EASTERN CARIBBEAN SUPREME COURT

ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO . ANUHCV2013/0330

BETWEEN:

ROMEO SKEPPLE

Claimant

And

OLIVER POTTER

Defendant

Appearances:

Mr. Kelvin John and Mr. Loy Weste for the Claimant

Mr. Dane Hamilton Jr. and Ms. Joy Dublin instructed by Mr Charlesworth Brown for the Defendant

2016: November 28; 29; 30

2017: November 9

JUDGMENT

Introductory

1] **LANNS, J [AG]:** This is a claim for damages for breach of a constructioncontract and for negligence. The defendantdenies the claim.

The Claim

[2] The claimant's pleaded case in essence is that on or about the 22nd November 2007, by an agreement (the building contract) in writing, the defendant agreed to construct a four storey apartment complex for the claimant at Radio Range in Antigua at a total cost of EC$2,580,000.00. In accordance with paragraph 2 of the agreement,this money was paid up from in one lump sum. The contract sets out a set out conditions under which the works were to be carried out1.

1 These conditions are set out under 30 headings.

[3] By condition 1 of the building contract, the defendant agreed that he would carry out the works in a good and workmanlike manner. By condition 3, the defendant agreed to commence construction on or before 1st December 2007 and complete same within 18 months after date of commencement. Thus the estimated date of completion was June 2009. Provision was also made in condition 3 for extension of time within which to complete . Pursuant to the building contract, the claimant on the 21st November 2007 paid the defendant the sum of EC$2,580.000.002 for completion and construction of the works and construction began soon after.

[4] In or about June 2009, the defendant ceased to do any further work and requested a further EC$400,000.00 for completion, and stated, in effect that once the additional sum of $400,000.00 was provided, the completion date would now be November 2009. The claimant treated the situation as a breach of the contract, and as a consequence, he repudiated the contract by letter dated 3rd September 2009.

[5] The claimant asserts that the defendant was in breach of the construction contract because

(1) he negligently underestimated the cost of constr uction of the apartme nt complex; (2) he negligently supervised cons truction of the apartment complex so as to keep construction costs within the contract price ; and (3) he failed and /or refused to complete construction of the apartment complex within the 18 months construction period.

[6] The claimant on the 7th October 2009 obtained a valua tion report from Way ne Martin a Civil Engineer and Quantity Surveyor, for the estimated cost of completion of the apartment complex. Mr. Martin estimated the completion cost to be EC$1,644.123.75. Then on the 3rd May 2013, the claimant obtained a report from Kemisha London - an Accoun tant , who 'calculated' the cost to complete construction to be EC$1, 969,413.89.

[7] The claimant further pleaded that due to the defendant's failure to complete the construction of the apartment complex, he was deprived of revenue from prospective tenants. He particularised his loss as follows:

2 It is apparent that financing for the apartment complex project came from the claiman'ts inheritance from his fathe'rs estate.

(a) Costs to complete construction of the apartment complex EC$1,969,413.89

(b) Loss of income for rent from the apartment complex 269,932.00

Total loss EC$2,239,345.89

[8] The claimant avers that clause 28 of the building contract provides that if any dispute or difference concerning the contract shall arise, such dispute or difference is to be referred to arbitration . According to the claimant, for two years, he (the claimant) sought to have the dispute referred to arbitration, but the defendant failed and or refused to comply with the terms of the agreement

pertaining to arbitrati on and thus, the claimant, by letter dated 4th October 2012, accepted the defendant's repudiation of the arbitration clause.

[9] The claimant prayed for: the following reliefs :

1. A declaration that the defendant has abandoned the arbitration clause in the construction contract;

2. Damages for breach of contract and negligence or the sum of EC$2,239,345.89

3. Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act Cap 143 at such rate and for such period as to the court seems just.

4. Further relief as to the court deems fit

5. Costs

The Defence

[10] In essence, the defendant's pleaded case is that there was a delay in the commencement date which he said was subject to variation pending approval from the Development Control Authority (DCA). Approval was only granted in or round 15th February 2008. After the commencement of the works, he was faced with unprecedented price increases, and other unforeseen circumstances due largely to the drastic increase in oil prices. Further, the defendant say that the Government of Antigua and Barbuda passed legislation to compel payment of sales tax, with effect from March 2008 at the rate of 15% on the sale/purchaseof a whole range of items and materials necessary for the construction works.

[11] The defendant denied that he underestimated the cost of the works or that he negligently supervised the works . He claimed that the initial estimate for completion of the works was $2,730, 000.00 which sum was reduced to $2,580, 000.00 at the request of the claimant , subject always to revisions and increases from time to time. The defendant admitted that he informed the claimant that he required an additiona l sum of $400,000.00 to complete the works. Additionally, the defendant averred that several parts of the items identified by the claimant as incomplete were not part of the agreed works. The defendant denied that the costs to complete the works would have amounted to the sums given by Mr. Martin and Ms. London in 2009 and 2013 in their reports. As to Mr Martin's report, the defendant says that the assessment was based on several items of which the defendant had no oblation to perform.

