

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO: ANUHCV2011/0021

BETWEEN:

ANGUS JOSEPH
Trading as A.A. JOSEPH BUILDING CONSTRUCTION

Claimant

-and-

MARTYN DAVIS

Defendant

Appearances:

Ms. Alincia Williams-Grant for the Claimant
Mr. Peyton Knight for the Defendant

2022: December 5th
2023: February 23rd

JUDGMENT

[1] **ROBERTSON, J.:** The Claimant entered into an agreement with the Defendant to engage in a construction project comprising three two-storied houses and a swimming pool belonging to the Defendant. The Claimant commenced work some time on or about September/October 2007. The Claimant's services were terminated by the Defendant through correspondence dated 4th December 2009. The Claimant initiated these proceedings seeking damages against the Defendant in the sum of EC \$236,094.16 and damages for wrongful termination and for breach of contract. The defendant has defended this claim and issued a counterclaim.

Relevant Background.

[2] The Claimant, trading as A.A. Joseph Building Construction, entered into an agreement to complete the Defendant's construction project located in St. Phillips, Antigua. The project comprised three

buildings which the Defendant describes as a main house and two cottages. The Claimant was also required to construct a swimming pool.

[3] The agreement between the parties was partly oral and partly an agreement by conduct. The Claimant and the Claimant's workers would work on the project.

[4] It is the Claimant's case that at the relevant time of the construction works the following was to be paid:

- (1) EC\$2,000.00 plus \$500.00 for traveling weekly together with statutory deductions due and payable thereon.
- (2) Tradesmen employed by the Claimant on the Defendant's project EC\$800.00 plus \$100.00 for traveling together with statutory deductions due and payable thereon.
- (3) Labourers employed by the Claimant on the project EC\$720.00 plus \$50.00 travelling together with statutory deductions due and payable thereon.

[5] The Claimant also indicates that prior to the salary stated above he was paid EC\$1650.00 per week.

[6] It is the Defendant's case that payments were to be made in the following way:

- (1) Claimant's salary – EC\$2,500.00 per week for working as an active foreman. From this amount the Claimant to pay all statutory deductions. EC\$500.00 per week for travelling. The Claimant was expected to work not less than 40 hours per week.
- (2) Tradesman's Salary- EC\$900.00 per week less statutory deductions. The Defendant to pay the statutory deductions. EC\$100.00 per week travelling allowance. Time to be 40 hours per week.
- (3) Labourers' Salary- EC\$720.00 per week less statutory deductions. The Defendant to pay the statutory deductions due. EC\$50.00 per week travelling allowance.

[7] It is the Defendant's case that while the Defendant agreed to pay the statutory deductions for the Claimant's workmen, the Defendant did not agree to pay the statutory deductions for the Claimant. The Claimant represents that it was at the insistence of the Defendant that the Defendant opted to pay the statutory deductions to the relevant statutory authorities. The Defendant indicated that he

took on the task of paying the statutory deductions to enable the Claimant to focus on the construction project without having to be concerned about paperwork.

[8] The salaries of the Claimant and the other workers on the project were paid directly by the Defendant. The sums to be paid were determined when the Claimant provided to the Defendant the weekly timesheet of all of the persons working on the project. Initially, the Defendant paid the salaries in cash but later the Defendant took the decision to pay the salaries by bank transfer to the individual accounts of the Claimant and the workers of the Claimant.

[9] The Defendant was generally making the statutory payments. However, it was discovered in July 2009 that the Defendant failed to make certain payments. Thereafter, the Claimant received letters of demand from certain statutory authorities such as Social Security Board of Control. The aggregate sum owed to the authorities was EC\$144,494.16. Specifically,

Medical Benefits Board	\$29, 156.40
Social Security Board	\$72,316.80
Board of Education	\$21,550.56
Inland Revenue Department	\$21,470.40

[10] The Claimant also contends that the refusal of the Defendant to pay the statutory authorities was in breach of the agreement between the Claimant and the Defendant. The Claimant also contends that the Defendant terminated the contract wrongfully and did not compensate the Claimants and his workers the two weeks of vacation in the sum of EC\$35,562.00 which would have been owed to them in 2009 nor were the Claimant and his workers paid their severance benefits in the sum of EC\$56,038.00.

[11] The Defendant contends that he agreed to pay the statutory deductions for the Claimant's workers and not the Claimant, that the Claimant is solely responsible for the payment of vacation, severance and other benefits due to the Claimant's workers, that the Defendant was forced to terminate the agreement with the Claimant because of the Claimant's actions.

[12] The Defendant issued a counterclaim in which the Defendant contends that the Claimant breached the contractual agreement in that the Claimant failed to complete the project within the stipulated

time and that the Claimant negligently and in breach of contractual duty carried out the works at a defective standard and that the works were not fit for reasonable comfortable habitation or that the work done was not fit for purpose.

[13] The Claimant denies that the Claimant breached any implied or expressed conditions of the agreement and that there were no deadlines established for the completion of the project. The Claimant also indicated that there were no leaks to the cistern, roof and pool as alleged and if there were the said defects fell outside the normal defects' liability period and foremost they were never brought to the attention of the Claimant prior to the claim being filed.

Evidence.

[14] The Claimant gave evidence and his evidence was supported by the evidence of Wilton Challenger, one of the Claimant's workmen. The Defendant gave evidence in support of his defence. The Court also heard the evidence of Everon Zachariah, civil, structural and coastal engineer, who was appointed an expert in accordance with CPR 32.

Issues for the Court's Determination.

[15] Issues: The Court is required to determine

- (1) The terms of the Claimant's engagement, specifically as it relates to:
 - (a) Whether it was a term of the agreement that the Defendant would pay the statutory deductions for the Claimant and the Claimant's workers to the relevant statutory authorities
 - (b) Whether there is an agreement stipulated as to time within which the project was to be completed.
- (2) The nature of the engagement between the Claimant and the Defendant, i.e. whether the Claimant was an independent contractor or an employee of the Defendant.
- (3) Whether the Defendant's termination of the agreement was legally justifiable.

EVIDENCE

The Claimant's Case

ANGUS JOSEPH

[16] In Mr. Joseph was a mason/contractor by profession and started his own business in 2006 under the name of A.A. Joseph Building Construction. He met the Defendant, Mr. Martyn Davis in 2007, when he was referred to the Defendant by previous customers (Michael and Shonnie).

