EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCVAP2015/0004

BETWEEN:

[1] YATES ASSOCIATES CONSTRUCTION COMPANY LTD
[2] CHRISTINA YATES

Appellants

and

OIL NUT BAY INC

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Mr. Terrance Neal with him Ms. Elizabeth Ryan for the Appellants
Mr. Gerard Farara, QC with him Mr. James Morin for the Respondent

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2015: September 30;
2018: October 5.

Civil appeal – Building contract – Fixed price contract – Bill of quantities contract – Breach of contract – Interpretation of contract – Construction agreement – Variations and Extras in building contracts – Defective construction – Costs of defects – Special damages -- Consequential loss – Time having been made of the essence – Appeal against learned judge's findings of fact – Approach of appellate court to learned judge's findings of fact and findings of credibility – Expert evidence – Defamation – Whether defamation claim can be maintained by a company

The first appellant, Yates Construction Company Ltd ("Yates") is a company engaged in construction works incorporated under the laws of the Territory of the Virgin Islands. The second appellant, Christina Yates ("Ms. Yates"), is the managing director of Yates. The

respondent, Oil Nut Bay Inc ("Oil Nut Bay"), is a developer engaged in construction projects at Oil Nut Bay, Virgin Gorda in the Territory of the Virgin Islands.

Yates and Oil Nut Bay entered into a written agreement ("the Agreement") whereby Yates agreed to construct a villa for a third party on a parcel of land situated at Oil Nut Bay for the sum of $2,650,000.00 USD. The Agreement was signed by the principal of Oil Nut Bay, Mr. David Johnson ("Mr. Johnson") and Ms. Yates. The Agreement required Yates to immediately commence construction with a completion date of 1st March 2011. The project was not completed by 1st March 2011 and a certificate of occupancy was not issued by the BVI Building Authority until 8th July 2011, four months after the stipulated date of completion. Between May and June 2011, Oil Nut Bay and Yates agreed a list of works (referred to by the parties as a "punch list") to be carried out on the house which Yates immediately began undertaking.

On 15th August 2011, Oil Nut Bay provided Yates with a construction report compiled by DSR Engineering outlining alleged defects in construction. Yates completed much of the work on the agreed list in early November 2011 and indicated that they had completed all the items which they classified were within their control to complete. Oil Nut Bay commissioned a re-inspection of the house. Upon re-inspection, it was observed that there remained more than 150 items outstanding which required completion or remedial work.

Yates submitted to Oil Nut Bay its final invoice for construction done on the villa on 18th November 2011 and informed Oil Nut Bay that it would take legal action to obtain payment, unless it received payment. Oil Nut Bay did not comply with Yates' demand for payment but instead filed a claim on 18th December 2011 for damages for breach of contract by Yates. Oil Nut Bay also brought a defamation claim against Ms. Yates in respect of a comment she made to a prospective purchaser about Mr. Johnson. In response, Yates filed a counterclaim for the amount outstanding on its 18th November 2011 invoice.

The learned judge allowed Oil Nut Bay's claim and Yates' counter-claim in part and in doing so made various findings of fact. The parties, being dissatisfied with the judgment, have both appealed and have filed several grounds of appeal challenging the learned judge's findings.

Held: allowing the appeal in part to the extent that the learned judge erred in awarding $100,000 to Oil Nut Bay in respect of the costs of remedying the defects in workmanship and in failing to grant Ms. Yates costs on the dismissal of Oil Nut Bay's defamation claim against her for damages; dismissing the counter-appeal; making the costs orders at paragraph 170 of the judgment, that:

1. The Schedule in this case was no more than a guide to assist the parties in valuing variations and was not intended to have any effect on the total home cost provided for in clause 3 of the Agreement. The characterization of the contract as a "lump sum contract" by the second appellant, Ms. Yates does not suggest that the Agreement was a bill of quantities contract. The learned judge was correct to find that the Schedule did not form part of the Agreement and that the Agreement

was a fixed price contract. The learned judge's finding that what was reduced to writing by the parties constituted the entire Agreement and amounted to a fixed price contract cannot be impugned.

Ian Norman Duncan Wallace, **Hudson's Building and Engineering Contracts** (11th Edn, Sweet & Maxwell 2007) applied.

2. In order for the Court to allow certain variations to be allowed, the claimed variations must be examined and proved to be indisputably necessary to complete the whole work. In relation to the variations claimed, the tiling and counter tops costs are not referable to any possible variation but rather due to the cost of the material selected. The learned judge's findings on these sums are correct and as such the tiling and counter tops do not amount to a variation. The sum for parking and parkways cannot be substantiated as a variation without evidence and as such the claim for variation on that is disallowed. In relation to stonework, drop ceiling, painting, IPE walkway, columns to beams, beams, main floor and system beams, these items would fall within the scope of the work for which the total home cost was payable. There is nothing to suggest that the learned judge made a material error of law or made a critical finding of fact which has no basis on the evidence for an appellate court to interfere with her findings of fact. The variations claimed have not met the threshold required and were not necessary to complete the whole work.

   Williams v Fitzmaurice [1858] 3 H & N 844 applied.

3. The costs of remedying the defects in workmanship fall within the category of special damages. It is trite that special damages must be specifically pleaded and strictly proved. The learned judge made a critical finding of fact which has no basis in the evidence in arbitrarily awarding $100,000.00 to Oil Nut Bay in respect of the costs of remedying the defects in workmanship. There is no basis on which the learned judge could have arrived at that sum based on the evidence.

4. Yates was given ample opportunity to remedy the defects. The appellant has provided no evidence of any attempt made to remedy any defect for which they did not require owner materials to rectify. The findings of the learned judge were well founded, and Yates does not have an unqualified right to re-enter and remedy defects. Yates has failed to prove that the learned judge made a critical finding of fact which has no basis in the evidence, or that there was a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, which justifies appellate interference with the findings of fact made by a judge.

5. The law is that an expert giving evidence must be impartial and independent and limit his evidence to his field of expertise. Based on the reasons articulated by the learned judge for disregarding the evidence of Mr. Rosa, it cannot be argued that the learned judge's finding was plainly wrong or that she did not take proper

advantage of having seen the witnesses or that she failed to appreciate the weight and bearing of the circumstances admitted and proved.

Part 32 Civil Procedure Rules 2000 applied.

6. The law is that the parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement. It was incumbent on Oil Nut Bay to indicate to Yates that variation, so that Yates could make alternative arrangements for the transportation of its employees. As Oil Nut Bay failed to do so, there is no basis for which this Court ought to interfere with the findings of the learned judge.

   Cowey v Liberian Operations Ltd [1966] 2 Lloyd's Rep. 45 applied; Cliff Williams et al v The Moorings Limited BVIHCV2009/0083 (delivered 16th December 2010, unreported) applied.

7. Where time is not of the essence in the contract but a date for completion is specified, the employer will be entitled to damages upon the contractor's default. Where the contract is silent as to the date of completion, the contractor must complete the work within a reasonable time. If, by reason of a breach of contract or by reason of extra work ordered by him, the employer prevents the contractor from completing the work by the date fixed, then unless the contract clearly provides that the contractor shall take the risk of prevention by such extra work, the employer cannot insist upon completion by the date fixed or within the period limited, but only for completion within a reasonable time. The onus of proving that the delay has been caused by some act or breach of contract on the part of the employer is on the contractor. It was open to the learned judge on the evidence before her to conclude that there was no unreasonable delay based on the parties' agreement as to extras or variations and to deny Oil Nut Bay damages for Yates' breach of the Agreement on that basis.

   Halsbury's Laws of England (Fourth Edition) applied.

8. It was open to the learned judge on the evidence to find that despite not adhering to the requirement of obtaining the written orders, that there was an implied promise to pay as Oil Nut Bay could have stopped the construction to ensure that all was in order but took no steps except limited inquiries. Not only was Oil Nut Bay aware that Mr. Formsma had requested changes and took no steps to challenge his authority to do so, but also that Oil Nut Bay had no interest in ensuring that the change orders were prepared in compliance with clause 5 of the Agreement.

9. The learned judge properly concluded from the evidence of the parties' dealings that Mr. Formsma was an agent. Having found that Mr. Formsma was making

changes of which Oil Nut Bay was aware and made no steps to stop Yates from taking his instructions, he had ostensible authority to contract.

10. Oil Nut Bay could not enforce the agreed completion date as there had been approved extras or variations. The learned judge correctly observed at paragraph 93 of her judgment that as the Agreement was a fixed price contract, the balance of the contract price was as a matter of law due and payable to Yates, subject to any deduction in respect of damages incurred for breach of contract. There is nothing in the Agreement to suggest that a failure by Yates to complete construction within the contract period would allow Oil Nut Bay to withhold payment of the contract price once construction had been completed. The learned judge properly evaluated the evidence before her and properly articulated her reasons for concluding as she did.

11. While a company may maintain an action of libel or slander which were uttered to injure its reputation, in this case the words uttered reflected solely upon Mr. Johnson, owner of Oil Nut Bay and not Oil Nut Bay itself. There is no indication that the learned judge failed to identify the principles of law in relation to defamation or that she failed to properly apply them. Therefore, there is no reason for this Court to interfere with the learned judge's findings.

    Gatley on Libel and Slander 10th Edn applied; Express Data Systems Ltd v Vincent Alexander SVGHCV119/1998 distinguished; Bargold v Mirror Newspapers [1981] 1 NSWLR 9 distinguished; **D&L Caterers Ltd. v D'Ajou** [1945] KB 364 distinguished.

12. The court has discretion as to whether costs are payable by one party to another and the amount of those costs. If the court makes an order on costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but the court may make a different order. In deciding what order to make about costs, the court will have regard to all the circumstances including, among other things, whether a party has succeeded on part of its case, even if that party has not been wholly successful. The court may make an order that a party must pay a proportion of another party's costs. It remains appropriate to give "real weight" to the overall success of the winning party.

    Civil Procedure Rules 2000 applied.

JUDGMENT

[1] BAPTISTE JA: This is an appeal brought by Yates Associates Construction Company Ltd. ("Yates") and Ms. Christina Yates ("Ms. Yates") and a counter-appeal brought by Oil

Nut Bay Inc. ("Oil Nut Bay") challenging several aspects of the judgment of the learned trial judge in a building contract dispute. The contextual background is set out below.

Factual Background

[2] The first appellant, Yates Construction Company Ltd., is a company engaged in construction works duly incorporated under the laws of the Territory of the Virgin Islands. The second appellant, Ms. Yates, was at all material times the managing director of Yates Construction. The respondent, Oil Nut Bay, is a developer engaged in construction projects at Oil Nut Bay, Virgin Gorda in the Territory of the Virgin Islands.

[3] On 23rd March 2010, Yates Construction and Oil Nut Bay entered into a written agreement whereby it was agreed that Yates Construction would construct a villa ("BV3") for a third party on a parcel of land known as Lot 3 situated at Oil Nut Bay for the sum of $2,650,000.00 USD ("the Agreement"). The Agreement was signed by the principal of Oil Nut Bay, Mr. David Johnson ("Mr. Johnson") and Ms. Yates.