[12] The defendant averred that based on a valuation report which he commissioned in June 2009 to assess the percentage of the works comple ted, 86 per cent of the works was completed. The claimant listed the works left to be done. On the basis of that defence, the defendant says that the claimant is not entitled to the reliefs claimed or any of them.

Issues

[13] The claimant in his pretrial memorandum and in his written closing submiss ions identified the issues to be:

1. Whether any alleged implementat ion of the Antigua and Barbuda Sales Tax Act (ABST) after the commencement of the contract caused a 15% increase in prices of material after the building contract had commenced;

2. Whether there was any clause in the contract for a variation of the contract price;

3. Whether there was an increase in oil prices and increase in the cost of materials after commencement of the contract;

4. Whether the contract was frustrated or whether the defendant negligently underestimated the cont ract and breached the contract by failing to complete construction;

5. The quantum to which the claimant is entitled.

[14] The defendant in his pretrial memorandum3 identified the issues to be:

1. Whether it was an implied term of the agreement that the original price for completion of the works was subject to revision and variatio n;

2. Whether the unprecedented and unforeseen increases in price reasonably required a revision of the contract price;

3. Whether the claimant terminated the services of the defendant.

[15] Ultimately the main issues for determination are:

4. Did the defendant breach the const ruction con tract by his failure to complete in a timely manner within the contract price?

5. Was the defendant negligent in any way and if so did his negligence cause financial loss to the claimant?

6. If the defendant breached the contract, and/or was negligen,t what is the measure of damages to be awarded?

[16] The corollary issues are:

(i) Whether there was a delay in commenceme nt of the works which affected commencement of construction?

(ii) Whether during the course of performing the works, the cost of materials had escalated due increase in oil prices and introd uction of the ABST Act ; and if so whether these purported unprecedented increases warranted a variation of the contract price;

(iii) Was there was an express or implied term in the contract for variation of the contract price?

3 No closing submissions received by the judge

(iv) Whether the defendant negligently underestimated the contract price and negligently negotiated the date for commence ment and completio n of the works; or whether the contract was frustrated by a combination of facto rs including delay in DCA approval, alleged price increases.

Did the Defendant Breach the Contract or was the Contract Discharged by Frustration?

A. The delay in commencement issue

[17] Paragraph 3 of the contract provided that the work was to commence on the 1st December 2007. It is common ground between the parties that this did not happen because the requisite permission from the DCA was not forthcoming. The documentary evidenceshows that permissions was granted on 23rd April 2008. The defendant gave evidence that work actually started in February 2008, and that it was the Architect Mr Francis who gave him permission to start the work. I believe him. Apparen tly, the DCA was not satisfied *with the* certain aspects of the Arc hitectural Plan and adjustments had to be made thereto. The fact remains that work did not begin on the agreed date, and this delay would have naturally had an effect on the date for commencement/completion of the project. The defendant should have known that he could not begin the works without permission of the DCA, and should have taken that into conside ration when he was negotiating the time for commencement and the time for completion . In point of fact, the work did not commence on the 1st December 2007 as agreed. The defendant was negligent in his failure to consider that commencemnet of the works on 1st December2007 was subject to approval by the DCA.

8. T he Oil Price Increase, ABST and IncreasedCost of Materials Issues

[18] The defendant in his statement of defence and in his witness stateme nt stated that the introduction of the ABST (which he said came into effect on the 1st April 2008), and the alleged increase in the price of a barrel of crude oil (which is said to have almost doubled to over US$150.00 by July of 2008) led to a significant increase on all build ing materials including cement and building blocks. Acco rding to the defendant, the overall cost of steel bars alone increased from approximately $2,850.00 to approximate ly $6,000.00. The defendant referred to these events as unforeseen circumstances that were beyond his control. In other words, these unforeseen events frustrated the contract.

[19] In cross examination , the defendant stated that from the commencement of the contract through February 2008, there was no change in the cost of materials . As to the introduction of the ABST, it emerged in cross examination that ABST never came into operation in Apri l 2008; it was implemented in January 2007. Notably, the defendant accepted under cross examination that the first set of invoices he received for materials purchased at the commencement of the contrac t had been subject to, and included ABST. When it was suggested to the defendant that at the time when he was contemplating costs of the project, he did not take ABST into account, the defendant answered 'No. I did not.'.

[20] Counsel for the claimant, relying on the principle of law that 'he who asserts must prove' submitted that the defendanthas failed to provide any tangible evidence of any astronomical increase in oil or price of materials. In the circumstances, counsel further submitted that the allegation that increased oil prices, and the introduction of ABST led to increased cost of materials has not been proved and must be dismissed accordingly.

