EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2009/0693

BETWEEN:

MARLON BROWNE
d/b/a Marlon A. Browne & Co

Claimant

and

NIGEL JAMES

Defendant

Appearances:
Ms. Sherrie Ann Bradshaw for the Claimant
Mrs. Marie-Lou Creque for the Defendant

…….
2016: May 3
2017: November 28
……..

JUDGMENT

[1] **LANNS: J. [AG]** The claimant Marlon Browne is a building contractor. He was retained by the defendant Nigel James ("the owner" or "the defendant") to build a dwelling house at Fitches Creek. The house was to contain three bedrooms, two bathrooms, one living room, a dining room, a kitchen, a utility room and a garage. A contract was entered into which was partly in writing and partly oral. The contract is dated 25th January 2008. The contract price was EC$705,429.32. The contract refers to a payment schedule. This schedule corresponds to the staged progress of the works. Work on the dwelling house was to be done in six stages. The dwelling house was to be completed within 10 months from the date the contractor received the first stage payments.

[2] When the contractor was about to begin the 5th stage of construction, a dispute arose between him and the owner concerning late payments, among other things, and the owner engaged other contractors to complete the dwelling house. The contractor treated this action on the part of the defendant as a breach of the building contract, and has brought this action against the defendant claiming monies due for cost overruns on materials, installation of temporary electrical installation, loss of profits, the value of equipment and materials belonging to the claimant left on the construction site, and damages for breach of contract. A figure was assigned to each of these items totaling $84,465.36.

[3] The owner in his re-amended defence has denied owing the sums claimed by the contractor. He says that it is the contractor who breached the contract. He counterclaims that workmanship was poor and defective and that the contractor is liable to him for loss and expenses incurred by him under various heads including remedial works, electrician, rent, plumber, bank interest, insurance and materials. The loss allegedly suffered by the defendant is quantified at $98,000.00.

Did the Defendant Breach the Contract by his Failure to Terminate the Contract in Writing; and/or by his Failure to Make the 5th Stage Payments for Progressing and Completing the Works; and/or by Depriving the Claimant of the Retention Fee Thereby Affecting his Profits?

(1) The Notice Issue

[4] The contractor asserts that the defendant owner did not comply with the termination method stipulated in the contract. He pleads that in breach of the contract, the defendant owner did not inform him in writing under the hand of the supervising engineer, Mr Wayne Martin (Mr Martin) of the termination of his services. In his witness statement, the claimant repeated the allegation that the defendant did not inform him in writing under the hand of Mr Martin that he was determining the contract. During cross examination, it was put to the contractor that the defendant owner in December 2008, told the contractor to put galvanize on the roof and leave the construction site; and that subsequently in January 2009, the defendant owner engaged workmen to complete the works. The contractor denied that the defendant owner gave him such instructions. He said he

showed up to work, and met other workers on the site. It was then that he realised that the defendant had determined the contract.

Findings on the Notice Issue

[5] Clause 17 of the Agreement provides for the method of termination. Clause 17 provides in relevant part:

> "17 Should the builder fail in the due performance of the works or any part thereof, or to proceed with the same to the satisfaction of the supervising engineer, the Owner may by writing determine the contract under the hand of the supervising engineer so far as regards the performance of completion of the same by the builder, but without thereby affecting in other respects the obligation and liabilities of the builder …"

[6] Prima facie, the language of clause 17 cannot be interpreted as saying the defendant must terminate the contract in writing, under the hand of Mr Martin. It seems to me that it was open to the defendant to terminate the contract by some alternative method, for example orally, or by written notice under the hand of the defendant owner himself. However, it is arguable that the word "may" sometimes mean 'shall" in which case the defendant would be obliged to terminate the contract as specified in clause 17.

[7] The claimant said the defendant did not terminate the contract in writing; nor did he terminate it orally. The defendant on the other hand admits he did not terminate the contract in writing, but says he did terminate it orally, which he says he was entitled to do. Here, the court has before it two versions of this issue of notice of termination, and must choose between the two versions. It must be remembered that the defendant's pleaded case was that he did not terminate the contract but contended it was the claimant who terminated the contract by not progressing the work; yet he is saying that he terminated the contract by telling the claimant to put galvanize on the roof and leave the construction site.

