EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO.: ANUHCV2014/0638

BETWEEN:

AUDREY COOK HENRY

Claimant

and

WILLIAM CARR

Defendant

Before:
Eddy Ventose — Master [A.G]

Appearances:

Ms. Safiya Roberts for the Claimant

2016: November 3
2017: January 3

JUDGMENT

1. **VENTOSE, M. [A.G.]:** The matter before the court is one for assessment of damages following the entry of judgment in default of defence on 15 May 2015.

Background Facts

2. The background facts as outlined from the statement of case of the Claimant, Ms Audrey Cook Henry are as follows. The Claimant, who resided in Brooklyn New York, United States of America, was originally from Antigua and Barbuda. She owned a residential home in Bennett Street in St. Johns. The Claimant wishes to renovate the home to enable her to earn some income. The property required substantial renovations so she engaged the services of Mr William Carr, the Defendant, to complete the works on the property. On 28 March 2011, The Claimant entered into an agreement with Mr Carr, the Defendant, which had as its stated object to refurbish and remodel the property (the "**Contract**").

3. Clause 3 of the Contract states that the Defendant undertakes to execute the works in a thorough and workmanlike manner and with materials to be supplied by the Claimant and to execute all works incidental to the proper execution and completion of the works. Clause 3 obligates the Defendant to hand over to the Claimant the completed works within six (6) weeks after the date of the agreement, namely, by 9 May 2011. The consideration for the Contract, as contained in Clause 4, was EC$79,000.00, which comprise EC$30,000.00 for labour and EC$49,000.00 for materials. The materials to be used in the works are listed in a Schedule to the Contract.

4. Clause 21 provides that if the Defendant fails to complete the works by the date of completion and the Claimant employs an architect or engineer for an opinion as to whether or not the works ought reasonably so to have been completed and such architect or engineer certifies in writing that in his opinion the works ought reasonably to have been completed, then the Defendant shall pay or allow the Claimant the sum of $100.00 per diem as liquidated and ascertained damages for the period during which the works shall so remain (sic) of have remained incomplete, the Claimant may deduct such sum from any monies due or to become due to the Defendant under the Contract. In other words, if the Defendant fails to complete the work on time a sum of $100.00 per day becomes payable to the Claimant for the period of time the works

remain incomplete. The Claimant may deduct any sums from any monies that may be due to, or becomes due to, the Defendant under the Contract.

5. Clause 14 of the Contract provides that if the Defendant is found to have breached a clause in the Contract which goes to the root of the Contract the Claimant may by written notice determine the Contract and end of services of the Defendant.

6. The Claimant paid the funds to the Defendant, less $4,000.00, which was written on the signed Contract as comprising the "retention fee". The funds were paid in three instalments: (1) EC$30,000.00 on 29 March 2011; (2) EC$25,000.00 on 6 April 2011; and (3) EC$20,000 on 21 April 2011. This was confirmed by ABI Bank Ltd via letter to Counsel for the Claimant on 10 June 2011.

7. The Defendant failed to meet the 9 May 2011 deadline. On 9 June 2011, the Claimant wrote, through her Attorney-at-Law, to the Defendant informing him that the deadline had passed and he had not completed the works in accordance with the terms of the Contract. The Defendant subsequently deposited the keys to the property at the office of the Claimant's Attorney-at-Law. The Claimant subsequently engaged the services of Mr Henderson St C Simon, a consultant engineer, who inspected the property and submitted a report to the Claimant on 21 July 2011 (the "**Engineer's Report**").

8. The Claimant on 1 September 2011 terminated the Contract with the Defendant for failing, inter alia, to complete the works during the contractual time period and to execute the works in a thorough and workmanlike manner. The Claimant also engaged the services of Mr Isaiah Knight, a builder and contractor, who provided her with a quotation for the total cost of completing the work (the "**Contractor's Quotation**") on 21 August 2011.

9. On 4 December 2014 the Claimant claimed against the Defendant for $50,282.00 for breach of contract. As mentioned previously, judgment in default of defence was

entered on 15 May 2015 against the Defendant. The assessment of damages due to the Claimant must now take place.