[4] Clause 2 of the Agreement provided as follows:

> "Construction Costs. Yates shall be solely responsible for all construction costs, including (i) hard construction costs, such as payment for all labour, materials, equipment, tools, heat, utilities and transportation, not for workers ONB ferry service for workers, necessary for the completion of the Home in a good workmanlike manner; (ii) exterior improvements including swimming pool, pond, driveway, ~~bocce ball court~~ and walkways; and (iii) all soft costs incurred in connection with the construction of the Home, including, without limitation, insurance premiums, survey costs, license, permit and all other fees should have been paid already and costs payable to any governmental authority having jurisdiction, for all the construction of the Home."[1]

[5] Clause 3 of the Agreement provided that the total construction costs was to be $2,650,000.00 with construction to be carried out in accordance with the plans and specifications and elevation attached to the Agreement as Exhibit B all of which was to be subject to the final approval by the owner of the house. However, the plans were

[1] Clause 2 including handwritten amendments to the Agreement.

not attached to the Agreement and construction commenced based on certain drawings which had been provided by Oil Nut Bay to Yates.

[6] The construction costs were based on a Schedule totaling $2,650,000.00 which had been compiled by Yates on 24th February 2010 using certain plans and specifications provided by Oil Nut Bay. Further, since the plans provided by Oil Nut Bay were incomplete it became necessary in preparing the costing for the construction for Yates to make allowances for the following items because the cost of these items was not yet known: (i) pump room; (ii) doors; (iii) Rocky Mountain hardware; (iv) windows; (v) carpentry; (vi) lighting, fixtures, fans & dimmer controls; (vii) miscellaneous items; (viii) stonework; (ix) countertops.

[7] Clause 5 of the Agreement provided for changes to be made to the plans upon the execution of a written change order by Oil Nut Bay and Yates specifying the change and its cost. The costs of any changes requested by Oil Nut Bay after the plans and which was approved by the ultimate owner of the house was to be paid to Yates together with an additional 15%.

[8] Clause 6 of the Agreement required Yates to immediately commence construction with a completion date of 1st March 2011 and warranted the construction to be performed in good workman like manner and that all allowances and specifications provided by Yates will be adequate to complete all aspects of the construction. Time was not initially made of the essence in the Agreement and no penalties for a failure to complete by the completion date were stipulated.

[9] The parties agreed to make progress payments of $200,000.00 per month towards the total home costs. Yates commenced construction in March 2010 and the first progress payment of $200,000.00 was made on 3rd May 2010. During construction, there were several changes to the plans and specifications some of which resulted in an increase in the cost of construction. There was a dispute between the parties as to whether these increased costs of construction could properly be regarded as extras or

variations, as well as a dispute as to whether the Agreement was a fixed price contract or a bill of quantities contract.

[10] The project was not completed by 1st March 2011 and a certificate of occupancy was not issued by the BVI Building Authority until 8th July 2011, four months after the stipulated date of completion. Between May and June 2011, Oil Nut Bay and Yates agreed a list of works (referred to by the parties as a 'punch list') to be carried out on the house which Yates immediately began undertaking.

[11] On 15th August 2011, Oil Nut Bay provided Yates with a construction report compiled by DSR Engineering outlining alleged defects in construction. Yates completed much of the work on the agreed list in early November 2011 and indicated that they had completed all the items they classified were within their control to complete. Oil Nut Bay commissioned a re-inspection of the house. Upon re-inspection, it was observed that there remained more than 150 items outstanding which required completion or remedial work. However, Yates was never provided with a copy of the Re-Inspection Report.

[12] Yates submitted to Oil Nut Bay its final invoice in the sum of $1,153,715.16 for construction done on the villa on 18th November 2011 and informed Oil Nut Bay that it would take legal action to obtain payment, unless it received payment by 19th December 2011.

[13] At the time of the submission of the final invoice, Oil Nut Bay had paid a total of $1,920,000 to Yates in respect of the villa, the last payment being made on 1st March 2011. Oil Nut Bay did not comply with Yates' demand for payment but instead filed a claim on 18th December 2011 for damages for breach of contract by Yates. In its claim, Oil Nut Bay sought the following relief:

(i) The sum of USD$191,227.08 as the cost of remedying each item contained in the Re-Inspection Report.

(ii) The sum of USD$105,000.00 in respect of the transportation costs incurred by Oil Nut Bay from and after the completion date to transport Yates' employees and/or subcontractors to the house.

(iii) The sum of USD$80,134.00 as the cost of repairing defective work to the pool and replacing the pool and koi pond pumps at the house.

(iv) The sum of USD$122,169.69 for contract credits owed to Oil Nut Bay under the Agreement.

(v) The sum of USD$257,267.44 for sums paid by Oil Nut Bay for materials that were to be paid for by Yates under the Agreement.

(vi) Damages for breach of contract.

[14] Oil Nut Bay also brought a defamation claim against Ms. Yates in respect of a comment she made to a prospective purchaser about Mr. Johnson and the speed with which he wrote checks as well as comments made in the local newspaper in respect of the dispute between Yates and Oil Nut Bay and how said dispute would impact on Yates' employees.

[15] In response, Yates filed a counterclaim for the amount outstanding on its 18th November 2011 invoice.

The Learned Judge's Decision – Findings of Fact

[16] The learned judge found that the Agreement, having been considered with reference to its objects and the whole of its terms, was a fixed price contract with a determinative price for the construction of the entire building. The learned judge expressed at paragraph 92 of the judgment that:

> "[92] This Court is convinced that the First Defendant [Yates] hedged its bets in the hope that it would be the contractor of choice allowed this "sweetheart deal" to be signed favourable to the First Claimant [Oil Nut Bay]. However, when the relationship started to deteriorate and it was apparent that the First Defendant had lost its edge, that it then sought to

> place another interpretation on the Agreement and rely on the suggestion, that 'if the Agreement did not say it was a fixed price contract by the use of those words then it could not amount to a fixed price contract'."

[17] The learned judge then considered whether provision was made for variations in the Agreement and in what manner variations were to be permitted. She found that the parties per clause 5 of the Agreement agreed the manner in which variations could be undertaken. The learned judge found that some of the items claimed could be considered a variation or extra work as Oil Nut Bay knew that variations had occurred, ordered several of them, and knew that the owner's agent had done so as well and nevertheless allowed Yates to expend sums on them then take the benefit of that expenditure by claiming in the end that the work was not properly ordered. The learned judge awarded to Yates the sum of $190,461.37 in relation to the extras or variations carried out.

[18] The learned judge, having found that the Agreement was a fixed price contract, concluded that Oil Nut Bay was not entitled to claim for contract credits of any nature.

[19] In relation to the claim for the cost of remedying each item contained in the Re-Inspection report, the learned judge went on to find at paragraphs 174 -175 of the judgment that:

> "[174] I believe that on a balance of probabilities that there are defects at least in the region of the admitted 90 as suggested by the First Defendant [Yates] but that the figure of $10,000.00 would be woefully inadequate to remedy the same in an admittedly luxury villa, while the figure as claimed of $191,127.08 is greatly excessive.
>
> [175] What is clear to me is that in looking at this cost as claimed that it had to include the costs for any defects to the koi pond and swimming pool and those claims could not have been separate and distinct as pleaded before the Court. Thus, I award the sum of $100,000.00 for all remedial and completion work that have to be undertaken on BV3 inclusive of any action to be taken on the koi pond and swimming pool."

[20] The learned judge allowed Oil Nut Bay's claim in respect of materials it paid for that were to be purchased by Yates based on an admission by Yates and awarded $252,967.44.

[21] In respect of transportation costs incurred after the completion date, the learned judge disallowed the claim. The learned judge found that it was incumbent on Oil Nut Bay, as the party responsible for providing the transportation service to give Yates notice of any variation of same. Oil Nut Bay having failed to do so, the court found that the term could not be unilaterally varied to the detriment of Yates.

[22] The learned judge held that Oil Nut Bay was not in breach of its obligation to allow Yates an opportunity to rectify any defects for which it was liable. The learned judge found that Yates did not have an unqualified right to re-enter and remedy defects where it was apparent that Oil Nut Bay having given them the opportunity had lost confidence in Yates' willingness or ability to remedy the defects satisfactorily.

[23] On the defamation claim, the learned judge found that the words spoken to the prospective purchaser by Ms. Yates were capable of being defamatory but were in fact defamatory of Mr. Johnson only. As the words spoken were incapable of being defamatory to Oil Nut Bay itself, the learned judge found that Oil Nut Bay had no locus standi to bring the claim against Ms. Yates, and therefore dismissed the defamation claim.

[24] In summary, the relevant portion of the learned judge's order is as follows:

> "<u>On the Claim by First Claimant:</u>
> 1. The sum of $191,227.08 for the cost of remedying defects is denied and the Court awards the sum of $100,000.00.
> 2. The sum of $105,000.00 for transportation costs is denied.
> 3. The sum of $80,134.00 for the repairs to the Koi Pond and pool are denied such costs to be included in the sum awarded at paragraph No. 1 herein above.
> 4. The sum of $122,169.69 as contract credits is denied, the Court having found that the parties had in fact executed a fixed price contract.
> 5. The sum of $257,267.44 for sums paid for materials and supplies is denied and the court awards the sum of $252,967.44.
> 6. Damages for breach of contract is denied.
> 7. Damages for defamation is denied.
> 8. Costs to the First Claimant for partial success on the claim are to be prescribed costs.
> …
>
> <u>On the Counterclaim:</u>

1. The sum of $1,130,197.04 for works done under the Agreement is denied and the First Defendant is awarded the sum of $190,461.37 in relation to the extras or variations carried out, together with the balance of all sums due under the Agreement of the original contract price inclusive of all retention sums less the payments made on behalf of the First Defendant in the sum of $252,967.44 as awarded.
2. Costs to the First Defendant for partial success on the counterclaim to be prescribed costs.
3. The claim for interest is denied."

[25] Yates, being dissatisfied with certain aspects of the decision of the learned judge, appealed to this Court. The grounds outlined succinctly in the notice of appeal raise the following issues:

(i) Whether the construction agreement between Yates and Oil Nut Bay was a fixed price contract.

(ii) Whether the learned judge erred in denying Yates' claim for variation or extras for work done at the request of Oil Nut Bay in the sum of $629,820.51 and awarding instead the sum of $190,461.37.

(iii) Whether the learned judge erred in arbitrarily awarding $100,000 to Oil Nut Bay in respect of the costs of remedying the defects in workmanship.

(iv) Whether the learned judge erred in making deductions in the amount of $252,977.44 in respect of materials and supplies paid for by Oil Nut Bay without the consent of Yates despite finding that the Agreement between the parties was a fixed price contract.

(v) Whether the learned judge erred in failing to grant Ms. Yates costs on the dismissal of Oil Nut Bay's defamation claim for damages against her;.

(vi) Whether the learned judge's finding that Oil Nut Bay was not in breach of its obligations under clause 9 of the Agreement to allow a reasonable opportunity to rectify any defects in workmanship was not supported by the evidence.

