EASTERN CARIBBEAN SUPREME COURT
ANGUILLA CIRCUIT

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO.: AXAHCV2016/0023

Between

ANGUILLA PARTNERSHIP ENTERPRISES LIMITED

Claimant

and

HENRY OWENS III

Defendant

Appearances:
Mr. John Carrington QC of counsel for the claimant
Ms. Tara Carter of Counsel for the defendant

2017: June 7;
November 9.

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[1] **GLASGOW, M.:** The claimant ('APEL') obtained a judgment in default of defence against the defendant ('Mr. Owens') on 20th April 2016. This is the assessment of the damages due to the claimant.

The Relevant Facts

[2] APEL is a property developer specializing in the construction and management of luxury villas in Anguilla. The Solaire project at Lockrums was one of its undertakings. Solaire consists of 4 luxury villas. 2 of those villas were listed for sale and the others were to be managed as part of a rental pool. Sometime during the year 2012, Mr. Owens met with principals of APEL and expressed an interest in purchasing Villa number 1 at Solaire. APEL averred that Mr. Owens did not

want his villa to be built according to the standard design of the other villas and as such he gave detailed instructions to APEL about his own specifications.

[3] Further to their discourse on the sale of Villa 1, the parties entered an agreement dated 25th February 2014 ('the note') in which it was agreed that Mr. Owens would pay APEL the sum of US$150,000.00 by 31 July 2014 as a 'contribution' towards the purchase of the villa. The money would be paid directly to APEL and would be used to offset the cost of construction of the villa. That sum of money would also be credited to the total purchase price of US $1,160,000.00 which consisted of the cost of the land plus the cost of construction. The balance of the purchase price would be paid to APEL 'according to the terms set out in the Purchase and Sale Agreement.' The note was also conditional in that it specified that APEL would commence construction of the villa as soon as the parties signed. A further condition stated that if by 31st July 2014, Mr. Owens decided not to proceed with the sale or if he failed to execute a Sale and Purchase Agreement, he would be obligated to pay the sum of US $150,000.00 to APEL by the same 31st July 2014.

[4] The parties did not sign a purchase and sale agreement by 31st July 2014 and Mr. Owens did not pay APEL the sum of $150,000.00 as outlined in the note. Rather, a purchase and sale agreement ('the PSA') was signed on 7th November 2014 in which no reference is made to the note or its condition that the sum of US$150,000.00 was to be paid by Mr. Owens to APEL if he failed to fulfill the terms of the note by 31st July 2014. The PSA refers to the sale of land described as Block 38510B Parcel 294 and the construction of a villa on the said lands by APEL for Mr. Owens' benefit. The price to be paid to APEL was also specified in the PSA in sums different from the note. For instance, the PSA stated the price for the sale of the land to be US$250,000.00. Mr. Owens was also obligated to pay a further US$250,000.00 as a contribution towards the construction of the villa. The total sum of US$500,000.00 was payable on the date of signing the PSA, that is to say, on 7th November 2014. The balance of the contract price was to be paid on the occurrence of any one of 3 cash flow events and in the manner detailed in what is referred to in the PSA as the construction agreement. The 3

cash flow events are listed as (i) the sale of another villa owned by Mr. Owens in Anguilla ('the Anguilla villa') (ii) the sale of Mr. Owens' home in Cape Cod; and (iii) the receipt of certain moneys owed to Mr. Owens. If the cash flow events failed to materialize by 1st July 2015, the PSA would be considered void. Mr. Owens was then be refunded US$250,000.00 of the US$500,000.00 deposited with APEL. The balance of the deposit in the sum of US$250,000.00 would be forfeited by APEL.

[5] Notwithstanding the differences between the terms of the note and the PSA, the PSA restates the total contract price of US$1,160,000.00 mentioned in the note. This total contract price is recited in an addendum to the PSA signed on 26th November 2014. The addendum is of some interest. As stated above, Mr. Owens was obligated to pay the sum of US$500,000.00 to APEL by 7th November 2014 according to the terms of the PSA. However, by 26th November 2014, the addendum sought to adjust this arrangement. Mr. Owens was permitted by the addendum to raise the sum of $500,000 by way of a loan. APEL agreed to 'cosign' the loan but on condition that Mr. Owens transferred his interest in the Anguilla villa to APEL as security for the arrangement. The addendum then restates the terms of the PSA regarding –

(1) the manner in which the US$500,000.00 would be utilized by APEL;

(2) the payment of the balance of the contract price on the occurrence of any one of the cash flow events;

(3) the fact that the PSA would terminate if the balance was not paid by 1st July 2015; and

(4) the fact that Mr. Owens would forfeit the sum of US $250,000.00 to APEL if the PSA was terminated by July 1, 2015.

[6] A construction contract ('the construction agreement') was signed between Mr. Owens and A.P.E Construction Inc. That agreement lists the construction price as US$910,000.00. The manner of payment of the construction price was set out in a payment schedule at clause 6 of the construction agreement. I think it is necessary to recite the full terms of the payment schedule

> *Payment 1 – US$250,000.00 will be paid upon receipt of* ***US$500,000.00 loan*** *referenced in* ***contract addendum.*** *This $250,000.00 is in conjunction with the $250,000.00 payment outlined in the* ***Residential Purchase and Sale agreement*** *that accompanies this document. These two payments will be made simultaneously and will amount to $500,000.00 total.*
>
> *Payment 2 - $610,000 payable when one of the cash flow events outlined in the Solaire* ***Anguilla Residential Purchase and Sale Agreement*** *occurs.*
>
> ***All payments*** *shall be transferred to* ***SELLER (APE).*** *No money will be deposited to escrow.* (Bold emphasis mine)

[7] APEL's evidence is that construction began in March 2014, a few weeks after the note was signed between the parties. According to Mr. Mc Inerney Sr. the construction stopped in April 2015 after it became apparent that Mr. Owens was meeting none of the conditions on payment. He had not obtained the loan as per the addendum to the PSA or paid any money to APEL by April 2015. Meanwhile construction had continued apace and APEL had, by April 2015, incurred considerable costs in meeting its contractual commitments. APEL's evidence is that since it was not put in funds as agreed with Mr. Owens it had to increase its borrowing to facilitate the construction of his villa. Mr. Owens' continued failure to meet his obligations led APEL to institute these proceedings. Mr. Owens failed to

defend the claim and APEL obtained a default judgment. It now seeks an award of damages.

Arguments on the Assessment

APEL

[8] In its submissions filed on July 20, 2016, APEL asserts that it is entitled to receive the sum of US$250,000.00 as per the PSA. APEL says that since Mr. Owens reneged on this obligation, it was entitled to treat the PSA as at an end and claim for this loss under the PSA.