[17] At the time when the Claimant was introduced to the Defendant the Defendant was looking for a contractor to replace the contractor who worked on the Defendant's property in St. Phillips. The evidence of the Claimant is that he was taken to the Defendant's property to assess the work done by the previous contractor and to assess the work which was required to be done by the Claimant if the Claimant agreed to be the contractor. The Claimant was informed that the project consisted of three two-storied buildings, a main house and two smaller cottages. The Claimant would also be required to build a swimming pool and deck.

[18] The evidence of the Claimant is that at the time when the Claimant commenced working on the site the foundation existed on two of the three buildings and on the third building the foundation was dug out and some steel and other form works were present in the ground.

[19] The Claimant commenced working on the site in September/October 2007 but there was no written agreement between the Claimant and the Defendant. The Claimant's evidence is that he recently formed his construction business, he trusted the Defendant and he hoped that his work with the Defendant would afford him opportunities for referrals to other projects including high- end projects.

[20] The evidence of the Claimant is that the Defendant insisted that he paid the statutory deductions owed by the Claimant for the Claimant and the Claimant's workers to the relevant statutory authorities. To facilitate this process the Claimant was to, on a weekly basis provide the Defendant with time sheets for the persons employed. Upon receipt of the time sheets the Defendant would prepare the necessary forms, file them, and pay the funds to the statutory authority. The Claimant noted that it was the Defendant's signature which would appear on the filings that were submitted to the social security, medical benefits and Inland Revenue. The Claimant understood that the payment of funds to the statutory authorities was the responsibility of the Claimant but agreed for the matter to be handled by the Defendant.

[21] The evidence of the Claimant was that he was initially paid the sum \$1650.00 from the Defendant and that this sum was increased to EC\$2,000.00 weekly as the Claimant had more men to supervise. The Defendant would pay the Claimant and the workers according to the information provided in the time sheet which was given to the Defendant.

[22] The Claimant completed the construction of the main house early in 2009 and the Defendant moved into the main house soon thereafter. Work resumed on the second cottage. While the Claimant was working on the Defendant's property the Claimant was introduced to Mr. White, a property owner in the neighbourhood and the neighbour to Defendant. The Defendant recommended that the Claimant work on Mr. White's property while working on the Claimant's property. The Defendant became the project manager for construction to be undertaken on Mr. White's property. The evidence of the Claimant is that the Defendant made the arrangements with Mr. White to construct Mr. White's house and that the Claimant was in no way involved in the arrangement. The Claimant was simply informed by the Defendant that the Claimant was required to send workers to the Mr. Whites property from a specific date to begin working on Mr. White's house. The Defendant continued to pay the Claimant and his workers in the same manner as had been done when the Claimant and the workmen were working on the Defendant's property. The Claimant's evidence is that the Claimant commenced working on Mr. White's property sometime in June 2009. The Defendant's evidence is that the Claimant commenced working on Mr. White's property in October 2008.

[23] The Claimant worked on the Defendant's property from 2007 to 2009 when in December 2009 the Claimant's services were terminated by the Defendant. The Claimant noted that while the Claimant worked on the Defendant's site the Defendant employed engineers, Mr. Oliver Dais and Mr. Hanley, who were also on the site and who would oversee the project when the Defendant was off island. The Defendant and his son in law were also engineers.

Statutory Deductions.

[24] The Claimant indicated that sometime in 2009 the Claimant and his workers discovered that the statutory deductions were not being paid to the authorities although the sums were already deducted from the Claimant and the workers' pay packets. The evidence of the Claimant is that initially the

issue was detected when workers had reason to approach the Social Security Board of Control to transact business, an officer from Medical Benefits and Social Security had cause to visit the project site to speak with the Claimant. The evidence of the Claimant is that the Defendant met with the compliance officer when the compliance officer came onto the work site and that the Claimant and the Defendant later visited the office of Social Security Board of Control to speak with a compliance supervisor about the payments.

[25] The Claimant indicated that at all times the Defendant acknowledged the sums to be paid and indicated that the Defendant would pay the sums which were owed to the authorities.

Quality of work

[26] The Claimant indicated that the only complaint raised by the Defendant was that there was a leak in the upstairs bathroom area of the main house. The evidence of the Claimant is that two workmen were sent to determine where the leak was and to fix the leak. The shingles in the area were removed, and finding that there was no evidence of a leak the shingles were replaced. There were no further reports about there being a leak. The Claimant also indicated that the Claimant was never informed of any leaks or other damage to the cistern. The Claimant indicated that in any event when the cistern was being built one of the Defendant's engineers was on site. The evidence of the Claimant is that he only heard about the defects in the building when the Defendant filed its defence and counterclaim some three years after the Claimant left the job. The Defendant was never given an opportunity prior to 2011 to remedy any defects which the Defendant now alleges, the leaks and tiling defects.

The Termination

[27] The Claimant's engagement was terminated sometime towards the end of November 2009. At the time of the termination the evidence of the Claimant is that the main house was completed; the pool at the main house was completed and the first cottage for his daughter was also completed. The Defendant and his family were living in the main house from early 2009. As it related to the third cottage the Claimant and his workmen were at the last block level with lintel beams in and casted.

As it related to Mr. White's house the Claimant and the workers started work on part of the foundation to include the maid quarters, store room, pump room, laundry area and the floor up to the third floor. The final floor of Mr. White's property was yet to be started.

WILTON CHALLENGER

[28] Mr. Wilton Challenger, a steel bender and who worked with the Claimant for over ten years provided evidence which supported the evidence of the Claimant. Mr. Challenger in his evidence stated that when they began the Defendant's project, about a quarter of the foundation was completed. This witness also stated that the Defendant was the "paymaster" and often saw Mr. Joseph give the Defendant the pay sheets.

[29] Mr Challenger asserted that the Defendant never complained about the quality of the work. In fact, this witness stated that before any major segments of the work moved on to the next stage, it was always approved by either the Defendant himself, one of two engineers, Junie Davis, Dr. Hanley, or a member of the Defendant's family.

