds us that '[t]he injunction against interfering with findings of fact unless compelled to do so, applies not only to findings of primary fact, but also the evaluation of those facts and inferences to be drawn from them'.[42] At paragraph 47 Baptiste JA adopted the learning of Lord Reed in **Henderson v Foxworth Investments Limited and another**:[43]

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, **an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified**."[44] (My emphasis).

[41] **In re B (A Child)(Care Proceedings: Threshold Criteria)**[45] is another case which identified the role of an appellate court. At paragraphs 53 Lord Neuberger opined that:

> "where a trial judge has reached a conclusion on the primary facts, it is only in a rare case, such as where that conclusion was one (i) which there was no evidence to support, (ii) which was based on a misunderstanding of the evidence, or (iii) which no reasonable judge could have reached, that an appellate tribunal will interfere with it."

At paragraph 200, Baroness Hale stated:

> "…**where findings depend on the reliability and credibility of the witnesses, it will generally defer to the trial judge who has had the great advantage of seeing and hearing the witnesses give their evidence. The question is whether the findings made were open to him on the evidence**." (My emphasis).

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[41] GDAHCVAP2012/0019 (delivered 12th October 2015, unreported).
[42] At para. 11.
[43] [2014] UKSC 41.
[44] At para. 67.
[45] [2013] 1 WLR 1911.

[42] In **Whitehouse v Jordan and another**[46] Lord Bridge of Harwich noted that:

> "…the importance of the part played by those advantages [which the trial judge derives from seeing and hearing the witnesses] varies through a wide spectrum from, at one end, a straight conflict of primary fact between witnesses, where credibility is crucial and the appellate court can hardly interfere, to, at the other end, an inference from undisputed primary facts, where the appellate court is in just as good a position as the trial judge to make the decision."[47]

[43] The following paragraphs from **Assicurazioni Generali SpA v Arab Insurance Group (BSC)**[48] by Ward LJ are also relevant:

> 196. The trial judge's view inevitably imposes a restraint upon the appellate court, the weight of which varies from case to case. Two factors lead us to be cautious about interfering. First, the appellate court recognises that judging the witness is a more complex task than merely judging the transcript. Each may have its intellectual component but the former can also crucially rely on intuition. That gives the trial judge the advantage over us in assessing a witness's demeanour, so often a vital factor in deciding where the truth lies. Secondly, judging is an art not a science. So the more complex the question, the more likely it is that different judges will come to different conclusions and the harder it is to determine right from wrong. Borrowing language from other jurisprudence, the trial judge is entitled to "a margin of appreciation".
>
> 197. Bearing these matters in mind, the Appeal Court conducting a review of the trial judge's decision will not conclude that the decision was wrong simply because it is not the decision the appeal judge would have made had he or she been called upon to make it in the court below. **Something more is required than personal unease and something less than perversity has to be established. The best formulation for the ground in between where a range of adverbs may be used - "clearly", "plainly", "blatantly", "palpably" wrong, is an adaptation of what Lord Fraser of Tullybelton said in G v G (Minors: Custody Appeal) [1985] 1 W.L.R. 642, 652, admittedly dealing with the different task of exercising a discretion. Adopting his approach, I would pose the test for deciding whether a finding of fact was against the evidence to be whether that finding by the trial judge exceeded the generous ambit within which reasonable disagreement about the conclusion to be drawn from the evidence is possible.** The difficulty or ease with which that test can be satisfied will depend on the nature of the finding under attack. If the challenge is to the finding of a primary fact, particularly if

[46] [1981] 1 WLR 246
[47] At p. 269-270.
[48] [2002] EWCA Civ 1642.

founded upon an assessment of the credibility of witnesses, then it will be a hard task to overthrow. Where the primary facts are not challenged and the judgment is made from the inferences drawn by the judge from the evidence before him, then the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with an evaluation of those facts. The judgment of the Court of Appeal in The Glannibanta (1876) 1 P.D. 283, 287, seems as apposite now as it did then:-

> "Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to [The Julia 14 Moo P. C. 210 and The Alice L.R. 2 P.C. 245], the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to a cause are nevertheless entitled, as well on question of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, even though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."[49] (My emphasis).

[44] In **Beacon Insurance Company Limited v Maharaj Bookstore Limited**,[50] the Board stated:

> "It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong"…This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts…Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. **The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence**…
>
> …

[49] At paras. 196-197.
[50] [2014] UKPC 21.

> **[17] Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole**."[51] (My emphasis).

[45] **McLaren v Caldwell's Paper Mill Company Limited**[52] laid down the principle that it is only in exceptional circumstances that an appeal court is entitled to take a different view on credibility from that of the judge who has seen the witness, particularly when the judge has referred favourably to the demeanour of the witness concerned.

[46] I therefore approach the task of evaluating the learned trial judge's judgment with the caution and warnings imposed by the above mentioned authorities firmly in mind. The Court of Appeal should apply restraint not only to the judge's findings of fact but also to the evaluation of those facts and the inferences drawn from them. It is axiomatic that the critical question which is before this Court is whether there was evidence before the learned trial judge from which she could properly have reached the conclusions that she did or whether, on the evidence, the reliability of which it was for her to assess, she was plainly wrong.

[47] I will now analyse each ground of Yate's appeal.

Ground 1: Whether the learned trial judge erred in concluding against the weight of the evidence in relation to the roof, pool, leaking windows, faulty coating on tower roof decks, faulty coating on the pods, faulty bathroom drains, cactus plant

` **Submissions of Yates**

Roof

[51] At paras. 12 and 17.
[52] 1973 SLT 158 at p. 163.

[48] Learned counsel for Yates, Mr. Neale, made a number of complaints regarding specific issues of fact found by the trial judge. One such complaint relates to the trial judge's finding concerning the roof of the villa. He contended that the learned trial judge erred in finding that the roof was not fit for the purpose for which it was intended. Mr. Neale submitted that contrary to the evidence, particularly the expert evidence of Richard Taylor, the structural engineer, there was absolutely no finding by him of any structural failure of the roof or that it was not fit for the purpose for which it was built. He argued that Mr. Taylor merely identified certain defects and offered certain simple solutions with respect to same. Mr. Neale submitted that the main defect identified by Mr. Taylor related to the size of the rafters, specifically that the size was not consistent with the Uniform Building Code ("UBC"); however, in cross-examination, Mr. Taylor conceded that the UBC formed no part of the laws of the Virgin Islands, as such, the learned trial judge ought not to have taken the UBC into consideration. Learned Counsel, Mr. Neale maintained that based on the trial judge's finding, it is apparent that she did. Mr. Neale argued that the other problem identified by Mr. Taylor in his expert report on the roof related to internal leaks in many locations beneath the shingle roof because the counter flashing and gutter details were inadequate. The learned trial judge in her judgment held that this was as a result of Mr. Nathanson's instructions to omit certain counter flashing details. Notwithstanding this finding by the learned trial judge, she went on to find Yates responsible for the leaks in the roof. Learned counsel, Mr. Neale submitted that this contradictory ruling by the learned trial judge cannot stand. He submitted that the learned trial judge was wrong to hold Yates liable for any defects in the roof construction on the basis of a structural failure and to hold that there be a complete replacement of the entire roof which in any event was never recommended by Mr. Taylor.

[49] Learned counsel, Mr. Neale pointed this Court to the transcript of proceedings where Mr. Taylor in his examination-in-chief, responding to a question posed by

learned Queen's Counsel, Mr. Bennett, reiterated that the recommendation listed in his report include sistering on new rafters or adding collar ties, both of which would strengthen the roof, as well as additional angle to be added to increase the hold down capacity. Mr. Neale contended that it was Mr. Hodkinson, the quantity surveyor's recommendation that the roof be removed and replaced. Mr. Neale reminded this Court that the learned trial judge had previously accepted the findings and recommendations of Mr. Taylor. As such, the court could not then base the costs of repairs on the recommendation of the quantity surveyor, Mr. Hodkinson. Learned counsel, Mr. Neale insisted that Mr. Hodkinson is a quantity surveyor, not a structural engineer; therefore, he was not qualified to make any recommendations with respect to the roof. In support of this argument learned counsel pointed to Part 32 of the **Civil Procedure Rules 2000** ("CPR 2000") which requires an expert to be sufficiently qualified in his or her field of expertise. Mr. Hodkinson's field of expertise was the valuations of the cost of rectifying defects in construction identified by the various experts employed by Blue Sand. Mr. Hodkinson was then required to produce a report based on Mr. Taylor's recommendations. However, Mr. Hodkinson in his report provided a valuation of $326,132.40 on the basis of replacing the roof design "…as per System Engineering Report".[53] Notwithstanding Mr. Hodkinson's reference to the replacement of the roof in the "System Engineering Report", there was no such recommendation by Mr. Taylor in his report. Mr. Neale maintained that Mr. Hodkinson made his own recommendation in the matter totally ignoring the recommendation of Mr. Taylor which he could not do since he was qualified as a structural engineer.

[50] Learned counsel, Mr. Neale argued that since Mr. Hodkinson's report took into account irrelevant matters, the court ought not to have placed any reliance on this report. Moreover, the learned trial judge erred in awarding the costs of

[53] Report by Mark Hodkinson, Record of Appeal, Bundle A at p. 216.

$326,132.40 plus a 28% markup to include contractor's profits of 15%, preliminaries assumed at 8% and design risk contingency at 5% to Blue Sand. Mr. Neale said that the report made it clear that the $326,132.40 included the 28% markup while the roof calculations itself specifically stated that the sum of $26,950.00 in the last line of the summary was for this contingency and was included as part of the total costs of $326,132.40. In any case, Yates having not been given any opportunity to carry out the repairs to the roof within the defect period, Blue Sand would have only been entitled to the basic cost of repairs.