[9] Relying on the case of **Laird v Pim and another**[1], PSA also claims the difference between the contract price of US$910,000.00 and the market value of the property valued in the sum of US $810,000.00. APEL asked for the difference of US$100,000.00.

[10] APEL also sought special damages of the costs of the architectural fees in the amount of US$15,000.00 and consequential losses for the costs of borrowing occasioned by Mr. Owens' failure to honour the various proposals for payment. The loss under this latter head is stated as US$166,802.00.

Mr. Owen's Initial Views on Damages

[11] In his initial submissions filed on 28th July 2016, Mr. Owens relies on the cases of **Pugh v Cantor Fitzgerald**[2] and **Kok Hoong v Leong Kweng Mines Ltd**[3] to argue that –

(1) The court on an assessment of damages can determine causation of APEL's alleged loss;

[1] (1841) 7 M & W 474.
[2] [2001] EWCA Civ 307.
[3] [1964] A.C. 993.

(2) In considering causation of the alleged loss, the court will have to consider whether there was a contract and if there was indeed a breach of the same. These issues were not determined in the judgment and remain open for Mr. Owens to argue;

(3) If the court is not persuaded that these issues remain open to defend then the court has to consider the context of the alleged agreement.

[12] Mr. Owens further submits that at the time of the grant of the default judgment, the court did not consider the merits of his defence and its prospects of success. As such there is nothing preventing this court from considering the facts and arguments he presents in opposition to the grant of damages in this case. I will attempt to provide a synopsis of the lengthy 'facts and arguments' Mr. Owens then asked the court to consider. Some of them are repetitive –

(1) The agreement of 25th February 2014 is a note in writing which was signed by the parties in an effort to assist APEL to present itself as a profitable entity. Mr. Owens never made any payments pursuant to the note as it was a mere ploy to assist APEL to raise financing. There was no intention that any payment would be made by Mr. Owens to APEL pursuant to the note;

(2) There was no PSA by 31st July 2014 since there was no intention for the parties to comply with the terms of the note as it was a mere marketing strategy. Mr. Owens denies signing the PSA. He observes that the signature page of that document was from some other documents as the paragraphs are not sequential. There is also no term in the PSA which deals with consideration and APEL has not argued 'reliance or representation' and has not sought reliefs for the same. Mr. Owens says that it is trite law that there must be consideration before an agreement can be binding or a claim is made for damages for breach of the same;

(3) APEL has not demanded any payments pursuant to the note. The PSA does not refer to the note or its terms. The signing of the note, PSA, addendum and construction agreement were all devices utilized by APEL for marketing and financing purposes and were never intended to be binding agreements;

(4) The note was signed on 25th February 2014 but no payment was required until 31st July 2014. The PSA required a deposit and yet none was paid. Rather an addendum was signed which was in conflict with the terms of the PSA;

(5) APEL ought to have cosigned a loan with Mr. Owens for the sum of US $500,000.00. However as this was never the purpose of the addendum, no loan was obtained;

(6) The PSA was made contingent on specific events which were all indicative of a future intention to purchase and adds confirmation to Mr. Owens' posture that there was no intention to create a binding agreement;

(7) The construction conducted by APEL was not in reliance on any promises made by Mr. Owens. APEL knew that Mr. Owens was advertising his property for sale. The deal between the parties was never finalized or contractually binding. APEL therefore did not suffer any loss or damage as there was no agreement to breach;

(8) If the court finds that the PSA is binding, the court can only look at that document to determine what transpired between the parties since clauses 11(c) and 11 (d) together make it the entire agreement between the parties. Mr. Owens argues that the PSA, in clause 2 brings the relationship between the parties to an end if the 3 cash flow events did not take place by 1st June 2015. The cash flow events did not take place

and as such the PSA came to an end. The construction agreement and the addendum to the PSA cannot exist in a vacuum and as such they are equally unenforceable;

(9) If the court is not impressed by the foregoing arguments then the court is urged to find that APEL is bound by its pleadings. Mr. Owens contrasts this case with the case of **Fellowes v Carino Hamilton Development Company Limited**[4] to make the point that APEL never pleaded misrepresentation or reliance as was done by the claimants in the **Fellowes** case. Accordingly, APEL cannot be allowed to expand their claim to seek additional relief. APEL is accordingly bound by the following prayers for relief on its claim –

(a) US $250,000.00 for breach of the PSA;

(b) Alternatively, specific performance of the PSA, its addendum, and the construction agreement;

(c) Special damages for breach of contract;

(d) Interest at a rate of 5%;

(e) Costs

(10) **Halsbury's Laws of England**[5] is provided as authority for the view that *"the purpose of contractual damages is to place the parties in the position in which they would have been had the contract been duly performed. There is no punitive element in the assessment of damages."*[6] Mr. Owens posits that the types of losses claimed by APEL

[4] Claim No. NEVHCV 2009/0125.
[5] 4th edn. Vol 23, para.458.
[6] Ibid.

on the assessment of damages are unreasonable when the claim form only sought relief of US $250,000.00. In any event a schedule of losses was not part of the claim. In this regard, the evidence of the present value of the incomplete villa as presented by APEL is irrelevant. The court should only consider that the claim is for a specified sum and award nothing beyond what was claimed and is due as actual losses under the 'purported contract'. By ' purported contract' I assume that Mr. Owens speaks about the PSA which he has denied signing;

(11) The court would observe that the 'purported agreements' do not include terms for financial consequences if Mr. Owens failed to pay the deposit. The agreement simply provides that it would fail if he did not do so. APEL is therefore not entitled to any relief;

(12) Based on the case of **Verlin Crabbe v Kensley Wheatley and Inter Islands Trading Limited**[7]**,** the court should refuse to make any award for damages in this case since there was no valid contract from which the claim for damages could flow.