Should the allegations of ABST, price increases etc. be dismissed or should they be treated as issues of frustration of the contract due to unforeseen circumstances beyond the control of the defendant.

Frustration

[21] The parties raised the issue of frustration. "Frustration occurs whenever the law recognises that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is being called for would render it a thing radically different from that which was undertaken by the contract"4.

[22] As was noted in the case of **Waters Ltd v Greater London Council** unforeseen increases in cos ts and price in the course of a construction contrac t, will not give rise to frustration of a contract, save where increases make the obligation radically different from those contemplated. The evidence which I accept is that increases of about 15% were in effect

4 Per Lord Radcliffe in the case of Davis Contractors Ltd v Fareham UrbanDistrict Council (1956)A.C. 696at 728

since in or about 2006, pre-contract. I therefor do not find that the contract was frustrated due to unforeseen price increases post contract. Those increases were in place before the execution of the contract and during pre-contractual negotia tions .

[23] Tellingly, the defendant, sometime between24th and 29th October 2007, prior to execution of t he contract, sent an email to the claimant wherein he told the claimant at paragraph 5:**" Romeo, man to man, I will make you a deal. If you can give a deposit or all of the money up front, as you mentioned in your email, on or before the end of the month, I will do the job for you with no changes as was first estimated, for EC$2,580,000.00. I will make the ultimate sacrifice and deduct the EC$150,000.00 from the labour cost and get the job done."** (My emphasis) The claimant did not sit idly by. Appare ntly, he had entrapped the defendant by the conte nts of his email dated 23rd October 2007. Clearly, the defendant was caught in his own folly . He made a poor bargain, and the courts will not normally release parties from the consequences of poor bargains5

[2 4] The defendant told the court in cross examination that he wrote those words to induce the claimant into entering into the contrac t. However, when it was suggested to him by learned counsel Mr Weste that he underestimated the contract, the defendant responded thus: "I agree. I made a mistake to agree to use the lowest estimate." By this response, the defendant had effectively resiled from his position as presented in paragraph 10 of his statement of defence where the defendant stated that he 'categorically denies that he underestimated the cost of the works and so negligently supervised the works'

[25] Armed with a commitmen t from the defendant to make the ultima te sacrifice, the claiman t cau sed the contract to be prepared accordingly. Alas! The defendant ran out of money, and could not comple te within the agreed time limi t. He made that last offer /estimate of $2,580,000.00 with full know ledge that the money was not going to be sufficient to complete su ch a huge project, (being a 4 storey apartment complex, with 16 studio apartments) within such a short space of time. Indeed, this was the ultimate sacrifice. There seems to have been no logical reason, why the defendant would have knowingly executed a contract to

5 Seeq uo tait on by Michel J in AM Track Construction v Trustee of the Public Workers Union, , GDAHCV2009/0129,de livere d 28th August 2009.

carry out such a huge project with an underestimated figure, for completion within 18 months. No doubt the defendant was lured by the power of persuasion of the claimant , and the enticement occasioned by his knowledge that the contract funds were readily availabel to be remitted in one lump sum, up front. 'Oh what tangled web we weave'. It canno t therefore be said that the contract was frustrated. By his own admissio n the defendant was mistaken; and as I have said before, he made a poor bargain. It canno t therefore be said

that the con tract was frustrated. The defendant negligently underestimated the contract price.

[26] On the material before the court, I can find no, or no sufficient evidence upon which I can make a finding that there were an y increases in the price of crude oil which led to an increase in the price of materials. Additionally, there is no, or no sufficient evidence (apart from the defendant's mere say so) upon which I can make a finding that the price of materials increased in the course of carrying out the construction works.

Was there any Express or Implied Terms in the Contract that were breached by the Defendant? Were there impliedterms pertaining to variation in the contract price that were breached by the claimant

[27] The claimant , at paragraph 6 of his statement of claim alleges that there were two implied terms of the agreement between himself and the defendant, namely: that the defendant would allocatehis time, resources and workmen at the workplace at all material times so as to ensure completion of the constructionworks in accordance with the contract terms; (2) tha t the defendant would exercise due care and diligence to construct the apartment complex within the building contract price paid by the claimant.

[28] The defendant denies the two implied terms allege d by the claimant. At paragraph 6 of his statement of defence, he alleges that the implied term properly stated that: "The terms and conditions of the building contract and the contract price in particular would be subject always to revisions and variations as agreed between the parties from time to time. " 6

6 The way this averment is put suggests that an implied term is expressed as opposed to implied.

[29] The defendant in his witness statement stated that he agreed to carry out the works on the basis of the third estimate on condition that the price would have to be adjusted in the event of changes in price and delays due to bad weather.