Damages for Breach of Contract

10. It is trite law that the purpose of the award of damages for breach of contract is to put the claimant in the position she would have been in had the contract been performed in accordance with its terms. In *British Westinghouse Electric Co Ltd v Underground Electric Rys* [1912] A.C. 673, 689, Viscount Haldane LC opined that:

> The first is that, as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach . . .

11. The interest that is protected is either her "performance interest" or "expectation interest". Whatever one defines as the interest protected by damages for breach of contract, one thing is clear: it is compensatory in nature. This principle was affirmed by Oliver J in *Radford v. De Froberville* [1977] 1 WLR 1262, 1270:

> If he contracts for the supply of that which he thinks serves his interests be they commercial, aesthetic or merely eccentric—then if that which is contracted for is not supplied by the other contracting party I do not see why, in principle, he should not be compensated by being provided with the cost of supplying it through someone else or in a different way, subject to the proviso, of course, that he is seeking compensation for a genuine loss and not merely using a technical breach to secure an uncovenanted profit.

12. It is not the Claimant's contention in the case at bar that the Contract has been substantially performed. It is the evidence of the Claimant that the Defendant failed: to complete the works; to use the quantity and quality of materials listed in the Schedule to the Contract which were paid by the Claimant; to use reasonable care

and skill in completing the works which resulted in defects in the work completed; and to execute the work in a thorough and workmanlike manner.

13. The failure of the Defendant to complete the Contract must result in loss to the Claimant before any compensation is payable. This too is trite law. What then is the loss suffered by the Claimant for which she should be compensated? The Claimant avers that she suffered financial loss as follows: (1) EC$23,5000.00 for completing the works; (2) EC$15,956.22 worth of materials that cannot be accounted for; (3) EC$11,700.00 liquidated damages; (4) EC$ 2,500.00 consequential loss; and (5) EC$3,000.00 non-pecuniary loss. Each of those heads of loss will be discussed seriatim.

Completion of Works

14. Under this head, the Claimant claims the cost of completing the works, remedying the defects, and completing the electrical works. There is no doubt that that Defendant was contractually obligated to complete the works. This was expressly provided for in Clauses 1 and 3 of the Contract. The loss to the Claimant would be the amount that she would now have to spend to get what she contracted – a completed house. This has been emphasised in many cases, such as *Todman-Brown v Rymer* (BVIHCV2009/0195 dated 11 May 2011) where Harripersaud-Charles J stated (at [98]) as follows:

> Where the contractor fails to complete, the measure of damages in the first instance is the difference between the contract price (if it has not yet been paid) and the amount it would actually cost the employer to complete the contract work substantially as it was originally intended, and in a reasonable manner, and at the earliest reasonable opportunity.

15. The Claimant avers that the Contract price is EC$75,000.00 (less EC$4,000 as the retention fee). There is clear evidence that this amount was paid to the Defendant. In the Engineer's Report, it is stated that EC$10,700 is needed to complete the

rennovation and identified the incomplete works as follows: (a) the panelling on the one interior wall on both sections; (b) kitchen cabinets on both sections; (c) painting of interior of building; (d) installation of electrical fixtures in both section; and (e) installation of plumbing fixtures in the two bedroom section. In addition, the report also identifies the following as incomplete works: (a) lack of roof screws in the areas of the galvanized sheeting; and (b) the levelling of the timber section of the floor. It is significant that the report stated that the engineer was unable to provide an opinion on the material used to date since they did not know of the original condition of the building.

16. In the Contractor's Quotation, the following are stated to require completion inside the house: (a) to complete work inside of the house putting close case; (b) put on doors on all bedrooms, including locks and stoppage pieces; (c) stile around bedroom top and bottom; (d) part off the kitchen; (e) paint all 3 bedroom side and floor; (f) paint all rafter and living room floor; (g) replace tile in the bathroom; (h) 1 kitchen sink, and 1 face basin all complete; (i) completion of all plumbing work; (j) go over all plumbing work; and (k) check over the roof. The estimate for these works is EC$18,800.00.

17. In respect of outside the house, the Contractor's Quotation outlined the following: (a) change the back step to put tank on (4X4ft); (b) step south side of the house (4X9ft); (c) walk way (3X40ft); (d) spouting on 2 sides of house (66ft of spouting including fittings); and (e) front of the house fencing and south side of the house fencing. The estimate for these works is EC$8,700.00.