[30] Mr. Challenger led evidence that he did steel work on the Project with another steel man known as "Rasta". Mr. Challenger explained that a steel plan had been provided to him and that he would ensure that the steel is placed according to the plan in place. Thereafter, the engineers not associated with the Claimant would ensure everything was correct before the steel could be covered with concrete.

[31] Additionally, Mr. Challenger stated that he did work on the construction of the cistern and that he was aware that the workmen double plastered the cistern to safeguard against leaks to the cistern. A similar approach was adopted with respect to the pool. This witness was aware that there was a complaint being made by the Defendant about a leak to the main house and was aware that the Claimant sent persons to the roof to investigate the leak.

[32] Evidence of this witness is that he worked on both the property of Defendant and Mr. White's during the relevant period.

[33] Mr. Challenger stated that he and the other workers were informed by the Claimant in December 2009 that their services were being terminated with immediate effect. The witness indicated that upon termination he was not paid for Christmas 2009, was not given severance and that to his knowledge and belief the other employees working on the project did not receive their severance payments.

MARTYN DAVIS (the Defendant)

[34] The Defendant in his evidence stated that he was a retired Quantity Surveyor. He previously was engaged by Wright Builders Limited to work on the project in July 2007. The engagement was terminated in September 2007. The Defendant stated that the following week he was introduced to the Claimant with whom he entered an agreement to construct the main house, two guest cottages, a swimming pool and a deck area on the Defendant's property. It is the Defendant's evidence that the Claimant indicated that the project would take one year to be completed.

[35] Mr Davis stated that initially, the agreement was that the Claimant would act as a working foreman being paid \$2000 per week. However, this sum was increased to \$2500 per week following discussions. It is the Defendant's evidence that it was agreed that the Claimant would deal with his own statutory deductions. The tradesmen were paid EC\$900.00 plus statutory deductions and a travelling allowance of EC\$100.00 per week.

[36] The Defendant indicated that when the Claimant commenced working on the project the Claimant commenced with four men including the Claimant, however, over a period the workforce increased to approximately twenty men. It had been further submitted by the Defendant that upon visiting a friend who was living in Willoughby Bay he noticed the Claimant's vehicle parked at another site and several of the Claimant's workmen were on that jobsite. The Defendant formed the view that the Claimant was removing workmen from his project and working on other projects records.

[37] During May 2008, the Defendant indicated that he undertook to project manage the construction project of a Mr. White who lived in his neighbourhood. The Defendant stated under cross-

examination that the Claimant was working with him at the time that the Claimant was to become one of several subcontractors on Mr. White's project which commenced in October 2008. The Defendant indicated that the agreement was for the Claimant to continue on the same terms and rates as existed between the Claimant and the Defendant and that the Claimant would supply the labour on Mr. White's project.

[38] The Defendant indicated that although the Claimant committed to the completion of the Defendant's project by the end of 2008 the main house was not completed until July of the following year. The pool and deck had not been substantially completed until November 2009. Under cross examination the Defendant agreed that he was the project manager on Mr. White's property, that that he kept good records as it related to the money spent and the movement of staff.

[39] The Defendant indicated that he raised the matter of the quality of the Claimant's work on several occasions. The Defendant stated that in January 2009 he began to notice the 'shoddy workmanship' of the Claimant and his workers and brought it to the attention of the Claimant. In January 2009 he also noticed water stains on the floors to the kitchen, lobby, master bedroom, lobby to walk-in -closet and in the walk in closet of the master bathroom. These matters were brought to the attention of the Claimant. The Claimant's effort to address the leak "eased the problem for a while, but during heavy rains, the leaks persisted and were never solved by the Claimant'.

[40] The tiling was completed in early February 2009 and it was immediately apparent that the tiles were uneven and stained by cement and grease. This was brought to the attention of the Claimant by the Defendant and his wife in mid-February 2009.

[41] The leaks of the cistern became apparent in October 2010 after a heavy rain and in summer 2010 when it was noticed the water was leaking from the swimming pool. The pool was partially emptied to locate the source of the leak. The evidence of the Defendant is that the pool was emptied and it was determined that a large part of the south wall of the pool was hollow and that fine cracks in the pool finish were evident although the pool was tiled and plastered by the Claimant and a specialist contractor was employed to apply the decorative finishes to the pool.

[42] The Defendant indicated that his persistent efforts to have the issue of the poor quality of work on the part of the Claimant addressed were futile. The Defendant stated that he made the decision that until the issues with the poor workmanship were addressed that the Defendant would not pay the statutory deductions and as such contributions from January to March 2008, May to June 2008 and December 2008, were not paid.

[43] The Defendant testified that concerning the pool, his son-in-law, had extensive qualifications as an engineer and practised in the United Kingdom and was on the island when the pool had been constructed. The Defendant's son-in-law designed the pools, and did the drawings for the pool with the assistance of his drafting assistant. The Defendant indicated that the drawings were never shared with Davis of Davis Engineering as at the time that the work was to be done, Davis of Davis Engineering was overseas. Further, the Defendant indicated that Mr. Owens was not on the jobsite all of the time when the concrete was being poured for the pool and that his son-in law did not supervise any laying of the concrete as this was the job of the Claimant.

[44] During cross-examination the Defendant was questioned on the process for ordering concrete generally and as it related to the construction of the pool and of the cistern. The Defendant explained that he was always required to pay for material including concrete, however the ordering of the concrete was done by both the Defendant and the Claimant.

[45] In order to place the order for concrete, the Defendant indicated that the cubic volume was required to be determined by the dimensions of the work to be covered plus an excess to account for spillage. The service provider would visit to determine the placement of the pump and to determine the cubic volume that is required for the concrete project. The Defendant indicated that this was not always the case and that this did not occur when the pool was being built.

[46] Concerning the payment for the concrete, the Defendant explained that upon receiving an order, the truck drivers would bring the product and give the receiving person, generally the Defendant or the Claimant, a delivery ticket from which an invoice was prepared. The Defendant indicated that after the ticket was received that he would check the ticket against the invoice received and match with the order placed.

[47] Under cross examination there was an attempt to suggest to the Defendant that his response letter in December of 2009 did not list all of the defects found in the work of the Claimant to which the Defendant suggested that some of the defects occurred after the Claimant left the job as well as that the Defendant found no need to point out said defects as the Claimants were aware of them.

