EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SKBHCV2015/0067

BETWEEN:

MITCHELL SUTTON-HERBERT

1st Claimant

MIDLAIN SUTTON-HERBERT

2nd Claimant

And

ALLIE'S CONSTRUCTION COMPANY LIMITED

Defendant

Appearances:-
Mr. Adrian Scantlebury for the Claimants.
Mr. Garth Wilkin for the Defendant.

2017: September 25

JUDGMENT

[1] **WARD, J**.: This is the all too familiar case of a building contract gone sour. The Claimants and the Defendant entered into an oral and partly written "labour only" agreement whereby the Defendant agreed to construct a two level dwelling house for the Claimants at Conaree Terrace Development. The original contract price for the provision of labour services was EC$392,858.84.

[2] The terms of the agreement are partly evidenced by a letter from the Defendant to the Claimants dated 5th January, 2011 together with an annexed estimate of the cost of material to be used in construction of the project. By its terms, the Defendant agreed to provide all labour and equipment to complete the works. According to the Claimants' testimony and witness statements, they were responsible for supplying the material to the Defendant which was estimated to cost EC$525,512.63.

[3] Since the Claimants were both resident abroad, it was agreed that the 2nd Claimant's brother-in-law, Mr. Everette Arrindell, would act as their agents with responsibility for project management and the purchasing of building material. It was agreed that the Defendant would contact Mr. Arrindell as and when he needed money or material. In turn, Mr. Arrindell would furnish the Claimants with invoices and receipts for all materials purchased as well as for monies deducted for labour costs.

[4] Construction commenced in June 2011 with the Defendant expecting to be able to complete the house in 9 months. However, the project was eventually beset by delays and ultimately complete work stoppage in March 2013. The Defendant admits that he was responsible for a 6 week delay which Mr. Arrindell approved owing to a commitment to another construction project in the Frigate Bay area.

[5] This admission apart, the parties ascribe blame to each other for the other periods of delay: March – May 2012; December 2012 - January 2013. On the Defendant's case, these delays were attributable to the Claimants being out of funds and, on one occasion, due to a medical issue affecting the 1st Claimant.

[6] Matters reached a head when by email dated 12th March, 2013 the Defendant advised the Claimants that the repeated delays, combined with the expenses incurred in providing project management services and procurement of materials had exhausted its resources to the point that it could not continue without being compensated. The Defendant claimed to have encountered enormous expenses in trucking, procurement of materials, mobilizing, demobilizing, and project management which were borne by Allie's Construction and for which it had received no compensation. The Defendant claimed the sum of EC$80,000 as due and owing for the provision of said services. The Claimants refuted the claim through its attorney by email dated 27th June, 2013. No further work was done by the Defendant since then.

[7] The Claimants have sued the Defendant claiming:

a) Damages for breach of contract in that the Defendant was guilty of inordinate delay and abandoned the project; failed to execute the work properly and with the reasonable skill and care of an ordinary competent contractor; loss of bargain occasioned by the Defendant's failure to construct the septic tank and soak-away at the contract price of $4,910.64 thus causing the Claimant to incur costs in the sum of $14,500.00 to complete these works using another contractor.

b) Restitution for money had and received;

c) Damages for conversion;

[8] The Defendant filed a defence denying the claims and, in relation to the claim for money had and received, the Defendant asserts a right to set off the sum of EC$108.230.52 against the sums paid to it by the Claimants. This sum, the Defendant claims, represents the cost of procurement and purchase of materials, trucking, project management and mobilization costs. During the trial, the Defendant abandoned the claim for project management costs.

[9] The Defendant avers that the Claimants are in breach of an oral agreement that the project would be completed in 9 months and were responsible for the project being delayed on three occasions. The Defendant admits being responsible for a 6 week delay but claims that that was authorized by the Claimants' agent who agreed to the Defendant stopping work on the Claimant's project in order to divert all its resources towards another project with which the Defendant was engaged at the time.