Pool

[51] Mr. Neale did not accept the learned trial judge's finding that Yates was responsible for replacing the diamond brite in the swimming pool. Mr. Neale asserted that the learned trial judge relied on the expert report by Erick Oeseburg ("Mr. Oeseburg") to arrive at this finding even after she indicated that she preferred Ms. Yates' evidence to that of Mr. Oeseburg, whom she held did not understand his duties to the court as an expert witness. Mr. Neale complained that the learned trial judge failed to provide any reasons whatsoever for finding that Yates was responsible for the diamond brite in the pool. Learned counsel, Mr. Neale further complained that even if Yates was to be held liable for the diamond brite replacement, then such liability could only be on the basis of the basic costs for remedying the defects, that is less the 28% profit and contingency element in Mr. Hodkinson's report for remedying defects in construction, since no opportunity was provided to Yates to remedy this defect.

Leaking windows; faulty coating on tower roof decks; faulty coating on the pods; faulty bathroom drains; cactus plant

[52] Mr. Neale complained that contrary to the evidence, the learned trial judge found that Yates was liable for the leaking windows, faulty coating on tower roof decks,

the absence of a vent in the laundry room, faulty coating on the pods and faulty bathroom drains. In relation to the finding of liability:

(i) the leaking windows – Blue Sand accepted that it was due to a defect in the window design and was no fault of Yates;

(ii) the faulty tower coating on the roof deck – Mr. Taylor accepted that this was a subjective assessment since it could be done a different way from what had been proposed by him with perfect results;

(iii) the absence of a laundry vent – Mr. Neale submitted that there was no claim by Blue Sand in its pleadings, witness statement, oral evidence or expert report of Mr. Hodkinson for repairs resulting from the absence of a laundry vent; and

(iv) the faulty coating on the pod – Yates was asked to leave the site before this could be completed; as such Yates was not given any opportunity to complete same.

[53] Regarding the learned trial judge's finding that Yates was responsible for destroying a cactus plant, Mr. Neale submitted that the burden of proof was on Blue Sand and not Yates to establish its landscaping claim. Blue Sand advanced no evidence of any requirement by the Town and Country Planning Department for the replacement of the natural vegetation on a building site and therefore could not under any circumstances have been held to prove its case on this issue. Mr. Neale further submitted that the learned trial judge's determination that the issue surrounding the alleged destruction of the cactus plant was not whether the landscaping costs were reasonable, but rather, it was whether any such requirement for replacement by the Town and Country Planning Department had been proved.

Submissions of Blue Sand

[54] Learned Queen's Counsel, Mr. Bennett, argued that there was evidence on which the learned trial judge could have arrived at the conclusions which she did in relation to the roof, pool, leaking windows, faulty coating on tower roof decks, faulty coating on the pods, faulty bathroom drains and cactus plant. Accordingly, this Court should not disturb her finding in relation to those issues.

Roof

[55] In specific response to Mr. Neale's contention that the learned trial judge erred in finding that the roof was structurally unsound, Mr. Bennett, QC stated that the judge was entitled to rely on the evidence of the expert witness Mr. Taylor in so finding. He submitted that the roof as constructed is not capable of withstanding wind loads of a hurricane with wind speeds up to 145 miles an hour. In this regard, it was clearly incapable of carrying out one of the important functions for which it was designed, namely protecting the premises and its inhabitants during a major hurricane. For this reason, the learned trial judge was entitled to find that the roof was defective and not fit for the purpose for which it was built.

[56] Mr. Bennett, QC said that Mr. Hodkinson, in his capacity as a quantity surveyor, explained to the lower court that even a solution involving the sistering of rafters will involve removal of the roof. With this in mind, Mr. Hodkinson priced the cost of resolving the structural problems of the roof on the basis that it would have to be removed and replaced. Learned Queen Counsel, Mr. Bennett, posited that the primary function of a quantity surveyor is to manage and control costs relating to building projects. In order to do so, a quantity surveyor must have a thorough knowledge of construction methods and the comparative cost of alternative solutions to problems of construction. There was accordingly evidence which entitled the court to find, as it did, that for the defects of the roof to be remedied, the roof would have to be removed.

Pool

[57] As regards Yates' objections to the learned tiral judge's reliance on Mr. Oeseburg's evidence in coming to her conclusion on the diamond brite, Mr. Bennett, QC said that the learned trial judge approached Mr Oeseburg's evidence with caution and gave little weight to some parts of it. She was entitled however to accept whatever part of that evidence she choose; accordingly, there was evidence upon which she could have found Yates liable for replacement of the diamond brite surface.

[58] In relation to the learned trial judge's other findings on the other issues, Mr. Bennett, QC submitted that there was adequate evidence for the learned trial judge to conclude as she did that Yates should be liable to remedy the defects.

Analysis

[59] The learned trial judge undoubtedly had the advantage of seeing and hearing the witnesses give their evidence. She would have observed their demeanor and on that basis she came to particular findings of fact. Taking this into consideration, this Court should be slow to interfere with her findings and conclusions unless it appears clear that she failed to make proper use of the advantage she had. As stated in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**, this Court must consider whether it was permissible for the judge at first instance to make the findings of fact which she did on the face of the evidence as a whole. Yates must show that the learned trial judge misapprehended the evidence or came to a conclusion or finding which cannot be supported on the evidence or which was not open to her.

[60] Having perused the evidence and having had regard to Mr. Neale's submissions on the appeal against the learned trial judge's finding of fact in relation to the roof,

I am of the considered opinion that this ground of appeal has great merit. The learned trial judge at paragraph 67 of her judgment was greatly impressed by Mr. Taylor whom she found was both experienced and knowledgeable in his field and 'understood thoroughly his duties to the court as an expert witness'. Critically, the learned trial judge accepted Mr. Taylor's findings concerning the roof both as to defects and cause and also his opinion on how such defects could be rectified. I pause here to make the observation that nowhere in Mr. Taylor's report did he indicate that there was any structural failure of the roof or that it was not fit for the purpose for which it was built. In actuality, Mr. Taylor identified certain defects in the roof and proposed various solutions for remedying the defects. Mr. Taylor's recommendation in his report for addressing the problem with the roof was not the replacement of the roof but rather sistering on new rafters or adding collar ties or the use of steel angles and bolts.[54] Notwithstanding this explicit evidence and the learned trial judge stating quite categorically that she accepted Mr. Taylor's evidence, she went on to hold that defects were found in the structure of the roof and that the roof was not fit for the purpose for which it was intended. I agree with Mr. Neale that it was not a finding which was open to the learned trial judge particularly after having accepted Mr. Taylor's evidence. This finding by the learned trial judge appears to have been arbitrarily made.

[61] Mr. Taylor, as the expert, presented to the court the analytical process by which he had arrived at his conclusion.[55] It is important to note that a trial judge is not compelled to accept an expert's evidence. It is for the trial judge to decide whether to accept or reject such evidence. However, in the circumstances of this case, where the learned trial judge accepted the evidence of the expert, there was no basis on which she could have later rejected same. This was contradictory and

[54] Mr. Taylor's examination-in-chief is however interesting. In responding to a question posed by learned Queen's Counsel, Mr. Bennett, Mr. Taylor stated that in order to achieve the same appearance Blue Sand would need to take off the roof and replace it.

[55] Pacific Recreation Pte Ltd. v S Y Technology Inc and another [2008] SGCA 1 referred to in Basab Inc. v Accufit Investment Inc. et al BVIHCMAP2014/0020 (delivered 9th November 2015, unreported).

inconsistent with her earlier finding that Mr. Taylor was experienced and knowledgeable in his field and understood thoroughly his duties to the court as an expert witness. The learned trial judge's finding appeared to be based on the erroneous presumption that Mr. Taylor concluded that the roof was structurally unsound. Mr. Bennett, QC submitted that the learned trial judge was entitled to rely on the evidence of Mr. Taylor to find that the roof was structurally unsound. I reiterate, there was no such finding by Mr. Taylor. Further, it is not open to a court of first instance to ignore unambiguous evidence and substitute its own ruling on a matter after having accepted that very evidence.

[62] The conclusion that the roof was structurally unsound has to be based on credible evidence given by an expert who has been deemed fit to do so. The evidence[56] which was before the learned trial judge reflected that there were certain defects in the roof. At no instance were the words "structurally unsound" or "unfit for the purpose for which it was built" used. Solutions were proposed for the defects identified, none of which included the complete replacement of the roof. The learned trial judge's ruling in this regard flies contrary to the evidence which was before her. On that basis, an appellate court can and in this case will intervene. The learned trial judge having come to a conclusion which was not open to her on the evidence fell into error. I will therefore set aside this erroneous finding of fact.

[63] I now move on to Mr. Neale's contention concerning the trial judge's acceptance of Mr. Hodkinson's recommendations which was supposedly based on Mr. Taylor's report. I agree with Mr. Neale that this finding is also flawed. I accept Mr. Neale's whole submission on this point being that the learned trial judge, having expressly accepted the findings and recommendations of Mr. Taylor, could not then base the costs of repairs on the recommendation of the quantity surveyor, Mr. Hodkinson. Mr. Taylor's recommendation in his report for addressing the problem with the roof

[56] This evidence was clearly accepted by the learned trial judge at paragraph 67 of her judgment.

was "sistering on new rafters or adding collar ties" or the use of "steel angles and bolts". It was common knowledge that Mr. Taylor was the structural engineer. Mr. Hodkinson's qualifications before the lower court illustrated that he was a quantity surveyor. These are two distinct roles. Mr. Taylor's evidence/report was accepted by the trial judge and found to be palatable. Nevertheless, she went on to hold that the roof ought to be replaced based on Mr. Hodkinson, the quantity surveyor's recommendation, who's report quite incorrectly stated that it was based on Mr. Taylor's report. There was no rational or logical basis for the learned trial judge to have so concluded in light of having accepted Mr. Taylor's opinion on how the defects could be rectified.