[30] .The defendant's counsel in cross examination of the claima nt, laid much store on clause 5 of the contract to suggest that there were discussions/agreementas to variation of the price of the contract. The claimant was adamant that he had no discussions or oral agreement as to variation of the contract price and any discussions he may have had with the defendant along such lines were pre-contract. Indeed, the defendant stated in cross examination that he gave the claimant a discount. This was reflectedin the pre contract email letter to the claiman t of October 2007 that he in essence gave the claimant a discount. A critical part of **the letter reads thus: "I will make the ultimate sacrifice and deduct the EC$150,000.00 from the labour cost and get the job done."**

[31] Learned counsel for the claimant submitted that there was no expressed or implied term of the contract that there would be a variation in the price of the contract to complete the works. As far as counsel was concerned, the contract was a fixed priced cont ract for EC$2, 580,000.00.

Findings on the Implied Terms and Variation Issues

[32] Paragraph 2 of the operative part of the contract, provides: "The Employer will pay the Contractor for the Works the lump sum of EC$2,580,000.007 which is US$959,107.81, or such other sum as shall become payable hereunder at the time and in the manner specified in the said Contract Documents." I do not interpret clause 5 as evidence of an agreement between the parties that the price of the contract may be subject to change in the circumstances suggested by the dependent or at all. My int erpretation of that paragraph is that although the contract price was fixed, there may be additi

onal sums that may become due and payable from time to time during the course of construction, and upon request by the defendant. Indeed, in his witness statement, the claimant stated at paragraphs 32, 33 and 34 that he paid the defendant an additional EC$144,159.35 to cover a refund for a meter

7 Oddly enough, despite provision for a lumpssum payment, Clause 14 sets out a Payment Schedule, but no issuehas been made of this, and nothing turns on it.

bank, to pay customs brokerage, to construct new steps, and balcony rails. This payment seemed to have been contemplated by paragraph 2 of the contract, but it does not mean that the contrac t price was to be varied. I find that the contract was a fixed price contract. I hold that there is no plausible evidence that the reduced estimated price which became the contract price was subject to a further revision or a variation as the defendant claims. The

argument of the defendant that the contract price was subject to variations cannot therefore be sustained.

[33]That having been said, it will be useful to set out and examine clause 5 of the building contract:

'The Contractor may, without invalidating this Agreement, order an addition or omission from, or other change in, the Works or the order or period in which they are to be carried out, and any such instructions shall be valued by the Architect/Contract Administrator on a fair and reasonable basis, using where relevant, prices in the priced Contract Documents and such valuation may include any direct loss and/or expense incurred by the Contractor due to the regular progress of the Works being affected by compliance with such instructions."

[34] To my mind, this condition can only bear upon matters pertaining to additions to, or omissions from, or other change in the works during the contractual period, as well as out of pocket expenses incurred by the contractor during the contract period. Clearly, the contract provides for variation pertaining to omissions, additions or other changes in the works , but the contractor may recover for such changes, upon valuation by the architect and upon his requesting payment by the claimant. The works under the contract seemed to have remained substantially the same, with a few exceptions, and the sums which had become payable as out of pocket expenses were in fact requested and paid separately in the sum of $144,159.35. If the defendant was shortchanged, it was open to him to counterclaim for any loss suffered as a result of such changes. There is no ground for implying that the contract price was subject to change because of changes made under condition 5 of the contract.

[35] Based on the evidence, I find that there was no implied or expressed term pertaining to variatio n in the contract price or otherwise that was breached by the claimant. The same cannot be said of the defendant. I find as a fact that he breached the implied terms alleged in paragraph 6 of the statement of claim - terms which would be implied in any building contract in which they were specifically excluded. Indeed, the building was to have been completed in 18 months, (June 2009) but it wasn't. Nor was it completed on the new date suggested by the defendant (August 2009)8. And the cost estimate of $2,580,000.00 provided by the defendant was unrealistic, given the scope of the work to be done.

[36] It is arguable that by accepting the estimate as given to him, the claimant obviously took the view that it was a reasonable estimate and that he impliedly assumed some of the risks that the final price woul d have exceed the estimate. He stated that he knew about construction, so he must have been aware of the gross underestimation of the cost of carrying out the works . But I do not think he is to be punished for that gross underestimation, especiall y where there is no counterclaim against him for loss and damage or breach of contract.