[48] It had been admitted by the Defendant that he had not conducted further repairs to the tiles but rather placed furniture over the defects and that the property is now listed for sale by several realtors. The description given in the listing were the words used by the agents which serve to and encourage the sale of the property despite the existing defects.

EVERON ZACHARIAH

[49] Mr. Zachariah provided expert evidence. Mr. Zachariah led evidence that he was a civil and structural Engineer, and has been in the profession for twenty-four years. He indicated that he did two inspections to the Defendant's property. The first was prior to being engaged as an expert in these proceedings and the other inspection was after in or about 2016 after he was appointed as an expert. Mr. Zachariah deposed that he understood his duty as an appointed expert under the provisions of CPR 32 and provided the Court with a report outlining the defects of the Defendant's property.

[50] Mr. Zachariah's expert opinion is that the area in which the property is located is an upper-income development where the value of the properties in the general environs generally ranged from approximately US\$1,000,000.00 to US\$5,000,000.00. Thus, based on the location of the development, he stated that it was clear that the level of workmanship which was expected would be of high quality. When asked to rate the quality of the property in question, Mr. Zachariah described it to be of fairly good rank, approximately 8 out of ten and to be considered of a high standard.

[51] Mr Zachariah's evidence stated that in February 2011 leaks had been observed to the roof of the main house, predominately located in the closet of the master bedroom and along the kitchen. He further stated that the leaks appeared to be predominately associated with (1) the valley locations, (2) where there is a change in roof slope or (3) where conduit exist in the roof. Under cross-examination he stated that he was aware that the Claimant carried out repair works in relation to the said leaks in which the Claimant ordered the carpenters to "wet down" the roof with a hose to find

where the leaking areas are. In the areas that had been found to be leaking, to the best of his knowledge he stated that they removed the shingles, battens and other protective membranes from the associated areas as well as installed wider roof flashings, then reinstall the shingles.

[52] Mr. Zachariah asserted in his expert report that upon inspection, the quality of the tile work on the upper floor is completely different to that on the lower floors. The quality on the upper floor, he stated was unacceptable for high-end construction. The tiles were found to be sloping in one direction with the adjacent tile sloping in the other direction. Measurements also revealed that there was as much as a 3/8 of an inch difference over a distance of approximately 6 feet as well as adjacent tiles were also found in some cases to differ in level up to 1/8 of an inch.

[53] Mr Zachariah in his testimony admitted that from his professional standpoint, in a "high end neighbourhood, if defective tiles were discovered by the homeowner that it would be normal for them to be asked to rectify immediately or as soon as possible.

[54] Mr. Zachariah stated that upon assessment and inspections of the area of the building said to be defective, the observed conditions are in tandem with inferences made by the Defendant. The estimated cost of rectifying the defects to the subject property in accordance with the description of damage and the presented bills of quantities is one hundred and eighty-three thousand seven hundred and thirty-nine Eastern Caribbean dollars and fifty cents (EC. \$183,739.50).

The Law, Analysis and Finding of the Court

The Agreement

[55] A contract is an agreement giving rise to obligations which are enforceable or recognised by the law¹. In the circumstances of this case the parties entered into an agreement which was partly oral and partly by conduct.

¹ Treitel, Law of Contract (8th Ed., 1991) p. 1.

[56] The evidence of the Claimant is that the parties agreed that although the Claimant would have ordinarily been responsible for the payment of statutory deductions to the statutory authorities the agreement between the Claimant and the Defendant is that the Defendant would be responsible for these payments. The Defendant contends that the agreement was that he pay the statutory deductions for the workers of the Claimant and that the Claimant would be responsible for the deductions for which he was liable.

[57] Based on the documentary evidence placed before this Court the Defendant admitted that he not only calculated but paid to the appropriate authorities the statutory deductions owed by the Claimant and the workers on the site. It is also noted that in the evidence of the Defendant the Defendant indicated that he took the decision to withhold the statutory deductions until certain defects which were identified by the Defendant were remedied by the Claimant.

[58] The evidence of the Defendant is that:

“22. Because of the issues concerning the poor quality of work, the leakage that I was having in the house and the fact that the Claimant was not addressing these issues, I decided that until they were fixed that I would not pay his statutory deductions. And thus, from January to March 2008, May to June 2008 and December 2008, I declined to pay those deductions. Further, it was during that period that I was overseas and did not keep a proper record of the persons the Claimant had on site.

23. I wanted to hold some money in hand to cover any remedial works. Further defective works were discovered shortly after the tiling and the roof defects had still not been addressed, so I continued to hold back these sums of money.

24. After the site discussions regarding the roof leaks, the defective tiling, the poor attempts at rectification works and further lack of attention to them, it became more apparent that the Claimant was not going to address the defective works and was avoiding further discussions with me about them. I wanted to hold some money in hand to cover the rectification work due to his inaction. I allowed these sums to be held back to cover potential remedial costs.

25 ...After I moved into the main house on the 4th of July 2009, an officer from Social Security, ..., with colleagues, visited the Claimant at my jobsite. Following discussions in my house, Mr. ... advised me that it was the Claimant's responsibility to pay the sums and

not mine personally as he was the employer of the workforce. I told him that I would clear the outstanding amount when the Claimant had sorted out issues between us.”

[59] It is clear that the arrangement between the Claimant and the Defendant is that the Defendant would pay the statutory deductions to the relevant authorities.

Timeline for Completion

[60] The authors of the Halsbury’s Laws of England noted that:

“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”.²

[61] The evidence of the Claimant is that no completion date was agreed between the parties. The Defendant contends that the Claimant agreed to complete the construction of the main house by the end of 2008 and the guesthouse shortly thereafter. The Claimant began working on the property around October 2007. The Defendant contends that the Claimant did not complete the main house until July 2009 and the guesthouse in or around August 2009 and that the pool and the deck were completed in November 2009. The second guest house was incomplete at the time when the Defendant terminated the construction agreement between the Claimant and the Defendant.