[64] There is a clear inherent inconsistency with the trial judge's ruling in this regard. This inconsistency is sufficiently material to undermine her conclusions. Applying the principle in **Beacon Insurance Company Limited v Maharaj Bookstore Limited**, this is one such occasion meriting appellate intervention. For that reason, the appeal against this finding of fact is allowed.

Diamond Brite

[65] Mr. Neale's objection to the learned trial judge's ruling concerning the diamond brite holds much weight. Mr. Oeseburg gave evidence in relation to the diamond brite. Paying particular regard to the learned trial judge's observations at paragraph 67 where she said 'I interject to say that I found Mr. Taylor both experienced and knowledge [*sic*] in his field and that he understood thoroughly his duties to the court as an expert witness. I could not say the same of Mr. Oeseburg however although it is no fault of his that he was not briefed about an expert's duty to the court and that he is not as experienced in his field', I am unable to accept the learned trial judge's later conclusion on this issue. Indeed, this finding to my mind should have resulted in the learned trial judge placing very little or no weight on Mr. Oeseburg's report. I am fortified in this view by the learned trial judge's

very own words later in the judgment where she found definitively 'In respect of the pools I prefer the evidence of Ms. Yates to that of the expert witness Mr. Oeseburg'.[57] I therefore reject Queen's Counsel, Mr. Bennett's submission that the learned trial judge was entitled to accept parts of Mr. Oeseburg's evidence. The learned trial judge having earlier rejected Mr. Oeseburg's expert evidence and particularly his evidence in relation to that same pool cannot later apply that evidence to come to a finding of fact. By the learned trial judge's very own indication, Mr. Oeseburg failed to meet the threshold. Auxiliary to that, there would have been no evidential basis upon which the learned trial judge could have concluded that Yates was responsible for replacing the Diamond Brite. Mr. Oeseburg was the only "expert" who gave evidence in relation to same. That evidence was rejected altogether by the learned trial judge. I am of the considered view that this was a material inconsistency and inaccuracy by the learned trial judge. In the circumstances, the learned trial judge plainly erred in attaching weight to Mr. Oeseburg's evidence in arriving at her conclusion. On that basis, the appeal against this finding is also allowed.

[66] At the considerable risk of brevity, I will address the remaining issues in this ground below.

Leaking windows; Faulty coating on pod

[67] I accept Mr. Neale's submission with regard to the leaking windows issue. Mr. Bennett, QC argued that there was evidence upon which the trial judge could have found Yates responsible for and liable to bear the cost of repairing the leaking windows. This finding runs contrary to Blue Sand's acceptance that the defect was due to the window design and was no fault of Yates. Yet, the learned trial judge found Yates responsible for this defect. The learned trial judge's finding

[57] At para. 74 of the judgment.

was plainly wrong. Accordingly, the appeal against this finding of fact is also allowed.

[68] Mr. Neale submitted that Yates was asked to leave the site before the faulty coating on the pod could be completed; as such, Yates was not given any opportunity to complete same. I will deal with this at a later juncture in the judgment.

Faulty tower coating on roof deck

[69] In relation to the faulty tower coating on the roof deck, I reject learned counsel, Mr. Neale's submission and accept Mr. Bennett, QC's submission. Mr. Taylor as the expert indicated that roof coatings will have to be replaced. It must be recalled that Mr. Taylor was deemed by the learned trial judge to be quite knowledgeable in his field and she accepted his report. Mr. Neale has submitted that Mr. Taylor had accepted that his assessment was a subjective one since the tower coating could be done a different way from what had been proposed by him with perfect results. I am of the considered view that Mr. Taylor's entire report would have been a subjective assessment. Mr. Neale gives credence and has asked this Court to accept portions of Mr. Taylor's report (his recommendation to remedy the defect in the roof) yet has now submitted that another portion of that same report ought not to be relied upon. There has been no reason or no good reason advanced for rejecting Mr. Taylor's findings in relation to the tower coating on the roof deck. It was clearly open to the learned trial judge to conclude as she did. This finding of fact is clearly unassailable.

Absence of laundry vent

[70] Mr. Neale submitted that there was no claim by Blue Sand in its pleadings, witness statement, oral evidence or the expert report of Mr. Hodkinson for repairs resulting from the absence of a laundry vent. I agree that there was no such claim by Blue

Sand. Mr. Taylor's evidence was that this was something that should have been placed on the drawing by the architect, however, there was no evidence that this was done. Indeed, the evidence of Ms. Yates was that Mr. Nathanson 'did not want the laundry vent' so it was not installed. The learned trial judge had unequivocally stated that she found Ms. Yates to be a credible witness and had accepted Mr. Taylor's report. Nonetheless, she went on to find Yates responsible for the absence of a laundry vent. I am constrained to agree with Mr. Neale that there appeared to have been no real analysis of the evidence by the learned trial judge on each specific issue. The learned trial judge appeared to have merely looked at Mr. Taylor's report and came to the conclusion that all items identified as defects in the report were the subject of a claim by Blue Sand. The learned trial judge clearly made findings of fact unsupported by the evidence. As was stated in **Henderson v Foxworth Investments Limited and another** an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified. I am so satisfied. This finding by the learned trial judge clearly had no basis on the evidence. It is clear to this Court that the learned trial judge did not properly undertake an evaluation of the material that was before her before arriving at the conclusion which she came to. As such, her decision relating to this issue cannot stand.

[71] For the reasons I have outlined above, this ground of appeal is allowed save and except for one finding of fact.

[72] I propose now to address ground 2.

Ground 2 – Whether the learned trial judge erred in concluding against the weight of the evidence regarding Yates' responsibility for the costs of remedying the defective paint

Submissions of Yates

[73] Mr. Neale complained that the learned trial judge erred in relation to the painting of the villa. He submitted that the learned trial judge ought to have found Mr. Nathanson fully responsible for the wrong selection of the type of paint since it was his specifications which were passed on to the paint shop. Learned counsel, Mr. Neale said that the evidence of Mr. Nathanson was actually contrary to the learned trial judge's findings in the matter since he contended that he did not specify the exact type of paint but specific colours.

Submissions of Blue Sand

[74] Learned Queen's Counsel, Mr. Bennett, submitted that there was adequate evidence upon which the judge could have found that Yates was responsible for and liable to bear the cost of correcting the defective painting.

Analysis

[75] It was Mr. Nathanson's evidence in the lower court that he did not specify particular paints, he specified colours only. Felipe Taylor's ("Mr. Felipe")[58] evidence was that Mr. Nathanson specified the exact type of paint to be used on the project and that the workers ("Yates' workers") followed his instructions. At paragraph 15 of the lower court judgment the learned trial judge opined, 'on issues of credibility I preferred the evidence of Ms. Yates, Ms. Potter and **Mr. Felipe to Mr. Nathanson's wherever they conflicted**'. (My emphasis). Later, at paragraph 79, the learned trial judge said:

> "I find them [Yates] wholly liable as I am not satisfied that Mr. Nathanson did not specify the exact type of paint as he was concerned with the colours (that is what usually mock-ups are concerned with) and that Yates ought to have seen that they were applying wood stain to walls. They did not and are wholly liable for the costs of remedying same."

[58] With no disrespect intended, I will refer to Felipe Taylor as "Mr. Felipe" so as not to be confused with Richard Taylor who I have previously referred to as "Mr. Taylor".

[76] In perusing the learned trial judge's finding on this issue, I am drawn to the ineluctable conclusion that the learned trial judge fell into error. Mr. Nathanson gave evidence that he did not specify the type of paint to be used on the villa. The learned trial judge rejected his evidence which she was entitled to do. At an earlier occasion in the judgment the learned trial judge stated that on the issues of credibility she preferred Mr. Felipe's evidence to that of Mr. Nathanson's. Taking this statement into account, it is befuddling that the learned trial judge found Yates wholly liable for the costs of remedying the defective paint. The resulting effect of the learned trial judge accepting Mr. Felipe's evidence to that of Mr. Nathanson would be that Yates solely should not have to remedy this particular defect. At the apparent conflict of evidence, the learned trial judge made a ruling which was not open to her on the evidence. The learned trial judge totally ignored or paid little weight to Mr. Felipe's evidence without indicating her reason for so doing. I apply the principles that were enunciated in **Whitehouse v Jordan** which were referred to at paragraph 42 of this judgment. The learned trial judge in the case at bar came to a determination on credibility. As held in **Assicurazioni Generali SpA v Arab Insurance Group**, an appellate court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, even though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

[77] I am of the considered view that by rejecting Mr. Nathanson's evidence and earlier stating that Mr. Felipe's evidence will be accepted where there is a conflict, the inference which remains is that Mr. Nathanson had recommended the type of paint which contributed to the defect. The effect is that Blue Sand is also partly responsible for this defect. As such, I agree with Mr. Neale that Yates is not wholly liable for the costs of repairing the defective paint contrary to the learned trial judge's finding. Accordingly, the justice of the case demands that Yates and Blue Sand must share the liability for remedying that defect equally.

Ground 3 – Whether the learned trial judge erred in concluding against the weight of the evidence that Yates did not prove the miscellaneous charges set out in Certificate No. 13

Submissions of Yates

[78] In relation to the dismissal of the claim for miscellaneous charges, Mr. Neale argued that the learned trial judge was wrong to hold that Yates had not, on a balance of probabilities, proven its claim set out in Certificate No. 13. He submitted that Yates provided detailed particulars of the miscellaneous items which were incorporated by Ms. Yates as part of her witness statement. Blue Sand did not address the miscellaneous items claimed in their pleadings, witness statements or oral evidence apart from what was previously set out as part of its defence; nor were Yates' witnesses challenged on this issue in cross-examination. Learned counsel, Mr. Neale, submitted that the trial judge fell into error by holding that Yates did not prove their case on a balance of probabilities.