[10] The Defendant claims to have discontinued construction of the Claimants' house in March 2013 because of the Claimant's refusal to pay the Defendant in full for procurement and trucking of materials to the site, mobilizing and demobilizing due to delays caused by the Claimants. A claim for project management services was abandoned during trial.

ISSUES:

[11] The material issues for resolution are as follows:

(i) Whether the Claimants are entitled to damages on account of unreasonable delay and /or abandoned the project;

(ii) Whether the Defendant failed to construct the dwelling house in a proper and workmanlike manner;

(iii) Whether the Defendant is liable for money had and received;

(iv) Whether the Defendant converted property of the Claimants to its own use and benefit;

(v) Whether the Defendant is entitled to set-off the sum of $108, 230.52 on a *quantum meruit* basis for non-contractual services it performed to the benefit of the Claimants.

Issue (i) -Whether the Claimants are entitled to damages on account of unreasonable delay and/or abandoned the project

Delay

[12] The Claimants submit that the Defendant's email dated 12th March, 2013, coupled with the fact that he did no further work on the house from that day forward, constitutes evidence of abandonment which amounted to a repudiatory breach of a condition of the contract by the Defendant. This, it is said, gave the Claimants the right to accept the repudiation and rescind the contract.

[13] The Defendant, on the other hand, submits that there was no unreasonable delay on the part of the Defendant and that the Defendant did not abandon the project. The Defendant further submits that unless time is made of the essence and a homeowner explicitly gives the contractor notice of a final date for completion, a contractor cannot be found to have repudiated a construction contract. The Defendant contends that in this case time was not made of the essence and the Claimants did not explicitly give the Defendant a final date for completion. Accordingly, the Claimants were not entitled to treat the contract as repudiated.

[14] The principles governing the issue of time being of the essence are succinctly stated in **Halsbury's Laws of England, Volume 9(1) at paragraph 931**. There the learned authors state:

> *"The modern law, in the case of contracts of all types, may be summarized as follows. Time will not be considered of the essence, except in one of the following cases: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence. If time is not of the essence, a party who fails to perform within the stipulated time does not commit a repudiatory breach but will be liable in damages."*

[15] Further, even where a right to rescind arises, the learned authors of **Halsbury's** make it plain that this *prima facie* right of the employer to rescind for breach will be lost if, with knowledge of their right to rescind and of the contractor's breach, they affirm the contract.

[16] The first task is to determine whether time was made of the essence and, if so, whether there was a breach which entitled the Claimants to treat the contract as repudiated. To do so, the court must consider in particular the terms of the agreement as contained in the Defendant's

letter dated 5th January, 2011, the Defendant's email dated 12th March, 2013 and the other evidence in the case.

[17] As it relates to the 5th January 2011 email, plainly, there is no express agreement as to completion date within this document. In his witness statement, the Defendant avers that after the estimate had been prepared and submitted, the 2nd Claimant asked him how long he would take to finish the project. He stated*: "I told "Baby" that the project would take 9 months. It was a 5 bedroom two storey house with 5 bathrooms. It was a big house, that is why I told her 9 months."* Even if it is accepted that this conversation took place (which the Claimants deny) this can in no way be construed as making time of the essence; nor does this amount to a stipulation as to time for completion of the construction of the house.

[18] Indeed, in responding to the Defendant's e-mail of 12th March, 2013, the Claimants, through counsel stated *"…[M]y clients deny that there was ever a set completion date. There was an expectation that the construction would be completed within a reasonable time."*

[19] Even when the parties met in January 2013 to resolve the impasse and paid the Defendant a further $60,000.00 to complete the project they did not stipulate a completion date.

[20] In light of the foregoing the court finds that time was never made of the essence of the agreement. Accordingly, the Claimants could only expect completion within a reasonable time. Here the project commenced in June 2011 and undoubtedly encountered periods of delay. The Defendant admits responsibility for a 6 week period of delay. I do not accept the evidence of the Defendant that this period of delay was authorised by the Claimants' agent.