Approach of Appellate Court to Findings of Fact

[26] At the outset, it is important to state that the grounds of appeal give rise to issues of fact. When an appeal concerns findings of fact of a trial judge, the Court is guided by the following approach outlined in McGraddie v McGraddie and another:[2]

> "It was a long settled principle, stated and restated in domestic and wider common law jurisprudence, that an appellate court should not interfere with the trial judge's conclusions on primary facts unless satisfied that he was plainly wrong …"

[27] Further, in Watt or Thomas v Thomas[3] Lord Thankerton observed that:

> "When a question of fact has been tried by a judge without a jury and it is not suggested that he misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound. The appellate court is, however, free to reverse his conclusions if the grounds given by him therefore are unsatisfactory by reason of material inconsistencies or inaccuracies or if it appears unmistakably from the evidence that in reaching them he has not taken proper advantage of having seen the witnesses or has failed to appreciate the weight and bearing of the circumstances admitted and proved."

[28] Additionally, in Central Bank of Ecuador and others v Conticorp SA and others[4] the court stated that:

> "…any appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere. Some conclusions of fact are, however, not conclusions of primary fact, but involve an assessment of a

[2] [2013] 1 WLR 2477.
[3] [1947] AC 484.
[4] [2015] UKPC 11.

number of different factors which have to be weighed against each other…"

[29] Further, Lord Reed in Henderson v Foxworth Investments Limited and another[5] stated:

> "It follows that, in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

[30] Additionally, in Beacon Insurance Company Limited v Maharaj Bookstore Limited,[6] the Board held that:

> "The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence…
> …
> Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole."

[31] In contemplation of the above considerations, I now turn to address the first issue in the appeal.

Whether the Agreement is a fixed price or bill of quantities contract

[32] The appellants' written submissions helpfully address each of the six grounds advanced in this appeal. Firstly, one of the main areas of dispute between Yates and Oil Nut Bay is whether the agreement was a fixed price contract requiring the payment of a fixed price regardless of the costs incurred in construction of the villa, or a bill of quantities contract where payment is based on the actual costs incurred in construction.

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[5] [2014] UKSC 41.
[6] [2014] UKPC 21.

[33] The gravamen of Yates' submissions is that the learned judge in her judgment, although correctly defining "fixed price contract" and correctly citing the legal principle adopted in the interpretation of such contracts, failed to consider all the surrounding circumstances when interpreting same, in particular, the Schedule which formed the basis upon which the contract price was arrived at between the parties, as well as the abundance of evidence in the matter which clearly showed that both parties expected payment for work which exceeded the allowances in the Agreement.

[34] Yates contends that looking at the circumstances and the evidence, the contract could not be a fixed term contract. On the understanding of the parties and what they contemplated before and after the works, it was a bill of quantities contract. The two main documents were the contract and the schedule. The schedule was not referred to in the contract. It was not attached to the contract. Yates further contends that by claiming a credit, it was not a fixed price contract, as on a fixed price contract, one does not claim a credit. Yates submitted that the schedule dictated the relationship of both parties and submits that it was a bill of quantities contract with a schedule. A schedule is not determinative of it being a bills of quantity contract. It is merely a guide.

[35] Yates contends that the contract price was not arrived at in isolation but was based on a Schedule created by it and accepted by Oil Nut Bay. Further, that this Schedule was also placed by Oil Nut Bay in its list of documents as part of the Agreement, so the only logical inference was that Oil Nut Bay considered the Schedule to be part of the Agreement at the time of the filing of the action.

[36] Yates submits that the documentary evidence prior to the execution of the Agreement also made it abundantly clear that the intention of the respondent was that the "contract will be tied to a Schedule" and that allowances were made for certain items "until exact specifications is defined". Additionally, Yates submits that even on the date the Agreement was signed, the evidence from Oil Nut Bay was that the contract price included allowances for several items because the exact specifications were unknown.

[37] Yates stated in its submissions that after the execution of the agreement, Oil Nut Bay represented to it that "…the final product/measurements is what Yates Construction will be billing us on". Yates contends that this statement was a clear representation that Oil Nut Bay considered the agreement to be a bill of quantities contract and not a fixed price contract. This interpretation was confirmed by Oil Nut Bay in its letter dated 28th April 2010 to Yates. The letter states as follows:

> "Jeff Null and I would like to have a meeting with you and your business partners at your office to discuss the allowances and change orders on BV3 before you submit any invoices. [Our goal is to understand what you have spent to date on those items which were called out in the contract as allowances. We had given the owners rep (Ryan Forsmsma) the allowances during the construction phase and we would like to reconcile what has been paid for by ONB and Yates. Please let me know when you can have the documentation available and we can set a time to meet next week."

Yates contends that the contents of this letter prove that Oil Nut Bay represented to it that the Schedule formed part of the Agreement. This letter attached the Schedule that had been sent to the owner's representative reflecting the allowances on the project and was an updated version of the original Schedule. Further, that up until 20th September 2010, almost six months after the execution of the Agreement, both parties were still relying on the Schedule as the basis of costing for the various items of construction.

[38] Yates argues that Oil Nut Bay also purchased certain items which were the responsibility of Yates under the Agreement and made deductions for reimbursement based on the Schedule. Yates highlights that under cross-examination, the representative of Oil Nut Bay, while contending that the Schedule was not part of the Agreement, could not explain why the exact amount allocated in the Schedule for the items purchased by it were deducted and the Schedule was attached as part of the documents in support of these deductions.

[39] Yates contends that the learned judge's finding that it had "entered into the contract for BV3 in the hope that it would have been contractor of choice for Oil Nut Bay for the anticipated home to be built there" and that it was only "when the relationship started

to deteriorate and it was apparent that the First Defendant had lost its edge, that it then sought to place another interpretation on the Agreement" and rely on the suggestion that "if the Agreement did not say it was a fixed price contract by the use of those terms then it did not amount to a fixed price contract" is not supported by the evidence. This, Yates submits, is because the Schedule included the basis upon which the contract price was agreed upon and whether or not Yates entered into an unprofitable agreement the costing for the items of construction would still have to be based on the Schedule since the contract price was not arrived at in isolation.

[40] Further, throughout the construction project, Yates' position was that the Agreement was a bill of quantities contract which was linked to the Schedule and this was also what Oil Nut Bay represented as concluded from documentary evidence in the matter. Also, the evidence suggests that the first time representatives of Oil Nut Bay used the term "fixed contract" was on 4th August 2011 after the relationship between the parties had broken down. Yates says that by this time Oil Nut Bay had taken legal advice in the matter and was preparing to commence litigation, having commissioned a construction expert to provide an inspection report which was prepared on 12th August 2011, 8 days after the use of the term "fixed contract". Yates highlights that it refuted the assertion that the Agreement was a fixed price contract by its letter dated 8th August 2011.

[41] Yates rendered its final invoice on the basis of a bill of quantities contract in November 2011 where certain credits were given to Oil Nut Bay in respect of works which were completed at a lower price than contained in the Agreement while claims were made by Yates for construction costs which exceeded the allowances or price in the contract. It is submitted that Oil Nut Bay accepted these credits and demanded further credits in its Statement of Claim and witness statements, which Yates contends, was only possible to obtain if the Agreement was a bill of quantities contract.

[42] Oil Nut Bay's skeleton argument addresses each of the grounds of appeal in significant detail. On this issue, it contends that the learned judge was correct in finding that the

Agreement constituted a fixed price contract. The crux of its submission is that the judge, having referred to the presumption in law that what is reduced to writing as between the parties is intended to comprise the entire agreement as between them, was correct in finding that the total home cost of $2,650,000 represented the final agreed figure.

[43] Oil Nut Bay claims that Yates unilaterally changed aspects of the design of the home resulting in increased building costs, and that they had enough information before it to quote for the fixed price arrived at in the Agreement. It is submitted that the court was correct in finding on the weight of the evidence that it was not convinced that Yates did not deliberately, at the time, allow the Agreement to remain intact with regard to the total home cost. Oil Nut Bay further submitted that Yates did operate throughout the period of construction on the basis that it was a fixed price contract.

[44] Oil Nut Bay contends that Yates' submission that the learned judge erred in not properly considering the Schedule is without merit. It is submitted that there were no plans, specifications or elevations attached to the Agreement nor did the Agreement make reference to same. Accordingly, the learned judge was correct in finding that the Schedule did not form part of the Agreement.

[45] Additionally, Oil Nut Bay states that in cross-examination, Ms. Yates stated that the Schedule was provided by Yates and represented "the breakdown of rates that we were – that made up the $2.65 million". Further, that even if the contract price was based on the Schedule, this is no way suggests that the Agreement is not a fixed price contract.

[46] Regarding Yates' submission that the first time the term "fixed contract" was used was in August 2011, Oil Nut Bay states that this point was raised during cross-examination of Ms. Yates and she failed to correct Mr. Johnson's confirmation in the letter dated 4th August 2011 that the Agreement was a fixed price contract because she knew that it was a correct description of the Agreement. Ms. Yates also stated under cross-

examination that Yates would not claim for the $67,000 of extras and that they would have to seek to recover this sum from future contracts with Oil Nut Bay. Oil Nut Bay claims that this was a clear admission that any additional costs cannot be claimed as an extra, therefore confirming that Ms. Yates regarded the Agreement as a fixed contract whether based on the Schedule or otherwise. Moreover, Oil Nut Bay asserts that Ms. Yates herself in referring to the contract as a "…lump sum contract with allowances and the schedule of rates which were to be adjusted as the design was finalized" acknowledged that the Agreement was in fact a lump sum contract.

Discussion

[47] Yates' position is that the learned judge erred in finding that the Agreement was a fixed price contract and ought to have found that the contract was a bill or quantities or an as built contract. Fixed price contracts are defined as "contracts where a fixed price or prices are quoted for carrying out and completing the work described in the drawing and specification".[7] On the other hand, in bill of quantities contracts:

> "The relevant incorporating provisions of contracts of this kind [bill of quantities contracts] make it clear that the contractor's quoted tender prices (but not his completion obligations) are only for the stipulated quantities, and that, whether or not variations are subsequently ordered, the ultimate contract price is to be re-calculated in the light of the final "as built" quantities of the work carried out"[8]

[48] The learned judge based her finding on the principle that in interpreting any contract that purports to bind parties, all the surrounding circumstances should be considered. However, in doing so the court ought to bear in mind the rebuttable presumption that what was reduced into writing was intended to include all the terms of the contract as agreed by the parties.[9]

[49] I now turn to examine the substance of the Agreement between the parties.

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[7] Hudson's Building and Engineering Contracts, 11th Edn, Vol. 1, para. 3-012.
[8] Hudson's Building and Engineering Contracts, 11th Edn, Vol 1, para 3-014.
[9] Law of Contract, 12th Edn, Edun Pell, para. 6-013.

[50] Clause 2 and 3 of the Agreement, as outlined above, provide that Yates would be solely responsible for all the construction costs and states the total cost of the home, including hard and soft costs and all materials, fixtures and finishes in the home, as $2,650,000, respectively. It is noteworthy, as the learned judge also found, that the parties had made several amendments to the Agreement but left untouched the term that indicated what the total home cost would constitute. In examining the Agreement, it is also observed that no such provisions are to be found which correspond with the definition of bill of quantities contracts outlined above.