Submissions of Blue Sand

[79] Mr. Bennett, QC's brief response was that it was open to the court to find that Yates did not prove the miscellaneous charges on Certificate No. 13. Therefore, this Court should not interfere with this finding.

Analysis

[80] The uncontroverted evidence before the court below was that there was a claim for miscellaneous charges amounting to $31,402.53. Blue Sand in their defence and counterclaim denied this claim.[59] Yates in schedule 1 of its reply and defence to the counterclaim provided detailed particulars of the miscellaneous items which were incorporated by Ms. Yates as part of her witness statement. This claim was never addressed by Blue Sand, neither were Yates' witnesses challenged on this

[59] Blue Sand in Appendix A to its defence and counterclaim pleaded to this Miscellaneous items claim as follows: "Line Item 147, Miscellaneous items. $31,402.53 claimed by the Claimant. This claim is embarrassing for lack of particularity, and in any event denied". p. 36, Record of Appeal, Volume A.

issue in cross-examination. It is trite that he who asserts must prove. In civil proceedings, the standard of proof required is on a balance of probabilities. This is the established general principle. In applying the standard of balance of probability, the dicta by Lord Nicholls in the House of Lords decision of **In re H. and Others (Minors) (Sexual Abuse: Standard of Proof)**[60] is instructive:

> "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. A step-father is usually less likely to have repeatedly raped and had non-consensual oral sex with his under age stepdaughter than on some occasion to have lost his temper and slapped her. 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."[61]

[81] As succinctly articulated by Ungoed-Thomas J in the case of **In re Dellow's Will Trusts.; Lloyds Bank Ltd v Institute of Cancer Research and others**[62] 'the more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it'.[63]

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[60] 1996 AC 563.
[61] At p. 586.
[62] [1964] 1 WLR 451.
[63] At p. 455.

[82] Applying the principles and guidance from the above mentioned cases and given the evidence that was adduced, it is pellucid that the learned trial judge ought to have, at the very least, found that Yates had proven its claim for the miscellaneous items. I am fortified in this view taking into consideration that the claim by Yates for the miscellaneous items was not one to be considered a serious allegation per se. Yates' case was not challenged by Blue Sand. As stated by Lord Nicholls in **In re H and Others (Minors) (Sexual Abuse: Standard of Proof)**, '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'.[64] The learned trial judge having previously considered and accepted that Yates had proven its case on a number of identical or similar issues, the occurrence of this event, that is, the claim for the miscellaneous items, was more likely than not. Accordingly, the learned trial judge erred in dismissing Yates' claim for the miscellaneous items under Certificate No. 13. This ground of appeal is therefore allowed.

Ground 4 – Whether the learned trial judge erred in concluding against the weight of the evidence that Yates was given a reasonable opportunity to remedy the defects

Submissions of Yates

[83] Mr. Neale assailed the judge's finding that Yates had been given a reasonable opportunity to remedy the defects in the villa but failed or was unable to do so. Mr. Neale argued that, the learned trial judge, having found that a reasonable defect liability period was 9 months, then went on to hold that a period of less than 6 months was sufficient notice for Yates to remedy any defects. Learned counsel submitted that such a finding was illogical, inconsistent and contrary to the learned trial judge's previous finding in the matter. Mr. Neale referred the Court to the letter dated 20th June 2010 where Blue Sand instructed Yates to cease work on

[64] At p. 586.

the villa. Learned counsel, Mr. Neale, maintained that the litany of defects pointed out by Blue Sand in the letter was not brought to Yates' attention before that time. As such, there was no reasonable opportunity given to rectify the problems. Mr. Neale contended that contrary to the learned trial judge's finding that Blue Sand had lost all faith in Yates, the reason Blue Sand requested that Yates ceased all work on the villa was due to the fact that Blue Sand wished to consult with an electrical and structural engineer on certain matters. The learned trial judge's finding with respect to the reason for the stoppage of the repairs by Blue Sand was therefore not supported by the evidence. Mr. Neale also referred the Court to a letter dated 7th July 2012 where Yates committed itself to rectify identified problems. Mr. Neale submitted that a reasonable opportunity to fix the problems was not given to Yates, therefore, the learned trial judge erred in concluding the contrary.

Submissions of Blue Sand

[84] Learned Queen's Counsel, Mr. Bennett, submitted that where workmanship falls short of the contractual standard, even if it is remedied prior to practical completion, there is a breach of contract and the employer is entitled to damages or to recover his outlay in correcting the defective work unless the contract can be construed as expressly or impliedly excluding any such right. Mr. Bennett, QC said that there was no expressed provision giving Yates the right to make good the defects in construction at its own expense or giving it a licence to enter the site for that purpose. Neither was there a defects' liability period for the duration of which Yates was entitled to correct such defects.

[85] Mr. Bennett, QC contended that notwithstanding this, Yates was given and availed itself of the opportunity to correct some of the defects identified. This proved wholly unsuccessful. As a result, Blue Sand, with Yates' approval, sought

engineering and other professional assistance. Mr. Bennett, QC argued that it cannot now be said that Yates was deprived of the opportunity to correct defects in its work. Learned Queen's Counsel, Mr. Bennett, argued that even if it could have been implied that Yates had a right to make good at its own cost any defects appearing in some notional defects liability period, the consequence would be that the measure of damages against Yates would have been the cost to it of remedying those defects.

Analysis

[86] I have examined the learned trial judge's finding that Yates was given a reasonable opportunity to remedy defects and I am of the view that she has erred in concluding same. The learned trial judge, having accepted the evidence of Mr. Hodkinson that he considered 6 to 12 months as the applicable defects liability period, went on to find that a reasonable period for remedying defects would be 9 months. The judge then stated:

> "[86] As already noted, Mrs. Hill brought some of these alleged defects to Yates's attention when Blue Sand took possession of the villa in January 2010 and Yates were initially allowed to go in to remedy some defects. However in June 20, 2010 Ms. Hill informed them that she was retaining an electrical engineer in addition to a structural engineer to review the villa and enumerated multiple alleged defects and she required them to cease all work which they did. However, Yates wrote a letter on July 7, 2010, CAD 1 Tab 84 responding in detail to Blue Sand's allegations and reiterating their willingness to remedy legitimate defects. Blue Sand did not answer.
>
> …
>
> [88] I also accept, based on the evidence of Ms. Hill that Yates was given reasonable opportunity to remedy the defects but they failed or were unable to do so and that Blue Sand had enough and called a halt in June 2010. This clearly was done on the basis that Blue Sand had lost faith in Yates ability to remedy the defects. I find that Blue Sand was entitled to do that as between the period January to June 2010 Yates had addressed very few problems identified by Mrs. Hill and had not been able to deal with the exterior painting or for that matter the disco lights. I find that in all

> the circumstances that Blue Sands had lost faith in Yates and that their action in seeking alternative solutions was not unreasonable."[65]

[87] Having found that 9 months was a reasonable defects liability period, the learned trial judge could not then go on to hold that a period of about 6 months was adequate opportunity for Yates to remedy the defects found. I agree with Mr. Neale that such a finding was illogical, inconsistent and contrary to the learned trial judge's previous finding in the matter.

[88] Further, the learned trial judge's statement that 'Yates had addressed very few problems identified by Mrs. Hill and had not been able to deal with … the disco lights' runs counter to Mrs. Hill's very own words in her letter dated 30th May 2010. Mrs. Hill in that letter indicated that 'disco lights seem fine – worked all evening'.[66] A perusal of that letter also shows that Mrs. Hill up to that date had requested that a comprehensive plan was first required to move forward before any fixes or alterations could have been done. I will reproduce part of that letter for clarity purposes:

> "On this roof leaking, I do not think that anything should be done until we have a plan and i think we first have to identify exactly why and where the leaks are coming from. … **So this issue has to be carefully planned before anyone launches into repairs.** I am getting engineering assistance on some of these issues.
>
> "as far as what exactly a crew will do up here tomorrow - I am not clear, but think this is what is planned.
> "…
>
> "I am not sure what else is you are planning - please advise as we cannot have guys working all over and the villa torn up - **we must work methodically and with a plan** - I will see you on site monday 8am."[67] (My emphasis).

[65] At paras. 86 and 88 of the judgment.
[66] Claimant's Agreed List of Documents, Record of Appeal, Bundle B at tab 82.
[67] Ibid.

[89] In addition, the letter dated 20th June 2010 from the Hills to the Yates definitively requested that Yates ceased any further work at the villa as they (the Hills) were going to retain an electrical engineer in addition to the structural engineer to review the villa. That letter went on to state:

> "On the leaking roofs, we have decided to move in another direction and do not want you to perform those repairs.
> On the pool, we do not want any probing done until we arrange for a structural engineer to be on site to inspect and observe".[68]

A natural consequence of the letter was that Yates could have later resumed remedial work on the villa after a structural engineer had inspected and observed and advised as to the way forward. In those circumstances, it was not open to the learned trial judge to draw the inference from the factual circumstance that the reason for the cessation of repairs was due to Blue Sand's dissatisfaction with the way in which the repairs were proceeding. This inference can be properly assailed. It is indubitable that there was evidence before the learned trial judge which indicated that some of the defects identified by Blue Sand were brought to Yates' attention and Yates, having reaffirmed its commitment to remedy any and all defects found, was never given any such opportunity. In the circumstances, the learned trial judge was wrong to hold that Yates was given a reasonable opportunity to remedy the defects but was unable to do so and that the reason for the stoppage of works by Blue Sand was that Blue Sand had lost faith in Yates' ability to remedy the defects. She came to a conclusion which was not open to her on the evidence. The principles that have been enunciated in **Paul Housen v Rural Municipality of Shellbrook No. 493**[69] are instructive in the present case:

> "**The standard of review for findings of fact is such that they cannot be reversed unless the trial judge has made a "palpable and overriding error". A palpable error is one that is plainly seen**.
>
> …

[68] Claimant's Agreed List of Documents, Record of Appeal, Bundle B at tab 83.
[69] 2002 SCC 33.