[21] The court is also satisfied that the other periods of delay were attributable to the Defendant. The 2nd Claimant testified that there was a stoppage which the Defendant attributed to the failure to secure galvalume from Antigua for the roof; and another which he claimed was caused by the only sand machine on the island breaking down.

[22] I prefer the Claimants' evidence on this issue of delay and do not accept that they were responsible for the delays because of illness or lack of funds. Indeed, the spreadsheets exhibited by the Claimants leave the court in no doubt that the Defendant was in possession of sufficient, and even excess, funds during those periods of delay. I find that the delays were caused by the Defendant engaging in other works at the same time.

[23] Given the Defendant's evidence that this was a project that could be completed within 9 months and given the uncontroverted evidence that 18 months later the project was

incomplete, the court considers this to be inordinate delay and finds that the defendant failed to complete the construction of the Claimants' dwelling house within a reasonable time.

[24] It follows from this, that the Claimants are not liable for any costs incurred by the Defendant in mobilizing or demobilizing from the site on those occasions when there were work stoppages.

Did the Defendant abandon the project?

[25] The Claimants rely on the Defendant's email of 12th March and the fact that the Defendant did no further work on the project thereafter as evidence of abandonment. The email is in the following terms:

> *"Mr. & Mrs. Bertie,*
>
> *This is with regards to the ongoing project over at Conaree. The project started in June of 2011. Allie's Construction was contracted to provide the labour (Labour Cost Only).The materials and and management was [Sic] to be provided through a third party namely Mr. Arrindel and yourself. As you may have noticed that from the early on set we have been providing not only project management but material procurement. We have provided you with receipts showing our activities regarding the of the works [Sic]. The job is now almost one year beyond the original completion date mainly due to delays that you requested or through the lack of materials. We have tried with all honesty to work along with you to finish the project. However, this delay has exhausted our resources to the point that we can't continue without being compensated. We have encountered enormous expenses in trucking, procurement of materials; mobilizing; demobilizing; and project management. Please note that all these were done at a cost to Allie's Construction and to date (one year beyond) the completion date) no compensation.*
>
> *We are hereby claiming a monthly cost for all the additional works listed above including responsibility and security for the works for the duration of the project to date.*
>
> *Project Start Date – June 2011*
>
> *Months to Date – 20 (to February 2013)*
>
> *Rate per month - $4,000.00*
>
> *Total to date – 20 x $4000.00 - $80,000.00.*
>
> *From:*
>
> *Keithroy Dyer (Allie's Construction)*
>
> *P.S. We have confirmed that the invoices for the galvalume was sent two times."*

[26] It was not until 27th June, 2013 that the Claimants replied to the Defendant's email. The material parts of that response are set out below:

> *"Indeed, my clients instruct that you have abandoned the site since on or about March 2013 as you have not been on site and no work has continued since then without any lawful excuse on your part. My clients received an email from you on 12th March, 2013 in which you made allegations which my clients consider to be false.*
>
> *(a) Firstly, as aforesaid, my clients deny that there was ever a set completion date. There was an expectation that the construction would be completed within a reasonable time but this has not happened owing to delay on your part as mentioned above.*
>
> *(b) Secondly, my clients deny that they requested delays. They also deny that any delay was the result of lack of materials. According to my clients there was always sufficient material on the site for work to continue. For instance, there remains on site a storage container full of material and two ready to install kitchens which you had access to.*
>
> *(c) Thirdly, my clients deny that they are liable for material procurement, mobilization, demobilization, trucking, security and project management. My clients assert that there was never any discussion or agreement for payment for material procurement. In fact, my clients assert that they procured the majority of materials which were supplied to the project site. Additionally, the Labour Cost Payment Summary you gave to my clients clearly provided for mobilization and by your letter of January 5, 2011 you agreed to provide all labour and equipment to complete the works for the quoted labour price. Additionally, having agreed to construct my client's house for a given price it is now objectionable for you to claim fees for management of a project which you had control over. Having agreed to construct the house it was for you to manage, plan, organize and control your own human resources and materials provided to achieve your goals. My clients therefore deny liability for the $80,000.00 claimed in your said email as they represent an attempt by you to divert attention from your own breaches by concocting a claim for items which were either not discussed or agreed to or items which were already provided for in the agreement.*
>
> *Because of your delay and abandonment of the job my clients consider that you have repudiated the construction agreement and my clients hereby accept your repudiation. It is against the backdrop of your repudiatory breach of the construction agreement that that my client instructed her agent Mr. Everette* Arrindell *to collect the keys for the property and the storage container from you but when Mr.* Arrindell *asked you to hand over the keys you refused to do so."*