[8] The court accepts the version given by the claimant. I do not accept the defendant told the claimant to put galvanize on roof and leave the construction site. Even if he did simply tell him to put on

galvanize and leave the site, that to my mind, was not sufficient or proper termination, without more. Notice provisions in construction contracts and other commercial agreements exist for a purpose. That purpose is to give the parties certainty over how they may communicate with each other, and when a communication will be effective for contractual purposes. Accordingly, I find that the defendant deviated from the terms of the contract in respect of the method of termination, and in breach of contract, proceeded to engage other workers before he had properly terminated the contract with the claimant. I think the claimant was justified in treating the contract as having been determined when he saw other workers on the construction site. The project came to a standstill because the owner failed to make the stage 5 payments. The contractor did not stop the work. It was the owner who brought it to a standstill. The evidence which I accept is that he had substantially carried out his obligations under the contract up to stage 4.[1]

(2) The Failure to Make 5th Stage Payments Issue

[9] The claimant in his witness statement asserts that even though Mr Martin (who was the supervising engineer) approved the 5th stage payments, the defendant failed to make such payments to him to allow him to proceed with the works. The claimant says that this failure on the part of the defendant was a termination of the contract. There is no dispute that the defendant failed to make the 5th stage payment of $145,000.00. There is also no dispute that he did drawdown such payments. He said he used such payments to complete defective works and to complete construction of the house. As regards the claimant's assertion that Mr Martin approved the 5th stage payment, from an examination of the Progress Report prepared by Mr Martin for the defendant dated December 2008, it appears that Mr Martin did not approve stage 5 payments. From what I can discern from the Report, he approved stages 1 to 4 and left stage 5 blank. However, in the text of his report, Mr Martin stated that construction to date appears satisfactory. Mr Martin was not called to give evidence as an expert or as a witness of fact. The defendant in his witness statement stated that Mr Martin was not only the supervising engineer, but also his agent for distribution of funds from the bank. He stated that the bank would not normally release funds until they were satisfied that each stage had been completed.

[1] Se the report of the expert Mr St Simon.

Finding on the issue Non-payment of the 5th Stage Payment

[10] Obviously, the claimant could not continue the contract until he was paid the 5th stage payment as per the contract. This did not happen. The defendant, having chosen not to make the 5th stage payments and having chosen to engage other workers, he rendered the contract with the claimant null and void or discharged, and the claimant was relieved of all obligations under it. I am satisfied that the failure of the defendant to allow the claimant to complete the contract by withholding the 5th stage payments and engaging other workers to complete the works, was materially prejudicial, to the claimant, and the defendant was in breach of the contract. Additionally, the claimant has admitted that in breach of the contract, he made late payments at the first stage of the contract, and that, instead of a lump sum payment of $175,000.00, as stipulated in the contract; the defendant owner paid it in three instalments, the last being in July 2008. Clearly th defendant owner failed to put the contractor in funds to allow him to complete the dwelling house, and instead engaged other workers to do so.

[11] In my judgment, the defendant was premature in committing to another contractor or to other workers, without calling upon the claimant to rectify any defective works which were identified.

Are the Sums Claimed by the Claimant Due and Payable?

(1) Cost overruns

[12] Building materials: The claimant in his statement of claim alleges that at the time the defendant terminated the contract, there were costs overruns amounting to $40,935.36. He says that the defendant has refused or failed to reimburse him for such costs. In his witness statement the claimant gave evidence that subsequent to the execution of the written agreement, it was agreed between the defendant and him that the defendant would pay him for any cost overruns occasioned by the increase in cost of materials. The claimant stated that during the course of the construction, there were fluctuations in the price of building materials. He consulted with, and obtained approval from the defendant for purchases of materials which exceeded the estimate provided for in the agreement. The defendant, during cross examination said that he appreciated that there would be increases in price of materials.

[13] Construction of basement: The claimant alleges that because of the gradient of the land, and at the request of the defendant, he agreed to construct a basement on the eastern side of the building.

This was not part of the written agreement between the parties but the defendant agreed to meet the additional costs of constructing the additional basement.

[14] When asked during cross examination, whether he was seeking overruns of $40,935.36, the claimant answered thus “Not at this time.”

[15] However, during further cross examination on cost overruns, the claimant stated that he bought the additional materials from Builders Merchant and he input the corresponding invoices and receipts in his system, but some of the receipts faded.

Discussion and Finding on Costs Overruns

[16] Special damages which are generally capable of exact calculation must be pleaded and proved. Ample support for this proposition is to be found in the words of Diplock J in (**Ilkiv v Samuels**,[2]

"Special damages in the sense of a monetary loss which the plaintiff has sustained up to the date of trial must be pleaded and particularised ... it is plain law ... that one can recover only special damage which has been pleaded, and of course, proved."