> Making a factual conclusion of any kind is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review. **If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the inference-drawing process itself is palpably in error that an appellate court can interfere with the factual conclusion**." (My emphasis).

The error by the learned trial judge is clear when I consider the evidence that was elicited before her. Applying **Paul Housen**, the learned trial judge had made a palpable and overriding error. For that reason, this ground of appeal is allowed.

Ground 5 – Whether the learned trial judge erred in concluding that the costs of rectifying the sloping terrace should be on the basis of the costs set out in Mr. Hodkinson's expert report

Submissions of Yates

[90] Learned counsel, Mr. Neale, argued that the learned trial judge also erred in concluding that the costs of rectifying the sloping terrace should be on the basis of the costs set out in Mr. Hodkinson's report. Mr. Neale contended that the evidence before the court below was that a solution was proposed by Yates which had been accepted by Blue Sand but that no opportunity was given to Yates to implement same. In those circumstances, Yates should not have, as a matter of law, been held liable for the repairs or if it was liable, then such liability should have only been on the basis of the basic repair costs without the profit and contingency element included in Mr. Hodkinson's report. Mr. Neale submitted that the learned trial judge correctly held that this was the position with respect to the termite infested cabinet doors where Yates had offered to replace same but was not allowed to do so but inconsistently did not hold this to also be the case with respect to the sloping terrace. The learned trial judge was therefore wrong to hold that Yates was responsible for the costs of putting the terrace right and further that such costs should be on the basis of Mr. Hodkinson's report.

Submissions of Blue Sand

[91] Mr. Bennett, QC essentially repeated his earlier submission that there was adequate evidence for the court to conclude as it did that Yates should be liable to correct this defect.

Analysis

[92] The learned trial judge's finding in relation to this issue can be found at paragraph 81 of the judgment:

> "Yates accepted responsibility for the incorrect sloping of the terrace. I note that Yates later offered a solution to rectify it but that Blue Sand appeared to have accepted it but later changed its mind as being no longer acceptable one has to assume. Yates is responsible for the costs of putting it right as per Hodkinson's costs."

The uncontroverted evidence before the court was that a solution had been agreed on between the parties and that Yates was at all material times prepared to address this problem but was not given an opportunity to do so.[70] My own assessment comports with that of Mr. Neale in that there was simply no evidential basis for the learned trial judge to have concluded that Blue Sand found this solution unacceptable. It is of interest to note the learned trial judge's ruling with respect to the termite infested cabinet doors at paragraph 78 of the judgment:

> "Yates accepted that there were termites because an infected piece of plywood had been used for cabinet doors and was willing to remedy that. They were not allowed to. It was a simple thing to do and therefore only the basic costs based on Mr. Hodkinson's figures without mark-up or contingencies is allowed for that item.

[93] The learned trial judge then went on to hold Yates responsible to replace the sloping terrace as per Mr. Hodkinson's costs despite having earlier found a very similar or same set of circumstances which existed for the infected piece of plywood. This is a material inconsistency. As was held in **Justus William v**

[70] There was no response from the Hills to the 7th July 2010 letter.

Evely Inglis[71] where the trial judge fails to make proper use of the advantage he or she possess in analyzing and carrying out an evaluation of the evidence, the learned trial judge's decision cannot stand if the decision does not comport with the evidence that was adduced. That is exactly the case in this instance. Accordingly, this ground of appeal is also allowed.

Ground 6 – Whether the learned trial judge erred in relying on the expert reports

Submissions of Yates

[94] Mr. Neale took specific objections to Mr. Hodkinson's and Mr. Oeseburg's expert report. Owing to the learned trial judge's ruling that Mr. Oeseburg did not understand his duty to the court, there is no need for this Court to address that report in any detail. In relation to Mr. Hodkinson's report, Mr. Neale contended that Mr. Hodkinson failed to attached copies of the instructions he received in the matter as well a copy of the Brocklebank report, a report by a structural engineer who declined to give evidence in the matter, although expressly stating that this was a document relied on by him in producing his report. Further, Mr. Hodkinson's oral evidence at the trial was that he did not understand that his duty as an expert witness in the matter, in keeping with CPR 32.4, was to the court and not Blue Sand. Mr. Neale submitted that that made his entire report unreliable as a basis of evidence; consequently, the court should have disregarded it.

[95] Learned counsel, Mr. Neale, pointed this Court to evidence in the transcript where Mr. Hodkinson indicated that he was not aware that he was required to put a copy of the instructions received in his report; neither was he provided with a copy of Part 32 of CPR 2000. Further, Mr. Hodkinson's costing and report relied on reports from other experts whose reports were not utilized and who were not sanctioned and called as experts in the matter. Mr. Neale submitted that it was clear that not only was Mr. Hodkinson in breach of a number of the mandatory

[71] SLUHCVAP2013/0032 (delivered 28th October 2015, unreported).

provisions of Part 32 of CPR 2000 but that he did not understand his duties and obligations to the court.

Submissions of Blue Sand

[96] Learned Queen's Counsel, Mr. Bennett, in response stated that the permission of the court is required for expert evidence to be received. In this case, permission was granted for such evidence. The reports of all experts were admitted into evidence without objection. Application was made to call each expert as a witness. Each expert testified without objection and accordingly each one gave oral evidence upon which he was cross-examined by counsel for Yates. Learned Queen's Counsel submitted that having not objected to the admission of the experts' reports, or to the giving of oral testimony by the experts and having cross examined the experts, it is not now open to Yates to object to the admissibility of the experts' testimony.

Analysis

[97] Expert evidence must be considered together with all of the evidence which is before the court and which the judge has accepted. The judge must determine what weight to attach to the expert evidence. It is necessary for an expert to present the analytical process by which he or she reached the conclusion in the report. It is insufficient that an expert merely supplies his or her conclusion on a matter in issue between the parties.[72] In the case of **Potomek Construction Limited v Zurich Securities Limited**[73] Mr. David Donaldson QC, sitting as a deputy judge of the High Court, was dealing with a submission that an expert had failed to comply with his obligation to place in his report the statement required by rule 35.10 of the English CPR to the effect that '...the expert understands his duty to the court and had complied with and will continue to comply with that duty...'.

[72] Basab Inc v Accufit Investment Inc BVIHCMAP2014/0020 (delivered 9th November 2015, unreported).
[73] [2004] 1 All ER (Comm) 672.

Mr. Donaldson, QC observed at paragraph 29 that:

> "No application was made to strike out or exclude the report. If it had been, I have no doubt that Mr. Crosbie [the expert] would have been asked to rectify his omission by adding the missing statement to his report, would have done so, and would have been permitted to do so by the court. As it was, he confirmed orally the contents of his report and elaborated on them in both evidence-in-chief and cross-examination. The defect in the report has thus been overtaken in that Mr Crosbie has now given oral evidence in the same terms as his report, and has done so on the basis which he confirmed in that evidence that he understood his duty to the court and was complying with it. In any event, in the circumstances I have recounted, I would, had it been necessary, have exercised my discretion against exclusion of the report; and, had it also been necessary, granted leave to amend the report by the addition of the missing statement."

[98] Mr. Donaldson, QC had earlier found that the expert (Mr. Crosbie) understood that his duty was to assist the court by providing an opinion and views independent of the party instructing him, and that he sought to fulfil that duty. The expert in that case stated that the omission was due to an error on his part. He confirmed his understanding that it was his duty to express his opinion independently as an expert and that he had to express his opinion fairly in order to assist the court, and confirmed on that basis the matters in that report. I am not of the view that a similar approach could be adopted here. By Mr. Hodkinson's own admission, he was never provided with a copy of Part 32 of CPR 2000. Further, that he was not advised that he ought to have certified at the end of his report that he had not in fact received instructions from any other source, other than what he had declared.

[99] The evidence elicited from Mr. Hodkinson during cross examination showed that he submitted his report based on precedents he had used in the office previously and that that was followed as the basis for his report. Mr. Hodkinson also stated that at the time of preparing his report he was not advised that Mr. Brocklebank and Lowell Fahie were no longer being put forward as expert witnesses, therefore he ought not to have relied on any report from them. He however indicated that he

was advised thereafter but no clarification or direction was given. Mr. Hodkinson relied on the report of experts who were not called as expert witnesses in the matter to provide his pricing quotation. It is then quite curious that the learned trial judge accepted Mr. Hodkinson's report and the costs of repairs therein. At most the learned trial judge ought to have accorded very little weight to his report. I reject the arguments of Mr. Bennett, QC and accept Mr. Neale's submission that Mr. Hodkinson was in breach of a number of the mandatory provisions of Part 32 of CPR 2000. On that basis the learned trial judge ought not to have accepted this expert report or at most should have attached very little weight to it. Consequently, this ground of appeal is allowed.

[100] Yates has succeeded on all of the grounds of appeal save and except in relation to one finding of fact, however, there is a cross-appeal before the Court which I will deal with below.

Cross-appeal

[101] Blue Sand, being dissatisfied with the learned trial judge's findings of fact in relation to certain matters, filed a cross-appeal against the judgment. I will address each ground in turn or where convenient, deal with them together.