[51] The Agreement also provided for the villa to be built according to plans, specifications and elevations as attached to the Agreement. However, as the learned judge observed, these documents were never attached nor does the Agreement refer to same. In my view, the parties having made several amendments to the Agreement curiously failed to ensure that these documents were attached to the Agreement and further omitted to incorporate the provisions of the Schedule in the Agreement itself.

[52] Additionally, Ms. Yates stated that the Schedule was provided by Yates and represented "the breakdown of rates that we were – that made up the $2.65 million". In my view, this assertion does not suggest that the Agreement was a bill of quantities contract, it was simply a breakdown of the fixed price. Further, I agree with Oil Nut Bay's submission that even if the contract price was based on the Schedule, this is no way suggests that the Agreement is not a fixed price contract.

[53] I find merit in Oil Nut Bay's submission that Ms. Yates' response letter dated 4th August 2011 in which she stated that Yates will not claim for the $67,000 in extras and that Yates would seek to recover this sum from future contracts with Oil Nut Bay amounted to an admission that additional costs in the construction of the villa did not fall within the total home cost stipulated. This admission confirms that Ms. Yates understood the Agreement to be a fixed price contract.

[54] Of relevance is the following paragraph of **Hudson's Building and Engineering** Contracts:

> "Sometimes these pricing documents may even contain estimated quantities of the whole work as well as the itemized prices, and in some cases may actually be called "bills of quantities" with the prices grossed up to produce a total contract sum…In lump sum contracts, however, such a document, even if so entitled will simply be a guide to assist tendering contractors in arriving at their lump sum tenders, with its pricing significance limited to the valuation of variations, should these be ordered, or for interim payment valuations."[10]

[55] Considering the above, I find that the Schedule in this case was no more than a guide to assist the parties in valuing variations and was not intended to have any effect on the total home cost provided for in clause 3 of the Agreement. Furthermore, under cross-examination Ms. Yates stated that she thought the contract was a lump sum contract with allowances and the schedule of rates which were to be adjusted as the design was finalised. The characterization of the contract as a "lump sum contract" by Ms. Yates does not suggest that the Agreement was a bill of quantities contract.

[56] In considering the surrounding circumstances of the Agreement, including the failure to attach the Schedule to the Agreement by the parties after numerous amendments to the Agreement and in interpreting the Agreement (in particular, clause 3 of the Agreement referring to a total figure instead of tender prices for stipulated quantities), I agree with Oil Nut Bay's submission that the learned judge was correct to find that the Schedule did not form part of the Agreement and that the Agreement was a fixed price contract. In my view, the learned judge's finding that what was reduced to writing by the parties constituted the entire Agreement and amounted to a fixed price contract cannot be impugned.

[10] Hudson's Building and Engineering Contracts, Vol. 1, para. 3-013.

Wh**ether the learned judge erred in denying Yates' claim for variation or** extras for work done at the request of Oil Nut Bay in the sum of $629,820.51 and awarding instead the sum of $190,461.37

[57] Yates argues that the learned judge in making a determination whether work could be regarded as a variation or extras failed to take into consideration the Schedule which formed the basis of the calculation of the contract price, as well as the documents relied on by the parties as the basis for the calculation of the rates and quantities of the various items of construction in order to arrive at the contract price of $2,650,000.00.

[58] Yates contends that the learned judge in finding that Yates had only been able to prove extras in the amount of $190,461.37 on the project was inconsistent with the evidence and she appeared to be under a misapprehension as to what constituted extras in a construction contract. On this ground, Yates submits that the learned judge failed to take into consideration the Schedule which formed the basis for the costing of the Agreement and which was therefore important to any determination as to whether work performed on the villa could be regarded as extras. Further, the learned judge appeared to have been of the view that merely because she found that the Agreement was a fixed price contract, it was not necessary to refer to the Schedule in the determination of extras. Additionally, in her analysis, the learned judge appeared not to appreciate that where an owner orders material which is more expensive than what was originally budgeted in a fixed price contract, he is responsible for the payment of those additional costs on the basis that such an action is to be construed as an implied request for extras by the owner.

[59] Yates posits that if this Court upholds the learned judge's finding that the Agreement was a fixed price contract, it is entitled to payment for the variations and extras it carried out on the residence.

[60] Yates further contends that the evidence shows that there were several items, including doors and windows, tiling and countertops, stonework, drop ceiling, parking and parkways, and painting which the parties in arriving at the total contract

price accepted were allowances because at the time the exact scope of the works were not known. Therefore, accurate pricing could not be given in respect of these items. Yates submits that Oil Nut Bay expected to pay for these extras once the actual material was selected. Essentially, Yates' contention is that based on the evidence in the matter the learned judge wrongly rejected several variations.

[61] Oil Nut Bay contends that the judge's findings cannot be impugned as there was no agreement for the payment of extras nor any signed variation orders.

[62] As it relates to the variations claimed in respect of countertops and woodwork, Oil Nut Bay submits that the learned judge was correct in concluding that those sums were not referable to any possible variation ordered, but rather seems to account for the cost of the material selected. Moreover, it was the owner's representative, Mr. Ryan Formsma, and not a representative of Oil Nut Bay who had ordered items which were more expensive than what was originally budgeted.

[63] Oil Nut Bay claims that the grounds raised against the judge's findings on variations for parking and parkways ($9,151.22), stonework ($57,949.59), ceiling ($65,217.24), paintings ($17,860.28), appliances ($13,530.34), IPE walkway ($15,299.25), columns to beams ($35,490.28), beams ($47,939), main floor ($30,309.65), and system beams ($17,209.27) ought to be rejected and the learned judge was correct to disallow these sums. For the stonework, painting, appliances, drop ceilings and IPE walkway, Oil Nut Bay contends that there is a lack of evidentiary basis for these claims to be admitted as variations. For the claims regarding columns to beams, system beams and the main floor, Oil Nut Bay asserts that the judge was correct in finding that these claims arose from a combination of the failure of Yates to adequately price the cost of construction for the house, in addition to the fact these works were necessary to complete the whole work and were variations attributable to Yates and not Oil Nut Bay. Further, it is submitted that the variations claimed by Yates with respect to the items discussed were

properly within the scope of work described in clause 2 of the Agreement and were therefore included in the fixed price of $2,650,000.

Discussion

[64] Having determined that the Agreement is a fixed price contract, the issue of whether the learned judge erred in denying Yates' claim for variation or extras for work done at the request of Oil Nut Bay in the sum of $629,820.51 and awarding instead the sum of $190,461.3 falls to be determined.

[65] The learned authors of **Keating's Building Contracts**[11] explain what constitutes an 'extra' in relation to a fixed price contract as: "work not expressly or impliedly included in the work for which the lump sum is payable". In determining whether certain variations were to be allowed, the court in Williams v Fitzmaurice[12] noted that it must be examined whether the claimed variations were indisputably necessary to complete the whole work. Therefore, an extra or variation in the circumstances would be an item which was not expressly or impliedly included into the scope of clause 3, but would be indisputably necessary to complete the whole work.

[66] Yates' argument is essentially that the learned judge failed to consider the Schedule in calculating rates for extras and variations and that the owner ordered items were more expensive than what was originally budgeted. Further, that if the Court upholds the finding that the Agreement is a fixed price contract, Yates is entitled to payment in the amount of extras ordered. Yates challenges the findings of the learned judge in relation to: (i) tiling and countertops; (ii) parking and parkways; (iii) drop ceiling; (iv) stonework; (v) painting; (vi) IPE walkway; (vii) columns to beams; (viii) beams; (ix) main floor; and (x) system beams.

Tiling and Countertops

[11] 4th edn., (Sweet and Maxwell, 1997) p. 62.
[12] [1858] 3 H & N 844.

[67] The learned judge rejected claims for variations to countertops and tiling in the amounts of $22,328.32 and $109,905.30, respectively. On this item, I agree with the findings of the learned judge that these sums are not referable to any possible variation ordered but rather is due to the cost of material selected, especially as the evidence shows that the tiles were selected by Mr. Formsma who was a representative of the owner and not of Oil Nut Bay. I agree with Oil Nut Bay's submission and find that the tiling and countertops do not amount to a variation.

Parking and Parkways

[68] Yates claimed the sum of $9,151.22 for variations for parking and parkways. I agree with the findings of the learned judge on this item. I therefore disallow the variation on the basis that there was no evidentiary basis as to how it came about to be justified as a variation.

Stonework, drop ceiling, painting, IPE walkway, columns to beams, beams, main floor and system beams

[69] As it relates to the claims for variations in respect of stonework ($57,949.59), drop ceiling ($65,217.24), painting ($17,860.28), IPE walkway ($15,299.25), columns to beams ($35,490.28), beams ($35,490.28), main floor ($30,309.65) and system beams ($17,209.27), I agree with Oil Nut Bay's submissions that these items would fall within the scope of the work for which the total home cost was payable and therefore should be disallowed. Further, I agree with the learned judge's conclusion that the claims for variations in respect of the beams, columns to beams, main level floor and system beams are attributable to design changes.

[70] I therefore uphold the judge's findings in disallowing the claims for variations in respect of the items raised in this appeal. There is nothing to suggest that the learned judge made a material error of law or made a critical finding of fact which has no basis in the evidence for an appellate court to interfere with her findings of fact.

Whether the learned judge erred in arbitrarily awarding $100,000 to Oil Nut Bay in respect of the costs of remedying the defects in workmanship

[71] Yates submits that the learned judge having found that Oil Nut Bay failed to prove its special damages claim with respect to the amount of remedial works to be done on the project and the value to be ascribed to same was wrong in law to arbitrarily assign a value of $100,000 for the carrying out of these remedial works in circumstances where there was no basis for such a valuation.

[72] According to Yates, the learned judge appeared to "pluck the sum of $100,000 out of the air" which contradicts the requirement of special damages that a party is required to specifically plead and prove same. As Oil Nut Bay had not proved its claim for special damages, the judge, having rejected the cost estimates of both parties, could not arbitrarily substitute a figure for this head of damages and should have found that the respondent had not proven its claim and not award any sum as damages. Alternatively, Yates asserts that the judge should have accepted its estimate of the costs of repairs which had not been challenged in cross-examination or in the witness statement on behalf of Oil Nut Bay. Further, Oil Nut Bay having failed to prove its case with respect to the remedial costs of the defects in construction, the Court could not arbitrarily ascribe a figure of $100,000 to such repairs in what was arguably a very technical matter that required expert evidence or the evidence of someone knowledgeable in the field of construction.

[73] In response, Oil Nut Bay contends that there was ample evidence before the court including the evidence of Mr. Craig Noblett and the Inspection and Re-Inspection reports of Mr. David Rosa and the admissions and concessions by Ms. Yates and Mr. McDonald (Yates' project supervisor) to support the judge's finding that it was obvious that the amount offered was indeed woefully inadequate and the judge was correct in rejecting the figure of $10,000 offered by Yates and awarding at the very least, the sum of $100,000.