[17] The claimant has pleaded special damages of $40,935.36, for cost overruns, but he has failed to strictly prove such loss or damage. He has tendered some invoices. Invoices are not receipts. And even if receipts were tendered, it is not sufficient to simply produce receipts. Oral evidence must be tendered to link the receipts to the loss or damage. In any event, there is a complicating factor regarding these receipts/invoices in that some of them are dated after the termination of the contract, and which could well be in respect of other construction projects in which the claimant admitted that he was involved. They include a quote for $19, 598.81.

[18] It is trite that a claimant who seeks a money judgment 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.[3] It is for the claimant to satisfy me that he expended $40, 936.36 in respect of cost overruns.

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[2] (1963) 2 All ER 879

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

[19] In reexamination, the claimant was asked how he came by cost overruns whereupon he explained that additional provisions were made for an additional basement which accounted for part of stage one of the contract. He further stated that he had issues with receiving monies from the defendant, during stage one, and as a result, he had to purchase materials out of his pocket. These materials were purchased at a much higher price than was originally estimated. In some stages, explained the claimant, there were overruns, and because he did not get to complete, he did not receive the stage 5 payments or the retention fee which would have compensated for those losses. He maintained that the additional basement/room was not part of the contract, and was not on the plan, but because of the gradient of the land, he agreed to construct a basement on the eastern side of the building. He maintained that the matter was discussed with the defendant and he agreed to meet the additional cost of constructing the additional basement, by seeking additional funding.

[20] The defendant admits that although the contract and the plan provided for one basement, there are two basements, but he does not agree that the second basement resulted in additional costs.

[21] I believe the claimant that the defendant agreed to meet the additional costs of the basement. I do not accept the defendant's story that it would have been cheaper if the additional basement was not closed up. The court believes that the claimant incurred costs overruns. I do not find the overruns was occasioned by negligence in monitoring cash flow. However, the claimant has not substantiated how he arrived at the figure of $40, 93636. 46. It was pleaded, but proved. To my mind the fact that he is unable to prove strictly his loss of $40,936.46, should not preclude him from being awarded under this head of damage. The court believes that he did incur some loss for cost overruns, in respect of the basement, and thus, on the authority of **Greer v Alstons Engineering Sales and Services Ltd**[4]I award the claimant the nominal sum of sum of $15, 000.00

(2) Temporary Electrical Supply from APUA

[22] The claimant claims the sum of $3,500.00 for erecting a temporary power box to provide temporary electrical supply for the construction site. He states that the defendant asked him to pay the cost of the temporary connection and promised to reimburse him, but he (defendant owner) did not reimburse the claimant..

[4] [2003] UKPC 46

[23] During cross examination, it was put to the claimant that the defendant gave him cash pay for the temporary power connection. The claimant was adamant that he was the one who paid for the power supply out of pocket. The claimant was shown the receipt for the temporary electricity supply. He explained that he paid the $3,500.00 in cash to APUA, and requested that the receipt be put in the name of the defendant. He made that request because the service was the defendant's service. It was put to the claimant that it was the defendant who made the application for the power box and the claimant was adamant that the application was made by him and the defendant. He pointed out his signature on the application form, along with the signature of the defendant.

[24] The defendant in his amended defence admits that a construction meter was required, but states that he paid the claimant $3,500.00 in cash for electricity to be connected to his property meter, and the claimant gave him the receipt from APUA in respect of such payment. The defendant repeated this averment in his witness statement.

[25] Under cross examination of the defendant by Ms. Bradshaw on this issue, the following exchange took place:

By Ms. Bradshaw:

Q: If you paid $3500.00 for electricity, how is it that you did not write a cheque for that amount?

A: I arrived back in Antigua and Mr Browne drove up in his car and he said he had this receipt and I had cash and I gave it to him. I had to go and get the cash. I went to Caribbean Union Bank and I got the cash and I gave it to him

PUT: That is not a true statement and that is not the pattern shown by you. From the very beginning the pattern was that you write a cheque direct to Mr Browne.

A: That is correct. That is the only payment I made to him in cash. I had just returned from overseas and only had one or two cheques remaining and would not be able to get any cheques until the following week. I did not want to be without cheques for the week-end.

Q: Was it not a refund?

A: I guess I worded it the wrong way.

Discussions and Findings on the Temporary Power Supply Issue

[26] The burden is on the claimant to satisfy me that he paid for the electrical connection out of pocket, and that he has not been refunded.

[27] Counsel for the defendant submitted that the claimant has failed to successfully prove that he paid for the temporary power supply out of his pocket. As far as counsel was concerned, the wording of the receipt is sufficient proof that the defendant paid APUA for the power supply, and the defendant was under no obligation to explain how he came to give the claimant cash as opposed to a cheque.