Grounds 1 and 4 –

Whether the learned trial judge erred in finding that Mr. Nathanson was clothed with ostensible authority and so the overpayment was authorized

Whether the learned trial judge erred in finding that Blue Sand was partly liable for the failure of the roof

Submissions of Blue Sand

Ostensible authority

[102] Learned Queen's Counsel, Mr. Bennett contended that the learned trial judge erred when she held that Mr. Nathanson was clothed by Blue Sand with ostensible authority to act on their behalf on all aspects of the project including making variations, agreeing prices and contracting with third parties. Queen's Counsel, Mr. Bennett, said that the relevant issue under consideration was the authority of Mr. Nathanson to vary the construction agreement between Blue Sand and Yates and to bind Blue Sand in contracts with third parties. Mr. Bennett, QC further submitted that in order for a principal to be estopped from denying that it is bound by the actions of any employee or agent acting beyond his actual ostensible authority, it must be shown that the principal held out the particular agent or employee as having the authority to so act. In the case where the principal is a company, this "holding out" must be done by someone with actual authority to carry out the relevant acts. Mr. Bennett, QC submitted that what must be shown is that someone with actual authority to bind Blue Sand to a contract or to vary its contract with Yates held out Mr. Nathanson to Yates as having the authority to enter into and vary contracts on its behalf. Learned Queen's Counsel argued that it is clear that the circumstances pointed out by the learned trial judge are incapable of establishing that Mr. Nathanson was clothed by Blue Sand with ostensible authority to enter into or vary contracts on its behalf.

[103] In this regard, learned Queen's Counsel, Mr. Bennett, pointed the Court to the exhibit examined by the learned trial judge which was found to confer ostensible authority on Mr. Nathanson. The exhibit was an email from Mrs. Hill to Mr. Nathanson which stated among other things that, "... if we see [Christina

Yates] we are going to tell [Christina Yates] that there is really nothing for us to say and as for the project you are our rep…" Learned Queen's Counsel, Mr. Bennett, argued that the learned trial judge misconstrued this exhibit which, Mr. Bennett, QC deemed to be irrelevant communication. He took issue with the learned trial judge's finding that Mr. Nathanson's visit to the site to monitor progress and his making "suggestions on construction to meet design interest" all related to Mr. Nathanson's function as an architect and concerned the design process. Mr. Bennett, QC said that there was nothing in the matters cited by the learned trial judge which could have supplied a foundation for the conclusion that Mr. Nathanson was clothed with ostensible authority to alter the contract on behalf of Blue Sand or to enter into contracts with third parties. As such, Mr. Nathanson could not have varied the contract between Blue Sand and Yates in relation to the wall, roof and other aspects where Blue Sand overpaid.

[104] Learned Queen's Counsel, Mr. Bennett, submitted that the written estimate was an offer which was accepted by Blue Sand. Yates was then obliged to carry out and complete the works shown in the drawings at the prices and rates and using the methods set out in its tender of December 2006. This included all work which was indispensably or contingently necessary to do so. Mr. Bennett, QC submitted that a contractor must inform the owner prior to carrying out work that fell outside of the contract as this will afford the owner the opportunity to negotiate a price or to withdraw the request.

Wall

[105] With respect to the wall, learned Queen's Counsel, Mr. Bennett submitted that the learned trial judge's conclusion is flawed. Mr. Nathanson had neither actual nor ostensible authority to contract with Mr. Flax. In order for Mr. Nathanson, by contracting with Mr. Flax, to affect Yates' contractual obligations (to construct the wall), he would have had to be contracting on behalf of Yates and not Blue Sand.

Mr. Bennet, QC's argument was essentially the same regarding the learned trial judge's conclusion in relation to the overpayment for: (1) footing; (2) top beam; (3) excavation; (4) columns; (5) tile work; (6) windows and doors; (7) backfill and compact area; (8) architect fees; and (9) termite treatment for the foundation.[74]

Tile work; Installation of the windows and doors

[106] With respect to the tile work and the installation of the windows and doors, Mr. Bennett, QC asserted that Yates carried out the work without protest and without maintaining at the time that the work fell outside of the contractual arrangements. Yates was therefore bound to charge the rate provided for in the contract.

Roof

[107] In relation to the roof, Mr. Bennett, QC contended that it was not open to the court to find that Mr. Nathanson's rejection of counter flashing, his approval of a "z splice" in the ridge beams, his rejection of a steel plate between the timber ridges and/or his rejection of a concrete beam at roof level caused or contributed to a structural failure of the roof, since there was no expert or any other evidence in the case to that effect. The structural failure of the roof, as found by the learned trial judge, was not attributed by Mr. Taylor to the use of a z splice or any of the other elements which the learned trial judge blamed on Mr. Nathanson. There was thus no basis on which the court could have apportioned any of the cost of correcting the structural defects affecting the roof to Blue Sand.

[108] Learned Queen's Counsel, Mr. Bennett, submitted that all drawings on the project were initially done by Yates' employee, Mr. Massicot. The plans contained structural and engineering details as to roof framing. It was clear that the structural and other engineering input on those plans came from Mr. Massicot

[74] Learned Queen's Counsel, Mr. Bennett, stated that reimbursement had to be made by the BVI Pest Control.

because Yates charged for engineering services. Mr. Nathanson had input in the roof framing design but the sizing of the timbers and other structural details of the roof were done by Yates' employees. Mr. Bennett, QC submitted that contrary to what was found by the learned trial judge, Ms. Yates was specifically consulted in relation to the structural viability of the roof design during the design stage and she gave assurances as to the structural soundness of the roof design. He pointed this Court to Ms. Yates' response to a question posed by Mr. Nathanson regarding the roof where she indicated, 'I feel this is your decision not mine as both alternatives are structurally sound. It is a matter of what will look better to you as you lay in bed staring at it...' Mr. Bennett, QC submitted that this evidence supports his contention.

Submissions of Yates

[109] Mr. Neale advanced that the evidence in the court below was such that there can be no doubt that the learned trial judge was entitled to make the finding of fact which she did. This was so because there was evidence which showed that Mr. Nathanson was representing Blue Sand at the negotiation stage and even beyond. Thus, there was more than sufficient evidence upon which the learned trial judge could base her finding that that the scope of Mr. Nathanson's actual or ostensible authority exceeded the usual scope of authority implied in law to vary the terms of the construction agreement between Yates and Blue Sand. Mr. Nathanson did purport to and effectively varied the terms of the relevant agreement**.**

Wall

[110] With respect to Blue Sand's argument concerning the construction of the wall and the arrangement with Mr. Flax, Mr. Neale submitted that no objections were raised to its construction. Blue Sand was aware that Mr. Nathanson had negotiated an agreement on their behalf with Mr. Flax for the construction of the wall on his

boundary line which included the charging of specific rates for the concrete and the excavation and trucking of the material by Mr. Flax. Blue Sand never challenged this agreement although it was provided with the costing for same by Yates as early as December 2009. The construction of the wall was not part of the original scope of works when the Budget for the project was agreed, as such, a number of additional costs were incurred.

[111] In answer to Blue Sand's objection to what they deemed were unilateral charges, Mr. Neale submitted that Ms. Yates' evidence before the lower court was that at the time of the drawing up of the Budget for the project, no details were known for certain items of construction such as doors, windows, and plumbing, hence these were marked as allowances in the Budget. Yates used its standard price for such items on the clear understanding between the parties that these prices would be adjusted once the exact material was selected. Blue Sand eventually selected items which were much more expensive than Yates' standard items which had been included in the Budget hence there was an increase in the price of these items which increase had been agreed to by Mr. Nathanson. The learned trial judge having arrived at a finding of fact based on the evidence, namely, that where an item was not agreed in the Budget there was an agreement between the parties to pay a reasonable price for same, this Court should not readily overturn the finding of the learned trial judge unless it can be shown that she took into consideration irrelevant matters or that there was not sufficient evidence to support the finding. Learned counsel, Mr. Neale, also submitted that the evidence of Mr. Nathanson supported the appellant's contention on the various issues.

Analysis

[112] The learned trial judge undoubtedly had the advantage of seeing and hearing the witnesses give their evidence and she would have observed their demeanor and on that basis she came to particular findings of fact. Taking this into

consideration, this Court should be slow to interfere with her findings and conclusions unless it appears clear that she failed to make proper use of the advantage she had.[75] A conclusion on the ground of appeal concerning the trial judge's finding that Mr. Nathanson was clothed by Blue Sand with ostensible authority to act on their behalf on all aspects of the project including making variations, agreeing prices and contracting with third parties is crucial to the determination of most, if not all, of the remaining issues of overpayment in the cross-appeal between the parties. I now turn to that issue.

[113] An architect or engineer in private practice has no implied authority to make a contract with a contractor or to vary or depart from the concluded contract.[76] In a leading treatise on building contracts, **Hudson's Building and Engineering Contracts**, the learned author stated:

> "An architect or engineer in private practice has no implied authority to make a contract with the contractor binding on his employer, or to vary or depart from a concluded contract. His duty when supervising a contract is to see that it is faithfully fulfilled according to its terms; but it may, of course, be varied by the parties themselves, or by the architect or engineer under specific authority given him in that behalf, whether under the express terms of the building contract, as in the case of a variations clause (which in fact is a clause permitting variation of the contract *work* and not of the contractual provisions as such) or on direct instructions from the employer.
>
> …
>
> …an owner who by some conduct or statement has misled a contractor into thinking that the architect has full authority may well be held either actually to have authorised the architect to contract on his behalf or, if not, to have clothed him with ostensible authority to contract. This, of course, would depend on the particular facts, but does not detract from the general principle that an architect, even instructed to obtain tenders, has

[75] Marie Makhoul v Cicely Foster et al ANUHCVAP2009/0014 (delivered 23rd February 2015, unreported); Biogen Inc v Medeva plc [1997] RPC 1, 45; Housen v Nikolaisen [2002] 2 SCR 235; Chiverton Construction Limited et al v Scrub Island Development Group Limited BVIHCVAP2009/0028 (delivered 19th September 2011, unreported).