[27] On the face of the exchanges between the parties it is evident that there is a difference in opinion as to whether the Defendant is entitled to compensation for procurement of material and trucking services. The 2nd Claimant testified that she did not believe she owed him money for those services. She stated:

> *"By his email he asked for $80, 000.00 which was not discussed. I had no knowledge of this…There is no way the Defendant could be owed money for work done by me…Unless I negotiate the price for a service I don't owe that person anything. That's the cost of doing business."*

[28] The Defendant testified as to what his email was meant to convey. He stated:

> *"Sending my email did not indicate that I stopped the contract or the relationship with the job. My email was simply saying this job was going on for 18 months and it was taking a toll on my business and I gave a time of 9 months to complete the job. The email is all about agreeing to say this is what I should be doing and the delays and in fairness I deserved payment."*

[29] The issue the court must first resolve here is whether the Defendant repudiated the contract. This requires an examination of the content of the Defendant's email to determine whether he has expressly or impliedly repudiated the agreement. The Court must also have regard to the conduct of the parties.

[30] In resolving this issue I have in mind the legal principles relating to repudiation. See **Halsbury's Laws of England (4th Edn. Reissue) vol. 9 (1), para. 999:**

> ***"****Repudiation may be an express renunciation of contractual obligations by one party (A). This will be so whether A absolutely refuses to perform his side of the bargain or unambiguously asserts that he will be unable to do so. However, it is more commonly implied from failure to render due performance or, in cases of anticipatory repudiation, by the party in default putting himself in such a position that he will apparently be unable to perform when the time comes. A party (B) seeking to rely on repudiation implied from conduct must show that the party in default has so conducted himself as to lead a reasonable person to believe that he will not perform or will be unable to perform at the stipulated time; as where A refuses to perform unless B complies with requirements not contained in the contract. The fact that a breach is deliberate will not necessarily amount to a repudiation; nor will words and conduct which do not amount to a renunciation of the contract. Where the parties genuinely differ as to the meaning of the contract a party will not necessarily be treated as having repudiated if he refuses to perform except according to his own bona fide interpretation of the contract, although that interpretation turns out to be erroneous."*

[31] Applying the foregoing principles the court holds that on a proper construction of the Defendant's email, the Defendant does no more than assert that he would be unable to continue the project unless compensated for services for which he believed he should be compensated. This does not constitute an absolute refusal on the part of the Defendant to perform his side of the bargain nor an unambiguous assertion that he will be unable to do so. As will appear later in this judgment, the Defendant's belief that he was entitled to payment for at least the provision of material procurement services and some transportation costs was well founded.

[32] The court must also consider the Claimants' response to the Defendant's email. There was a delay of over three months before the Claimants could reply. The reasons for this delay were said to be that the 2nd Claimant was distressed by the Defendant's email and did not know what he was talking about.