[37] It is also arguable that both parties at times acted outside the contrac t terms, and that some of the correspondence passed between them personally and through their lawyers, had the effect of varying the contract respecting time for completion; for example, the claimant in his letter to the claimant (through his lawyer) dated 18th April 2009, demanded that construction be completed by 31st August 2009. Here, the claimant seemed to be granting the claimant an extension of time withi n which to complete construction. Subsequently, the defendant in his responding letter to the claimant (through his lawyer), dated 9th June 2009 requested an additional sum of $400,000.00 to complete the building, and he promised to complete the construction by the end of November 2009. As to whether this was a request for an extension of time under condition 3 of the contract, it is uncertain. Whatever the case, this proposed new arrangement was rejected and the defendant's services were subsequently terminatedby letter from the claimant's attorneys dated 3rd September 2009.

8 It is likely that this date was given in lightof the late startdue to delay in DCA approval.But there was no meeting of minds on the new date suggested, nor on the counter suggestion

[38] As I previously started, and the fact remains the defendant did not complete the work that he was contracted to do in a timely manner. I therefore have no hesitation in holding that it was an implied term of the agreement that the defendant would allocate his time, resources and workmen at the workplace at all material times so as to ensure completion of the construction works in accordance with the contract terms and conditions , and that the defendant would exercise due care and diligenceto construct the apartment complex within the building contract price paid by the claimant , and within the time9 specified for completion. In breach of the cont ract, the defendant failed to complete the apartment complex within the prescribed time and at the stipulated price. I think the claimant was justified in treating such failures as a breach of contrac t and repudiating said contract. The defendant deviated from the contract in terms of price agreed upon and date for completion. The claimant had to see to comple tion of the works , and I would hold that there are monies due and owing to him for breach of the con tract and or for negligence.

What is the Measure of Damages to be Awarded?

[39] The following questions are central to the determination of the measure of damages to be awarded.

(1) What percentage of the apartment project was completed at the time worked ceased

(2) What was the percentage of work left to be completed

(3) What was the value of the completed works at stage of suspension/cessation of the works?

(4) What was the actual sum spent on the completion of the works after the breach of the contract?

(5) What is the loss of rental revenue or profits if any actually suffered by the claimant?

[40] During the course of trial, reference was made to reports of four valuators, namely, Mr K. Bertrand Joseph, Mr K. Mr Wayne Martin, Mr Irving C. Edwards and Mr. R. Everon Zachariah. These gentlemen valued the apartment structure at different times during construction, after suspension of works, and after completion of the works by the claimant. Seemingly, the

9 It is noted that the there was no provision in the contract making time of the essence. But this point was never pleaded or canvassed beforeme.

parties are relying on the reports commissioned by them for a determination as to what is the sum due to the claimant for breach of the contract. Reference was also made to an Accountant , Ms. Kemisha London who was retained by the claimant to provide a report on the cost to complete the apartmen t complex. The court cannot pay regard to all of these reports; and will only pay regard to two of these reports which were ordered by the court, because they complied with the requirements of the CPT 32, and the authors of those reports (Mr Irving C. Edwards and Mr. R Evron Zachariah subjected themselves to cross examination thereon.

Valuation Report of Mr Irving C. Edwards

[41] Mr Irving Edwards is a Civil Engineer & Quanti ty Surveyor. He prepared a report which served as his evidence in chief. His report is dated 14th January 2010. It was commissioned by the claimant. The cover letter for the report reveals that in accordance with the request of the claimant , "an investigation, analysis and appraisal report on the subject structure had been completed for the purposes of estima ting (1) Construction deficiencies or incomplete works within the Cont ract; (2) Extra work pursued over and beyond the Contract arrangements'".

[4 2] Mr. Irving went on to state thus: "Af ter careful conside ration of all the factors that affect the construction of the works, the proposed value was estimated to be $991,269.00"' In his summary of the total cost to complete the project, Mr. Edwards itemise d the costs for completing various segments of the works on the first, second and third floors. In the end he estimated the cost to complete the works to be $991,269.0010.

[43] During cross-examination , Mr Edwards in formed that in preparing his report he was guided by the architectural and engineering drawings prepared by Denfield Francis and Lewis Simon and Partners. He was also given the contrac t documents, but no Bill of Quantities was given to him. He stated that there were several it ems of work done that were not included in the contract, such as the driveway which he casually said 'could be taken out'.

10 See pages 6 and 24 of Bundle 3

Valuation Report of Mr. R. Everon Zachariah

[44] Mr. Zachariah is represented as the Principal of Civil Engineering & Associated Services Ltd. (CENAS.) He prepared a report which served as his evidence in chief. The report is dated 11th February 2016. Mr Zachariah states that the report aims to:

(a) 'Make an assessment of likely cost for the construction at the time of const ruction ;'

(b) 'Make an assessment of the stage at which the works was suspended by the cont ractor;'

(c) 'Make an assessment of the value of the completed works at the time of the suspension of the works'

(d) 'Assess the works to be completed'

(e) 'Makean assessment of the likely cost for the completion of the unfinished works forming part of the initial contract, which it is understood was finished by Mr Skepple'.