[76] Hudson's Building and Engineering Contracts (11th edn., Sweet & Maxwell, 1995).

> no *ostensible* authority to conclude a contract, and strong facts would be needed to rebut the presumption.
>
> Secondly, an owner who knows what his architect has done, and stands by and allows the work ordered to be carried out, will be held to have ratified the contract made by the architect, or to have impliedly promised to pay a reasonable price for the work."[77]

[114] Egbert J in **Re Chittick and Taylor**[78] stated that, 'If the [owner], without giving definite instructions, knew the plaintiff [contractor] was doing extra work or supplying extra materials and stood by and approved of what was being done and encouraged the plaintiff to do it, that, in my opinion, amounts to an implied instruction to the plaintiff, and the defendant is liable'.[79]

[115] In **Cooper v Langdon**,[80] a contractor agreed to build a house for the plaintiff according to certain plans. The plaintiff sued the contractor for non-performance of the agreement. The contractor said that he deviated from the plans by the authority of the plaintiff's architect. It was held that this was no answer as it was not shown that the architect was the plaintiff's agent to bind him by any deviation from the plans.

[116] In the case at bar, the trial judge relied on an email from Ms. Hill to Mr. Nathanson in which Mrs. Hill indicated that '…if we see [Ms. Yates] we are going to tell her that there is really nothing for us to say and as for the project you are our rep...' Mr. Bennett, QC has argued that this communication was never disclosed to Yates before disclosure in the trial proceedings, as such, Yates could not see this as holding out. While I agree with Mr. Bennett, QC, this is only half of the evidence. The learned trial judge did not rely only on this piece of evidence to come to the conclusion which she came. She had before her requests from Yates to the Hills asking for them to be more involved in the project communications signifying that

[77] 11th edn., Sweet & Maxwell, 1995 at paras. 2-061 to 2-064.
[78] (1954) 12 WWR 653.
[79] At p. 655.
[80] (1841) 9 M & W 60.

despite such requests all decisions were left up to Mr. Nathanson; a letter dated 18th March 2009 from Mr. Nathanson to Yates requesting status reports each week and Mrs. Hill's response when advised of this was "omg-this is wonderful-go Jon!"; and communication from Mr. Nathanson to Yates indicating that payment requests should be sent to him. Moreover, it was quite clear from the evidence in the lower court that Mr. Nathanson consulted with Blue Sand on a regular basis on all issues relating to the project so that at all times Blue Sand was fully aware and approved of the decisions taken by him. The clear inference is that Blue Sand would have ratified the actions of Mr. Nathanson.

[117] Additionally, the learned trial judge had before her (i) Ms. Yates' witness statement which averred that '…the Defendant [Blue Sand] insisted that all correspondence and questions regarding the project should be channeled through Mr. Nathanson rather than directly to the Defendant [Blue Sand]';[81] (ii) Mr. Felipe's witness statement in which he swore that he was advised by Mrs. Hill that Mr. Nathanson '… would be acting as their [Blue Sand's] representative on the project and that we should follow all his instructions';[82] (iii) Mrs. Hill's sworn evidence where she indicated that during the negotiation stage, Blue Sand was represented by herself, Mr. Hill and Mr. Nathanson. Critically, the learned trial judge would have seen and heard the witnesses and observed their demeanour. At paragraph 15 of the judgment, she stated categorically, 'on issues of credibility I preferred the evidence of Ms. Yates, Ms. Potter and Mr. Felipe to Mr. Nathanson's wherever they conflicted'. Borrowing from the language of **In re B (A Child)(Care Proceedings: Threshold Criteria)**:

> "where findings depend on the reliability and credibility of the witnesses, it [an appellate court] will generally defer to the trial judge who has had the great advantage of seeing and hearing the witnesses give their evidence. The question is whether the findings made were open to him on the evidence".

[81] Witness Statement of Christina Yates, Record of Appeal, Volume A, at p. 103, para. 18.
[82] Witness Statement of Felipe Taylor, Record of Appeal, Volume A, at p. 95, para. 4.

Based on the totality of the evidence, I agree with the learned trial judge's conclusion that Mr. Nathanson was clothed with ostensible authority by Blue Sand to act on their behalf in varying the contract. It was clearly open to the learned trial judge to so conclude. There is accordingly no basis upon which this Court could interfere.

[118] The learned trial judge's decision in relation to the top beam, the wall built to protect Mr. Flax's property, the footing, the excavation and other aspects of overpayment was influenced by her finding that Mr. Nathanson was acting as an agent for Blue Sand. In view of my conclusion at paragraph 115, the learned trial judge quite properly concluded that Mr. Nathanson, acting as agent for Blue Sand, made various alterations and variations which resulted in higher costs to the contract price and Blue Sand ratified these alterations and variations. Mr. Nathanson's own evidence supported this when he stated that he understood the windows and doors would be repriced.[83]

Overpayment for Ms. Potter's fees including the 15% markup therein

[119] In relation to the overpayment for Ms. Potter's fees including the 15% markup therein, learned Queen's Counsel, Mr. Bennett, submitted that the only question relevant to whether Yates was entitled to charge for work done by an architect/draftsperson employed by it to work on the project, was whether the work carried out by that architect/drafts person came within the classification of "blueprints/drafting/engineering". Essentially, whether Ms. Potter's work came within the classification of "blueprints/drafting/engineering". However, I do not agree that this question comes within the realm of relevance. It was not disputed that substantial design changes were made to the Massicott drawings at the request of Mr. Nathanson acting on behalf of Blue Sand. Ms. Potter, acting on the instructions of Mr. Nathanson, revised these drawings. The question would

[83] Record of Appeal, pp. 181 and 183.

therefore remain whether Mr. Nathanson as agent for Blue Sand had ostensible authority to change the contract. On that issue, the learned trial judge weighed the evidence of the two sides and accepted Ms. Yates' evidence when she said that the sum of $10,000.00 listed in the Budget for "blue prints/drafting/engineering" was for work done to the date of the Budget and that what was done by Ms. Potter were revisions as a result of design changes which were requested by Mr. Nathanson.[84] The learned trial judge went on to find[85] the evidence of Ms. Potter and Ms. Yates credible and was supported by documentary evidence and held that the overpayment in that regard was authorized. This finding was consistent with her earlier finding that Mr. Nathanson was clothed with ostensible authority by Blue Sand to act on their behalf. I see no reason to disturb this finding by the learned trial judge.

[120] The learned trial judge was well placed to assess the evidence and credibility of the witnesses. The question for an appellate court is whether the findings made were open to her on the evidence. In the case at bar, the findings by the learned trial in relation to this ground of overpayment were open to her on the evidence. As such, I will defer to the trial judge on this issue. I am of the considered view that the learned trial judge made proper use of the advantage she had. For the reasons advanced, these grounds of appeal must fail.

Ground 2 – Whether the learned trial judge erred in holding that the contract was a cost plus percentage contract

Submissions of Blue Sand

[121] Learned Queen's Counsel, Mr. Bennett submitted that the learned trial judge fell into error when she held that the contract between the parties was a cost plus percentage contract. He argued that the contract was a classical lump sum contract, that is, a contract to carry out and complete defined work for a price

[84] At para. 26 of the judgment.
[85] At paras. 25 – 26 of the judgment.

ascertained or to be ascertained in accordance with the schedule of rates and prices. In such a contract the contractor's aim is to produce a tender that is priced high enough to make a profit and low enough to be accepted by the owner.

[122] In this case, Mr. Bennett, QC said the extent and design of the works of the villa was not sufficiently known at the time of the agreement and that the parties had employed a relatively primitive schedule of rates and prices to arrive at a provisional contract price. Unlike the case of a cost plus percentage contract, the owner does not guarantee the contractor any level of profit – he simply accepts or rejects the pricing proposal. The question was not, as the learned trial judge assumed, whether the contractor was entitled to a profit on the work and that it was up to Yates to price its proposal so as to generate a profit. The question for the court was whether in the absence of any express agreement to that effect, Yates as the contractor was entitled to unilaterally impose a 15% markup on goods and services used in the project, including items such as windows, doors and tiles purchased and brought on site by the owner.

[123] Mr. Bennett, QC complained that a term concerning the imposition of a 15% charge for the benefit of Yates could not be implied. He submitted that a term will be implied only if it is essential to do so in order to give the contract "business efficacy", that is, if without it, the contract would be commercially unworkable. Mr. Bennett, QC posited that it was very possible for the contract to be workable in a commercial sense without provision for any additional percentage charge on materials to be imposed for the benefit of Yates. He however did not indicate to the Court how this would have been possible. Learned Queen's Counsel, Mr. Bennett, also took issue that it was a 15% markup that was imposed.

Submissions of Yates

[124] Mr. Neale submitted that Blue Sand's contention regarding the 15% markup is

unfounded. He submitted that the evidence in the matter was that the Budget did not contain a specific profit element but that a 15% profit was built into the cost of materials in the Budget and that this was accepted by the parties. Learned counsel, Mr. Neale disagreed with Mr. Bennett, QC's arguments regarding the recovery from the BVI Pest Control, the roof, the swimming pool, amongst other things. Mr. Neal maintained that the learned trial judge's finding in relation to same ought not to be disturbed.