[62] In the circumstances of this case there is no evidence which establishes a timeline within which the Claimant was required to complete the construction project. It is noted that the project was likely to

² Vol. 4 para. 1180.

be of some volume as it required the construction of three two storied buildings in a high end neighbourhood. It is also noted that when the Claimant commenced the project, the Defendant's evidence is that the Claimant commenced with four workers including the Claimant. During the life of the project this sum was increased to between 15 to 20 workers according to the Claimant and the Defendant. There is no evidence which supports that there was a completion date.

[63] Additionally, there is no evidence before the Court which could assist the court in determining a reasonable completion date of the project.

[64] The authors of the Halsbury's Law of England on the matter of the test for independent contractor made the following observation.

"...the modern starting point for deciding whether a contract of service (now generally referred to as a 'contract of employment') exists is to ascertain if:

- (1) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master ('mutuality of obligation');
- (2) he agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master ('control'); and
- (3) The other provisions of the contract are consistent with its being a contract of service⁷.

The final classification of an individual now depends upon a balance of all relevant factor, fine though that balance sometimes might be, with 'mutuality of obligation' and 'control' being seen as the 'irreducible minimum' legal requirements for the existence of a contract of employment. The factors taken into consideration may include: the method of payment; any obligation to work only for that employer; stipulations as to hours; overtime, holidays etc.; arrangements for payment of income tax and national insurance contributions¹²; how the contract may be terminated¹³; whether the individual may delegate work; who provides tools and equipment; and who, ultimately, bears the risk of loss and the chance of profit. In some cases, the nature of the work itself may be an important consideration.

The way in which the parties themselves treat the contract and the way in which they describe and operate it are not decisive; and a court or tribunal must consider the categorization of the person in question objectively. Thus, a person could have been described as self-employed during the currency of the engagement but, on its

termination, claim to have been in fact an employee for the purpose of claiming unfair dismissal²⁰, although such a course of action could have unfortunate taxation implications.³

[65] In the circumstances of this case the parties entered into an oral agreement. The evidence before the court indicates the following:

- (1) Division of labour. The Claimant was responsible for engaging the persons who worked on the worksite. The Defendant was responsible for supplying material for the project, providing instructions on the work to be done on the project.
- (2) Wages. The Defendant paid the wages to the Claimant and the workers. Initially the wages were paid in cash and later the wages were paid directly from his account to the accounts of the Claimant and the workers. The Defendant asserts that this was done for convenience as the Claimant did not have the banking arrangements set up, however, this court takes judicial notice of the fact that the setting up of the necessary banking arrangements is not overly burdensome and in ordinary arrangements between an independent contractor and the employer the Defendant would have recognised that his duty to the workers ended when he paid the Claimant.
- (3) Payroll Information. The Claimant kept the timesheets and provided the timesheets to the Defendant on a weekly basis. The Defendant used the information on the timesheets to determine the wages to be paid to the Claimant and to the workers and the statutory deductions that were applicable. It is noted that in evidence before this court there was at least one document, time sheet for the week ending 4th December 2009 when the Defendant corrected the number of days submitted for payment from 5 days to 4 days.
- (4) Vacation Pay. The Claimant contends that the Defendant provided vacation pay to the Claimants and the workers for the year 2008 only. This contention has not been denied by the Defendant.
- (5) Statutory Deductions. The Defendant not only paid the wages of the Claimant and workers by direct bank transfer, but the Defendant also made and paid the statutory deductions to the relevant statutory authorities. It is noted that the Defendant's evidence is that he was

³Halsbury's Laws of England; Employment (Volume 39 (2021), paras 1-346; Volume 40 (2021), paras 347-728; Volume 41 (2021), paras 729-1086; Volume 41A (2021), paras 1087-1509); 1. Nature of a Contract of Employment; (1) Employment under Contract; (i) In general; 4. Test at common law as to whether a person is an employee.

informed by a representative of the Social Security Board of Control that the obligation to pay the statutory deductions rests with the Claimant not the Defendant

- (6) Work Assignment. The Defendant described the Claimant as being a working foreman. The evidence suggests that the Defendant gave instructions to the Claimant regarding work done on the project such as when the project should focus on the completion of the main house and when the Claimant was required to send workers to the construction project on Mr. White's property.
- (7) The Defendant was paid as the project manager for the construction project on Mr. White's property. The evidence of the Claimant is that the Defendant negotiated with Mr. White regarding when the Claimant would assume working on Mr. White's property and how much the Claimant and the workers would be paid. When the Claimant and his workers worked on Mr. White's property the Defendant would pay the Claimant and the workers in accordance with the same arrangement as described, when the Claimant with his workers were working with the Defendant. Such an arrangement would likely to have been for the financial benefit of the Defendant.
- (8) Working Hours. The Claimant and the workers were required to be on the Defendant's site from 7:00 a.m. to 3.30 p.m. during the weekdays and on Saturdays as required.

[66] Objectively, the parties were operating closer to that of an employee/employer relationship than an independent contractor/ employer relationship. In this Court's view the correspondence of the Defendant under the letterhead of Peninsular Construction Services dated 29th October 2009 and 12th November 2009 and the response from the Counsel of the Claimant dated 20th November 2009 were attempts to re-set the relationship to that of independent contractor/ employer. However, the services of the Claimant were terminated by the Defendant by the Defendant's correspondence dated 2nd December 2009.

[67] The working hours on the Defendant's project were from Defendant's standpoint expected to exercise a level of control over the Claimant. Additionally, based upon the correspondence of the Counsel for the Claimant dated 20th November 2009 it is clear that the Claimant understood that he was an independent contractor. That correspondence indicates, "Surely, you must understand that the nature of an independent contractor dictates that the contractor is free to go and come as he

pleases and give directions to his men as he sees fit in the interest of the project. Consequently, your letter of 3rd instant is otiose to such an arrangement: particularly, your statement that “this has left me with no alternative but to deduct a proportion of your weekly fee to cover the hours not supervising your men” and “it is necessary for me to write you a warning letter”. Unless, however, Mr. Davis, your assertion is that our client is your employee.”

[68] The Defendant responded to this correspondence on 2nd December 2009 and in that correspondence the Defendant indicated, among other things that, “As regards Mr. Joseph, the agreement is that he would provide the services as a working foreman. It is ludicrous for you to state that Mr. Joseph was to come and go as he pleased. He as the independent contractor employing over 15 men on site was responsible to ensure that his men worked diligently, properly carried out their tasks, and followed proper instruction. This would only be possible if he devoted proper efforts, which generally required his full-time efforts on site, except for the time spent ordering and collecting goods etcetera.’