[28] Tellingly, learned counsel for the defendant in her written closing submissions seemed to have resiled from her earlier position submitting that while the sums were in fact paid by the claimant, the defendant reimbursed the claimant the $3,500.00 with cash he had received from the bank.

[29] There are two versions of this issue before me. Having seen and heard the witnesses, I have to say that the defendant's version impressed me more than the claimant on this aspect of the case. I find as a fact, based on an oral agreement between the claimant and the defendant, the claimant paid for the electrical connection out of pocket, and requested that the receipt be made out in the defendant's name. I accept that the claimant, by virtue of the oral agreement between the parties, presented the receipt to the defendant, and he was refunded in cash. The APUA receipt given to the defendant substantiates that payment. The claimant gave up the receipt to the defendant. It would seem odd that he would give the defendant the receipt before the defendant reimbursed him. He ought to have kept the receipt until he had received the money from the defendant. The fact that he gave the defendant the receipt is telling.

[30] On the state of the evidence then, the claimant has not satisfied me that he has not been reimbursed. As previously stated, it was for the claimant to satisfy me that he was not reimbursed. I am not satisfied. I can find no sufficient evidence upon which I can make a finding that the claimant was not reimbursed the $3500.00 he paid APUA for temporary electrical connection. The defendant's story is more believable. Accordingly, I make no award under that head of claim.

(3) The Claimant's Claim for Damages/Lost Profits for Breach of Contract

[31] The claimant claims the sum of $25,130.00 as damages for breach of contract. In his witness statement he referred to that sum of money as 'loss of profits' as a consequence of the contract being terminated prematurely, preventing him from completing work that was left to be done. The defendant in his defence and witness statement denies that he prematurely terminated the contract and says by not progressing the work and doing so to acceptable industry standards, and by failing to pay and send the workmen on site, the claimant constructively terminated the contract, thus forcing the defendant to remedy the situation.

[32] Counsel for the defendant was of the view that the $25,130.00 claimed by the claimant is the retention fee provided for in the contract. Counsel submitted that this fee would only become due and payable upon satisfaction of the completed works. Counsel argued that even if the works were completed, the claimant would still be required to prove satisfaction of the works in order to be entitled to final payment. It was counsel's further submission that the claimant has failed to demonstrate the basis for his entitlement to the sum of $25,130.00 being claimed as 'damages for breach of contract' and 'loss of profits'.

Discussion and Findings on the Sum Clamed as Damages for Breach of Contract and or Loss of Profits Issue

[33] I do not find, as defendant's counsel seems to suggest that the claimant's claim for $25,130.00 is a claim for the retention fee. The retention fee provided for in the contract is $25,429.32 (and not $25,130.00), which becomes due and payable at stage 6 of the contract. Stage 6 is expressed in the payment schedule as follows:

> "Stage 6: Retention: Completion of all works, satisfactory for 8 weeks $25,429.32"[5]

[34] It is doubtful whether withholding or non-payment of the retention fee could be regarded as lost profits; or whether 'retention' could properly be called 'profit'. Lost profits are "damages for the loss of net income to a business measured by reasonable certainty".[6] I agree that lost profits may be recoverable in cases sounding in breach of contract, and it is arguable that it arises in the instant

[5] It is not clear why the sum of $25,429.32 was not used/quoted.
[6] Article entitled "Proving and Defending Lost Profits Damages by Hon Martin "Marty" Lowry, Judge, 101st Judicial District Court, Texas for the Business Litigation Section of the Dallas Bar Association.

case. In **Emden's Construction Law**, Issue 36, it is stated at paragraph [221] "where the employer repudiates the contract after the work has commenced … the measure of damages can be measured as loss of profits on the unfinished balance, plus the value of the work done at contract rates'" Alternatively the contractor may sue for a quantum meruit,

[35] However, I find that the claimant has not shown how he arrived at the figure of $20,130.00 for lost profits, and it was not investigated at trial. I would conclude that the claimant has not provided the necessary evidence to prove his claim for lost profits. Moreover, the claimant's counsel has not offered any submissions on the point to assist the court. Accordingly, I disallow the claim for lost profits.