[33] The court accepts the Defendant's submissions on the effect of delay on a purported acceptance of a repudiation. The case of **Stocznia Gdanska SA v Latvian Shipping Co (No.2)**[1] cited by the Defendant is instructive. Rix, LJ puts the matter thus:

> *"In my judgment there is of course a middle ground between acceptance of repudiation and affirmation of the contract, and that is the period when the innocent party is making up his mind what to do. If he does nothing for too long, there may come a time when the law will treat him as having affirmed."*

[34] The authors of **Chitty on Contracts 13th Edition** elaborate at paragraph 24-002:

> *"The length of the period given to the innocent party in order to make up his mind will very much depend upon the facts of the case. The period may not be a long one because a party who does nothing for too long may be held to have affirmed the contract. The length of time will also depend upon the time at which the innocent party's obligations fall due for performance."*

[35] Applying these principles to the facts of this case I hold that the Defendant's email of 12th March, 2013 does not constitute a repudiation of the agreement. Even if it did, given the Claimants' inordinate delay in responding to the Defendant's email, they are deemed to have affirmed the agreement and to have forfeited any right to treat the agreement as repudiated. It follows that the Claimants are not entitled to damages for breach of contract on the grounds of abandonment.

[36] It also follows from my finding on the issue of abandonment that the Claimant's claim for damages for loss of bargain in having to pay for the construction of a septic tank cannot be sustained.

Issue (ii) - Whether the Defendant failed to construct the dwelling house in a proper and workmanlike manner.

[37] The court accepts and relies on the expert testimony and Project Inspection Report of the Claimants' expert, Mr. Victor Williams, which was submitted pursuant to Rule 32.3 and 32.4 of

[1] [2002] EWCA Civ 889

CPR 2000.. He undertook an inspection of the property on 19th July 2013. He details several defects requiring corrective works and his recommendations for remedying same as set out at paragraph 5.3 of his report :

> **Floors**: Further chipping and grinding of upper level floors are necessary to prepare it for the laying of tiles.
>
> **Walls**: There are about 5% of walls that require grinding of compounding before the final coat of paint can be applied.
>
> **Ceiling**: There is some inconsistency in the staining of the roof and approximately and approximately 10% to 15% of the ceiling surface will require further staining.
>
> **The secondary rafters in the garage are not equally sized**: This occurs where the light point is located. It is aesthetically displeasing but it carries no structural consequence.
>
> **The varnish colour in the ceiling is not constant**. Some rooms reflected a deeper tone than others.
>
> **The vent pipe protrudes out of the wall in bathroom and this will affect the tiling if it is not corrected.**
>
> **There is an unsealed area in the exterior of the foundation wall on the east side of the building. If this area is not sealed, it is possible that over time, the foundation could be compromised. At this stage, it is anticipated that there is no present danger but it would be wise to correct it."**

[38] I extract the following relevant principles from the learned authors of **Chitty on Contracts**, Chapter 21 paragraphs 37-071 and 37-208:

> *"The contractor must carry out his works using all proper skill and care, and the standard required in the particular case is to be gathered from all the circumstances of the contract…Where after completion, there are defects in the works, then the Employer will normally be entitled to damages equal to the cost of making good the defects (sometimes referred to as the cost of reinstatement). However, whilst such an award of damages puts the Plaintiff (Employer) into the position he would in if the contract had been properly performed in the first place it is still for the Plaintiff to show that reinstatement is a reasonable response to the damage in question."*

[39] Mr. Williams has estimated that the aforementioned defects can be corrected at a cost of EC $15,230.64. The Defendant relies on Mr. Williams' evidence that in the usual contractual arrangements these types of defect would normally be corrected by the contractor at some stage. It is said that the Claimants' failure to permit the Defendant to do so means that the Claimants have failed to mitigate their loss and should not recover the full sums claimed. I do not agree. Given the circumstances that led to the project coming to a halt, I do not consider it unreasonable that the Claimants did not afford the Defendant an opportunity to correct these defects. I would accordingly allow this claim.

[40] The court has given due consideration to further assertions of defective works made by the Claimants at paragraph 8 of the statement of claim and para 22 (a-h) of the witness statement of the 2nd Claimant.