APEL's Further Submissions

[13] On 23rd June 2017, APEL filed its closing submissions in which it responded in full to the various arguments raised by Mr. Owens –

(1) Relying on the cases of **Strachan v the Gleaner Company Limited**[8] and **Laudat v Ambo**[9], APEL argues that having obtained a default judgment against Mr. Owens, the question of liability cannot be raised at the assessment of damages. APEL asks the question, what is the liability that has been determined and cannot be disputed? APEL

[7] BVIHCV 2007/0048.
[8] [2005] UKPC 22.
[9] DOMHCVAP 2010/0016.

answers the question with this observation by Edwards J.A in **Laudat v Ambo**;

> *Ordinarily, at an assessment of damages hearing the court would not enquire into matters of liability because the defendant, having failed to file an acknowledgment of service and/or a defence is taken to admit liability as pleaded. At the assessment of damages hearing, the court is not required to re-open the application or request for default judgment; and it would not be appropriate to go behind the default judgment order or assess the merits of the pleadings in relation to the cause of action while the default judgment stands. The issue of the defendant's liability having been settled by the default judgment, the only issue for the court is how much in compensatory damages is due to the claimant upon the evidence adduced by the claimant in proof of any special damages claimed and general damages. Where damages for any pleaded causes of action have not been proven by the evidence, the claimant would generally not be entitled to damages under that head of claim.*

[14] APEL submits that the "liability as pleaded" is liability for the breaches of the PSA, its addendum and the construction agreement. It makes the point that once a default judgment has been obtained, there can be no reexamination of the merits of the claim or any defence that could have been presented by Mr. Owens. Once the pleadings have sufficiently set out the existence of a contract between the parties and the breach of the contract by one of the parties, the cause of action must be taken as being proven. The only outstanding matter would be the assessment of damages due to a claimant for a defendant's breach of the contract. Therefore, Mr. Owens cannot, at this stage, dispute the validity and enforceability of the contracts, that is to say, whether there was an intention to create legal relations, whether consideration was given, whether the contracts were finalized or were binding. He is limited to disputing the quantum of damages to be paid to APEL.

[15] In further answer to the charge that APEL is bound by its pleading, the company submits that –

In its Statement of Claim, the Claimant pleaded the existence and breaches of the PSA and Construction Agreement and in the prayer for relief seeks inter alia "special damages for breach of contract of a Purchase and Sale Agreement and Construction Agreement, interest and further or other relief".

The pleadings are specifically that the defendant "was in default and/or breach of the terms and conditions of the PSA" (Statement of Claim para. 12) and "In accordance with section 6 of the Construction agreement the Defendant was to satisfy the construction cost of the custom villa in accordance with a payment schedule. The Defendant has failed and/or refused to pay the construction cost in accordance with the schedule." (Statement of Claim paras.13 and 14).

The Claimant has therefore both pleaded breaches of the PSA and Construction Agreement and sought relief by way of damages for breaches of these contracts. [10]

[16] At the assessment hearing, Mr. Owens repeated the charge that, if anything at all, APEL was confined to receive the sum of US$250,000.00 set out on its pleadings. APEL replied that this is a manifestly incorrect approach to its claim. Its response is that the PSA itself specifies that the sum of US$250,000.00 could only be retained if Mr. Owens met his obligations. Mr. Owens did not pay any of the moneys agreed and as such there was no question of APEL retaining the sum of US$250,000.00. APEL was then left to pursue the damages it could prove.

[17] Mr. Owens also made much of his argument that the construction agreement was stated to be between him and APE Construction Inc. To this complaint APEL rejoins that Mr. Owens was seeking to re-open the claim after the judgment. APEL reiterates that

[10] APEL's submissions filed on June 23, 2017 at paras. 11 to 13.

(1) Paragraph 2 of the statement of claim pleads the particulars of the note which sets out APEL's obligation to construct a villa on Mr. Owens behalf;

(2) Paragraphs 7 and 8 of the statement of claim recite the preamble of the PSA and addendum to the effect that

> *'the PURCHASER desires the SELLER to construct a Residence on the said Parcel on his behalf and SELLER agrees to carry out said construction on behalf of the PURCHASER on the terms and conditions contained in the Construction Agreement.';*

(3) Clause 2 of the PSA stipulates that Mr. Owens is to pay APEL the sums due under the construction agreement;

(4) The addendum refers to Mr. Owens' obligation to pay APEL the deposit on the construction price and the terms for payment of the balance of the construction price;

(5) Paragraphs 9 and 13-17 of the statement of claim plead the construction agreement, the price to be paid, and Mr. Owens' failure to pay the sums due both under the PSA and the construction agreement.;

[18] APEL further submitted that APE Construction Inc. is a business name used by APEL. Even though it presented no evidence of this fact, it contends that Mr. Owens has not challenged this assertion and as such it ought to be accepted by the court. If the court does not accept this view, there is still ample evidence on the documents (to which Mr. Owens is a party) and the pleadings to show Mr. Owens' obligations to pay APEL under both the PSA and the construction agreement. The court is empowered to award damages for his failure to honor those obligations.

[19] APEL also responded to Mr. Owens' submission that the PSA became void on the non-occurrence of the cash flow events and as such damages should not be awarded. In the absence of a defence to which APEL could have replied, APEL submits that the court cannot go beyond the pleadings establishing Mr. Owens' liability. In any event, the clauses in the PSA referring to that agreement becoming void refer to (i) the non-occurrence of the cash flow events and APEL's election to retain the deposit in the event of Mr. Owen's breach of the agreements. It is no answer for Mr. Owens to say that the PSA was void in light of APEL's pleaded case which shows his breach of the PSA. This claim for breach of the PSA was not dependent on the non – occurrence of the cash flow events but on Mr. Owens' subsequent promise to raise the funds. Further, by failing to pay the deposit as agreed, he placed APEL in a position where there was no deposit to retain.

[20] APEL also disputes the argument that it did not mitigate its losses by submitting that the onus of proof lies on Mr. Owens to prove APEL so failed to mitigate. **Geest Plc v Lansiquot**[11] is provided as authority for this view. APEL points out that Mr. Owens has presented no proof to contradict APEL's direct evidence that it brought prospective purchasers to the incomplete villa but that no one was interested in purchasing it.

[21] In terms of the measure of damages that it seeks, APEL adjusted its original request. In this regard, the PSA contemplated the sale of the property at US$250,000.00 for the land and the sale of the villa at US$910,000.00. In respect of sale of the land, the measure of the damages should be the difference between the contract price and the market price at the date of the breach of the PSA. **Johnson v Agnew**[12]**.** Evidence was presented on behalf of APEL by Mr. Gifford Connor, a certified land surveyor and property appraiser. Mr. Connor opined that the most likely present value of the land is US$225,000.00. The difference

[11] [2002] UKPC 48.

[12] [1980] AC367.

between the present value of US$225, 000.00 and the contract price for the land of US$ 250,000.00 amounts to US$25,000.00. APEL requests the difference of US$25,000.00 for the sale of the land.

[22] With respect to the construction of the villa, APEL argues that it commenced construction soon after the note was signed in reliance on Mr. Owens' promise to pay US$150,000.00 thereunder. The parties moved on to the PSA and the construction agreement whereby Mr. Owens was obligated to purchase the villa at a price of US$910,000.00. The PSA contemplated that Mr. Owens would initially finance the construction by paying the sum of US$500,000.00 which was to include the purchase price of the land in the sum of US$250,000.00 and the sum of US$250,000.00 as a deposit on the construction cost. The balance of the contract price of US$610,000.00 was to be paid when one of the cash flow events occurred.