[69] It is clear that despite the arrangement between the parties on the payment of the statutory deductions and the payment of salaries the Claimant viewed himself as being an independent contractor.

[70] The Claimant contends that by reason of the conduct of the Defendant that the Defendant would pay the statutory deductions directly to the statutory authorities and the fact that the Defendant would pay the salaries of the Claimant and the workers from cheques drawn on the Defendant’s account the Defendant was also required to pay the vacation and severance pay to the persons who worked on the project. However, it has been noted that the Claimant was an independent contractor, and the Claimant has produced no evidence that the Defendant agreed to pay the vacation and severance pay to the men who worked on the project.

Whether there was a breach of contract / whether there was wrongful termination.

Breach of Contract/ Wrongful termination.

[71] The Claimant contends that the Defendant repudiated and terminated the contract between the Claimant and the Defendant. The Claimant has not, in its pleadings outlined the particulars of the

repudiation or breach. The Defendant's case is that by correspondence dated 2nd December 2009 the Defendant notified the Claimant that the Claimant was not complying with the terms of the oral agreement to provide skills and services as required under the contract and that the Claimant's services were being terminated. The Claimant was provided seven (7) days' notice of the termination. The Defendant indicated that the agreement was terminated for the following reasons:

- (1) Refusal to communicate with the Defendant about ongoing work.
- (2) Refusal to come to the work site.
- (3) Failed to supervise his employees on the work site.
- (4) Failed to appoint a supervisor or "link" person in the Claimant's absence to supervise and communicate with the Defendant.
- (5) Refused to provide necessary tradesmen and labour to the site to allow for the timely completion of the project.
- (6) Prevented his employees from working on the Defendant's site although the workers were willing and available.
- (7) On 1st December 2009 removed an essential workman from the site without consulting with or obtaining the consent of the Defendant thereby preventing the timely completion of the swimming pool. The Claimant failed to notify the defendant when and if at all a replacement worker would be provided.
- (8) Failed to cooperate with the Defendant.

[72] Claimant disputes the matters raised by the Defendant.

[73] The Defendant also notified the Claimant that his services would not be required by Mr. White as Mr. White indicated that he would not be making any further payment to the Defendant for the construction work provided at Mr. White's residence.

[74] The Defendant has issued a counterclaim and contends that the Claimant breached an implied term of the agreement to carry out building works with reasonable care and skill, that the building works would be fit for purpose; that the building works would be fit for reasonable comfortable habitation; that the building works would be completed within the time agreed; that the building works would be finished to a high standard commensurate with newly constructed residence in a high income neighbourhood in which the Land was situate.

[75] The Defendant particularises the defective works as including:

- (1) The floor tiles in the kitchen, living room and master bedroom in the main house were installed unevenly and defectively and are a safety hazard to users of the building.
- (2) The roof of the main house leaked severely in several places including but not limited to the kitchen, living room, master bathroom and walk in closet.
- (3) The cistern in the main house leaked at several locations.
- (4) The south eastern side of the swimming pool leaked.
- (5) Water ponding along the veranda of the guesthouse and presenting a safety hazard.
- (6) Several places of the roof of the guesthouse leaked.
- (7) Electricals incorrectly installed.

Floor Tiling

[76] The Defendant contends that the floor tiles in the kitchen, living room and master bedroom were installed unevenly and in a defective manner. The Defendant also contends that the tiles in the veranda of the guest house were also installed in a defective manner so that the water pools and does not run off as it is expected to occur. The Defendant contends that the unevenness of the tiles was brought to the attention of the Claimant by the Defendant and by the Defendant's wife. The Claimant denies that this is in fact the case and notes that the matters were not brought to the Claimant's attention.

[77] On the matter of the floor tiling Mr. Everon Zachariah indicated that:

"A close inspection was carried out in respect to the quality of tile work on the Upper floor of the Main House. ... For enclosed areas the surface should be relatively flat with tile joints corresponding."

The inspection reveals a complete difference in the quality of tiling on the upper and lower floors. On the upper floor in the areas of the living room, bedroom and kitchen several areas were observed where the adjacent tile did not line up or were not level. In some areas tiles were found to be sloping in one direction with the adjacent tile sloping in the other direction. Measurements taken using a straight edge revealed there was as much as 3/8 inch difference over a distance of approximately 6 feet. Adjacent tiles were also found in some

cases to differ in level by up to 1/8 of an inch. Enclosure Nos. 4 to 8 show the tiling works in general, and the specific defects outlined above.

These photos show both the extent to which the tile ends are out of level and the appearance to the eye in different lighting conditions and angles. This quality of tiling is not considered acceptable for high -end construction. For comparison, a photo of the acceptable tiling areas is also shown. It is clear than not only does the tiling appear aesthetically unpleasing, but it also could cause tripping to users”

[78] During cross-examination Mr. Zachariah indicated that he assessed the main house and the guest house and noted the almost the entire main house was tiled. The inspection was initially done in 2011, prior to Mr. Zachariah being appointed an expert and in 2016 in furtherance of the report which is now before the Court. This witness indicated that the uneven tiles were not only in the main house but was also observed in the guest cottage. In the main house this witness referred to uneven tiles being found in the living room bedroom and kitchen and that there was “quite a bit” found in these areas. In Mr. Zachariah’s opinion the unevenness in the areas were obvious particularly if one has an eye for finesse and in addition seeing water pooling in a particular area of the floor.

[79] The enclosures numbered 4 to 8 show uneven tiles. The photographs enclosed show uneven tiles which in the Court’s view would have been perceptible to a contractor. Thus, even if it was not brought to the attention of the Claimant the Claimant ought to have noticed it and taken corrective action.

Leakage- Roof

[80] The Defendant contends that there were leaks in the main house and in the guest house. As it relates to the main house the Defendant contends that leaks could be observed in the areas of the kitchen, living room, master bathroom and walk in closet. The Claimant recognises that there was a leak in the walk-in closet, but this was detected while the Claimant was still on the project and the leak was rectified. The fact that the leak in the main house was repaired was revealed in the expert report.

[81] In the report the Mr. Zachariah indicated that:

“At our initial site visit and inspection in February 2011, leaks were observed to the roof of the main house. These leaks in the roof were predominantly located in the closet of master bedroom, and along the kitchen. These leaks appear to be predominantly associated with (1) the valley locations, (2) where there is change in roof slope or (3) where conduits exist in the roof.

....

It is usually very difficult to identify the exact source of most water leaks, as the actual source may not be at the area where the leak manifest itself, or the hole may be of such size that it is difficult to see same. It therefore is often necessary to water proof all areas at a higher elevation than the manifestation point where water could possibly enter from. It is understood that the repair works carried out entailed removing the shingle roof cover over moderate areas of the room and installing wider roof flashings then reinstalling shingles.”

[82] When Mr. Zachariah visited the guest house he noted that there were signs of the leaks manifested in the discoloration to the pickle finish to the rafters and ceiling, watermark/signs of deterioration of the base of the rafters, rust to the electrical fixtures that were flooded as a result of the leak. Enclosures 10 and 11 were included to illustrate the matters to which reference was made.

[83] As it related to the leaks in the guest house Mr. Zachariah reported that there was evidence of leaks generally in the valley areas where the slope of the roof changed and by electrical fixtures (light/fan) where apparently conduit may have gone through the ceiling.

[84] The Claimant and his witness agreed that there was a leak in the main house. The contention of the Claimant is that the leak was repaired by the Claimant. However, in 2011 when the Mr. Zachariah visited the house he observed leaks in the main house. The leaks in the main house appeared to have been repaired by the time of the 2016 visit and report.

[85] However, the leak in the guest house would need to be addressed.

Leaks to the Swimming Pool and Cistern

[86] Mr. Zachariah noted that at the last visit there were no active leaks observed but that there was slow seepage. This was evident from the signs of salt leaching through the wall suggesting that there may be some moisture movement due to seepage. Mr. Zachariah indicated that he understood that work was previously done to address the leakage of the pool. The evidence of the Claimant is that the Defendant made no complaints about the pool. Mr. Zachariah indicated that the solution for the seepage is the proper sealing and waterproofing of the internal surface. Rectification would entail dewatering the pool, applying a pool sealer such as Map elastic then refinishing the pool with diamond brite.

[87] Mr. Zachariah also indicated that there is evidence that reinforcement in the pool is undergoing corrosion where the reinforcement does not have adequate cover. The steel was required to have a minimum coverage of 2 inches. In some instances, the coverage was 1 inch. At the time of the inspection there were a few nail spots at the base of the pool that appear to be in the earlier stages of corrosion. Mr. Zachariah indicated that the extent of the problem is uncertain however given that the pool is a saltwater pool it is very likely that several areas of rusting and corrosion will develop over time...

[88] As it relates to the Cistern Mr. Zachariah noted that there were signs of leaks to the cistern at several locations. And that the leakage increases with increasing depth of water in the cistern. The leaks were manifested by moisture and water ponding at the areas where the water was able to escape or pond. The extended areas where seepage/leaks occur indicate that this problem is unlikely to be confined to a single permeable area at one location but rather to multiple areas where the permeability of the cistern is questionable. Mr. Zachariah was informed that the leakage was managed by ensuring that the water level in the cistern does not increase higher than the ground floor level which would allow the hydrostatic pressure to force water through the structure.

[89] Mr. Zachariah notes that the nature of the repairs is dependent on the extent of the problem but suggests that the leaks may be due to the quality of sealing works and the rectification of the leakage

would entail chipping and re-plastering the internal cistern wall and then applying two coats of waterproofing agents compatible with potable water such as Damtite or Thoroseal.

[90] The evidence of the Claimant is that the pool was built with the assistance of the Claimant. The evidence is that “Martyn also professed to have engineering experience and his son in law said he was an engineer. I can recall that at one time when we were doing the deck for the pool Martyn gave us a plan that showed the steel structure for the pool which we believe was done by his son in law. It was Martyn who did the markings for the pool on the ground. The backhoe came dug it and we did the steel works for it. I can recall that for the concrete flooring for the pool about 8 inches thick blocks were used and 12 inch blocks for the cistern and every block cavity was filled with concrete and steel. This was the same process used for the cistern. We built the walls and the deck (casted) scratch coat, put on the coping and finished the plastering on inside and out. I was not there when the diamond brite went on.”

[91] As it related to the cistern the Claimant stated ...” I was never told about any leaks whatsoever.” He also said “In fact, when we built the cistern the engineer, Mr. Oliver Davis, who was hired by Martyn to assess the work we were doing at varying stages of the construction , did an inspection before the columns were cast and even before the ceiling which is the floor of the first floor of the main house was cast. The Engineer never pointed out any deficiencies or work that need correcting before we cast the floor (cistern ceiling). He did not indicate any structural issues after either. Martyn never indicated that the engineers identified any problems with the work that we did”.

[92] It is noted that during the cross-examination of the Claimant the Claimant admitted that it was his responsibility to supervise the pouring of the concrete in the pool and in the cistern.

[93] The evidence of Mr. Zachariah is that if an engineer was engaged in the project the role of the engineer would include minimising issues such as those which occurred with the swimming pool and the cistern. Thus, the engineer would have been required to ensure that there was adequate cover of the steel, ensure that the steel was in the correct position, and ensure that the concrete was at the specific strength for the specific area. In relation to the cistern the engineers in similar manner would ensure that the masonry blocks are cast in lifts not exceeding 4 layers and ensure the

appropriate reinforcement of the masonry blocks, ensure that the cistern is plastered properly in two layers and the joints bevelled and the sealant applied on the finished plaster.

[94] In this case the Claimant contends that there was an engineer on the site. The evidence of the Defendant during cross examination is that his son in law is a qualified structural engineer who practised in the United Kingdom and at the relevant time prepared the engineering drawings for the pool. The Defendant's son in law was in Antigua when the pool was being constructed. The Defendant stated that although his son in law was not on site when the concrete was being poured, he did visit the site to inspect and ensure that the reinforcement was in the correct positions but that he did not supervise the laying of the concrete.

[95] Mr. Wilton Challenger, a witness for the Claimant also indicated that two engineers were on site and at least one engineer was present when the steel for the pool was put in place and the concrete was poured.

[96] It is difficult for this Court to accept that the Defendant did not have an engineer present when concrete for the pool was being delivered since the Defendant appeared to keep a relatively close supervision of the project this is evidenced by fact that he was able to adjust payment claims made by the Claimant when the number of employee and the hours of work were not accurate. The witness for the Claimant Wilton Challenger noted that there were instances in which the Defendant would instruct the worker to re-do or to correct a task. The Defendant even complained in one instance that the Claimant reassigned a worker who was required on a particular day to do work on the swimming pool. Additionally, the Defendant himself indicated that he is a project manager and not only managed his project but also the project of Mr. White. Further, prior to the delivery the supplier of the concrete would often visit the site to consider the cubic volume to be poured and the location for the concrete pump. Upon delivery of the concrete the person in charge, the Claimant or the Defendant would be given a ticket which would indicate the time when the service provider arrived, the time when the load was discharged, the quality of the concrete which includes the crushing strength of the concrete, the volume of the concrete that was in the truck and the delivery driver's name. If the ticket was not received by the Defendant at the time of delivery, he would receive the

ticket the next day at which time the Defendant would reconcile with the work done on site. The Defendant was also a quantity surveyor.

[97] In this Court's opinion the costs to repair the cistern and the pool should be equally shared.

[98] The Defendant also pleads loss arising from the leaks and loss of equipment. The losses arising from the leak did not form part of the Claimant's evidence and the only report before this Court was the report to which reference was previously made, the report of Everon Zachariah dated April 2016.

Damages

[99] It is noted that damages for breach of contract are compensatory. Compensation is normally achieved by placing the innocent party in the same position, so far as money can do, as if the contract has been performed.

Statutory Deductions

[100] The relevant statutory authorities are Medical Benefits, Social Security Board of Control, Board of Education and Inland Revenue Department. As a consequence of the findings above the Defendant is liable for the sums owed to the authorities for the benefit of the Claimant. The evidence before the Court indicates that the sum owed to Social Security Board of Control is \$31,935.76⁴ and the sum owed to Medical Benefits Board is \$27,374.24⁵.

[101] The sums owed to the Board of Education and the Inland Revenue Department are not available to the Court. The Court did not have the benefit of submissions from the Counsel for the Claimant however the Court permitted Counsel for the Claimant to make reference to the relevant documents for the purpose of the calculation of statutory deductions owed. As it relates to the sums owed to the Board of Education and Inland Revenue Department the Court was referred to receipts and a

⁴ See correspondence from the Antigua and Barbuda Social Security Board dated 5th January 2010.

⁵ See correspondence from Medical Benefits Board of Control dated 29th November 2010.

document which offered information on the calculation of the levy payable to the Board of Education. The receipts provided no assistance in the determination of the sums owed.

[102] It is noted the Defendant has admitted that the Defendant held the payments for statutory deductions for the months of January to March 2008, May to June 2008 and December 2008. There is information before the Court which informs how the weekly levy for the Board of Education is calculated. This information indicates that the weekly earnings less \$125.00 is multiplied by 2.5%. Accordingly, the weekly sum payable to the Board of Education is the equivalent of \$46.87 per week. The Claimant's weekly pay was \$2500.00. The total sum owed for the months of January to March 2008, May to June 2008 and December (approximately 24 weeks) is \$1,124.88.

[103] The Defendant is also liable to pay to the Claimant vacation pay for 2009 and severance benefits for the period of employment from October 2007 to December 2nd, 2009. The vacation pay for workers is \$90.00 (\$45.00 per week for two weeks). The severance payment for the Claimant \$13,000.00 the equivalent of one day's pay each month that the Claimant worked with the Defendant.

Damages Recoverable by the Defendant.

[104] The Defendant is entitled to recover damages for the repairs required to be done the Defendant's residence. Mr. Everon Zachariah provided information regarding the costs for repairs. These costs are indicated hereunder:

(1) Remove Tiles	\$3,000.00
(2) Re-tile Livingroom	\$45,000.00
(3) Roof work- Investigate source of leaks	\$1,500.00
(4) Remove shingles from affected area	\$5,000.00
(5) Replace copper valley sheeting	\$6,000.00
(6) Replace shingles over area (approx.. 100 sq. ft.)	\$2,500.00
(7) Chip internal walls of Cistern (\$11,000 /2)	\$5,500.00
(8) Remove & Replace Damaged tiles area	\$6,000.00
(9) Refill Cistern with water (\$6,000.00/2)	\$3,000.00
(10) Dewater pool (approx. \$5,000/2)	\$2,500.00

(11) Reinforce Form and recast (\$6,000/2)	\$3,000.00
(12) Chip and re-plaster wall face along leak (1,837.50/2)	\$918.75
(13) Cut out, exposed and treat slab steel (\$1,000.00/2)	\$ 500.00
(14) Reinforce and cast capping s/pool (\$12,000.00/2)	\$6,000.00
(15) Re-diamond brite pool (\$14,000.00/2)	\$7,000.00
(16) Clean, re-fill & treat pool (\$9,000.00/2)	\$4,500.00
(17) Remove tile from low area where water ponds	\$400.00
(18) Screen low areas	\$600.00
(19) Retile repaired areas	\$800.00
(20) Repair leaks to Guest House	\$5,000.00
Total sum	\$108,718.75.

[105] Accordingly, it is ordered that:

- (1) The Defendant is liable to the Claimant on the Claimant's claim. The Defendant is liable to pay to the Claimant the sum owed to statutory authorities and any applicable interest applied by the authorities. Such payments being:
 - i. Social Security Board - \$31,935.76.
 - ii. Medical Benefits Board -\$27,374.24.
 - iii. Board of Education -\$1,124.88.
- (2) The Defendant is also liable to the Claimant for vacation and severance entitlements in the sums of \$90.00 and \$13,000.00 respectively.
- (3) The Claimant is liable to the Defendant on the Defendant's Counterclaim. The Claimant is liable to pay the Defendant the sum of EC\$108,718.75.
- (4) Each party to bear their costs of these proceedings.

Marissa Robertson

High Court Judge

By the Court

Registrar