[45] Mr. Zachariah was of the opinion that the estimated cost for completion of the works was $707,040.000. In the opinion of Mr. Zacharia h, the contract sum was insu fficient to carry out the

required works, and it was inevitable that the defendant would have experienced difficulty at some stage of the construction.

[46] It is notable that Mr. Zachariah, in his report, disclosed that his assessment of the work which remained outstanding after suspension of work, were determined from information presented in the valuation reports carried out before his, in tandem with discussions with the claimant and the defendant. Clearly, Mr. Zachariah had not examined the building before he inspected it on the 6th February 2016, so he did not know personally, what was there before, to gain an independe nt appreciation of the value of the property at the time of suspension of the work .

[47] In his written submissions , Mr. Weste pointed out that the claimant's expert, Mr Edwards, examined the property shortly after the defendant's repudiation of the contract, whereas the defendant's expert, Mr. Zachariah examined the property many years after the claimant had completed it. Based on that contention, Mr Weste urged that the court should prefer the valuation of the claimant's expert, Mr Edwards.

Applicable Principle

[48] Where a party has sustained loss by reason of a breach of contract, he is so far as money can do it, to be placed in the same situation , with respect to damages, as if the contract had been performed (Parke B in **Robinson v Harman** (1848) 1 Ex 850, at 855). See also **Halsburys Laws of England** Vol. 12 (1), 4th edition, reissue, paragraph 941: "The normal function of damages for breach of contract is compensatory. Damages are awarded not to punish the party in breach, or confer a windfall on the innocent party, but to compensate the innocent party and repair his actual loss. Compensation is normally achieved by placing the innocent party in the same position, so far as money can do, as if the contract had been performed." Claimants must establish that their loss was caused by the Defendants' breach of contract. Claimants are debarred from claiming any part of the damages which is due to their neglect to take such steps as are necessary to mitigate their loss consequent upon the Defendant's breach."

[49] As to the measure of damages which the claimant may receive from the defendant, the law applicable is set out in Halsbury' s Laws of England (3rd Edn.) Vol 3, para 956 at page 48711:

"The measure of damages for failure by the contractor to complete a building or engineering contract will include first the difference (if any) between the price of the work as agreed upon in the contract, and the employer is actually put to in its completion".

Applying the Principle

[50] As can be seen, the court is faced wit h differing estimates as to the percentage of work left to be done, and differing amounts as to the cost to complete the project. The court is also hamstrung by the absence of proof of the actual amount spent on completion of the apartment complex. In other words the 'cost of the cure'

11 Quoted in Nurse v Campbell, (1966)10 WIR 143

[51] It is trite that a claimant who seeks a money judgment for damages in his favour must provide the court with cogent evidence to support and quantify the loss or damage and not leave the court to speculate as to these matters. It is not sufficient to simply produce an estimate of the value of the work to be done, or to produce receipts with no oral evidence as to link the receipts to the loss or damage.12

[52] There has been extensive cross examination of the claimant, but the cross examination focused primarily on pre and post contract discussions and negotiations; purported extras, changing of designs, adjustments to costs. These were not matters that were foreshadowed or particularised in the defence, or for which a counterclaim has been brought. Nothing was put to the claimant in cross-examination as to how much money he actually spent to complete the building. And nothing was put to the claimant as to when he actually started work to finish the building or when he finished . Conse quently, the claimant's evidence given at paragraph 55 of his witness statement that it took him 12 months from the time the defendant left the project for him to comple te the construction was left virtually unchallenged, although somewhat sketchy and uncertain

[53] That having been said, I note that the defendant, in commenting on the time which the claimant said that it took him to complete the project, was of the view that 12 months was

'outlandish'. However, he did not suggest a time within which the project would have been completed .

[54] In truth and in fact, there has been nothing forth comin g from the claimant as to the cost he actually paid to completing the building. Whatever receipts and or invoices the claiman t had in his possession, these were apparently passed to Ms London, who, (as previously stated), was hired to calculate and report on the amount spent on the apartment project for the period April 2009 to December 2012. She signed a witness statement, but she was never called to put her report in evidence and be cross examined thereon.

[55]I find that the claimant has not provided any evidence of the amount actually expended by him to complete the works. Ordinarily in such a case, the claimant is entitled to a nominal

12 Per Saunders J.A. in Peter Crane et al vs Colin Walters, Civil Appeal No 11 of 2001, paragraph 36

su m only. It would have been useful for the purposes of assessment, to know exactly what amount was expended, sin ce the figures submitted by the valuators for cost of the work left to be done were only estimates. If in fact remedial/completion works cost more or less, then in my opinion that is a factor to be taken into account in the assessment of damages.

In the absence of any evidence as to costs the claimant was actuall y put to in completing t he apartment complex, the court will do its best with what it has. Wha t the court has is the valuation report of Mr Edwards and that of Mr Zachariah.