[23] Mr. Owens failed to make any payment pursuant to the note, the PSA or the construction agreement. Instead he encouraged APEL to continue with the construction as agreed. APEL could not keep a deposit of the US$250,000.00 as remedy for breach of the PSA since no part of the US$500,000.00 was paid by Mr. Owens. However, APEL submits, it is not without recourse. Relying on the dicta of Lord Diplock in **Photo Production Ltd v Securicor Transport Ltd**[13], APEL submits that the breach of Mr. Owens's primary obligation to pay the construction costs leads to a secondary obligation for him to pay damages to APEL. The right to obtain damages in these circumstances, APEL continues, does not arise from the contract but by the operation of law. Lord Diplock explains the principle in this manner[14] –

> *Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to*

[13] [1980] 1AER 556.
[14] [1980] 1AER 556 at 566.

the other party for the loss sustained by him in consequence of the breach…

[24] Flowing from the foregoing principle, APEL says that it is firstly entitled to recover the costs of borrowing replacement money to finance the construction of the villa. Mr. Owens induced APEL to commence and continue construction of his villa on the promise to obtain the required funding. APEL asked to reduce the sum claimed under this head of loss to $87,500.00. Mr. Owens raised no objection to the request and as such APEL says that it must be paid.

[25] In respect of further expense, APEL claims that it expended $412,959.00 on the construction of the villa. Chad Meldrum, a qualified architectural engineer and business administrator provided evidence that the building was 78.33% complete and that the costs of the balance of the construction amounts to US$106,600.00. APEL suggests the methods proposed by **McGregor on Damages**[15] to assist the court to assess the quantum of damages to be awarded for breaches of contract in these circumstances. **McGregor on Damages** advises the following approaches to quantification of damages –

(1) The general measure is the contract price minus the completion costs as at the date of breach;

(2) An alternative method of arriving at the damages to be awarded involves calculating the net profit on the contract as a whole plus the expenditure to date in part performance.

(3) The third method suggested by **McGregor on Damages**[16] *'is the proportion of the contract price as the work done bears to the total cost of the whole project plus any remaining profit on the outstanding works'*.

[15] 18th edn. Para. 13-054.
[16] Supra note 18.

[26] APEL therefore asks for –

(1) Damages for breach of the PSA for the sale of the land in the sum of $25,000.00;

(2) Damages for the breach of the PSA and construction agreement in the sum of $803,400.00;

(3) Repayment of borrowing costs in the sum of $87,500.00;

(4) Prescribed costs of $52,717.80; and

(5) The recovery of the costs paid for the services of Mr. Meldrum and Connor in the sums of $7,881.00 and $5,000.00 respectively.

Mr. Owens' Views on Damages

[27] Mr. Owens repeats his earlier response that principles of the law of contract preclude any award of damages pursuant to the construction agreement. That agreement, it is contended, is between Mr. Owens and another entity, APE Construction Inc. and cannot be relied on by APEL to pursue damages for loss. He further relied on his argument that the PSA became void due to the non – occurrence of the cash flow events.

[28] Mr. Owens also repeats and relies on the argument that APEL is bound by its pleadings and its sole claim to US$250,000.00. Beyond this, Mr. Owens submits, APEL is not entitled to any further damages since it did not seek general damages and the claim for specific performance in the alternative cannot be awarded since specific performance cannot be awarded in cases of void agreements. In any event the claim for special damages cannot be awarded since APEL presented no

evidence of the same. Special damages are those out of pocket expenses that must be specifically pleaded and proved[17].

Findings and Conclusions

[29] The extensive submissions and debate in this case can be subsumed under or reduced to 2 issues namely –

(1) Can the court consider the issues of liability as proposed by Mr. Owens;
(2) What, if any damages are to be awarded to APEL?

Can the Court Consider the Issues of Liability Raised by Mr. Owens?

(3) Mr. Owens fired the first shot in this regard and vociferously disputed APEL's request for an award of damages. His lengthy arguments on this point are fully stated above but, in short, these are the points that he makes –

(a) There is nothing precluding this court from examining the question of whether a contract existed between the parties to this claim. Indeed the court is enjoined to do so if it is consider whether any damages can be awarded;

(b) When the court examines the documents, it will find that for the various reasons and based on the authorities presented by Mr. Owens in his evidence and on his submissions both recited above in this judgment, the documents were all void and in fact they were created as a financing mechanism for APEL's Solaire project. The court will find that there was never an intention to create legal relations;

[17] APEL responded to these submissions but I believe that the company has already put its case with sufficient cogency and expansion. The response is in large part a reiteration of these points.

(c) As a corollary of (b) above, if APEL is entitled to rely on any of the documents, it cannot rely on the construction agreement since it was not a party to that arrangement. Additionally, the PSA is now void since none of the cash flow events occurred;

(d) If the court finds that APEL should be awarded damages, the damages must be restricted to the US$250,000.00 claimed in its prayer for relief. Mr. Owens however doubts if this sum can be awarded since APEL has not proven this loss.

[30] APEL's arguments in response to Mr. Owen's position on this question are also extensively set out above.

My Views on the First Issue

[31] I must confess grave difficulties with the position advanced by Mr. Owens on the approach that the court ought to take at this stage of the proceedings. He relies on observations made in the cases of **Pugh v Cantor Fitzgerald International** quoting from Parker J in **Lunnun v Singh**[18] –

> *That on an assessment of damages all issues are open to a defendant save to the extent that they are inconsistent with the earlier determination of the issue of liability, whether such determination takes the form of a judgment following a full hearing on the facts or a default judgment*.

[18]All England Official Transcripts (1997-2008) at page 13.

[32] And quoting from Gibson LJ in **Lunnun**[19]that

> *the true principle is that on an assessment of damages any point which goes to quantification of the damage can be raised by the defendant, provided that it is not inconsistent with any issue settled by the judgment*.

[33] Reliance was also placed on the observations of Viscount Radcliffe in the Privy Council in **Kok Hoong v Leong Cheong Kweng Mines Ltd**[20]

> *. . . default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham LC (in New Brunswick Railway Co v British & French Trust Corporation Ltd [1939] AC 1, 21), they can estop only for what must 'necessarily and with complete precision have been thereby determined'.*

[34] I do not find these pronouncements inconsistent with the view expressed by her Ladyship Edwards JA in the **Michael Laduat** case to the effect that the general position is that the defendant who fails to file a defence to the claim is taken to have admitted liability as pleaded. Her Ladyship also admonished that "*it would not be appropriate to go behind the default judgment order or assess the merits of the pleadings in relation to which the default judgment stands"*.[21] The position seems to be that the defendant can raise any points he wishes so long as they correlate with or strictly define the damages to be awarded and those points are not inconsistent with the points of liability settled by the default judgment. I would agree with APEL that this begs the question as to what points of liability were settled by the default judgment. I would add that a measured approach must be adopted as it must be remembered that it would be inappropriate to conduct an exercise that scrutinizes the viability of APEL's pleadings. It seems to me that the

[19] All England Official Transcripts (1997-2008) at page 20.