(4) Claimant's Claim for the Equipment and Materials Belonging to the Claimant and Left on Claimant's Premises at the Work Site

[36] The claimant alleges that the following items belonging to him were left at the work site:

(1) 3x 6 and 4x4 lumbar valued at EC$2,000.00

(2) Scaffolding valued at EC$500.00

(3) One cement mixer valued at EC$12,000.00

(4) Temporary power box valued at EC$400.00

[37] At trial, it was confirmed that the claimant has since regained possession of the concrete mixer[7] and thus, the only items with which the court is concerned are the lumbar, the scaffolding and the APUA power box. While the claimant has pleaded the items left on the premises, he has not specifically proved the value of such items. However, the defendant has not disputed that the items were left at the work site, and I find as fact the items were left there. The defendant admits that he told the claimant to leave the work site. The claimant said he did not get an opportunity to take the items. I believe him. As to the value of the items, while it is true that the claimant has not strictly proved the value of the items, I feel able to award a figure based on the authority of the Trinidad case of **Grant** v. **Motilal Motilal Moonan Limited,**[8] I therefore award the claimant the sum of

[7] The cement mixer was outside the premises of the claimant.

[8] In that case damages were asses in relation to furniture and other household items which had ben damaged and destroyed. The plaintiff had made a list of the items that were damaged or lost and wrote was described as a 'price' in relation to each item.

$2900.00 for the lumbar, scaffolding and power box which remained on the owner's premises when the claimant left the construction site.

Does the Claimant Owe the Defendant for Damages for Poor workmanship and Remedying Defects?

(1) Allegations of Poor Workmanship

[38] The defendant alleges that he suffered loss as a result of having to remedy poor workmanship. He particularised his loss as follows:

(a) Breaking of walls to facilitate the placement of plumbing pipes
(b) Remedying uneven floors with copious amount of thinset
(c) Hiring workmen to complete roof; construct and erect the entrance pagoda entirely
(d) Hiring workmen to complete masonry of the windows
(e) Hiring workmen to complete the carpentry with respect to rails
(f) Aesthetic loss from having rooms off-square
(g) Cost difference re use of 6-inch blocks when 8-inch blocks were requested by defendant and quoted by claimant
(h) Diminished structural integrity in respect of use of 6-inch blocks
(i) Diminished structural integrity as block were not filled every third row as required
(j) Building not pipes for air conditioning pursuant to plans
(k) Aesthetic displacement of light positioning
(l) Payment of rent when ought to be in occupation of own premises
(m) Interest payments to bank when project ought to have been finished
(n) Engineer's report

[39] The claimant denied these allegations and stated that he was never made aware of any issues the defendant may have had with workmanship. He says that at all times he complied with the obligations under the agreement to 'erect and build in a substantial and workmanlike manner". He asserts that:

(a) The plumbing was prepared to standard building practices;
(b) Rooms were square off; the person who the defendant retained to do the tiling did it wrong
(c) In relation to blocks, the standard for blocks is for 6 inch blocks on walls and 8inch blocks for foundation;
(d) The floors were level;
(e) Roofing was part of stage 5; and decorative trim was not a part of stage 5 and the defendant had breached the contract at that stage
(f) Windows were never received; frames were received and pinned until windows arrived;
(g) Rails were part of stage 5

The Court of Appeal hld that that evidence even without the support from a qualified valuer was sufficient to enable an award to be made

(h) The blocks were filled in every third row as required and to standard building practices. I blocks were not filled in this was to accommodate plumbing and electrical installations.
(i) Piping for air conditioning is not done on residential premises as the air condition units sits outside and a hole is drilled into the wall to connect inside and outside of the unit. Piping is done for commercial premises
(j) In relation to light positioning, the claimant has no knowledge of that.
(k) The property was insured pursuant to the terms of the agreement
(l) There was no breach of contract on the claimant's part
(m) The claimant has not suffered any loss

. (2) Report of Mr Henderson St. Simon

[40] Mr Henderson St Simon was the expert appointed to determine (1) whether the contractor had completed all the work required up to stage 4 of the project and if not, what was required to complete this stage; (2) whether the work completed by the contractor up to stage 4 was done in a substantial and workmanlike manner; (3) whether up to and including stage 4 the contractor failed to address, or was responsible for issues regarding workmanship which were being complained of by the owner. The report is dated 22nd September 2011.

[41] Mr St Simon opined that stage 4 of the construction had been substantially completed. Except for certain sections noted on examination, Mr St Simon opined that the work was done in a substantial and workmanlike manner and save for sections noted, work was done in accordance with the Antigua and Barbuda Guidelines.