Discussion

[74] In respect of the costs of remedying the defects in workmanship, the learned judge having found that there was no cogent evidence before the court as to Oil Nut Bay's special damages, awarded $100,000 as a reasonable sum for remedial works to be effected. At paragraphs 174-175 of the judgment, the learned judge found that:

> "I believe that on a balance of probabilities that there are defects at least in the region of the admitted 90 as suggested by the First Defendant but that the figure of $10,000 would be woefully inadequate to remedy the same in an admittedly luxury villa, while the figure as claimed of $191,127.08 is greatly excessive.
>
> What is clear to me is that in looking at this cost as claimed that it had to include the costs for any defects to the koi pond and the swimming pool and those claims could not have been separate and distinct as pleaded before the Court. Thus, I award the sum of $100,000.00 for all remedial and completion work that have to be undertaken on BV3 inclusive of any action to be taken on the koi pond and swimming pool."

[75] Yates claims that as Oil Nut Bay had not proved its case with respect to remedial costs of the defects, the court could not have arbitrarily ascribed a figure of $100,000 to such repairs in what was a technical matter. Oil Nut Bay also challenges the award on the counter-appeal on a different basis.

[76] On this issue, it is my view that the costs for remedying the defects in workmanship fall within the category of special damages. It is trite that special damages must be specifically pleaded and strictly proved. From a reading of the judgment, the learned judge had no basis (aside from the fact that the total cost had to include costs for any defects to the swimming pool and the koi pond) for awarding the sum of $100,000. From the judgment, the learned judge did not accept the evidence of Mr. David Rosa, Mr. Stephen Sinclair and Mr. Craig Noblett as to the amount and cost of the defects. Therefore, there is no basis on which the learned judge arrived at that sum.

[77] Having arrived at that conclusion, there is merit in Yates' submissions on this ground. I find that the learned judge made a critical finding of fact which has no basis in the evidence in arbitrarily awarding $100,000 to Oil Nut Bay in respect of the costs of remedying the defects in workmanship.

Whether the learned judge erred in making deductions in the amount of $252,977.44 in respect of materials and supplies paid for by Oil Nut Bay without the consent of Yates despite finding that the Agreement between the parties was a fixed price contract

[78] Yates submits that the learned judge having found that the Agreement was a fixed price contract erred in law in making deductions in the amount of $252,977.44 in respect of material purchased by Oil Nut Bay without the consent and/or permission of Yates. Yates contends that in a fixed price contract, there can be no deductions from the contract price by the owner. Therefore, the judge having held that the agreement was a fixed price contract, Oil Nut Bay was not entitled to any reimbursement of its unauthorized deduction of $212,967.44 from the contract price or should have been made to repay Yates its 20% profit margin, the sum of $42,594.00.

[79] Regarding the issue of whether the learned judge erred in making deductions in the amount of $252,977.44 in respect of material purchased without the consent of Oil Nut Bay, it is submitted that the finding was made in light of admissions by Yates that the materials purchased by Oil Nut Bay had in fact represented materials which it had been the responsibility of Yates to purchase under the Agreement. These payments cannot be described as unauthorized deductions but were payments for which materials should have been purchased by Yates and Yates failed to do so. Further, Oil Nut Bay had to purchase the materials itself to ensure that the project was completed.

[80] It is further asserted that Yates' contention that Oil Nut Bay misrepresented that Yates authorized the deductions cannot be substantiated. Notably, in cross-examination by learned counsel for Yates, Mr. Johnson denied that Oil Nut Bay did not have the permission of Yates to authorize deductions. Essentially, Oil Nut Bay asserts that it paid $252,967.44 for materials and supplies that were included in the fixed price

of $2,650,000.00 and therefore the learned judge was correct to deduct the sum paid from the fixed price.

Discussion

[81] I agree with Oil Nut Bay's submissions that the materials purchased, for which the sum of $252,967.44 was deducted by the learned judge, were materials which Yates had the obligation under clause 2 of the Agreement to provide and failed to do so. I reject Yates' submission that Oil Nut Bay was only authorized to deduct $40,000 for the purchase of material, as Yates had admitted the sum of approximately $252,000 in paragraph 13 of their defence.

[82] Further, at paragraph 41 of the judgment, the learned judge noted that:

> "Ms. Yates told this court that she had authorized the First Claimant [Oil Nut Bay] to deduct $40,000.00 from her progress payments for items she said were easier for the First Claimant to order. But she never authorized deductions in the sum as claimed although she did later admit that there was in excess of $200,000.00 worth of materials that had been paid for by the First Claimant for which she had been ultimately responsible". (my emphasis)

[83] Additionally, the evidence before the court below does not reveal that Mr. Johnson of Oil Nut Bay misrepresented that permission was given for these deductions.

[84] I find that Yates has failed to prove on this ground that the learned judge made a critical finding of fact which has no basis in the evidence, or that there was a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, which justifies appellate interference with the findings of fact made by a trial judge. In my view, the learned judge was correct to view Ms. Yates' evidence as an admission of liability for the materials purchased. This ground is therefore without merit.

Whether the learned judge erred in failing to grant Ms. Yates costs on the **dismissal of Oil Nut Bay's defamation claim for damages against her**

[85] Yates complains that the learned judge failed to exercise her discretion with respect to the awarding of costs in favour of Ms. Yates on the dismissal of Oil Nut Bay's defamation claim against her. Specifically, the learned judge failed to assign reasons for her failure to award Ms. Yates her costs on the claim or indicate that she had considered the matter. It is submitted that Ms. Yates should be awarded costs on the prescribed basis because of the dismissal of the defamation claim brought against her in keeping with rule 64.6 of the Civil Procedure Rules 2000 ("CPR").

[86] On this issue, Oil Nut Bay argues that no costs ought to be awarded to Ms. Yates as the court erred in not allowing Oil Nut Bay's defamation claim and in not awarding it costs. Additionally, as there was a joint defence and representation of Yates and Ms. Yates, no question of separate costs arises.

[87] As Oil Nut Bay has challenged the learned judge's findings in dismissing the defamation claim on its counter-appeal, it would be apt for this issue to be dealt with later in the judgment. I have addressed this ground at paragraph 169 of the judgment.

Whether the learned judge**'s finding that Oil Nut Bay was not in breach of its** obligations under clause 9 of the Agreement to allow a reasonable opportunity to rectify any defects in workmanship was not supported by the evidence.

[88] Yates asserts that the learned judge's finding that Oil Nut Bay was not in breach of its obligations under clause 9 of the Agreement to allow Yates a reasonable opportunity to rectify any defects in workmanship was not supported by the evidence. The evidence in the court below was that the outstanding tasks were relatively simple and there was no evidence before the court that Yates was unable to complete the repairs if provided with the requisite material. Yates claims that this is particularly so because the learned judge accepted the evidence of Ms. Yates and Yates' project supervisor, Mr. McDonald that Yates was always willing

to remedy any legitimate defects once all the materials had been supplied. Therefore, the judge's finding on this point was inconsistent with the evidence and she should have found that Oil Nut Bay was in breach of clause 9 of the Agreement, and as a result Oil Nut Bay ought not to have been awarded the sum of $100,000 for the costs of remedying any defects in construction or at the very least should only have been entitled to the sum of $10,000 which was the amount estimated by Yates to remedy any defects in construction.

[89] On this point, Oil Nut Bay submits that there were numerous items of defective work which did not require owner's materials for their completion. Nevertheless, Yates failed to complete them. Also, Yates was afforded an opportunity to rectify any defective or incomplete work (identified on the initial Inspection Report prepared by Mr. David Rosa and the Re-inspection report) over several months from June 2011, when the list of defective works was prepared, to November 2011. Oil Nut Bay contends that that period was more than enough time for Yates to remedy the defects to the requisite standard. Therefore, it is submitted that the learned judge's finding on this issue cannot be faulted.

[90] On this ground, Yates asserts that the works required to be completed were not capable of completion until certain materials (floor tiles) were supplied to it. However, Oil Nut Bay makes the point that there were over 150 items as identified by the Re-inspection Report which did not require owner's materials for their completion. Yates however failed to rectify those other items. I accept Oil Nut Bay's submission that Yates was given ample opportunity from August 2011 when the initial list of defects was provided to them in July 2011 until November 2011.

[91] The fact remains that there is no evidence of Yates making any attempt to remedy any of the defects for which they did not require owner materials to rectify. I therefore agree with the findings of the learned judge that Yates did not have an unqualified right to re-enter and remedy defects where it was apparent that Oil Nut Bay had lost confidence in its willingness or ability to remedy the defects satisfactorily.

[92] In my view, the learned judge properly evaluated the evidence before her and her conclusion cannot be regarded as a demonstrable misunderstanding of relevant evidence or a demonstrable failure to consider relevant evidence for this Court to interfere with her findings. I therefore agree with the learned judge's findings that Oil Nut Bay has not breached clause 9 of the Agreement as Yates was given a reasonable opportunity to rectify the defects in construction and cannot justify why no attempts to were made remedy the defects which did not require owner's materials.

The Counter-Appeal

[93] Oil Nut Bay filed a counter-notice of appeal seeking the following orders:

(i) That the sum of $100,000 awarded to Oil Nut Bay for the cost of remedying defects be increased to such higher sum as the Court of Appeal considers just.

(ii) That Oil Nut Bay be awarded a reasonable sum for cost of transportation of Yates' workers and employees after 1st March 2011, being the contractual date for completion of the villa or within a reasonable time thereafter.

That Oil Nut Bay be awarded general damages for breach of contract.

(iii) That the sum of $190,461.37 awarded to Yates on its counterclaim for extras or variations be discharged or a lesser sum awarded.

(iv) That the award to Yates of the balance of all sums under the Agreement of the original contract sum be set aside.

(v) That the costs orders made in favour of Yates and Ms. Yates be set aside.

(vi) That Oil Nut Bay be awarded damages for defamation as against Ms. Yates.

Defects

[94] Firstly, Oil Nut Bay claims that the learned judge failed to award the appropriate sum of $191,127.08 in respect of remedial works to the villa as well as to the koi pool and the swimming pool on the basis that there was no cogent evidence as to the costs of the necessary remedial work. Further, that the award of $100,000 amounts to less than half that amount and as such could be regarded as a reasonable sum for remedial works to be undertaken. This ground turns on the correctness of the learned judge's assessment of Oil Nut Bay's three purported expert witnesses: Mr. Rosa, Mr. Sinclair, and Mr. Noblett.

[95] In assessing the costs of remedying defects, the learned judge rejected the opinions of Mr. Rosa and Mr. Sinclair who provided evidence in relation to the scope and quantum of the defects. Mr. Rosa prepared the Inspection Report and Re-Inspection Report in August and November 2011, respectively. In the Re-Inspection Report, Mr. Rosa identified that 150 of the 336 deficiencies remained uncorrected or not remedied to the requisite standard. In that report, he noted that the costs of conducting the remedial work as stated in the EMCS cost analysis prepared by Mr. Craig Noblett were reasonable. Yates also did not offer any expert evidence to refute Mr. Rosa's findings and testimony. Mr. Sinclair gave evidence in relation to the defects relating to the swimming pool and the koi pond.