[5 6] Mr Weste was of the view that the court should accept the figure of EC$991,269.0 suggested by Mr Edwards over the figure suggeste d by Mr Zacharia h by reason that Mr Zachariah viewed the property after 6 years of its completion.by the claimant. Mr Weste has overlooked the fact that other persons carried out inspection of the building before Mr Ed wards. It seems to me that if anyone was well suited to be tendered for cross examination or comment on the condition of the building in 2009, when the claimant suspended works, it would have been Mr Joseph and Mr Martin, because they would have seen the condition of the building in 2009, shortly before and after suspension of works, a nd would have been well placed to comment on any changes in conditio n and value of the property in 2012 after its completion by the defendant. They would have been able to

d etermine the percentage of the work done and left undone, and/or to place a value of the work done and left to be done. However, it bears repeating that the reports submitted by Mr Joseph and Mr Martin cannot be considered in the assessment proceedings.

[5 7] On the state of the evidence, then, the claimant has led no evidence to substantiate the cost of EC1, 969,413.89 claimed as the cost to complete the structure. Significantly, Mr Weste seemed to have abandoned that figure as broken down and particularised in the statement of claim wit hout formally amending it. Indeed, in his written submissions , he urged the court to prefer the estimate of $991,2690.0 as assessed by Mr Edwards, a reduction of

$978,144.89.

[58] In assessing the amount spent on completion of the apart ment, I am cognizant that I am not bound to accept the evidence or opinion of Mr Edwards, Mr Zachariah, on any point, simply because they are experts.

[59] In **Heidi Binder v Patrick Mavey et al** BVI HGV 2005/0006, Justice Indra Hariprashad - Charles quoted the authors of Expert Evide nce Law and Practice p.352as saying:

"It must be always open to the judge to make findings contrary to the opinions of experts even where the reports are agreed. ... "

[60] Despite there being no direct evid ence that the claimant actually spent EC1,969,413 to complete the building, I am minded to find that true measure of loss is reflected in the amounts being assessed in the reports of both Mr Edwards and Mr Zachariah as being needed to finish the project to bring it to its contract ually agreed state. The court accepts Mr Edwards and Mr Zachariah as experts in their field. I find that their estimates of the cost to complete the defects reasonably reflected the cost of 'the cure' to the claimant. However, in as much as it is open to me to make findings contrary to the opinions of experts, I am not bound to accept either of the figures suggested by Mr Edwards or Mr Zachariah. I am content to allow the Mean between the two figures. In the result I award the claimant the sum of EC$849, 154.50 as being representative of the difference between the contract price and cost to which the claimant was actually put to complete the apartment comple x.

Loss of Rental Income/Revenue

[61] The claimant in his statement of case claims loss of rental income in the sum of EC$269,932.00. He did not particularize that loss . All he said was "Due to the Defendant's failure to complete the const ruction of the Apa rtment complex, the Claimant was deprived of revenue from prospective tenants ." In his witness statement at paragraph 53, the claimant repeated tha t averment, and went on to state that he began to rent the apartments on short term basis between June and October 2011 at a daily rate of US$65.00 per day, and that in March 2012, he entered into a verbal agreement with the Housing Coordinator of Mount St John's Medical Center to provide accommodation for doc tors at the rate of EC$1200.00 per month.

[62] Counsel for the claimant has in his written closing submissions, suggested that the claima nt is reasonably entitled to EC$230,400.00 for loss of rental income for 12 months at $1200.00 per month for 16 apartments. Here again, the claimant has effectively amended his statement of claim by reducing the sum claimed for loss of rental income from EC$269,932.00 to EC$230,400.00- a reduction of $39,592.00.

[63] The defendant in his defence disputed that the claimant was entitled to any of the reliefs claimed. This naturally incl uded the relief for loss of rental income. However, the defendant has not provided any serious challenge to this claim. In fact, the defendant in cross examination acknowledged that he was aware that the claimant intended to rent out the apartments upon completion.

[64] I have no doubt that the failure to complete the apartment complex in a timely manner meant that the claimant would have lost the opportunity to rent the apartments . The question is how is that loss of opportunity to be assessed? What should be the loss period? And what is an appropriate monthly rate.

[65] As stated before, "Damages for breach of contract generally seek to compensate the victim for his loss rather than to punish the wrongdoer for his conduct. The general compensation aim means that in the absence of provable loss, only nominal damages will be awarded."13 Has the claimant proved loss of rental income?

[66] The claimant has exhibited 8 receipts purportedly intending to show that the apartments are rented for 'as much as $1300.00 per month'. Of the 8 receipts, 4 are not legible, and from what I can discern, they bear dates in 2011, 2012 and 2013 for varying amounts of $1100.00; $3600.00, $1200.00, $862.00, and $1300.00.