[20] [1964] AC 993, [1964] 1 All ER 300, 1012.

[21] DOMHCVAP2010/0016

exercise would be informed by examining APEL's pleadings to identify the points of liability resolved by the default judgment. Mr. Owens would not be permitted to raise a defence to those points at this juncture but he would certainly be entitled to raise any matters to the extent that they relate to whether and how much it is awarded as damages and are not in conflict with the points already settled by the default judgment.

[35] This was indeed what transpired in the **Cantor Fitzgerald** case where the claimant brought a claim for unlawful termination of his employment contract. He obtained a default judgment which the defendant sought to have set aside. On appeal from the decision refusing the application to set aside the default judgment, it was found that a proposed defence of gross misconduct was rightly rejected by the court hearing the setting aside application. This is since the default judgment itself had concluded the issue of whether the defendant had in fact unlawfully terminated the claimant's employment contract. However the defendant was not precluded from arguing that the claimant was not entitled to aspects of the damages he sought for the defendant's unlawful conduct. The claimant wished to argue that he was entitled to post termination benefits pursuant to the terms of a partnership agreement which prohibited competitive work. He contended that the prohibition against competitive engagements prevented him from mitigating his losses by seeking alternative employment as a broker. The defendant's posture was that the very facts on which it sought to rely to demonstrate the claimant's gross misconduct would show that he did engage in competitive conduct. As such he could not rely on the terms of that partnership agreement to seek damages and should have mitigated his losses by seeking alternative employment. The defendant was not shut out from relying on the terms of the agreements touching and concerning the relations between the parties to show that the claimant had engaged in conduct that precluded him from receiving the measure of damages that he sought.

[36] **Lunnun v Singh** is a pre – CPR decision which was expressly approved **in Pugh v Cantor Fiztgerald** and it lends further assistance to this discourse. In **Lunnun**, the claimant filed a claim for losses and damages suffered as a result of alleged leakage of water and sewage from the defendant's premises on to adjoining premises of the claimant. The claimant obtained a default judgment. On assessment the defendant argued, inter alia, that some but not all of the claimant's losses were caused by the leakage from the defendant's premises. The trial judge held that it was not open to the defendant to raise this argument on the assessment hearing since it went to the question of liability which was conclusively decided by the default judgment. On appeal, their Lordships disagreed and held that while the question of whether or not the defendant was liable for damage caused to the claimant's premises was determined by the default judgment, the question as to causation of a particular head of loss remained open to be raised by the defendant.

[37] Parker LJ statement of principle has been recited above. Clarke LJ added expanded elucidation[22] –

> *In my judgment the relevant principles can be deduced from Turner v Toleman and Maes Finance Ltd and another v A Phillips & Co, to both of which my Lord, Mr Justice Jonathan Parker, has referred. They may be summarised as follows:*
>
> *1. The ordinary form of judgment of the court entered in accordance with Rules of Supreme Court 1965 Ord.13, r.9(2) is that:*
>
> *"It is this day adjudged that the defendant do pay the plaintiff dam-ages to be assessed."*

[22] All England Official Transcripts (1997-2008) at page 14.

2. The defendant may apply for an order that the judgment be set aside.

3. The following propositions assume that the judgment is not set aside. They also assume that there has been no judicial determination of any of the issues because if there has that determination will of course bind the parties subject to any appeal.

4. On the assessment of the damages the defendant may not take any point which is inconsistent with the liability alleged in the statement of claim.

5. Subject to 4 the plaintiff may take any point which is relevant to the assessment of damages.

6. Such points will include the following:

(1) Contributory negligence…;

(2) Failure to take reasonable steps to mitigate …

(3) Subject to (5) below, causation.

(4) Quantum.

(5) Causation. As the Vice-Chancellor put it in Maes:
"The defendant cannot thereafter contend that his acts or omissions were not causative of any loss to the plaintiff. [My emphasis]. But he may still be able to argue, on the assessment, that they were not causative of any particular items of alleged loss."

Moreover, he may do so even if the statement of the claim alleges a particular item was caused by the tort.

In Turner v Toleman Lord Justice Simon Brown, with whom Mr Justice Wilson agreed, as my Lord has indicated, quoted the following statement by Lord Justice Waller in refusing leave to appeal on paper in that case: "What loss and damage was caused by this defendant's negligence must be part of the exercise of assessing damages."

Lord Justice Simon Brown expressed the view that that was plainly correct and that it accorded with his own experience over many years. In the instant case it appears to me that the defendant cannot challenge the following allegations derived from the statement of claim:

(1) that the plaintiff was the owner and occupier of No 136 Chapeltown Road;

(2) that the defendants were the owners of the adjoining premises including a sewer at No 138 Chapeltown Road;

(3) that from not later than 1990 the sewer was cracked and water and sew-age therefrom had percolated into the basement of No 136;

(4) that the sewer was not a natural user of the land;

(5) that water and sewage had escaped into the basement of No 136 and damaged it;

(6) that in the circumstances the defendants had wrongfully interfered with the plaintiff's enjoyment of No 136; and

(7) that as at the date of the statement of claim damage to No 136 was continuing and the plaintiff had sustained a sum of loss and damage.

To challenge any of those allegations would be inconsistent with the defend-ants' liability. However, I can see nothing to prevent the defendants challenging any of the following matters:

(1) how much water and sewage leaked, percolated or escaped from No 138 to the basement at No 136;

(2) how much damage such water or sewage caused;

(3) what loss the plaintiff suffered as a result.

None of those questions is addressed in the statement of claim. Moreover, insofar as the statement of claim makes any allegations of loss and causation (which it only does to a very limited extent in the particulars at paragraph (6) which have been quoted by Mr Justice Jonathan Parker) it is clear from Turner v Toleman that it is open to the defendants to challenge them on the assessment.