[42] Upon inspection of the structure, Mr St Simon found:

a) The building was not square
b) The approved plan for the foundation indicates that all walls are to be 8" reinforced concrete. The floor plan shows all superstructure walls to be 6" There is nothing in writing that that the interior blocks in the super structure were to be 8"
c) The floor at the entrance foyer inside the kitchen and along the corridor leading to the southern bedroom was not level. This was patently level and require no measurements;
d) One section of the foundation wall inside the basement is not in accordance with building guidelines. It required steel reinforcement;

e) The blocks in one unplastered section of the foundation wall are not level;

f) One section of the foundation wall (within the basement) was not constructed as shown on the foundation plan;

g) One sheet of galvanize was of a different shade of green than others.

[43] Mr Simon pointed out that items (a) to (d) and (e) are not structural problems; that items (a) (c) and (f) are aesthetically unpleasant and that item (f) must be constructed

[44] Mr St. Simon further pointed out that the roofing of the pagoda, the "lagging in" of windows and the completion of the rails are items which are normally completed in the finishing stages.

[45] There is nothing in writing in relation to the piping for air conditioning, reported Mr St Simon. There were provisions in the contract for the owner to make changes. These should have been confirmed in writing and approved by the Engineer, Mr St Simon opined.

[46] References have been made in Mr St Simon's report to the report of Mr Wayne Martin, Engineer. As previously stated, Mr Martin has given no witness statement and was not called to give evidence and be tendered for cross examination thereon.

[47] I accept Mr St Simon's report as being accurate; that although there were defects that required remedying, stage 4 of the construction had been substantially completed; that the work was done in a substantial and workmanlike manner and save for sections noted, work was done in accordance with the Antigua and Barbuda Guidelines.

(2) The Defendant Owner's Claim for Electrician

[48] Under this head, a claim is made for $8,500.00. Counsel for the defendant in her closing submissions submitted that of the $8,500.00 the defendant has proved 'at least $7,029.50'. She referenced page 207 of the trial bundle of documents to prove this claim. Page 207 contains a paper hand writing as follows:

"Nigel James

1—single pole and 3 way switch

$29.50

Vaden Browne

[49] I do not find the claim for has been proved to my satisfaction. I am uncertain as to whether this piece of paper is intended to be a receipt. There is no date, and it is uncertain as to whether Mr Payne sells electrical items or whether he bought them out of pocket from a dealer. I disallow it.

(4)The Defendant Owner's Claim for Plumbing Expenses

[5] Under this head, the claim is for $6000.00. This claim has been pleaded but not proved. I disallow it. The contractor was not allowed to complete. The owner drew down the $145,000 to complete, and he had the retention fee in his hands. I also take into account the report of Mr St Simon where he stated that the completion of each stage is not an exact science; that some of the work detailed in a stage may be finally completed in another stage, while some of the work to be completed in a future stage may be advanced in an earlier stage. From the evidence of the contractor, this is what happened in some instances including stage one.

(5) The Defendant Owner's Claim for Trucking

[51] Under this head, the owner claims $8,000.00. The claim is pleaded but there is nothing to substantiate it. I disallow it. Additionally, it bears repeating that the claimant was not allowed to complete. The owner would have drawn down the $145,000 to complete. Again, I take into account the report of Mr St Simon where he stated that the completion of each stage is not an exact science; that some of the work detailed in a stage may be finally completed in another stage, while some of the work to be completed in a future stage may be advanced in an earlier stage.

(6) The Defendant Owner's Claim for Rent

[52] Under this head, the owner claims the sum of $22,500.00. He seeks to justify this claim by saying in his defence and witness statement that the contractor ought to have completed by March 2009 and as the contractor failed to complete; he (the defendant) had to pay rent of $2.500.00 per month until his residence was sufficiently habitable, that is, from 18th March 2009 to December 2009 – nine months later. During cross examination, counsel for the claimant put to the defendant that when he was in control of the works, he took a longer time to complete the house, and the defendant answered, 'no.' He told the court that even though the building was at the 5th stage of completion he had to go back and do certain things that the contractor did not do. The defendant sought to convince the court that it was the contractor's fault that he did not move in the house until December 2009.

[53] Counsel for the defendant in her written closing submissions, pointed out that the defendant has produced cheques he paid to Mr S. Hadeed totaling $12, 500.00. rent. The effect of this is that the defendant is no longer seeking the sum of $22, 500.00 for rent. Rather he is seeing $12,500.00. The question which arises is whether the defendant is entitled to rent; and if so was nine months a reasonable time within which to remedy defects and complete the dwelling house?