[67] In regard to an appropriate monthly rate, in cases of this nature, damages are usually based on the user princip le. This is evident from the decision of the Privy Council in **lnverugie**

13 **Law of Contract** 4th edition, page 1695 at paragraph 8.1.

Investments Ltd. v. Hackett. Here the claimant was wrongfully deprived by the defendant of possession of 30 apartments in a hotel complex in the Bahamas. The Privy Council held

that the claimant was entitled to recover a reasonablerent for the period for which he was deprived of possession of the apartments. Applying the user principle, Lord Lloyd, delivering the judgment of the Board, concluded that the claimant was entitled to recover a reasonable rent whether or not he had 'suffered any actual loss'. Likewise, the defendant was liable to pay a reasonable rent even though he 'may not have derived any actual benefit'. To the same effect is the principle enunciated in the case of **(Royal Bristol Permanent Building Society v Bomash** (1887) 35 Ch. D. 39014

[68] As I have said, the defendant has not disputed or challenged this alleged monthly rental figure of $1200.00 suggested by the claiman t, nor has he suggested any figure as an alternative to the $1200.00 said to be the prevailing monthly rent for the apartments. In the result, I am content to accept $1200.00 as the reasonable monthly rental, for each apartment, and I propose to work with that figure..

[69] In terms of the loss period, or the date of assessment, the general principle is that damages are assessed as at the date of breach. However, this is not an absol ute or inflexible rule and the court has power to fix such other date as may be appropriate in the circumstances **(Johnson v Agnew ,** [1980] AC 367, 401). In the circumstances of this case, I think it would be appropriate that the damages start on the date of expiration of the time within which the works were to be completed that is, 1st September 200915 for a period of 7 months . The court is of the view that, having repudiated the contract, the claiman t ought to have mitigated his loss by beginning the remedial works within a reasonable time, to make the apartments rentable. The claimant has not said definitively when he began the remedial/completion works. That in formation remains uncertain. In order to avoid a windfall, the court will consider the end of April 2010 to be the end period for which damages will be awarded for rental income. I limit my award in respect of the loss period to 7 months from the 3rd September 2009 to 3rd April 2010.

14 The facts of thosecases are not on all fours with the instant case, in that they are gain-basedcases, where the defendant in lnverugie had been using the apartments, and the Defendant in Bomash knew of the use to which the land was to be put, but I think the principleis the same and may be applied herein.

15 As per letter to defendant dated 23rd April 2009.

[70] Notably, the figure claimed for loss of rental income is based on possible/potential rental of all 16 apartments for 12 months . This is mere speculativeness. Inferentially, the claimant is basing his claim for rental of all 16 apartments on some verbal agreement said to have been reached between him and Mount St Johns for rental of all the apartme nts. The court cannot possibly accept this as an agreement upon which it should act to award damages for loss of rental income in respect of 16 apartments. In the eyes of the court, this verbal agreement does not prove loss of income for all 16 apartments, because the loss of rental for 16 apartments was based on speculation that all 16 apartments would have been rented from a certain unknown date and would have continued for 12 months without expiration. Moreover, it seems to me that if agreement were reached between the claimant and Mt St Johns, the nature of the agreement would call for it to be in writing , and should be stamped and recorded as a deed. When therefore the claimant is asking the court to award damages based on this alleged verbal agreement with Mt St Johns, the claimant is effectively asking the court to sanction a fraud on the revenue which it should not do. (Per Gordon J.A in**Soumitra Sengupta v Woods Development Limited, Ant igua**Civil Appeal No. 20 of 2003

[71] From what I can glean from the rental receipts tendered , seven apartments were rented during the period 2011 to 2013. In order to avoid a windfall, and based on my views expressed under this sub head, I will use 7 as a gauge in my determination of the rental income.

[72] The result is that the claimant is awarded the sum of $58,800.00 for loss of opportunity to rent the apartments being EC$1200.00 x 7 months. x 7 apartments.

Conclusion

[73] For all the reasons stated above, the court orders as follows:

1. There will be judgment in favour of the claimant against the defendant in the sum of EC907, 954.50, (being $849,154.50 for cost of completion of the works + $58,800.00for loss of opportunity to rent the apartments).

2 . Success was divided so the defendant shall pay the claimant half of the costs as prescribed under CPR 65.5, Appendices B and C as amended.

[74] Counse l for the claimant has provided me with helpful submissions and authorities. I am grateful for his assistance. I was not similarly assisted by counsel for the defendant. I have received no closing submissions on behalf of the defendant.

[75] I sincerely apologise to the parties for the delay in delivery of this judgment. Despite my best efforts, and due to other pressing work commitments, I was unable to complete it earlier.

Pearletta Lanns

High Cort Judge [Ag]