[38] For the purposes of this present discourse, the relevant matters averred on APEL's statement of case include –

(1) At paragraph 2 , the terms of the note as set out above in this judgment which enjoined Mr. Owens to pay certain sums towards the purchase of a villa to be constructed by APEL;

(2) At paragraphs 4 and 5, Mr. Owens's specific request for the design of the villa to be constructed by APEL;

(3) At paragraphs 6, APEL's obligation to begin construction of the villa at the signing of the note and the condition that Mr. Owens pay the sum of USD$150,000.00 if he failed to execute the PSA by 21st July 2014 or if he decided not to proceed with the purchase of the villa;

(4) At paragraph 7, the terms of the PSA set out above in this judgment;

(5) At paragraph 8, the terms of the addendum also set out above;

(6) At paragraphs 9 to 11, the terms of the construction agreement, the relevant terms of which are set above in this judgment;

(7) At paragraph 12, Mr. Owens' nonpayment of his obligations is stated and APEL specifically avers that Mr. Owens is in breach of the PSA for which APEL was entitled to demand payment of the deposit together with interests, costs and expenses;

(8) At paragraphs 13 to 17, Mr. Owens' obligation to pay under the construction contract is recited along with averments on his promises to meet this obligation. At these paragraphs, APEL also pleads its reliance on Mr. Owens' promises, his failure to fulfill those promises and APEL's loss suffered as a consequence;

.

(9) At paragraph 17, APEL pleads its willingness to complete its part of the bargain;

(10) APEL's prayer for relief is recited above in this judgment.

[39] Having considered the matters pleaded by APEL, I find that the default judgment has decided Mr. Owens' liability to APEL in this regard –

(1) He contracted the note, the PSA, its addendum and the construction agreement. I conclude that as a corollary of this finding, Mr. Owens may no longer dispute whether the agreements are void or valid which includes the charges that he did not sign the notes, that there was no consideration for the agreements or that they were signed to facilitate APEL's financing of its project;

(2) He was obligated by those agreements to make certain payments to APEL; and

(3) He failed to make any payments as required by the agreements;

[40] If Mr. Owens wished to refute any of the claims raised by APEL, he ought to have done so by way of a timely defence. It is inappropriate at this point in the proceedings for him to challenge any of these claims. Accordingly, Mr. Owens is to compensate APEL for the losses it can prove that it incurred by reason of his breach of the agreements and in accordance with the law. As I have also explained above, Mr. Owens is not precluded from raising any issue on the assessment so long as it is not inconsistent with the matters resolved by the default judgment.

What Damages are to be paid to APEL?

The Measure of Damages

[41] There are 2 aspects of the peculiar facts of this case to be distilled on the assessment –

(1) What are the damages, if any, to be awarded for APEL's claim for breach of the agreement for the sale of the land;

(2) What are the damages, if any, to be awarded for APEL's claim for breach of the construction agreement?

Sale of Land Agreement

[42] The normal measure of damages for breach of an agreement for sale of land is the difference between the sale price and the value of the land, the difference in value usually computed at the date fixed for completion[23]. **Halsbury Laws of England[24]** restates the principle thus –

When on a contract for the sale of land the purchaser wrongfully refuses to complete, the measure of damages is the injury sustained by the vendor as a result, set presumptively at the difference between the price and the value of the land concerned. Older cases suggested that the value for these purposes should presumptively be taken at the time fixed for completion. More recently, however, this has been seen to be unrealistic in the light of the lack of a generally available market for land. Today, if the vendor has resold within a reasonable time of the breach the actual difference in price may in general be recovered; otherwise damages are likely to be reckoned as at the time he might reasonably have sold, or has reasonably abandoned any attempt at resale.

In addition, the innocent vendor may claim wasted conveyancing costs and any other consequential losses, in so far as these result from the breach and are not too remote.

The vendor may generally retain any deposit, independently of whether he has suffered any loss; but if he does sue for damages credit must be given for the amount of any deposit retained.

[43] In its prayer for relief APEL asked for the contracted sum of US$250,000.00. However in its submissions APEL rightly conceded that this sum could not be paid

[23] Laird v Pim and Johnson v Agnew.
[24] 5th edn. Vol 29, para. 603.

as it was a forfeiture sum to be retained by APEL if Mr. Owens met his obligations under the PSA. He failed to do so and as such APEL is confined to seek damages for the breach of the obligation to pay for the land. APEL has asked the court to award the difference between the sale price of the land being US$250,000.00 and the value of the land at the date of the breach. It will be recalled that by the signing of the PSA, Mr. Owens was obligated to have the sum of US$500,000.00 in the hands of APEL on 7th November 2014. It turns out that he failed to meet this obligation. APEL allowed him a fair amount of time by way of an addendum to produce the sale price. In the absence of a date for completion, the law deems that Mr. Owens should have completed his part of the bargain within a reasonable time. He failed to meet this obligation. APEL has provided a valuation of the land at November 2014 in the sum of US$225, 000. 00. They are prepared to accept the sum awarded as at this date. No objection to this proposal was made by Mr. Owens either in his evidence or at the hearing. The difference between the contract price of US$250,000.00 and the value of US$225,000.00 is US$25,000.00. APEL is therefore awarded the sum of US$25,000.00 as damages for Mr. Owens' breach of the agreement for sale of the land.

Measure of Damages for the Construction of the Villa

[44] **McGregor on Damages**[25] observes that there is a paucity of authorities on the measure of damages to be awarded in cases where an employer acts to prevent the completion of works by the contractor. The learned authors however suggest the following guidelines to assessment. -

(1) The general measure is the contract price minus the completion costs as at the date of breach. In this case the measure of damages would be the contract price of US$910,000.00 minus the cost of completion of US$106,600.00 which equals US$803,400.00;

[25] Supra Note 18.

(2) An alternative method of arriving at the damages to be awarded involves calculating the net profit on the contract as a whole plus the expenditure to date in part performance. In this case Mr. Meldrum gave evidence that it would cost APEL the sum of US$519,559.00 to construct the villa (US$412,959 expended to date of valuation of works plus US$106,600.00 to completion). The villa was to be sold for US$910,000.00. Subtracting the construction costs of US$519,559.00 would leave a profit of US$390,441.00. APEL was entitled to this sum plus its expenditure to date in the sum of US$412,959.00 which amounts to US$803,400.00 which is the same sum as if the general rule applied;

(3) The third method suggested by **McGregor on Damages**[26] *'is the proportion of the contract price as the work done bears to the total cost of the whole project plus any remaining profit on the outstanding works'.* APEL submits that[27] *using the 78.33% measure, the claimant would be entitled to $712,803 of the contract price. The balance of the contract price would be $197,107 and Mr. Meldrum's evidence is that the remaining cost to completion was $106,600.00 leaving a profit of $90,957 on the outstanding work. The total due to the Claimant would therefore be $712,803 + $90,597 = $803,400*

[45] **McGregor on Damages** suggests these approaches in cases where there is adequate proof of the cost of completing the construction and if it is shown that the agreement can be performed at a profit to the builder. I find that in this case both elements are present. I have referred to the evidence that has been given by Mr. Meldrum as to the completion stages and costs. Mr. Meldrum's evidence also indicates that the cost of construction is less than the contract price. As such APEL ought to have obtained a profit from the arrangement. Mr. Meldrum's evidence states that 78.33% of the agreed construction has been completed at a

[26] Ibid
[27] Para. 36 of APEL's submissions filed on June 23, 2017.

cost of US$412,959. His further assessment is that it would take US$106,600.00 to complete the villa to the specifications sought by Mr. Meldrum. The villa was to be sold for US$910,000.00. Subtracting the construction costs of US$519,559.00 would leave a profit of US$390, 441.00. None of this evidence has been seriously challenged by Mr. Owens. His complaint is that this evidence should not be accepted since APEL cannot rely on the construction agreement to seek damages. I find this assertion to be incorrect as I will explain below.