[54] Notably, the defendant has produced several cheques made out to S. Hadeed for the varying dates during the years 2007, 2008 and 2009. No receipts have been tendered relating to them or explaining what the purpose of the cheques. The cheques for 2007 and 2008 cannot possibly be taken into account as these are pre-contract cheques. There are only 2 (copies) cheques payable to S. Hadeed for 2009 being: (1) cheque dated '6/09/09 in the amount $5000; and (2) cheque dated "5/10/09 in the amount of $5000.00. The defendant cannot be expected to mulch the claimant if he chooses to terminate the contract and failed to complete the building within a reasonable time after January 2009.

(7) Discussion and Finding on the Issue of Rent

[55] The evidence before the court is that the owner took physical possession of the incomplete building in January 2009. The claimant testified that in January when he went to work, he met other persons on the construction site. I believe him. As previously stated, it emerged in cross

examination of the defendant that he drew down the stage 5 payment of $145,000.00 from the bank in January 2009. That date assumes importance.

[56] I do not have any suggestion from counsel as to how long the house should have taken to complete after the defendant terminated the contract and took physical control of the project. Having taken physical control of the project in January 2009, and having terminated the contract before the completion date had expired, and there being no suggestion that it was impossible for the claimant to complete within the time specified in the contract, (March 2009), it is doubtful whether it is reasonable for the court to make an award for rent for the period claimed and for the amount claimed. Even if an amount for rent were payable to the defendant, the defendant ought to have completed the project within a reasonable time. By his own evidence, he received the 5th stage drawdown of $145,000.00 from the bank in January 2009, (the same time he terminated the contactor).

[57] All that being said, I consider, that there were defects which would have taken extra time to remedy. However, there being no suggestion as to what is a reasonable time, within which to remedy defects and complete construction, the court will consider the end of May 2009 to be the time when construction of the house together with remedying the defects, would have been completed. Accordingly, the court will consider the end of May 2009 to be the period for which damages will be awarded, (thought it may have actually taken the defendant a longer time to remedy the few defects and complete the works left undone and to make the House habitable. This computes to $10,000 (being $2,500.00 x 4).

(8) The Defendant Owner's Claim for Bank Interest

[58] The defendant claims the sum of $22,500.00 for bank interest. He complains of having to pay bank interest of $22,500.00 on his construction loan without having the use of his house. I find that to also compensate the defendant for bank interest payments he made and for alternate accommodation would be duplicative. Aside from that, I do not agree that the claimant failed to complete; the claimant did not fail to complete; the evidence is that the claimant was terminated, and debarred from completing. There were some defects. But the defendant did not give the claimant an opportunity to remedy the defects. The claimant says that the defendant did not complain to him about any defects. I accept his evidence.

[59] The court finds that the claim for bank interest has no merit, and no authority was cited in support of that claim

(9) The Defendant Owner's Claim for Insurance

[60] Under this head, the owner claims $8,000.00. In his amended defence, he averred that the claimant failed to properly and completely insure the property pursuant to the contract and he had to pay the difference on two separate occasions. In his defence to counterclaim, the claimant averred that the property was insured pursuant to the terms of the agreement between the parties. He did not elaborate.

Findings on the Insurance Issue

[61] Under Clause 13 of the construction agreement, the contractor agreed to keep the building insured in the name of the owner during the course of construction. It is acknowledged that the claimant paid the sum of $875.00 towards the initial cover note quoted for $2,625.00. In the written closing submissions, counsel for the defendant pointed out that of the $8000.00 claimed, the defendant has proved payment of $4, 382.19. There is documentary evidence showing that the defendant on the 27th March 2009 paid to Sagicor Insurance the sum of $3,271.50 for the period 27th November 2008 to 27th March 2009. It is unclear to me as to how counsel arrived at the figure of $4,382.19, which she says the defendant has proved. Counsel for the claimant has not offered any submissions on this issue, and it is unclear from the evidence elicited from the claimant as to what period he meant when he said that the property was insured pursuant to the terms of the agreement between the parties. In as much as the defendant has produced receipts for the sum of $3, 271.50 for a period which includes the course of construction, the court awards the defendant the said sum for insurance for the period November 2008 to March 2009.