[41] Given the thorough and detailed report authored by Mr. Williams, the court is not persuaded that it should have any regard to those additional matters cited as defects by the Claimants that are not reflected in Mr. Williams' report.

Issue (iii) - Whether the Defendant is liable for money had and received.

[42] The arrangement and course of dealings between the parties was that the Defendant would request payment at intervals which would be paid in advance of work being done by the Defendant. Subsequently, the Defendant would submit a cover note and invoices which would show how the funds paid had been applied to work done and/or materials purchased.

[43] The Claimants assert that by December, 2012 the Defendant had surplus funds totaling $39, 378.00 which had been paid to him for labour and costs of materials but which were unaccounted for. It is said that despite this surplus position the Defendant demanded and received a further $60,000.00 in January 2013 which he said would permit him to complete the construction of the house. Notwithstanding this assurance, work stopped in March 2013 and the house remained incomplete.

[44] The Claimants therefore plead that the Defendant had and received the total sum of EC $99,378.00 without any justification. This claim is supported by spreadsheets that were prepared by using a combination of the Defendant's cover notes showing money applied to labour and supplies, invoices in support of supplies expenses incurred and a record of the payments made by the Claimants during the relevant periods.

[45] For its part the Defendant under cross-examination accepted the spreadsheets exhibited by the Claimants. Importantly, Mr. Dyer made the following concession:

> *"I have seen the accounting spreadsheets prepared by Mrs. Sutton-Herbert. They form part of the documents disclosed in court. I accept those spreadsheets. I received cheque payments from Mr. Arrindell throughout the project."*

[46] In cross-examination Learned Counsel for the Claimants meticulously took the Defendant through the spreadsheets and effectively extracted admissions from the Defendant which cogently demonstrate that the Defendant held surplus funds, as alleged by the Claimants, based on total paid out over a particular period compared with sums claimed in the cover notes and invoices submitted by the Defendant.

[47] By way of illustration the Defendant was referred to his cover note and a document captioned invoices and cheques for June 7 – August 8 2011. Total material cost for that period was $64, 808.23. Total labour cost was $76, 642.53. Altogether, material and labour costs totaled $141,450.76. However, cheques actually paid out for this period totaled $190,000.00. On being presented with this information the exchanges were as follows:

Deft: I see $190,000.00. I see total supplies and labour. We are looking at a difference of at least $48,000.00.

PUT: By 8th August 2011 you are ahead in payments by $48,000.00.

Deft: That's what her records say. I said earlier I agree with them.

[48] The Defendant was taken through similar documents ending with the period 5th December, 2012 showing a surplus payment then in excess of $38,000.00. It is not in dispute that he was paid a further $60,000.00 in January 2013. The court finds that he did tell the Claimants that this sum would be sufficient to complete the construction. I further find that the Defendant has not properly accounted for how this money was applied before work ceased in March, save for the bare assertion in cross-examination that he had used the money to purchase stain and "pay the tile man."

[49] It has however been established by invoices produced that he expended some EC$7, 705.58 on the purchase of construction material during the period 11th January, 2013 to 7th February, 2013. This sum must be deducted from the amount claimed as money had and received.

[50] In reply the Defendant seeks to claim an entitlement to set off the sum of EC$108, 230.52 against the sums paid to him by the Claimants. It seems convenient therefore to treat with this issue at this juncture.

Issue (iv) - Whether the Defendant is entitled to set-off the sum of $108, 230.52 on a *quantum meruit* basis for non-contractual services it performed to the benefit of the Claimants.

[51] The Defendant claims to be entitled to set off the sum of EC$44, 230.52 representing his fees for the procurement and purchase of materials at 20% of total cost of materials. The justification for this is said to be a construction industry practice - and an implied term of the agreement – that when a contractor uses his resources to procure materials, any savings would be credited to the contractor's account because of the considerable losses of time and labour suffered by the Defendant.

[52] This practice is elucidated in the witness statement of Carl Francis, an expert retained by the Defendant. His evidence is in the following terms:

> *"When there is a full construction contract, that is, labour and material, then the contractor includes the full price of the material in the contract or estimate. However, contractors who have accounts with suppliers normally get a discount, so when the contractor purchases the material the contractor gets the discount for himself, which pays for his services in purchasing the materials.*
>
> *If it is a labour-only contract, and for whatever reason, the contractor buys materials on his own account then the owner should repay the contractor the list price for the materials so that the contractor would get his discount as payment for his services in procuring and delivering the materials.*
>
> *For example, if a contractor has a 20% discount with a supplier of roofing material, and the contractor in a labour only contract purchases roofing for EC$10,000.00 then the owner should really pay the contractor EC$10,000 + 20% = EC$12,000 (which is the list price of the roofing material)"*

[53] It is on this basis that the Defendant urges that since a total of EC$221,152.59 was spent on materials procured locally using the Defendant's resources, 20% of that sum '$44, 230.52' should be credited to the Defendant.

[54] The Claimants have adopted a strident posture on this issue, insisting that since there were no negotiations regarding the provision of such services, they are not obliged to pay the Defendant.

[55] However, the Claimants' own expert, Mr. Williams, addressed this so called industry practice in his evidence. He stated that where the contractor in a labour only contract uses his own facility to procure materials for the owner, he ought to be compensated. However, it is for the owner to place a value on those services. It does not automatically equate with the list price of the materials.

[56] Mr. Williams further testified:

> *"The procurement of material would normally fall under the owner when the GC is given a "labour contract only". Although it appears that the GC offered to assist with procurement and there seems to have been no discussion of a fee, the GC can still make a request for such a fee. Under normal circumstances the GC would be given a rate of EC $200.00 per week or EC$800.00 per month for procurement. The duration of the project was for eighteen months and there was a period when work had ceased. Over the period of the contract, the very maximum that can be considered for the GC's claim is EC$14,400.00."*

[57] The court finds as a fact that the Defendant did provide services in procuring material for the project using his account as practically all of the invoices are in the Defendant's name. The court further finds that the Claimants have benefitted from the services provided by the Defendant in procuring material for the project even though these services were not provided for in the agreement.

[58] However, I do not consider it right or just that a contractor who secures a discount on his account with a supplier by spending the owner's money to purchase material should be entitled to retain the savings earned as compensation for providing procurement services. I accept Mr. William's evidence as to the going rate for such services and would accept his formula for determining what is appropriate compensation in these circumstances.

[59] Working on the basis that the duration of the project was 18 months, I agree with the Claimants' submissions that 4 months should be deducted on account of delay and inactivity on the project attributable to the defendant. Accordingly, fees for procurement services are calculated at the rate of $800.00 per month for 14 months which yields EC$ 11,200.00.

Trucking services

[60] The court is satisfied that the Defendant provided services for trucking of some materials. In the court's view, all of those invoices which are endorsed with a transportation cost must be regarded as having been delivered by the supplier and paid for by the Claimants. Those that are not endorsed with a transportation cost gives rise to a reasonable inference that they were

either delivered free of charge or transported to the site by the Defendant. On the evidence before me, Builders' Paradise Hardware is the only supplier that provided free delivery. Therefore, all invoices from that supplier can be discounted. This leaves 82 invoices not endorsed with a transportation cost or otherwise endorsed to indicate delivery by the supplier.

[61] The court is satisfied that the Defendant provided services for trucking of those materials contained in those 82 invoices. The court endorses the approach of examining the number of invoices not endorsed for delivery and multiplying that by the average cost of each delivery ($50.00) in order to determine the amount of compensation to which the Defendant is entitled. This amounts to EC$4, 100.00.

[62] In summary, therefore, I hold that the Defendant is entitled to set off the following sums against excess payment of $99, 378.00 paid by the Claimants to him.

(i) $7, 705.58 expended on materials for the project between 11th January 2013 -7th February, 2013;

(ii) $11, 200.00 representing fees owed for procurement services;

(iii) $4, 100.00 for trucking services.

[63] The other claims made by the Defendant by way of set off are unsustainable.

Issue (v) – Whether the Defendant converted the Claimants' property to its own use and benefit.

[64] The Claimants' claim for conversion is based on the fact that the Defendant had sole custody of the key for a 40 foot container which stored material and personal items which the Claimants had purchased overseas for the project. The Defendant transferred the key to the 2nd Claimant on the occasion of the inspection of the property by Victor Williams on 19th July, 2013.

[65] When the 2nd Claimant subsequently inspected the container, she discovered items missing to the value of EC$7, 434.05. These items had to be replaced at a cost of EC$8, 651.26. She stated that there was no evidence that the items were applied in the construction of her house. For example, a window that was missing from the container was not installed in the house; the grout that was missing was not used in her house. 28 gallons of stain could not be accounted for. The Claimants ask the court to infer that the Defendant took the items and converted them to his own use.

[66] The Defendant contends that the Claimants have not established that the Defendant took the items from the container since, on the Claimants' evidence, it was sometime after the Defendant relinquished possession of the key that the Claimants first discovered items missing. At the time, the Defendant was not in possession of the key to the container.

[67] I need do no more than quote the learned authors of **Clerk & Lindsell on Torts, 13th Edition**, for a statement of principle on the concept of conversion:

> *"The essence of conversion lies in the unlawful appropriation of another's chattel, whether for the defendant's own benefit or that of a third party. It is a wide tort, covering the deliberate taking, receipt, purchase, sale, disposal or consumption of another's property."*

[68] To satisfy this claim, there must nonetheless be an evidentiary nexus between the Defendant and the unlawful appropriation of the goods. While it is true that the Defendant had sole possession of the key to the container up to July, 2013, the evidence is that on the day of the inspection the key was handed over to the Claimants. There is no evidence that the container was immediately inspected on that occasion. According to the Statement of Claim, it was *"on a subsequent date when the 2nd claimant inspected the container she realized that certain material and items were missing.*" However, in her evidence before the Court, the 2nd Claimant refuted any suggestion that Mr. Arrindell may have gone into the container. She stated clearly that he did not have a key to the container.

[69] Under cross-examination the Defendant admitted that he was the only person who had the key to the container. He said his workmen could not get into the Claimants' container. He said he also had a container on site. He further testified:

> *"Sometimes we had to take stuff from her container and put into my container to get stuff in her container because of how things were packed. "*

[70] On this evidence, the court finds that the key to the container was only ever in the Defendant's possession up to July, 2013 and thereafter in the possession of the Claimants whom I found to be very credible witnesses .

[71] In my view, given that the Defendant had exclusive possession of the key to the container up to July 2013, the only reasonable inference is that he was the person responsible for the disappearance of its contents. Accordingly, I find for the Claimants on this issue.

Disposal

[72] Judgment is awarded to the Claimants:

(i) In the sum of EC$ 15, 230.64 as damages for breach of contract.
(ii) In the sum of EC$ 99, 378.00 as restitution for monies had and received. The Defendant is entitled to set off the sum of EC$ 23,005.58 against this award for monies had and received representing:

(a) $7, 705.58 expended on materials for the project between 11th January 2013 -7th February, 2013;

(b) $11, 200.00 being fees owed for procurement services;

(c) $4, 100.00 for trucking services.

(iii) Damages for conversion in the sum of EC$8, 651.26.
(iv) Interest on the judgment debt at the rate of 5% per annum from the date judgment is entered until the same is satisfied.
(v) Prescribed costs to the Claimants on the basis of Part 64.6 (1) and 65.5(1).

Trevor M. Ward, QC
Resident Judge

By the Court

Registrar