18. Apart from noting that the Contract was for the refurbishing and remodelling a dwelling house, the specific items that needed remodelling or refurbishing are not itemised in the Contract. A Schedule to the Contract which itemised matters was deleted and replaced with the following: (1) [*mobilisation and breakdown*] [30,000]; (2) roof [25,000]; (3) finishing painting and kitchen cupboards [20,000]; and (4) retention [4,000]. In the absence of any evidence to the contrary, this seems to be an accurate statement of the scope of works to be completed under the Contract.

19. There is little evidence to suggest that the Contract included work to be done to the exterior of the house. Although it might be reasonable to assume that the Claimant would have wanted the outside of the house completed as well, the evidence does not establish this. In the Schedule of materials, which is annexed to the Contract, there is no evidence of materials that might be used to complete any works on the outside of the house. In the absence of evidence that the scope of works under the Contract included works to be undertaken on the grounds of the property, I would not include it in the amount of compensation payable to the Claimant.

20. The court is presented with two estimates for the completion of the works, namely, EC$10,700.00 in the Engineer's Report and EC$18,800 in the Contractor's Quotation. I accept the Contractor's Quotation as a reasonable estimate of the costs of the works to be completed. I would therefore award EC$18,800.00 for completion of the works in accordance with the Contractor's Quotation. From this must be subtracted the $4,000.00 retention fee. The total awarded under this head is $14,800.00

Cost of Materials

21. The Claimant avers that the Defendant failed to use the quantity and quality of materials listed in the Schedule of the Contract and which the Claimant paid for. In addition, the Claimant avers that rotten timber was used; and the installation of electrical fixtures and plumbing was incomplete. Under this head, the Claimant claims EC$15,956.22 representing the cost of the materials which were paid for by the Claimant but not received or used. These include EC$8,229.98 for plywood, EC$5,000.00 for electrical and plumbing supplies, EC$747.00 for roof screws, and EC$1,978.92 for paint.

22. It is not the Claimant's case that no timber was used in the renovation, only that some of the timber used was rotten. When pressed with the question of how much of the timber was actually rotten, Counsel for the Claimant could not answer. Without specific evidence that all the timber used in the property was rotten as alleged by the

Claimant, an award under this head can only be nominal. Neither the Engineer's Report nor the Contractor's Estimate make reference to any timber requiring replacement and if replacement was at all necessary it would have been specifically listed, or be included, in either the report or the quotation, respectively. In any event, the Claimant was not able to specifically provide evidence to substantiate the claim that the Defendant did not purchase any plywood to be used in the renovation of the house. A nominal sum of EC$1,500.000 is therefore awarded.

23. In addition, the Claimant specifically avers that the electrical fixtures and plumbing were incomplete, not that they were not done at all. In any event, the Engineer's Report and the Contractor's Quotation make provision for plumbing and electrical works, which would be included in the amount awarded for completion of works as stated above. No award is therefore made for the materials for the plumbing and electrical works. In addition, the Engineer's Report and the Contractor's Quotation mention completion of painting, and the Engineer's Report makes reference to the lack of roof screws. Although the Contractor's Quotation mentions checking over the roof, it does not mention the roof screws. Consequently, the sum of EC$747.00 is awarded for the screws. A total of EC$2,247.00 is awarded under this head.

Liquidated Damages

24. The Claimant also claims EC$11,700.00 pursuant to Clause 21 of the Contract that provides that the Defendant shall pay to the Claimant the sum of EC$100.00 as liquidated and ascertained damages for each day that the works remain incomplete. The works should have been completed by 9 May 2011 in accordance with Clause 3 of the Contract. Pursuant to Clause 21 of the Contract the Claimant engaged the services of an engineer who reported that the work had not been properly completed. The Claimant terminated the Contract with the Defendant on 1 September 2011. As a result, she claims liquidated damages in the sum of EC$100.00 per day from 9 May 2011 to 31 August 2011 in the amount of EC$11,700.00.