[46] As I have alluded to above, Mr. Owens's principal objection to this head of loss is the assertion that APEL cannot be awarded damages pursuant to the construction agreement since he did not enter into a construction arrangement with APEL but with another company. In reply, APEL directs the court to its pleadings. The company reiterates that these points of liability have been previously determined by the default judgment. The points on the pleadings about the construction arrangements are quite extensive and I repeat them for emphasis –

(1) Paragraphs 2 to 5 of the statement of claim refer to the purchase of the villa and Mr. Owens' construction specifications in this regard;

(2) Paragraph 6 specifically refers to APEL's obligation to start the construction of the villa on execution of the note;

(3) Paragraphs 7 and 8 speak, among other things, of Mr. Owens' obligation to raise funds to pay towards APEL's construction of the villa;

(4) Paragraphs 9 to 11 recite the terms of the construction agreement between the parties;

(5) Paragraphs 12 to 14 speak to Mr. Owens' breach of the construction agreement and APEL's right to rescind the same and seek damages;

(6) Paragraph 15 pleads that Mr. Owens

> *despite being in default, … maintained his commitment to fulfilling his obligations under the Construction agreement and had promised to the Claimant that he would obtain the funds necessary to satisfy the construction cost, inducing the Claimant to continue with the construction of the custom Villa;*

(7) APEL's reliance on Mr. Owens' promises to pay for the construction costs as agreed, its request that he keeps those promises, the loss APEL suffered as a result of the failed promises and its readiness to meet its obligations are pleaded at paragraphs 16 to 19.

[47] It appears to me that whether Mr. Owens contracted for APEL to construct a villa, the terms on which he did so, his breach of those terms, APEL's reliance on his promises to fulfill his bargain and the loss APEL suffered when he failed to meet those promises are all matters fully pleaded by APEL. Mr. Owens did not file a defence to these complaints. The default judgment therefore conclusively decided the liability for those claims. It would be inappropriate for the court to reconsider these issues at this stage of the proceedings.

[48] If I am wrong on this issue and Mr. Owens is entitled to argue on the assessment (1) that he did not contract with APEL to construct the villa; and (2) that he should not pay for the losses thus incurred, I will recite the evidence which demonstrate to me that he did in fact have an agreement to buy land from APEL on which land APEL agreed to construct a villa to his specification for a set price. It is useful to indicate that much of the material was attached to the statement of claim and could have been refuted by Mr. Owens on a defence. The only additional material beyond those attached to the statement of claim was the testimony of Thomas McInerney Senior and his son, Thomas McInerney Junior given on the assessment in which they testified that APEL commenced and pursued the construction as agreed by the parties. Mr. Owens did not challenge the evidence

of the McInerneys on this issue. The material attached to the statement of claim is as follows -

(1) The note which lists APEL as the '**developer**' and Mr. Owens' obligation to pay a deposit to the developer as a contribution towards the construction of the villa. The contribution was to be paid directly to the developer and the developer was obliged to utilize the deposit to commence construction. The deposit was to be credited to the total purchase price which the note provides that Mr. Owens agreed to pay to APEL according to the terms of the PSA. I accept that by 31st July 2014 the note had expired. However the note demonstrates the early intention of the parties. It is also Mr. Thomas McInerney Junior's evidence that APEL's construction of the villa began shortly after the note was signed. This evidence was not refuted by Mr. Owens;

(2) The recital to the PSA states that Mr. Owens as purchaser wished to have APEL as seller construct a residence on the land to be sold by APEL to him and APEL so agreed subject to the terms and conditions of the construction agreement;

(3) Clause 2 of the PSA sets out the purchase price for the land as US$250,000.00

> *'together with the amount of $250,000.00 which represents the* ***Contribution to the construction contract*** *due to be paid by the Purchaser. The price for the Parcel shall constitute the full purchase price to be paid by Purchaser… The PURCHASER shall also simultaneously transfer such amount of funds to the SELLER that will satisfy all installment payments then due and owing to the SELLER as set out in the payment schedule of this Agreement* ***and/or Construction Agreement***

The Purchase Price consists of and shall be paid as follows

Payment of deposit. *(Payment of portion of Purchase Price), a minimum of US$250,000.00 due and payable on date of this Agreement and which shall be transferred directly to the SELLER.* ***PURCHASER will also contribute an additional $250,000.00 to SELLER upon signing of this Agreement as towards costs outlined and agreed to the Construction Contract that accompanies this document.***

Balance of Purchase Price. *The balance of the Construction* ***Contract*** *will be paid upon occurrence of one of the cash flow events … and* ***will be paid in accordance with schedule outlined in Construction Contract***. (Bold emphasis mine)

(4) The addendum to the PSA states specifically that Mr. Owens was being permitted to raise a loan to offset part of the costs to construct the villa. The money raised would include the US$250,000.00 contribution towards the construction costs. It is also clearly stated that the balance of the contact price of US$610,000.00 was to be paid to APEL on the occurrence of one of the cash flow events;

(5) The schedule for the payment under the construction contract stipulates –

Payment 1 – US$250,000.00 will be paid upon receipt of ***US$500,000.00 loan*** *referenced in* ***contract addendum.*** *This $250,000.00 is in conjunction with the $250,000.00 payment outlined in the* ***Residential Purchase and Sale agreement*** *that accompanies this document. These two payments will be made simultaneously and will amount to $500,000.00 total.*

> *Payment 2 - $610,000 payable when one of the cash flow events outlined in the Solaire **Anguilla Residential Purchase and Sale Agreement** occurs.*
>
> ***All payments** shall be transferred to **SELLER (APE).** No money will be deposited to escrow.* (Bold emphasis mine)

[49] Accordingly Mr. Owens has failed to show that he is not liable for the damages suffered as a result of his breach of the construction agreement. Using the method suggested by **McGregor on Damages**, I award the sum of US$803,400.00 to APEL as damages due for Mr. Owens' failure to pay for the construction of the villa.

Other Expenses Incurred and Claimed by APEL

[50] APEL requests the cost of borrowing replacement money to finance the construction of the villa. APEL alleges that it was forced to raise funds to complete the construction of the villa due to Mr. Owens' failure to pay the sums due for the land and the deposit which was to be utilized towards the construction costs. The increased borrowing is claimed in the sum of US$87,500.00. The company further requests the costs of the valuations conducted by Mr. Connor and Meldrum. The sum paid for the 2 valuation is claimed in the amount of US$5,000.00 and US$7,881.00 respectively. **Halsbury Laws of England**[28] gives some guidance with respect to this sometimes difficult aspect of a claim for loss under a building contract –

> *The complexity of construction work sometimes makes it difficult to establish clearly how an undoubted actual loss was caused. A claim must nevertheless be set out with sufficient particularity and specify a discernible nexus between the wrong and its consequences. Provided that such a nexus has been established, then where the full extra costs*

[28] Supra. Note 24. McGregor on Damages notes the lack of authorities on consequential losses in cases where the owner's breach causes the non-completion of construction.

depend on a complex interaction between the consequences of various events so that it is difficult to make an accurate apportionment of the total extra costs, an individual award may be made for such primary costs as can be proved to flow from the relevant event or events and a supplementary award in respect of the remainder as a composite whole

[51] For my part, it seems incontrovertible that the evidence provides a sufficient nexus between the expenses borne by APEL and the actions of Mr. Owens. APEL is entitled to recoup these losses.

Other Arguments made Mr. Owens Against an Award of Damages.

[52] I have not been persuaded by Mr. Owens' other arguments that no sums should be awarded since the claim is for a specified sum and that APEL is bound by its request for relief of a specified sum. While it can be said that APEL should have specifically included relief for general damages, this argument ignores the extensive material on the pleadings seeking damages for breach of Mr. Owens' various obligations. It also ignores the prayer for further and other relief. Mason J in **Francis v First Caribbean International Bank (Bdos)Ltd** recited the helpful observation of Lord Neuberger in **Kirin v Amgen Inc. v Transkaryotic Therapies Inc(No. 2)[29] –**

"In summary, it appears to me that where there is a claim for "further or other relief," then unless the claimant obtains permission to amend the particulars of claim to broaden the relief claimed, the position is as follows. First, relief will not normally be accorded in respect of a claim of a type which is not pleaded. Secondly, relief will not be accorded which is inconsistent with the relief specifically claimed, but that does not, of course, preclude alternative relief being granted, for instance, damages or a declaration in lieu of an injunction, or damages in lieu of specific

[29] [2001] All ER (D) 111.

performance. Thirdly, relief will not be granted if not supported by the allegations in the pleaded case. Fourthly, relief will not be accorded, save in very unusual circumstances, if the defendant reasonably claims that the claim for it takes him by surprise"

[53] It seems to me and I so find that the award of damages generally is not inconsistent with the allegations set out on the pleadings and the grant of damages to APEL is indeed supported by the allegations set out on the pleadings.

[54] I am equally unconvinced by Mr. Owens's argument that no sums should be awarded because the agreements became void due to the non – occurrence of any of the cash flow events. I have already found that the enforceability or otherwise of the agreements is a matter which should have been raised on a timely defence filed by Mr. Owens. The judgment against him for failing to file a timely defence has therefore concluded the issue of enforceability of the agreements. APEL's position is that its pleaded case was not dependent on the non-occurrence of the cash flow events but rather on the breach of Mr. Owens' several promises to make payments as agreed. By reneging on his promises APEL was not placed '*in a position where it could elect whether to retain the deposit as no deposit was paid. The issue whether the agreements became void … does not arise in this claim.'* [30] I agree that it would be inconsistent with the terms of the default judgment for Mr. Owens to dispute at this stage this pleaded case of APEL that he reneged on his subsequent promises to pay as agreed. This is a matter of liability which has been resolved by the default judgment.

[55] Mr. Owens also contends that APEL did not act to mitigate its losses. Thomas McInerney Junior gave evidence that APEL did invite prospective purchasers to view the property but the prospective buyers were not interested. Among other things, buyers were not impressed with the layout of the villa which had been constructed according to Mr. Owens' building preferences. Mr. Owens has not challenged or impugned this evidence. The law is settled on this issue. The onus

[30] APEL's submissions filed on 23rd June 2017 at para. 18.

of proof that the claimant failed to mitigate his losses falls on the defendant. I must restate the guidance of their Lordships on this issue in **Geest** –

> *This assessment proceeded without any pleading and without any evidence beyond the plaintiff's affidavit and oral evidence. This is not unusual. Many such assessments proceed in a relatively informal manner. The object is to ascertain the plaintiff's medical history since the accident and to assess the plaintiff's continuing symptoms and long-term prospects, with a view to putting a money value on the plaintiff's pain and suffering, loss of amenity and financial loss. Had there been pleadings, however, it would have been the clear duty of the company to plead in its defence that the plaintiff had failed to mitigate her damage and to give appropriate particulars sufficient to alert the plaintiff to the nature of the company's case, enable the plaintiff to direct her evidence to the real areas of dispute and avoid surprise (see Bullen & Leake & Jacob's Precedents of Pleadings, 14th ed (2001), vol 2, page 1103, paragraph 71-13; Rules of the Supreme Court, Order 18 rule 12(1)(c), Order 18 rule 8(1)(b); The Supreme Court Practice 1999 (published September 1998), vol 1, paragraphs 18/7/4, 18/7/11, 18/8/2, 18/12/2, 18/12/13). In this instance, no complaint was made by the plaintiff's leading counsel when counsel for the company advanced this argument, perhaps because he had been warned in advance, and no point was taken in the Court of Appeal or before the Board on the procedure adopted. It should however be clearly understood that if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it. If there are no pleadings, notice should be given by letter.*

[56] I find that Mr. Owens has not discharged the onus of proving that APEL failed to mitigate its losses.

Final Award

[57] APEL is awarded the following sums on this assessment of damages –

(1) US$25,000.00 for the breach of the PSA in respect of the sale of land;

(2) US$803,400 in respect of the breach of the construction agreement;

(3) Cost of borrowing – US$87,500.00;

(4) Reimbursement of costs incurred for the valuations conducted by Messrs. Connor and Meldrum – US$12,881.00;

(5) Prescribed costs of US$48,968.06

[58] The total award is therefore US$977,749.06 at the interest rate of 5% per annum from the date of this judgment.

Raulston Glasgow
Master

By the Court

Registrar