[96] However, the learned judge was not convinced that Mr. Rosa was independent or qualified to offer an opinion on the majority of works undertaken. Oil Nut Bay submits that the learned judge erred in finding that she could not rely on the evidence of Mr. Rosa. It is further submitted that the learned judge misstated factual evidence and failed to take into account at all or to give proper weight and effect to the fact that it was Mr. Rosa who himself had undertaken a comprehensive examination of the defective or incomplete work done by Yates in the construction project. Oil Nut Bay contends that Mr. Rosa gave credible evidence as an independent expert on the remedial work required on the villa and delivered his reports with independence and

impartiality. Further, that the judge in regarding Mr. Rosa's evidence as unreliable failed to weigh his evidence and its credibility against the clear admission of Ms. Yates that there were over 90 items not completed or rectified by Yates as at November 2011. Oil Nut Bay submits that having regard to Yates' list of defective works coupled with the evidence contained in Mr. Rosa's reports, the learned judge ought to have awarded a larger sum. As a result, the learned judge's conclusion in discounting Mr. Rosa's evidence was against the weight of the evidence and ought to be set aside.

[97] Oil Nut Bay also challenges the learned judge's finding on the evidence of Mr. Sinclair who was found to be of limited assistance because he did not attend the site personally. Mr. Sinclair opined that the construction and finish of the koi pond was not to the standard expected of an ordinary and competent skilled professional exercising all reasonable skill, care and diligence working on a luxury project in a larger luxury development. On this point, Oil Nut Bay claims that Mr. Sinclair had an extensive amount of documentation before him in preparing his report. Further, Mr. Sinclair's evidence was that of an independent expert in relation to the pool and koi ponds and he did visit the site, although at a time when some of the remedial work had already been undertaken.

[98] Oil Nut also takes issue with the finding the amount awarded for the cost of remedying defects included the costs for any defects to the koi pond and pool. Alternatively, Oil Nut Bay states that the learned judge having included the costs of remedying defects to the koi pond and pool ought to have awarded a higher sum.

[99] Yates provided written submissions in response to Oil Nut Bay's counter-appeal. On this point, Yates submits that where an expert gives evidence outside of his competence or fails to comply with his duties and responsibilities, the trial judge has a discretion as to whether to disregard that evidence or ascribe weight to it. Yates contends that there was much evidence to support the learned judge's findings as to the unreliability of Mr. Rosa's and Mr. Sinclair's evidence.

[100] In support of its position, Yates referred to the following passage of the decision of this Court in Quillen v Harney Westwood & Riegels (No. 2)[13] where it is stated that:

> "An appeal will not be entertained from an order which it was within the discretion of the judge to make, unless it can be shown that he exercised his discretion under a mistake of law, or in disregard of principle, or under a misapprehension as to facts, or that he took into account irrelevant matters, or failed to exercise his discretion, or the conclusion which the judge reached in the exercise of his discretion was 'outside the generous ambit within which a reasonable disagreement is possible."

[101] Yates also repeats the findings made by the learned judge as to the reliability of the evidence of Mr. Noblett for the following reasons: he was not a qualified quantity surveyor; his evidence was based entirely on Mr. Rosa's report; he had also not visited the site and had not seen the defects; he conceded that the calculations in his report were incorrect; and he produced the same costings with his new company as he had done previously. Yates argues that in the absence of any reliable evidence of valuation of defects from Mr. Rosa, Mr. Sinclair or Mr. Noblett, the learned judge was correct not to place weight on their evidence.

[102] Yates, relying on Watt v Thomas,[14] submits that the learned judge's findings of fact ought not be disturbed as it has not been proved that the learned judge's finding was plainly unsound or that she did not take proper advantage of having seen the witnesses or that she failed to appreciate the weight and bearing of the circumstances admitted and proved.

[103] In its reply to Yates' submissions, Oil Nut Bay argues that the decision of Watt v Thomas gives this Court authority to set aside the learned judge's findings with respect to the reliability of the evidence of Mr. Rosa and Mr. Sinclair, as she had not taken proper advantage of seeing the witnesses or failed to appreciate the weight and bearing of the circumstances admitted and proved.

Discussion

[13] (1999) 58 WIR 147.
[14] [1947] AC 484.

[104] A challenge made to a trial judge's finding on credibility is an arduous task. Arden LJ stated in Langsam v Beachcroft[15] that:

> "It is well established that, where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, which is not available to the appellate court. It is therefore, rare for an appellate court to overturn a judge's finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account his assessment of many factors. The correctness of the evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion which on the evidence he was not entitled to reach."

[105] In this case, it is difficult for an appellate court to interfere with a trial judge's findings where she drew inferences from her findings of primary fact which were dependent on her assessment of the credibility or reliability of Mr. Rosa, Mr. Sinclair and Mr. Noblett who gave oral evidence, and of the weight to be attached to their evidence. The learned judge had the advantage of seeing and hearing the witnesses give their evidence and had the opportunity to observe their demeanor. Therefore, the Court should be slow to interfere with the judge's findings and conclusions unless it appears that she failed to make proper use of the advantage she had.

[106] This issue requires an examination of the evidence of Mr. Rosa and Mr. Sinclair. The learned judge in her judgment detailed her reservations on the credibility of the evidence of Mr. Rosa and Mr. Sinclair. I am unable to agree with the submissions of Oil Nut Bay on this ground that the findings of the learned judge should be disturbed. Firstly, in the court below, Yates challenged Mr. Rosa and Mr. Noblett as experts. In relation to Mr. Rosa, it was proved that he was hired by Oil Nut Bay before the matter became litigious and accepted that he had not been instructed on the procedure to become an expert witness. Further, Mr. Rosa sought to provide expertise on matters of construction and electrical engineering when his field of expertise was chemical engineering. As it relates to the reliability of his evidence, the learned judge noted that

[15] [2012] EWCA Civ 1230 at para. 72.

while giving evidence he was unable to verify certain items on his own inspection report and went on to say that they were incomplete.

[107] Part 32 of the CPR 2000 deals with expert witnesses. The expert must be impartial and independent and limit his evidence to his field of expertise. In my view and based on the reasons articulated by the learned judge for disregarding the evidence of Mr. Rosa, it cannot be argued that the learned judge's finding was plainly unsound or that she did not take proper advantage of having seen the witnesses or that she failed to appreciate the weight and bearing of the circumstances admitted and proved.

[108] In relation to Mr. Sinclair, I find that the learned judge made appropriate findings based on the evidence before her. The judge accepted Mr. Sinclair as an expert but found him to be of limited assistance because he did not attend the site personally at a time prior to remedial works being effected and because his findings relied on Mr. Rosa's evidence, which I have similarly found to be unreliable.

[109] Similarly, Mr. Noblett's evidence in relation to costings was found to be solely based on the Inspection and Re-Inspection reports of Mr. Rosa. Further, his independence was doubted when it was revealed that his former company and his present company were employed by Oil Nut Bay. Moreover, under cross-examination, he admitted that he had not visited the site and had not seen the defects, yet, he produced the same costings with his new company as he had done with his previous company.

[110] In my view, it is difficult to impugn the findings of the learned judge on this ground. It cannot be said that the learned judge's findings were plainly wrong as there was much evidence from which she could have arrived at the conclusion which she did. Therefore, there is no merit in Oil Nut Bay's submission that the learned judge ought to have given weight to the witnesses' evidence.

[111] Accordingly, I find that there was no basis for the learned judge to award the sum of $191,127.08 in respect of remedial works as she reasonably rejected the evidence submitted in support of that sum.

Transportation Costs

[112] Secondly, Oil Nut Bay submits that the learned judge should have awarded a reasonable sum in damages to it for breach of contract and/or for the cost of transporting Yates' employees to and from Oil Nut Bay after 1st March 2011 (the contractual date of completion) or a reasonable time thereafter. Oil Nut Bay contends that the judge found erroneously that its contractual obligations to pay the costs of transporting Yates' employees by boat to and from Oil Nut Bay continued notwithstanding that Yates never completed the dwelling-house substantially until July 2011 or at all when it left the site in November 2011.

[113] Oil Nut Bay posits that the learned judge relied on the assertion that Yates was not informed of their liability for transporting costs arising after 1st March 2011 in denying Oil Nut Bay damages under this aspect of the claim. Oil Nut Bay submits that there was no obligation to do so in law or in the Agreement and accordingly the learned judge erred. Rather, the sum expended on the transportation of employees was a consequential loss of Yates' delay in meeting its contractual obligations to complete the villa by the agreed completion date.

[114] Based on the evidence of the figures claimed given by Ms. Terri Nelson, the Chief Financial Officer of Oil Nut Bay, it is submitted that the learned judge ought to have awarded Oil Nut Bay at least the sum of $44,000.

[115] In response, Yates contends that the learned judge correctly found that Oil Nut Bay provided no notice to it of transportation costs and could not after the fact claim for this item as a cost as there was no opportunity provided to Yates to make alternative transportation arrangements for its employees. Further, the learned

judge held that there had been approved extras or variations which resulted in construction being completed after the agreed date. Therefore, Oil Nut Bay could not enforce the completion cause. Accordingly, the argument that Yates was responsible for transportation costs after the completion date is unmeritorious.

[116] Additionally, Yates submits that the evidence shows that Oil Nut Bay did not provide a special boat to transport Yates' workers to Oil Nut Bay, but the workers adjusted their schedule to be able to travel via the usual boat used by Oil Nut Bay to transport its employees. As such, there was no question of any increased transportation costs. Further, Oil Nut Bay was working on two other projects at Oil Nut Bay which included free transportation as a component of the Agreement, so it was not possible to discern which workers were travelling to work for which project. For this reason, Yates contends that Oil Nut Bay has not proved that it suffered any loss.

[117] In reply, Oil Nut Bay argues that contrary to Yates' submissions the Agreement provided for transportation of the employees during the period of construction. Further, on the point that no special boat was provided, Oil Nut Bay claims that the evidence before the court below shows that a larger boat was used than that which would have been used to transport its own workers. This resulted in increased fuel, maintenance and labour costs.

Discussion

[118] On this point, I disagree with Oil Nut Bay's submission that the sum expended on the transportation of employees was a consequential loss of Yates' delay in meeting its contractual obligations to complete the villa by the agreed completion date. I agree the learned judge's finding that there had been approved extras or variations which resulted in the completion of the building beyond the completion date. Therefore, in my view, Oil Nut Bay cannot argue that it is only responsible for transportation costs up to the completion date when it had approved variations or extras to take place after the said date.

[119] I find that it cannot be argued that the learned judge made a critical finding of fact which has no basis in the evidence. In assessing whether the learned judge's finding was "plainly wrong", it does not mean that this Court in assessing the findings of fact together with the evidence would have arrived at a different conclusion, but rather whether the finding of fact was possible within the reasonable realm of possible conclusions based on the evidence as a whole.

[120] It is common ground that the provision of transportation for Yates' employees was an agreed term of the Agreement. The law is that the parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement.[16] Therefore, if Oil Nut Bay desired to discontinue the provision of transportation services after the completion date, it was incumbent on Oil Nut Bay to indicate to Yates that variation so that Yates could make alternative arrangements for the transportation of its employees. As Oil Nut Bay failed to do so, there is no basis for which this Court ought to interfere with the findings of the learned judge.