(10) The Defendant Owner's Claim for Materials

[62] Under this head, the defendant owner claims the sum of $18,000.00. Counsel for the defendant in her written submissions purports to explain and substantiate the claim for materials. Submissions are not evidence. This claim for materials that counsel is seeking to justify in her closing submissions was not investigated at trial at all. What counsel seemed to have done was to lump materials purchased for finishing the work with materials for remedying defective work, and has produced copies of invoices and receipts which counsel says total $128,218.62. Then, in essence,

counsel proceeded to give evidence in her closing submissions to justify the claim of $18,000.00 for materials

[63] Here is what counsel has put in her closing submissions on the issue of materials

> "61. This $128,218.62 sum does not include the actual sum for the windows and doors of $46,224.15 that was quoted by Luke Woodwork Shop, and in respect of which $8,800.00 was actually paid as a deposit. While he has not exhibited proof of expenditure of the balance, given the learning in the **Binder** case … the court can take judicial note that it must have been paid as the windows and doors have been installed."
>
> "62 This would prove an expenditure of $181,472,27. This does not include labour for installation of any completed works. By the Claimant's own estimate, labour on finishing exclusive of plumbing, electrical and sewerage would have been $64,500.00. This would tally $245,972.27. The Claimant having already received $500,000 from the Defendant, the Defendant would have been left with $205,429.32, leaving him with a $40,542.95 deficit. The Court is therefore invited to find that the Defendant has proven the sum as claimed of $18,000.00"

Discussion and Findings on the Materials Issue

[64] I must honesty confess that I am unable to see counsel's rational for her assessment, or how counsel arrived at the figure of $18,000.00, or what exactly that $18,000.00,is associated with. As I have said, these issues were not canvased or investigated at trial. That having been said, it cannot be denied that rectifying defective work will attract additional cost, and generally, the owner would be entitled to recover from the contractor the cost of rectifying the defects, such costs to be assessed at the time it was reasonable for him to carry out the work. He was not given an opportunity to remedy the defective work.

[65] The defendant owner in his witness statement states that he was present at the fifth site visit[9] and pointed out the discrepancies he saw. He said that it was during the last visit that he fully appreciated the extent of the contractor's poor workmanship and unfinished work, and there and then made enquiries about the structural integrity of the building. He did not state the date of the fifth site visit, but it appears that the defects became apparent sometime in or around June 2009, after he had terminated the contract.

[9] He gave no indication of the date of this site visit.

[66] Reference was again made to a Report by Wayne Martin dated 17th June 2009[10] in which it is said he made certain assertions and opined as to certain matters. It must be remembered that Mr Martin has not been called to put any report into evidence and to be cross-examined. It also bears repeating that Mr St Simon reported that except for certain defects (which he pointed out), the building was constructed in a workmanlike manner and in accordance with Antigua and Barbuda Guidelines. Further, it bears repeating that I accept Mr St Simon's report as accurate.

[67] What the defendant contractor is entitled to recover is the cost of rectifying the defects. I have not seen any report apart from the submissions put forward by counsel for the defendant, as to what is the estimated cost of remedying the defects.

[68] That said, I consider that the contract price was $705,429.32. Of that sum, the claimant received $500,000.00. It means that the defendant would have had available and at his disposal the sum of $205,429.32. My assessment is that included in the $205, 429.32 would be monies which the defendant had held back to purchase windows, and the balance in his hands would have cancelled out the amount he allegedly spent on materials.

[69] I agree that materials would have had to be purchased to remedy defective work, but I am not satisfied that the defendant owner has sufficiently proved this expenditure It bears repeating that it is trite that a claimant who seeks a money judgment 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.[11] It is for the defendant owner (the counter claimant in this case) to satisfy me that he expended $18,000.00 on materials associated with defective work. I am not satisfied. On the contrary, it appears that this separate amount of $18,000 for materials is well accounted for in the sums remaining in the hands of the defendant owner under the contract.

The Defendant's Claim for Fraud

[70] The court finds that there is no or no sufficient evidence upon which the court can make a finding that the clamant has been involved in, or is guilty of any fraudulent activity in relation to the documents obtained or not obtained from the DNC. In any event the court is of the view that the

[10] I have not seen the June 2009 report, and as said before Mr Martin was not called.
[11] Per Saunders J.A. in Peter Crane et al vs Colin Walters, Civil Appeal No 11 of 2001, paragraph 36

way the allegation of fraud, is pleaded does not give the defendant standing to bring it. The court dismisses that claim for want of standing and for lack of evidence in proof.

[71] In all the circumstances, I give judgment for the claimant as follows:

(i)	Amount due for cost overruns	$ 15,000.00
(ii)	Amount due for Lumbar	$ 2,000.00
(iii)	Amount due for Power Box	$ 400.00
(iv)	Amount due for Scaffolding	$ 500.00
		$ 17,900.00
Less	Amount due for Rent	$ 10,000.00
Less	Amount due for Insurance	$ 3,271.50
		$ 13, 271.50
	Net due to Contractor	$ 4, 628.50

[72] I am grateful to counsel for the defendant owner for her helpful submissions.

Pearletta E. Lanns

HCJ {Ag]

By the Court

Registrar