Analysis

[125] The learned trial judge accepted the evidence of Ms. Yates that it was agreed between the parties that such a charge will be added onto all the items and or services provided. She also held that the markup was customary in the trade in the BVI and was to be treated as a term implied by custom into the contract. To arrive at this finding, the learned trial judge referred to Mr. Hodkinson's report for remedial works which provided for a 15% markup in relation to the profit. In my determination, building contracts, of whatever degree of complexity, need to provide for the amount that the contractor is entitled to be paid.[86] Construction contracts can be divided into broad classifications which are not mutually exclusive. One such classification is, as Mr. Bennett, QC submitted, lump sum contracts which include contracts to carry out and complete a defined work for a fixed lump sum and contracts where the contract price is arrived at by re-measurement either during or at the end of the project, to establish the price for the work undertaken. There is an inherent danger or risk with this type of contract because if the work is not completed, a contractor may not be entitled to be remunerated. All the same, most construction contracts make provision expressly for interim or stage payments as the work proceeds. If there is no express provision for payment of instalments of the contract price, the courts may be

[86] Hudson's Building and Engineering Contracts, 12th edn., Sweet & Maxwell, para. 5-001.

prepared to imply them in a contract of any substance.[87] Where the extent and scope of the work is not sufficiently known at the time of the contract, some form of measure and value may be used. Lump sum fixed price contracts may make provision for the adjustment of the contract price in certain circumstances. The classification of the contract is not the main focus; it is the intention to be derived from the contract as a whole rather than the precise terminology which will be paramount.

[126] Mr. Bennett, QC submitted that unlike the case of a cost plus percentage contract, the owner does not guarantee the contractor any level of profit – he simply accepts or rejects the pricing proposal. I have distilled from learned Queen's Counsel, Mr. Bennett's argument that it was up to Yates to price its proposal to guarantee itself a profit so that where for example, windows, doors and tiles were purchased and brought on site by Blue Sand, Yates was not entitled to a 15% markup on such items. I would do no more than describe Mr. Bennett, QC's argument as unattractive and unpersuasive. I accept Mr. Neale's position that for this argument to be workable, Yates would be operating free of charge – that simply could not have been the intention of the parties. The learned trial judge stated that she perused the Budget and that there was not a separate item for contractor's fees or profit. She rejected the idea that Yates was building gratis and held that the markup must be implied. Contrary to learned Queen's Counsel, Mr. Bennett's submission, this approach would give business efficacy to the contract. I agree with the conclusion of the learned trial judge. It is of interest also that the 15% markup on materials supplied by the owner was, after negotiations between Blue Sand and Yates, later reduced to 10%, which Blue Sand paid. Consequently, Blue Sand would be estopped from now pursuing this as a ground of appeal. Accordingly, this ground of appeal is also dismissed.

[87] Hudson's Building and Engineering Contracts, 12th edn, Sweet & Maxwell, para. 5-001.

Ground 3 – Whether the learned trial judge erred in concluding that Blue Sand ought to reimburse Yates for monies paid for termite treatment for foundation

Submissions of Blue Sand

[127] Mr. Bennett, QC said that the court accepted that Blue Sand, which had the obligation to pay for termite treatment for the foundation, paid BVI Pest Control directly for this service in May 2008. Blue Sand's position was that Yates was under no obligation to pay for the service and had not been asked to do so. If, however, Yates had paid, Blue Sand would be willing to assist it to recover any monies so paid. Learned Queen's Counsel, Mr. Bennett, stated that despite this the learned trial judge went on to accept Ms. Yates' evidence that Yates had paid the sum to the BVI Pest Control and ordered that Blue Sand must reimburse them as the monies paid on their behalf.

[128] Mr. Bennett, QC submitted that in so holding, the court failed to appreciate that the party that was liable to reimburse Yates would be BVI Pest Control if it had in fact been paid twice for the same service. Blue Sand was under no obligation to Yates in this regard as payment had not been made at its request.

Submissions of Yates

[129] Mr. Neale in response to Queen's Counsel, Mr. Bennett's argument stated that Blue Sand did not produce any evidence that it actually paid the pest control invoice. Neither did Blue Sand provide Yates with a copy of the invoice when requested to do so. In those circumstances, it was not unreasonable for Yates to pay the invoice upon a demand for payment by BVI Pest Control, particularly given the fact that Yates was responsible for making the arrangements for the termite treatment with the company and to thereafter seek reimbursement of this payment from Blue Sand.

Analysis

[130] I accept the submissions of Mr. Neale on this issue. The evidence which was before the learned trial judge was that:

> "The invoice No.19053 dated May 30, 2008 was sent directly to the Defendant [Blue Sand] by BVI Pest Control however in September an employee of the company complained to the Claimant [Yates] that they were having difficulty obtaining payment from the Defendant because they were hardly ever on island. The Claimant therefore paid the pest company with its check #2492 on September 24, 2008 and billed same to the Defendant. If Defendant did in fact pay this $4,000.00 to the pest company after September 2008 then evidence of this should be produced to the Claimant i.e. a cancelled cheque so that the Claimant can take steps to obtain reimbursement for the Defendant of the overpayment to the pest company. The Claimant for the reasons stated above rejects this aspect of the counterclaim".[88]

[131] Accordingly, there was evidence before the judge which indicated that payment was requested from Blue Sand. The payment was not forthcoming; as such, Yates went ahead and paid the pest company by cheque and billed same to Blue Sand. Learned Queen's Counsel, Mr. Bennett, is of the view that Yates had no obligation to pay the pest control. However, Yates as the contractor was responsible for making the arrangements for the termite treatment with the company. The learned trial judge had regard to the evidence of payment which was before her and accepted that the position which Yates found itself in and the ensuing solution provided by Yates was reasonable. I am also of that view. In light of this, I would dismiss this ground of appeal.

Ground 5 – Whether the learned trial judge erred in relation to her finding on the pool

Submissions of Blue Sand

[132] Mr. Bennett, QC also complained that the learned trial judge's ruling concerning the swimming pool was flawed. He said that there was no evidence that

[88] Schedule 1 to Response to Defendant's Appendix A Summary, Record of Appeal, Bundle A, p. 69 at para. 18.

Mr. Nathanson had anything to do with the placement of the skimmer.[89] He said this is more convincing considering that Yates' position and evidence before the lower court has always been that it was responsible for the placement of the pool skimmer and it had been correctly placed. Mr. Bennett, QC referred the Court to Yates' evidence which stated, '…the pool skimmer was installed as we would normally install that pool skimmer which was in the wall of that pool' which he said revealed that Mr. Nathanson did not direct the placement of the skimmer.

Submissions of Yates

[133] Learned counsel, Mr. Neale, submitted that with respect to the placement of the skimmer, the evidence of Yates was that the skimmer had to be positioned in relation to the scum line tiles in order to be effective and that having placed the tiles at the height set out in the plan, Yates was ordered by Mr. Nathanson to remove the tiles and place it higher; consequently, Yates cannot be blamed for any incorrect placement of the skimmer.

Analysis

[134] This is a short point. The learned trial judge had initially held that on issues of credibility she preferred the evidence of Ms. Yates to that of Mr. Nathanson. The learned trial judge specifically stated that:

> "In respect of the pools I prefer the evidence of Ms. Yates to that of the expert witness Mr. Oeseburg for the reasons already advanced. I find that the pool leaks and that the most likely cause is the incorrect placement of the skimmer which position was specifically directed by Mr. Nathanson, again to meet his design concepts."[90]

[135] This finding to my mind is inconsistent taking into consideration that Ms. Yates stated that the pool skimmer was installed as they would normally install the pool

[89] The learned judge, at paragraph 74 of the judgment, found that the pools leaked and that the most likely cause was the incorrect placement of the skimmer which position was specifically directed by Mr Nathanson to meet his design concepts.
[90] At para. 74 of the judgment.

skimmer which was in the wall of the pool. Considering that there was no evidence on which the learned trial judge could have found that Mr. Nathanson had anything to do with the placement of the skimmer, this finding can be successfully impugned. This ground of appeal is accordingly allowed.

Conclusion

[136] Yates has succeeded on all grounds of appeal except one save and except in relation to one finding of fact. Blue Sand has succeeded in only one of their grounds. Accordingly, I would order that Yates is entitled to the claim for its miscellaneous charges set out in Certificate No. 13. Yates is also responsible for the defects as found in the roof by Mr. Taylor. Yates, having failed to be given a reasonable opportunity to remedy the defects found by Blue Sand, is not responsible for the sum Blue Sand paid in remedial works. Blue Sand's cross-appeal is dismissed save for the appeal in relation to the placement of the skimmer.

[137] In view of the matters I have indicated above, I hold that:

(1) Blue Sand having lost on most of the grounds of appeal would be liable to pay Yates the sums of monies that it admitted to owing to Yates. For clarity, this sum is $191,616.92.

(2) Blue Sand is to pay Yates the total due under Certificate No. 13 which includes the admitted sum of $191,616.92 and the sum due for the miscellaneous charges specifically being $31,402.53.

(3) Yates is entitled to the retention monies of $98,311.20 less a reduction for the legitimate defects estimated at $25,000.00 as per Yates' claim.

(4) In relation to the roof, the matter be remitted to the court below for the

quantification of damages based on Mr. Taylor's report.

(5) Yates is not entitled to compensate Blue Sand for any other defect except in relation to the roof.

[138] I have dismissed Yates' claim in relation to the tower coating and would hold that the $25,000.00 retained by Blue Sand would have effectively covered the cost of that defect. I have allowed Blue Sand's appeal in relation to the skimmer. As I have found that Yates was not given a reasonable time to remedy the defect, and taking into consideration the nature of this matter and the length of time that has elapsed, the justice of this case requires that Blue Sand will receive no compensation for same. In any event, this would have been remedied by Blue Sand at a later opportunity and for which Blue Sand has lost its appeal for the recovery of remedial works on the villa.

Costs

[139] In so far as Yates has had substantial success on its appeal, and Blue Sand has had success in relation to only one matter of the appeal, I am of the view that the appropriate costs order should be that Yates receive costs to be assessed in relation to the grounds of appeal on which it has succeeded unless these costs are agreed within 21 days of this order. Blue Sand is to receive costs to be assessed in relation to the one ground on which it succeeded unless these costs are agreed to within 21 days of this order.

[140] I gratefully acknowledge the assistance of learned counsel and learned Queen's Counsel.