Breach of Contract

[121] On this ground, Oil Nut Bay submits that the learned judge, having found that Yates breached the Agreement by not completing construction by the agreed completion date (time having been made of the essence), erred in not awarding damages for that breach to Oil Nut Bay as Yates' failure to comply with the letter of December 2010 making time of the essence amounts to unreasonable delay in itself.

[122] Oil Nut Bay further submits that despite time being of the essence in the contract as of December 2010, the court in finding that there was no

[16] Cowey v Liberian Operations Ltd [1966] 2 Lloyd's Rep. 45. See also Cliff Williams et al v The Moorings Limited BVIHCV2009/0083 (delivered 16th December 2010, unreported).

unreasonable delay erred in placing great weight on the fact that it had found that variations had been agreed to after the contract was formed.

[123] Oil Nut Bay in its submissions relied on the following passage of Louinder v Leis:[17]

> "The result of non-compliance with the notice is that the party in default is guilty of unreasonable delay in complying with a non-essential time stipulation. The unreasonable delay amounts to a repudiation and this justifies rescission."

[124] Oil Nut Bay contends that there was a plethora of evidence before the court which proved that the delay in completion was the fault of Yates and there was no evidence that a longer period for completion of the construction had been agreed by the parties, whether as a result of any extras or variations. On this basis, Oil Nut Bay submits that the learned judge ought to have awarded it damages for breach of contract.

Discussion

[125] On this ground, I find the following paragraph of **Halsbury's Laws of England**[18] instructive:

> "Where time is not of the essence of the contract but a date for completion is specified, the employer will be entitled to damages upon the contractor's default. Where the contract is silent as to the date of completion, the contractor must complete the work within a reasonable time. If, by reason of a breach of contract or by reason of extra work ordered by him, the employer prevents the contractor from completing the work by the date **fixed…then unless the contract clearly provides that the** contractor shall take the risk of prevention by such extra work, the employer cannot insist upon completion by the date fixed or within the period limited, but only for completion within a reasonable time. The onus of proving that the delay has been caused by some act or breach of contract on the part of the employer is on the contractor." (my emphasis)

[17] (1982) 149 CLR 509.
[18] 4th edn. (1987 Butterworths).

[126] In the Agreement at hand, there is no provision making time of the essence. I agree with the learned judge's finding that time was made of the essence subsequently by Oil Nut Bay's December 2010 letter as Yates then (on the evidence) became aware of the importance of the completion date.

[127] On the evidence, the agreed completion date was 1st March 2011. The earliest date for occupancy of the villa was 8th July 2011 when the BVI Building Authority issued a Certificate of Occupancy. The period of delay is therefore four months after the agreed date of completion. The evidence before the learned judge was that during construction, several changes were made to the plans and specifications. The learned judge also found that because of these changes, extras or variations were approved. The learned judge found Oil Nut Bay could not insist upon completion by the agreed date as the approved extras or variations had the effect of extending the timeline for construction. Therefore, the failure to meet the completion date was inevitable. In my view, it was open to the learned judge on the evidence before her to conclude that there was no unreasonable delay based on the parties' agreement as to extras or variations and to deny Oil Nut Bay damages for Yates' breach of the Agreement on that basis.

Variations/Extras

[128] Oil Nut Bay also challenges the variations allowed by the court in respect of: the koi pond in the sum of $20,936.17; plumbing in the sum of $46,639.15; the roof in the sum of $43,492.36; doors in the sum of $25,630.01; and electrical in the sum of $13,965.02.

[129] Oil Nut Bay claims that the changes made to the design of the koi pond were done at the request of the owner and/or Mr. Formsma acting as the owner's representative without its knowledge. It further claims that this evidence was before the court and the learned judge ought to have rejected the variation.

[130] For the changes made to the plumbing and the roof, Oil Nut Bay argues that the learned judge erred in making those awards since there was evidence before her that no change orders were presented to Oil Nut Bay for those unilateral variations. Oil Nut Bay submits that only the roof changes relating to the enclosure of the gym should be included which amounts to a sum of $292.92.

[131] For the changes made to the doors, Oil Nut Bay contends that no change orders were received for that unilateral variation and therefore, the learned judge should not have allowed this item as a variation. Only door changes in respect of the enclosure of the gym and changes to the pump room should be included.

[132] Oil Nut Bay referred to the decision of Tharsis Sulphur and Copper Company Ltd v McElroy & Sons[19] where the court held that if a contractor undertook to carry out works and subsequently discovered that the works could not be completed without a variation and if he does the work without obtaining the variation, then he is not entitled to recover the additional costs.

[133] For the variations allowed to electrical costs, Oil Nut Bay submits that electrical costs are to be properly included in the total home cost as stipulated in the Agreement.

[134] Oil Nut Bay also challenges the learned judge's findings with respect to the requirements of clause 5 of the Agreement which provides the procedure for requesting changes. Oil Nut Bay claims that the court erred in not fully considering that the purpose of clause 5 was to ensure that the parties were at all times fully aware of any proposed changes to the fixed price under the Agreement. Clause 5 does not provide for unilateral changes and therefore, any changes so made by Yates were made in breach of the Agreement.

[19] [1878] 3 App Cas 1040.

[135] Further, Oil Nut Bay posits that the evidence shows that it had requested that Yates inform it if there were to be any claims for extras on a number of occasions. However, no claims for extras were made throughout construction.

[136] Oil Nut Bay argues that the learned judge wrongly interpreted clauses 5 and 6 of the Agreement and misapplied relevant principles of law in concluding that it knew or approved certain of the items of extras or variations or held out Mr. Formsma as an agent of Oil Nut Bay. As a result, the learned judge erred in awarding the sum of $190,461.37 to Yates in respect of extras or variations except the sums admitted by Oil Nut Bay regarding the gym and pump room.

[137] On this ground, Yates contends that the learned judge appropriately applied the correct legal principle and correctly found that there was evidence which showed that Oil Nut Bay and/or the owner's representative authorized by the owner and/or with the consent of Oil Nut Bay had either ordered extras or was fully aware that same were being ordered and did not discourage these orders, and as such was estopped from denying liability for same.

[138] Yates asserts that the sum of $292.92 submitted in respect of extras or variations for the roof is without merit and shows a fundamental misunderstanding of the costs involved in erecting a roof. It is argued that the figures used by Oil Nut Bay are in relation to the square footage of the roof and the total cost is in fact $9,692.44 in addition to costs such as for labour for its installation, additional down spouts, gutters, lumber for the framing, as well as costs for the column and beams supporting the roof. On this basis, Yates argues that there is no basis for this Court to set aside the learned judge's findings.

[139] In reply, Oil Nut Bay contends that the learned judge awarded $43,492.36 for changes to the roof, which changes on the face of Yates' invoice dated 18th

November 2011 are attributable to a variety of factors and not just the gym enclosure. Therefore, it submits that only roof changes relating to the enclosure of the gym should be included as agreed variations, which amounts to $292.92.

Discussion

[140] The evidence on this ground from Mr. Johnson is that there was a provision for extras or variations to be made where changes were required, and changes had to be authorized by Oil Nut Bay and not the owner. He further stated in the court below that there were no written or signed changed orders for any variations. Ms. Yates' evidence is that she believed that all the changes given to her by the owner's agent, Mr. Formsma were sanctioned by Oil Nut Bay as Oil Nut Bay had a representative visit the construction site to oversee the project and Yates' efforts with respect to these changes were not stopped. She admitted that she was asked periodically for the costings of variations but indicated they were never prepared as she never had the time to do so.

[141] I find no merit in Oil Nut Bay's submission that because there were no written or signed changed orders for variations, Oil Nut Bay cannot be liable for any extras or variations. The learned judge properly considered the evidence that changes were given orally with respect to the variations allowed to the pump room and the gym. These items were not the subject of any written and signed change orders but were sanctioned by Oil Nut Bay. I find that in all the circumstances it was open to the learned judge on the evidence to find that despite not adhering to the requirement of obtaining the written orders, that there was an implied promise to pay as Oil Nut Bay could have stopped the construction to ensure that all was in order but took no steps except limited inquiries.

[142] Secondly, I reject Oil Nut Bay's submissions in relation to the changes requested by Mr. Formsma. The learned judge considered the evidence in the form of correspondence from Mr. Eric Munro, an employee of Oil Nut Bay which indicated:

> "Chris talks about changes that she has made and changes that Ryan Formsma has made. I am unaware of any dollar values and I have asked

> repeatedly for such change order request. Chris states every time that she isn't going to sit down and figure out any additional cost until at the end of the project. I haven't ever been in this situation but I cannot afford Chris to pull off site to spend the time pulling all this information together either."

This correspondence shows that not only was Oil Nut Bay aware that Mr. Formsma had requested changes and took no steps to challenge his authority to do so, but also that Oil Nut Bay had no interest in ensuring that the change orders were prepared in compliance with clause 5 of the Agreement.

[143] Thirdly, as it relates to the variation allowed to the electrical costs, the learned judge found that the sum is due to a change in the provision of electrical requirements which were agreed by the parties in August 2010. There is no evidence to suggest contrary.

[144] Therefore, I find that there is no merit in this ground of appeal. The learned judge made findings of fact, on the evidence before her, which cannot be regarded as plainly wrong for this Court to interfere with her findings.

Mr. Formsma was not an agent of Oil Nut Bay

[145] Oil Nut Bay argues that the learned judge erred in finding as a matter of law that Oil Nut Bay held Mr. Formsma out as their agent with respect to giving instructions and Ms. Yates and employees of Yates were entitled to rely on these instructions. It is submitted that there is no provision in the Agreement for either the owner or the owner's representative to make changes or to give orders relating to construction as the owner is not a party to the Agreement. Alternatively, Oil Nut Bay posits that even if the circumstances were such that it held out Mr. Formsma as their agent (which is refuted), clause 7 of the Agreement limits the agent's authority to offering suggestions and recommendations to Yates. Further, Oil Nut Bay claims that at no point was any representation of authority made by Oil Nut Bay to Yates which would satisfy the requirements to create a relationship of agency. Therefore, this finding should be set aside.

[146] In response, Yates argues that the learned judge correctly applied the legal principle that a contractor who has been requested to do work which is in fact a variation will be able to recover payment for it if the owner himself has expressly or impliedly requested the work knowing it be such, and that where an owner in person with full knowledge has himself ordered varied work and/or has evinced by words or conduct an intention to pay for it, that will almost always constitute a variation of the contract itself, in finding that Mr. Formsma was an agent of Oil Nut Bay. Yates asserts that there was much evidence that Oil Nut Bay ordered materials in excess of the contract price and also either authorised Mr. Formsma to order materials in excess of the contract price or represented to Yates that he had the authority to do so. As a result, Oil Nut Bay's contentions on this point are without merit.

Discussion

[147] Following the point made at paragraph 141 regarding Oil Nut Bay's knowledge that Mr. Formsma was making changes, I find that the learned judge properly concluded from the evidence of the parties' dealings that he was an agent of Oil Nut Bay. In the learned judge's view, Oil Nut Bay having been aware that Mr. Formsma was making changes and not taking steps to stop Yates from taking his instructions had the effect of clothing him with ostensible authority to contract. I agree with this finding. Accordingly, this ground is without merit and is dismissed.