25. Parties are free to determine and contractually provide for the consequences of a breach of contract. They can include a term in the contract which provides for a sum to be payable by a party in the event of a breach. However, the courts have asserted the power to regulate such contractual terms and those that amount to a penalty will not be enforceable and the innocent party will only recover damages he can prove as a result of the breach of contract. If the term were found to be a liquidated damages clause, then, it would limit the liability of the defaulting party to the sums payable under the clause, irrespective of the actual loss suffered by the innocent party. The whole point of a liquidated damages provision is for the parties to agree in advance what is to happen in the event of the breach that occurred (See generally E. McKendrick, Contract Law: Text, Cases, and Materials, 5th ed, OUP (2012) 913).

26. The question that must be determined is whether Clause 21 is a penalty or a liquidated damages clause. Lord Dunedin in *Dunlop Pneumatic Tyre Ltd v. New Garage and Motor Co Ltd* [1915] AC 79 stated that the essence of a penalty is a payment of money stipulated as in terrorem of the offending party; whereas the essence of liquidated damages is a genuine covenanted pre-estimate of damage. The UK Supreme Court of the United Kingdom in *Cavendish Square Holding BV v El Makdessi; ParkingEye Ltd v Beavis* [2016] 2 All ER (Comm) 1 stated (at [31]) that: the law relating to penalties has become the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and a deterrent. It continued that these distinctions originated in an over-literal reading of Lord Dunedin's four tests and a tendency to treat them as almost immutable rules of general application, which exhaust the field. In the Supreme Court's view (at [32]):

> The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation.

27. In relation to consequential loss (discussed below), the Claimant avers that the Defendant was aware that she (the Claimant) wanted the property renovated to be able to rent it at EC$850.00 per month. The Claimant's legitimate interest in enforcement of the secondary obligation to complete the renovations on time was to ensure that that she would not suffer loss of rental income. It is the Claimant's evidence that this would amount to EC$2,550.00 for the period June 2011 to August 2011. The payment of $100.00 per day for non-completion of the works found in Clause 21 imposes a detriment of the Defendant, which is out of all proportion of the legitimate interest of the Claimant in having the work completed on time. Consequently, the Claimant is not entitled to EC$11,700.00 as liquidated damages.

Consequential Loss

28. The Claimant also claims lost profits in the sum of EC$2,550.00 as consequential damages resulting from the breach of the Contract. The Claimant avers that the Defendant was aware that the Claimant wanted the property renovated to be able to rent it at EC$850.00 per month. Whether the Defendant was aware or not matters little. The Claimant was not resident in Antigua and had borrowed the money for the renovation from ABI Bank Limited. The court accepts that the Claimant intended to rent the property on completion of the renovations by the Defendant. The loss suffered is not remote. An award of EC$2,550.00 is therefore justified.

Non-Pecuniary Loss

29. The Claimant also claims non-pecuniary loss for the anxiety, distress and inconvenience caused by the Defendant's breaches of the Contract. Counsel for the Claimant cites the decision of *Isaacs v Browne* (SVGHCV2010/0250 dated 26 July 2013) for the view that damages are recoverable for inconvenience and discomfort. However, in that decision, the Claimants' case was that they were building the dwelling house to enable them to return to St. Vincent to enjoy their retirement and the delay occasioned by the breach caused them financial loss. In addition, they had to stay by relatives when they visited St. Vincent.

possess those skills. It takes the Claimant's argument no further on this head simply to point to the fact that the Defendant was engaged "in order to relieve the stress and anxiety of a home remodel on her own". The case for inconvenience simply has not been established. However, one can accept the Claimant's evidence that there was anxiety and distress in not having her home completed properly and on time. The sum of EC$1000.00 is awarded under this head.

Conclusion

31. The damages awarded to the Claimant are as follows:

a. Cost of completion	$14,800.00
b. Materials	$2,247.00
c. Consequential Loss	$2,550.00
d. Non-pecuniary loss	$1,000.00
TOTAL:	**$20,597.00**

32. The Claimant is entitled to interest on the global sum of $20, 597.00 at a rate of 5% from the date of assessment until payment and fixed costs in the sum of $1100.00.

33. I wish to thank Counsel for her submissions and authorities.

Eddy Ventose

Master [AG.]