Award of Contract Balance

[148] Oil Nut Bay also contends that the learned judge erred in awarding Yates the balance of the contract sum of $567,493.93 under the Agreement because, considering the evidence and the findings of the judge, Yates had failed to finish the construction by the agreed completion date or within a reasonable time thereafter thereby breaching the Agreement. Further, the learned judge having found that time was of the essence, essentially rewarded Yates for breaching the Agreement in failing to complete construction by the agreed date or within a

reasonable time thereafter. It is submitted that the learned judge failed to properly consider the term of the Agreement which stipulates that Oil Nut Bay was under no obligation to continue to make payments to Yates where it was clear that Yates would not finish the construction on time. Oil Nut Bay argues that that point was highlighted by Ms. Yates under cross-examination. However, the learned judge held to the contrary.

[149] In response, Yates argues that Oil Nut Bay's ground of appeal is misconceived. This is because the finding of the learned judge was that as there had been approved extras or variations, Oil Nut Bay could not enforce the completion clause under the Agreement and could only insist upon completion within a reasonable time. Considering that a certificate of occupancy was awarded by the BVI Building Authority on 7th July 2011 and the fact that the owner actually moved into the house on 30th May 2011, Yates claims that it cannot be said that the construction was not completed within a reasonable time considering the extras which were outside the scope of the contract. Further, as the learned judge had found that the Agreement was a fixed price contract, the balance of the contract became payable to Yates subject to any deduction in respect of damages for breach of contract.

[150] Additionally, Yates contends that there is nothing in the Agreement to suggest that a failure by it to complete construction within the contract period would allow Oil Nut Bay to withhold payment of the contract price once construction had been completed. It is submitted that the withholding of payment notwithstanding the completion of construction being penal in nature would require a specific clause to that effect in the Agreement so that there could be no doubt that the consequence of the failure to maintain the deadline for completion would be non-payment of any further sums under the contract whether or not construction was completed.

[151] In reply, Oil Nut Bay posits that the learned judge's award of the contract balance is inconsistent with the finding that time was of the essence. If Yates had met its contractual obligations and completed by the agreed date, there would have been no need for variations to the contract after that date. The learned judge erred in finding that variations to the contract made after the completion date prevented Oil Nut Bay from recovering damages.

Discussion

[152] On this ground, I agree with Yates' submissions that Oil Nut Bay could not enforce the agreed completion date as there had been approved extras or variations. Further, the learned judge correctly observed at paragraph 93 of her judgment that as the Agreement was a fixed price contract, the balance of the contract price was a matter of law due and payable to Yates subject to any deduction in respect of damages incurred for breach of contract. Further, there is merit in Yates' submission that there is nothing in the Agreement to suggest that a failure by it to complete construction within the contract period would allow Oil Nut Bay to withhold payment of the contract price once construction had been completed. I find that the learned judge properly evaluated the evidence before her and properly articulated her reasons for concluding as she did. Accordingly, I dismiss this ground of appeal.

Defamation

[153] On this ground, Oil Nut Bay submits that the learned judge erred in finding that the words spoken by Ms. Yates were only defamatory of Mr. Johnson and not of Oil Nut Bay itself and that Oil Nut Bay had no locus standi to bring the claim.

[154] The statement made by Ms. Yates to a prospective purchaser of property at Oil Nut Bay from Oil Nut Bay is as follows:

> "Mr. Johnson was constantly rushing ahead of the rest of the touring party and kept saying let's go let's go. The potential purchaser then enquired of the Second Defendant [the Second Counter Respondent], "Does he do everything this quick?" to which the Second Defendant respondent "not writing cheques".

[155] Oil Nut Bay submits that having regard to the authorities[20] which hold that a company can maintain an action for defamation uttered in relation to business dealings, the defamatory comment made by Ms. Yates was uttered in such a context. Therefore, it is argued that the learned judge erred in not awarding damages for defamation against Ms. Yates and that Oil Nut Bay is entitled to its costs as the defamation claim should have been allowed.

[156] On this ground, Yates submits that the learned judge "made a quantum leap" in concluding that words suggesting that Mr. Johnson was not quick to write cheques had the meaning that he was not a reliable businessman. Yates contends that in the natural and ordinary context, the words ought to have been interpreted to mean the opposite, i.e., a careful businessman. Yates argues that the learned judge was wrong to arrive at that conclusion and invites this Court to set aside the learned judge's findings on that point, Oil Nut Bay having raised the matter as a ground in the counter-appeal.

[157] In respect of the learned judge's other findings on this ground, Yates submits that in light of the evidence and the finding that the words were spoken in reference to Mr. Johnson, an individual and not Oil Nut Bay a corporate entity, the learned judge had to arrive at the inevitable conclusion that Oil Nut Bay had no locus standi to bring the claim against Ms. Yates. Therefore, Yates argues that this ground has no merit and should be dismissed.

[158] In reply, Oil Nut Bay argues that Yates in its submissions attempted a 'quantum leap' of their own to seek to interpret the words stated by Ms. Yates as a compliment to Mr. Johnson. Further, it is submitted that disparaging Mr. Johnson who is the chairman and sole owner of Oil Nut Bay amounts to disparaging Oil Nut Bay as a prospective purchaser would be discouraged from engaging in business

[20]D&L Caterers v D'Ajou [1945] KB 364 and Express Data Systems Ltd v Vincent Alexander SVGHCV119/1998.

with Oil Nut Bay upon hearing that the sole owner and chairman does not pay his bills on time.

Discussion

[159] The crux of this ground is whether the words uttered by Ms. Yates could be imputed to be defamatory of Oil Nut Bay itself. In considering this issue, the learned judge referred to the following paragraph of Gatley on Libel and Slander:[21]

> "a corporation or company cannot maintain an action of libel or slander for any words which reflect upon itself but solely upon its individual officers or members defamed…the action should be brought in the names of the individual officers or members defamed."

[160] The learned authors of Gatley on Libel and Slander further state that:

> "It is necessary in all cases that the defamatory words are capable of being understood as referring to the claimant. A company cannot, therefore, maintain an action for defamation in respect of words which reflect solely upon its individual officers or members and not upon the company itself.
> …
> Where the imputation concerns a business matter more difficult questions of degree will arise but to the extent to which the person directly defamed controls the company and can therefore be regarded as its alter ego will be a relevant consideration."

[161] In Express Data Systems Ltd v Vincent Alexander[22] the court noted that "a trading company may maintain an action of libel or slander for any words that are calculated to injure its reputation in the way of its trade or business". It was held that an allegation that a company owned and operated by a liar reflected on the respondent company in Bargold v Mirror Newspapers.[23] Similarly, in D&L **Caterers Ltd. v D'Ajou**,[24] the plaintiff company, of which the plaintiff Jackson was the managing director, carried on the business of a restaurant. The plaintiffs alleged that the defendant had slandered the plaintiffs to a third party by telling

[21] Gatley on Libel and Slander, 10th Edn, para. 959.
[22] Supra, n.19.
[23] [1981] 1 NSWLR 9.
[24] [1945] KB 364.

him, that the plaintiffs were illegally carrying on their restaurant in breach of the relevant orders of the Ministry of Food, and were thereby committing criminal offences, which in the case of an individual could be punished corporally by imprisonment. Goddard LJ held that:

> "they [the words] were meant to be defamatory. They say, as I read them, that the company and the plaintiff Jackson are carrying on this restaurant in a questionable manner, calling for the specific attention of the Ministry of Food. It is obviously implied that the rationing orders made under the Defence of the Realm Regulations have been broken, and I think it is also indicated that the plaintiff Jackson is buying food in the "black market," as it is commonly called. I do not think that anybody with a modicum of common sense could have any doubt that that is so. Therefore those words are."

[162] On this ground, I reject Yates' contention that the words uttered by Ms. Yates ought to have been interpreted that he was a careful businessman. The learned judge's conclusion that the words uttered had the effect of lowering Mr. Johnson in the estimation of right thinking members of society generally by imputing that he was not a reliable or efficient businessman cannot be regarded as unreasonable or a material error.

[163] I disagree with Oil Nut Bay's submission that disparaging Mr. Johnson who is the chairman and sole owner of Oil Nut Bay amounts to disparaging Oil Nut Bay. In my view, the authorities submitted by Oil Nut Bay can be distinguished. I find that the words uttered reflected solely upon Mr. Johnson and it would be farfetched to conclude that the words meant that Oil Nut Bay had poor financial health and/or insolvency. Further, there is no reason that Mr. Johnson was not joined in the claim in the court below to enable him to pursue his claim against Ms. Yates. There is no indication that the learned judge failed to identify the principles of law in relation to defamation or that she failed to properly apply them. Therefore, there is no reason for this Court to interfere with the learned judge's findings on this ground. The ground is accordingly dismissed.

[164] As Oil Nut Bay has not succeeded on this ground of appeal, the learned judge ought to have awarded costs to Ms. Yates on the dismissal of the defamation

claim against her. I therefore allow Yates' ground of appeal in relation to the costs on the defamation claim in the court below.

Costs

[165] Oil Nut Bay claims that the costs orders made by the learned judge in favour of Yates ought to be set aside.

[166] Yates submits that the learned judge correctly exercised her discretion pursuant to rule 65.11 of the CPR in awarding prescribed costs depending on the success of the respective parties' claims.

[167] In reply, Oil Nut Bay submits that as the findings in the appeal were made in error, the costs award made on that basis was also erroneous.

[168] The court has discretion as to whether costs are payable by one party to another and the amount of those costs. If the court makes an order about costs, the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but the court may make a different order. In deciding what order to make about costs, the court will have regard to all the circumstances including, among other things, whether a party has succeeded on part of its case, even if that party has not been wholly successful. The court may make an order that a party must pay a proportion of another party's costs.

[169] The court has a wide discretion with respect to costs and its aim is to "make an order that reflects the overall justice of the case." The general rule remains that costs should follow the event, i.e. the unsuccessful party will be ordered to pay the costs of the successful party. Although the court may depart from the general rule, it remains appropriate to give "real weight" to the overall success of the winning party. There is no automatic rule requiring the reduction of another party's costs if he loses on one or more issues. This principle is of general

application. In Budgen v Andrew Gardener Partnership,[25] Simon LJ said at paragraph 35 that "the court can properly have regard to the fact that even the winner is likely to fail on some issues".

Conclusion

[170] For the reasons given, I would make the following orders:

(1) I would allow Yates' appeal in part, to the extent that the learned judge erred in arbitrarily awarding the sum of $100,000.00 in respect of the cost of remedying defects and erred in failing to grant Ms. Yates costs on the dismissal of Oil Nut Bay's defamation claim for damages against her.

(2) I would dismiss Oil Nut Bay's counter notice of appeal.

(3) I would award Yates prescribed costs in the court below and two-thirds of these costs on appeal, as well as costs on the counter-appeal.

(4) I would award Ms. Yates prescribed costs in the court below in relation to the defamation claim.

[25] [2002] EWCA Civ 1125.

(5) I would award Ms. Yates two-thirds of the prescribed costs in the court below in relation to the defamation grounds pursued in the appeal and in the counter-appeal.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar