

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. AXAHCV2021/0009

BETWEEN:

SAMANTHA CADENHEAD

Claimant

AND

ARNAUD DROUET (dba STEEL ALU DESIGN)

Defendant

Before:

His Lordship The Honourable Justice Ermin Moise

Appearances:

Ms. Merlanih Lim of counsel for the claimant

Ms. Jean Dyer of counsel for the defendant

2022: November 7th;
2023: March 13th.

JUDGMENT

[1] **Moise, J:** This is a claim for breach of contract. The Claimant, Ms. Samantha Cadenhead, pleads that the defendant, Mr. Arnaud Drouet committed a fundamental breach of a contract entered into in October, 2018 for the supply and installation of railings at her property in South Hill, Anguilla. As an alternative to her claim for breach of contract, Ms. Cadenhead claims that Mr. Drouet has been unjustly enriched and, on account of this, she seeks an order for damages against him together with interest and costs. Mr. Drouet however denies that he

is in breach of the contract. He has in fact counterclaimed for damages of his own and submits that it is Ms. Cadenhead who is in breach of the contract.

The Facts

- [2] Ms. Cadenhead is an American citizen and the owner of property located at Back Street, South Hill, Anguilla. The property is located along a cliff side with unobstructed views overlooking Sandy Ground and Road Bay. She refers to the property as Cascade Villa. Ms. Cadenhead states that sometime in 2016, she commenced construction work on the villa. However, completion of the work had been delayed because of Hurricane Irma in 2017 and the Covid19 pandemic in 2020. She states that she is now in the finishing stages of construction.

- [3] Ms. Cadenhead states that in or about September 2018, she had discussions with Mr. Drouet regarding certain specifications of metal railings which she needed installed at Cascade Villa. She states in her evidence that she informed Mr. Drouet that these metal railings were to be exterior/ outdoor railings and as such would be exposed to rain, sun and other elements of weather. Her evidence is that she and Mr. Drouet generally communicated via Whatsapp messages, and in due course she issued instructions to him and made an order for railings with requests concerning her desired specifications.

- [4] It is Ms. Cadenhead's assertion that the railings which she ordered were to be of a black, semi-gloss finish for the metal frame and posts, with encased glass panels. She states that this was a finishing which was similar to that of a house she owned in Hawaii and that she had shown a picture of that specific finishing to Mr. Drouet. Ms. Cadenhead accepted, in oral testimony, that the photos of the railings in Hawaii were merely general examples of what she desired. As such, she did not contract for a replica of the railings at her property in Hawaii.

- [5] During cross examination, Ms. Cadenhead insisted that it was important to her for the railings to be of a black, semi-gloss finishing. However, I note that in a Whatsapp message dated 4th October, 2018, it was Mr. Drouet who enquired as

to whether she would have wished for the finishing of the railings being in matte or shining. Ms. Cadenhead responded by saying “shine but not high gloss.” This was the only place in the negotiations where the issue of the shine finishing appears to have been discussed.

- [6] However, Ms. Cadenhead also states that Mr. Drouet then pointed her to a website, www.RALcolor.com, and requested that she selects the paint colour for the railings he had agreed to install. Ms. Cadenhead states that this website contains colour swatches with code numbers, and does not give any description as to the type of finish. It was her evidence that she visited the website as requested and informed Mr. Drouet of her selection. She had in fact selected the colour option “Black 9005”, which was termed “jet black” on the website. This colour selection was not of a shine finishing. Despite the specifications of what she had selected from the website, Ms. Cadenhead also states that she was specific in informing Mr. Drouet that she wanted the railings to be done with a semi-gloss finish. She states that in her message to Mr. Drouet dated 4th October, 2018 she requested that the railings be black, shine but not high gloss, and not matte. That would have however been prior to her selection of the colour on the website.
- [7] Having been given the assurances that Mr. Drouet had the experience and competence to perform the task, Ms. Cadenhead states that she agreed to contract Mr. Drouet to supply and install 74.1 meters of aluminum railings on the balconies of Cascade Villa. She claims that she also engaged Mr. Drouet to supply and install four (4) glass shower doors and metal brackets in the bathroom of the Villa.
- [8] Mr. Drouet had provided Ms. Cadenhead with estimate number 543, dated 29th September 2018. This estimate reflected the sum of \$25,995.00US as the cost for the supply and installation of the metal railings. Ms. Cadenhead states that a further estimate number 544 dated 29th September 2018 was issued by Mr. Drouet. However, this appeared to have been amended by Mr. Drouet in writing,

and was for payment of the sum of \$14,517.00US for the supply and installation of the glass doors and brackets. This I take it related to the bathroom works which Ms. Cadenhead also engaged Mr. Drouet to undertake.

- [9] Ms. Cadenhead goes on to state that she was presented with a contract dated 5th October, 2018 which contained the full price for the services and products which Mr. Drouet agreed to provide to her. That price was \$40,512.00US. According to the contract, a deposit of 60% was to be paid prior to the commencement of the work. That totaled \$24,310.00US. The remaining balance of \$16,202.00US was to be paid in two further installments. The first was to be paid before the installation of the railings and the second after the work was completed.
- [10] It was Ms. Cadenhead's evidence that on 25th October 2018 she paid the sum of \$65,350.00EC to Mr. Drouet as a deposit for the commencement of the work. That amounted to approximately \$24,384.44US. It is important to note that Ms. Cadenhead understood this deposit to also include 60% of the total payments for the installation of the railings as well as the glass shower doors in the bathroom. However, it was understood that the specifics of the shower doors could not have been worked out until such time as the bathroom was tiled. I do note however, that in his own evidence Mr. Drouet indicated that he had taken some measurements of the bathroom prior to the tiling of the floor. He stated that although certain specific measurements were not possible due to the unfinished tiling, there were some general measurements taken in order to determine an estimate of the costs of installation.
- [11] In addition to that, Ms. Cadenhead indicates that she kept Mr. Drouet informed of the delays with the construction works. She stated that these delays would have had an impact on Mr. Drouet's ability to install the railings as well as take the necessary measurements for the shower doors.
- [12] Ms. Cadenhead's evidence was that on 4th August, 2019, she was in Anguilla and contacted Mr. Drouet with a view to having a meeting on the site of the

construction. This was to facilitate the measurement of a window which Mr. Drouet had separately agreed to install at the villa. It was also her evidence that she requested that Mr. Drouet bring along a sample of the railing he intended to install in order for her to see it before installation. However, Mr. Drouet did not turn up on the date of the meeting. He responded to a whatsapp message on 9th August, 2019 and a further date for the onsite meeting was set for 11th August, 2019. Mr. Drouet met that commitment. He visited the site and took measurements for the window but did not bring along a sample of the railings. In his testimony at trial, Mr. Drouet acknowledged the request for a sample of the railing but indicated that at the time he was driving a car and that the railing could not fit in the car. This was his explanation for not bringing a sample along to the meeting.

[13] In December, 2019, the balcony to the villa had been tiled and, according to Ms. Cadenhead, Mr. Drouet was informed that he could now proceed to install the railings. Ms. Cadenhead was at that time in the United States but was informed that Mr. Drouet arrived at the Villa with 4 railing sections, each encased in wood. The evidence is that, Mr. Wayne Richardson, who was then the partner and now husband of Ms. Cadenhead, was present at the time of Mr. Drouet's arrival at the Villa. He had sight of the railings in the wooden casings and instructed Mr. Drouet not to have them installed. Mr. Richardson, who assisted with the supervision of the works, was of the view that Ms. Cadenhead would not have been satisfied with the quality and finish of the railings. He therefore instructed Mr. Drouet to cease the installation works until he had received further instructions.

[14] Ms. Cadenhead states that she was sent photos of the railings and was also able to see them during a face time conversation with Mr. Richardson. It was her evidence that she observed the railings to be spray-painted with a coat of sanded, matte black paint. The texture was uneven and akin to that of a cast iron skillet. She was unhappy with what Mr. Drouet had produced for installation and contacted him in order to express her displeasure. She expressed the view that the railings were far from being of factory-manufactured quality, but rather

appeared to be amateur and unprofessional in quality and finish. It was not the semi-gloss finish she had specifically ordered.

- [15] In cross examination Ms. Cadenhead acknowledged that Mr. Drouet did not represent to her that the railings would have been factory manufactured or painted. She accepted that he did inform her that he would have the railings painted in Anguilla at his workshop. She stated that she expressed some concern with this, but acknowledged that there was no assurance given to her that the railings would have had a factory finish insofar as the painting was concerned. Despite this, she stated that she rejected the railings on the basis that she did not like the texture nor did she want them spray painted in that way. At the meeting held on 19th December, 2018 she stated to Mr. Drouet that she didn't want the railings spray painted, but that they should have been "factory baked". That would have been after she had in fact rejected the railings which he had attempted to install.
- [16] According to Ms. Cadenhead, she instructed Mr. Richardson to visit Mr. Drouet at his workshop to discuss the way forward with this matter. The meeting took place and Mr. Drouet presented images of other finishing which would have assisted in correcting the errors made with the railings. These were however not acceptable to Ms. Cadenhead.
- [17] Ms. Cadenhead arrived in Anguilla in January, 2020 and she observed some of the railings which had been left at the Villa. She states that the railings were not only of a finishing which was contrary to what she had ordered, but that the railings themselves were defective. They had by then started to flake with some paint coming off. This, according to her, was despite the fact that they were never taken out of the wooden casings. It was her view that the railings would not have withstood the elements had they actually been installed on the premises. There were also no rubber casings to shield the glass panels to be installed. I note that Mr. Drouet indicated in his own evidence that the rubber casings and glass

panels would have been installed afterwards. However, he was not allowed to complete the installation.

- [18] Ms. Cadenhead then attended a meeting at Mr. Drouet's workshop to discuss the matter. She told him that she could not accept the railings he had presented as they were not within the specifications of what she had ordered. Ms. Cadenhead then sought the services of another supplier, Anguilla Aluminum, who installed the railings at a cost of \$23,000.00US.
- [19] Ms. Cadenhead led evidence from Mr. Wayne Richardson which largely sought to corroborate what she had to say about his role in the matter. He states that he was present on site when Mr. Drouet brought some of the railings for installation. He accepts that it was he who instructed Mr. Drouet to cease the installation of the railings due to the fact that he was sure that Ms. Cadenhead would not be happy with what Mr. Drouet had produced. It was his evidence that he immediately contacted Ms. Cadenhead and in a face time conversation allowed her to see the condition of the railings. This was done in Mr. Drouet's presence and during that conversation Ms. Cadenhead spoke directly to Mr. Drouet and expressed her displeasure. Mr. Richardson also attended the meeting with Mr. Drouet at his workshop; though no resolution of the issue was arrived at.
- [20] Evidence was also led from Mr. Lanig Troin, who states that he is the owner of Anguilla Aluminum. He is therefore engaged in the business of supplying and installing aluminum products such as railings. He was contacted by Ms. Cadenhead and hired to install railings at the villa. She invited him to the premises to have a look at some railings which had been supplied. He states in his evidence that he arrived at the villa and observed that the railings were flaking and were white underneath the paint. He also states that the railings had been sprayed. He was of the view that the railings were sprayed with black paint with the wood attached to it.

- [21] It was Mr. Troin's evidence that Ms. Cadenhead engaged him to prepare and install the railings. He states that he placed an order with his supplier in Germany for the exterior balcony railings, based on Ms. Cadenhead's order of colour and finish. He then received the railings which had been coloured at the factory in Germany, around 6 months after placement of the order. Mr. Troin commenced the installation in around July 2020 and completed the installation sometime after the passage of the hurricane season.
- [22] Mr. Drouet gave evidence on his own behalf. He is a French national who has lived in Anguilla since 2007. He states that he trades under the business name Steel Alu Design and has traded as such since in or about September, 2008. The main thrust of his business is the supply of superior designs and also the assembling and installation of high-end aluminum, steel and glass products.
- [23] Mr. Drouet recalls discussions with Ms. Cadenhead commencing September 2018 regarding the supply of certain customized items, namely railings in aluminum and glass, a shower glass door, a door bracket and hinge towel handles for her property situated in South Hill. Mr. Drouet asserted that these discussions were instigated by Ms. Cadenhead and/or Mr. Wayne Richardson.
- [24] Mr. Drouet stated that he confirmed to Ms. Cadenhead his ability to design and assemble railings in accordance with special orders from various customers. He requested that Ms. Cadenhead provide him with photographs of the railings which she wanted. He also suggested that she visit the website www.RALcolor.com to select the type of paint and the particular finish of the outdoor railings. It was Mr. Drouet's evidence that the RAL website is a special website for colour of paint and the finishing.
- [25] Mr. Drouet stated in his evidence that on 9th September, 2018 Ms. Cadenhead followed up with him on an initial request for a quotation for the works on the railings. He reminded her that he had requested photographs of what she wanted as he was unable to provide a quote until this was done. She duly obliged at that

point and provided photographs of the railings. Having obtained these photographs, on 4th October, 2018, Mr. Drouet forwarded quotations numbered 543 and 544 to Ms. Cadenhead. Although these quotations were forwarded on 4th October, 2018, they were in fact dated 29th September, 2018. Mr. Drouet states that both quotations contained the following terms:-

- (i) the estimates were valid for one (1) month;
- (ii) the goods were to remain the property of Steel Alu Design until the end of payment;
- (iii) duties and installation were included in the estimates;
- (iv) a 60% deposit was payable;
- (v) 20% was due before installation; and
- (vi) the 20% balance was due when the work was done.

[26] Mr. Drouet also indicated that he informed Ms. Cadenhead that the property would have to be tiled before the railings could be installed. Insofar as it relates to the installation of glass doors to the bathroom, he indicated that those were to be customized and the shower glass ordered from a factory. He therefore informed Ms. Cadenhead that the final measurements could not be taken until the shower was actually tiled. He did note in his evidence however, that he took measurements of the bathroom in order to provide a working estimate for this aspect of the work. Final specifications were not possible prior to the tiling of the bathroom.

[27] Mr. Drouet went on to state that on 11th October 2018, Ms. Cadenhead informed him via WhatsApp that she had visited the website and selected Black 9005. According to him, Black 9005 has a matte and not a semi-gloss finish. Mr. Drouet states also that Ms. Cadenhead was well aware that he would be assembling and painting the railings locally as she selected the colour of the paint (and finish) that she wanted from the website. On the same day Estimate 544 was amended because he was informed by Ms. Cadenhead that there were five (5) shower

doors and not (6) as she had previously indicated. Estimate 544 was in the total sum of \$14,517.00US.

- [28] However, I do note that in cross examination Mr. Drouet stated that he was not particularly familiar with the website but used it from time to time. He also acknowledged that it was not possible to see what the finishing of the railings would look like from selecting a colour on the website. He therefore acknowledged that what Ms. Cadenhead was selecting was the colour and not the finishing of the railings. He was taken to and acknowledged correspondence which highlighted Ms. Cadenhead's desire to have a semi-gloss finish on the railings. I do note however, that having examined Mr. Drouet's cross examination and his demeanour, there may have genuinely been a misapprehension between the two parties regarding this aspect of the contract.
- [29] Mr. Drouet states that, at Ms. Cadenhead's request, he sent her photos of shower doors he had installed at the Zemi Beach Resort. She was satisfied with what she saw. Mr. Drouet then stated that Ms. Cadenhead eventually paid him the sum of \$65,350.00EC after he followed up with her via WhatsApp on 24th October 2018 regarding the payment. He states that this sum when converted to US dollars was approximately \$24,053.15US and, as such, was less than the 60% deposit. Mr. Drouet nonetheless commenced work on the railings.
- [30] Mr. Drouet indicated that he visited Ms. Cadenhead's property from time to time in order to determine the progress of the construction. This was necessary in order to determine the appropriate time to have the railings installed. Mr. Drouet indicated that he contacted Ms. Cadenhead who made various excuses for the delay in construction. However, by 28th November, 2018, Mr. Drouet, according to his evidence, had in fact already assembled the railings. He states therefore, that he stored the railings on his property without charging any additional costs for storage. He did so as he considered that Ms. Cadenhead was acting in good faith. It is unclear to me as to why any additional storage fees were even in question as the contract indicated that the railings remained the property of Mr. Drouet until

installation and final payment. One would not imagine it to be proper to charge storage fees for one's own property. However, I do note that these railings would have remained in storage for over a year due to the delays in the construction and the inability to have them installed until the tiling was complete in December, 2019.

- [31] Mr. Drouet states that on 29th July 2019, he sent photographs of the railings to the Ms. Cadenhead via WhatsApp. Upon seeing the photographs she remarked "Looks like the railings are ready. Some of the balconies are ready". Mr. Drouet states that at no time did Ms. Cadenhead suggest that the railings were not the colour and finish which she had selected. He states that he then informed her that the colour she had chosen was not the same as the door and that she still had time to change the colour if she wanted the door and railings to match. Ms. Cadenhead responded by stating that she was not sure of the color of the railings. Mr. Drouet responded that they were "more black". Ms. Cadenhead responded by stating "[t]hat's okay". However, Ms. Cadenhead noted in her own evidence that it was difficult to see the finishing of the railings on photographs in this way.
- [32] Despite the complaints of Ms. Cadenhead, Mr. Drouet insists that the railings he designed were not made of wood. He states that they are made of aluminum and glass as ordered by Ms. Cadenhead. It was Mr. Drouet's evidence that he had sourced the aluminum used to make the railings in the Caribbean. The suppliers in the Caribbean only supply white aluminum. He therefore spray painted the white aluminum with a gun (and not a can) with the paint selected by Ms. Cadenhead which he had sourced in St. Maarten. He also insisted that the railings were the colour and finish as ordered by Ms. Cadenhead. The wooden frames were placed around the railings to protect them during transportation and were not to form part of the finished look. As I indicated earlier, Mr. Drouet accepted in cross examination that what was selected from the website by Ms. Cadenhead was the colour and not the finishing of the railings.

- [33] Mr. Drouet then went on to state that on 21st August, 2019 he was contacted by Ms. Cadenhead and informed that he should proceed with the installation of the railings. There is some discrepancy in the evidence as to whether the installation began in August or December of that year. However, Mr. Drouet acknowledged that this took place some years ago and he could not quite recall whether it was August or December. On balance, the evidence suggests to me that the installation took place in December, 2019.
- [34] Mr. Drouet states that although Ms. Cadenhead had not made the additional 20% payment towards the price, as was agreed to, he nonetheless attended the premises for the purpose of installing the railings. Mr. Drouet states however, that Mr. Richardson instructed him not to install the railings after he and his workers had started the installation and were almost finished. He was also instructed to take the railings back to his workshop. According to Mr. Drouet, Mr. Richardson also informed him that Ms. Cadenhead did not like the colour of the railings. This was surprising to Mr. Drouet as, according to him, the colour of the railings was that selected by Ms. Cadenhead. He states further, that the paint which was used was ordered from the same RAL website. No dissatisfaction was expressed at that time as to the quality of the railings and/or the workmanship.
- [35] Mr. Drouet stated that when the railings were transported to the villa, no glass was in them for safety reasons. It was his intention that the glass and rubber would be installed on site. He was however asked to leave Ms. Cadenhead's property because the railings were not the colour that Ms. Cadenhead wanted. He therefore returned the railings to his workshop once they were rejected by Mr. Richardson.
- [36] Mr. Drouet denies that the photographs exhibited by Ms. Cadenhead are an accurate reflection of the railings which he wished to install. He states further, that there was only one minor scratch on the railings and therefore denies the assertion that they were flaked. He stated also that he offered to resolve the

scratch as it was caused by one of his workers. However, according to his evidence, the scratch was barely visible.

[37] Mr. Drouet went on to state that Ms. Cadenhead eventually raised an issue as to the colour and finish of the railings directly with him in December 2019 when he showed her samples of the railings via WhatsApp. According to Mr. Drouet, Ms. Cadenhead then stated that she had “never seen railings like that anywhere.” She then took the position that the matte finish was unacceptable although that is what she had selected. Nonetheless, Mr. Drouet states that he was open to exploring changes to the colour and the finish once such changes were at Cadenhead’s expense. That proposition was however not accepted and Ms. Cadenhead insisted that she wanted a refund of the deposit she had paid to Mr. Drouet.

[38] Mr. Drouet states that it was oppressive and unjust for Ms. Cadenhead to have rescinded the contract in this way. He states that he in fact spent the 60% deposit paid to him on the material for the railings. As such, he was not paid for his labour. He states further that he had in fact placed an order for the shower glass with Saint-Gobain Glass Solutions Sud-Ouest in Bordeaux, France. This he stated cost him the sum of €10,583.40. He presented invoices to substantiate this assertion. Mr. Drouet also states however that Saint-Gobain Glass Solutions Sud-Ouest never supplied the glass that he ordered for the shower doors. It went out of business two (2) years ago and did not refund him his money. However, in cross examination he acknowledged that Saint-Gobain Glass Solutions Sud-Ouest is now back in business since the Covid-19 Pandemic is over. Ms. Cadenhead in her own evidence at trial stated that she never saw those invoices and was not informed that there had been an order placed for the shower glass. She responded to this evidence by also stating that the measurements were to be taken only after the tiling of the bathroom. She therefore questions the ordering of the glass as contained in Mr. Drouet’s own evidence. Mr. Drouet acknowledged that he did not inform Ms. Cadenhead of the orders he had placed with Saint-Gobain Glass Solutions Sud-Ouest.

[39] Mr. Drouet therefore asserts that it is Ms. Cadenhead who is in breach of the agreement and requests that an order be made for her to pay the remaining balance as set out in the terms of the agreement. He acknowledged in oral testimony that the only thing which was wrong with the railings was the finishing. He states that he offered to rectify the problem but Ms. Cadenhead was not willing to agree to this.

Issues

[40] The issues for consideration in this case are relatively narrow. Insofar as it relates to Ms. Cadenhead's case, the court is to consider whether Mr. Drouet has breached the contract. This entails a determination of whether there was in fact an agreement that the railings be in a semi-gloss as opposed to matte finishing. She also complains that the railings presented by Mr. Drouet were not factory manufactured. The court is to consider whether this too was a term of the contract. The court is also to determine whether the railings presented by Mr. Drouet were defective in standard and quality.

[41] Even if Ms. Cadenhead was able to prove the terms of the contract as stated above and a breach of any or all of those terms, the court is to also consider whether Mr. Drouet's actions amount to a repudiatory breach for which Ms. Cadenhead was entitled to cancel this contract altogether and demand repayment of her deposit. It is also important to consider whether the facts of this case are such that Mr. Drouet has been unjustly enriched and whether he had made any misrepresentations to Ms. Cadenhead prior to entering into the contract. The court must also consider whether Ms. Cadenhead's own actions amount to a breach of the contract for which Mr. Drouet is entitled to damages.

The Law

[42] Counsel for Ms. Cadenhead filed pre and post-trial submissions in this matter. However, I must note that the submissions have referred to very little legal

authority for the propositions put forward. Insofar as it relates to the pleading of repudiatory or fundamental breach of the contract, counsel simply states that *“the Claimant is entitled by law, to treat the contract as having been repudiated as a result of the Defendant’s breach and conduct. The Claimant is entitled to an award of damages (Civil Appeal No 3 of 1996 Spiricor St Lucia Ltd v. Attorney General of St Lucia et al, as applied in ANUHCV2010/0029 Christopher Wheatley et al v. Waterpoint Caribbean Homes Ltd).”* The court was not pointed to any specific paragraphs in either of these cases which would have been helpful in the assessment of the case as bar. The submissions filed post trial were not of any additional assistance.

- [43] In an examination of the case of ***Spiricor St Lucia Ltd v. Attorney General of St Lucia et al***¹, the Court of Appeal there addressed certain general principles relating to the repudiation of a contract on account of an ability to perform the terms agreed to by the parties. Byron CJ there noted that ***“... conduct, which inevitably leads to the conclusion that a party to a contract will not be able to perform, amounts in law to a repudiation of the contract. Willingness to perform is irrelevant if it is evident that there is no ability to do so. The contract becomes determined if the other party adopts the repudiation by so acting as in effect to declare that he too treats the contract as at an end.”*** The learned Chief Justice then went on to refer to the 4th edition of **Halsbury’s Laws of England** Vol. 9 where the following was noted at paragraph 548:

“Repudiation may be an express renunciation of contractual obligations. However, it is more commonly implied from failure to render due performance or, in cases of anticipatory repudiation, by the party in default putting himself in such a position that he will apparently be unable to perform when the time comes. A party seeking to rely on repudiation implied from conduct must show that the party in default has so conducted himself as to lead a reasonable

¹ Civil Appeal No 3 of 1996

man to believe that he will not perform or will be unable to perform at the stipulated time."

- [44] The Court of Appeal then went on to refer to the 25th Edition of **Chitty on Contracts** where the following was noted at paragraph 1608:

"Anticipatory breach and actual breach. There is no distinction between the tests for what is an anticipatory breach and what is a breach after the time for performance has arrived. It follows, therefore, that where the conduct of the promisor is such as to lead a reasonable person to the conclusion that he will not be able to perform when the time for performance arrives, the promisee may treat this as a renunciation of the contract and sue for damages forthwith. He is allowed to anticipate an inevitable event and is not obliged to wait until it happens."

- [45] Given the broad range of issues which the Court of Appeal was called upon to address in that case, I took the time to at least highlight some of the paragraphs which relate to the legal principles of repudiatory breach referred to therein. However, it would have been more than helpful if counsel for Ms. Cadenhead had gone somewhat further to assist the court in precisely why she would have wished to rely on this authority within the context of the facts of the case before me. This is because the case seemed to have addressed the repudiation of a contract on account of the inability to perform the terms of the contract as well as the issues relating to anticipatory breach. Though some of the principles highlighted there are general principles in relation to repudiatory breach, I express doubt in my mind that the issues raised in relation to Mr. Drouet's performance of the contract are similar in any way to the circumstances of what the Court of Appeal came to consider. This appears to me to be a case of Ms. Cadenhead's dissatisfaction with Mr. Drouet's actual performance of the contract insofar as it relates to the finishing, assembling and installation of the railings.

[46] Insofar as the case of ***Christopher Wheatley et al v. Waterpoint Caribbean Homes Ltd***² was referred to, I express a similar sentiment here. In that case Henry J. referred to ***Spiricor St Lucia Ltd v. Attorney General of St Lucia et al***, within the context of an anticipatory breach on the part of a building contractor in his inability to perform the contract within a specified time. That therefore addressed the issue of delay in performance of the contract and whether the conduct of the defendant is in itself to be considered a repudiatory breach.

[47] However, the judgment of Henry J. also addresses some general principles which may be helpful in determining the circumstances of this case; as part of the decision the judge also had to address the question of defective performance of the contract. That is a separate issue from anticipatory breach. At paragraph 48 of the judgment, the Henry J. noted as follows:

“A breach of contract will not necessarily terminate the contract, so that the primary obligations of both parties may continue. However, if there has been a repudiatory breach of contract, then the injured party has an option to terminate or affirm the contract. The choice whether to affirm or not is the choice of the innocent party. It cannot be taken away from him by the party in breach attempting to make amends...”

[48] To my mind, the fundamental question here is whether Mr. Drouet had in fact breached the contract. If the court so finds that he did, then the second issue for consideration is whether the breach was such that Ms. Cadenhead was entitled to repudiate the contract on account of that breach. If that is the case, then Mr. Drouet cannot take away Ms. Cadenhead's right to repudiate the contract by seeking to rectify his breach.

² ANUHCv2010/0029

[49] Insofar as Ms. Cadenhead has pleaded misrepresentation, counsel in her pre-trial submissions stated as follows:

“... the Defendant misrepresented to the Claimant the type of finish, specifications and quality of railings that he was able to supply to her. The Claimant relied on said misrepresentations to enter into the contract and suffered detriment of financial expense and inconvenience, due to the railings supplied by the Defendant that were not only of incorrect specification, but furthermore of defective quality.”

[50] In support of that proposition and the claim for damages in restitution, counsel referred the court to the cases of ***Gilfanov et al v. Polyakov et al***³ and ***Compagnie de Chemin de Fer Paris-Orleans v. Leeston Shipping Co***⁴. Again, neither in the pre nor post trial submissions did counsel go into any detail in explaining why any of these cases were relevant to the facts and circumstances of the current case. I must confess, for my part, for reasons which I will explain later on, this case does not appear to me to be one of misrepresentation at all.

[51] There is also a pleading of unjust enrichment. In similar fashion, much has not been put before me as to why this case falls within the parameters of this equitable doctrine. The cases of ***Featherwood Trading Ltd v. Fraunteld Management Ltd***⁵; ***Barton v Gwyn-Jones and ors***⁶ were referred to without any specific reference to the legal principles espoused therein and why they were relevant to the current case. Counsel submits however that:

The express wording contained in the document(s) which comprise the contractual agreement between the parties is scant. It is contended that the Court is empowered to make a finding that the Defendant has been and continues to be unjustly enriched by the deposit monies paid to him by the

³ BVIHCMAP 2016/009

⁴ (1919) 36 TLR 68 applied

⁵ BVIHCVAP 2012/0020

⁶ [2019] EWCA Civ 1999

Claimant in the circumstances of the incorrect and moreover defective quality railings he supplied, and to order damages by way of restitution of same to the Claimant.

[52] Perhaps this submission highlights the actual challenge with this case. Whilst it is submitted that certain terms of the contract were fundamental, a breach of which would entitle Ms. Cadenhead to repudiate the contract, the evidence suggests that there was a rather casual approach to the negotiation and finalization of the terms of the agreement. The actual document outlining Mr. Drouet's terms of payment did not go into much detail regarding the issues which Ms. Cadenhead later took offense to. The issue of the semi-gloss as opposed to matte finishing was contained in a rather brief WhatsApp exchange initiated by Mr. Drouet. Even after he enquired of Ms. Cadenhead regarding the discrepancy between the colour of the door and the railing she didn't seem to be quite concerned about the finishing then. When one considers that the railings were actually assembled for over a year before the building was actually ready for the installation, this casts some doubt in my mind as to whether this is in fact a case of unjust enrichment at all. This appears to me to be a straight forward case of whether there was a breach of contract, and whether that breach is such that Ms. Cadenhead was entitled to repudiate the contract altogether.

[53] On the other hand, counsel for Mr. Drouet has referred the court to the case of ***Suisse Atlantique Société D'armement Maritime S A v N V Rotterdamsche Kolen Centrale***⁷ where Upjohn LJ made the following remarks regarding what constitutes a "fundamental breach" of a contract:

"There is no magic in the words "fundamental breach"; this expression is no more than a convenient shorthand expression for saying that a particular breach or breaches of contract by one party is or are such as to go to the root of the contract which entitles the other party to treat

⁷ [1966] 2 All ER 61

such breach or breaches as a repudiation of the whole contract. Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case. The innocent party may accept that breach or those breaches as a repudiation and treat the whole contract at an end and sue for damages generally, or he may at his option prefer to affirm the contract and treat it as continuing on foot, in which case he can sue only for damages for breach or breaches of the particular stipulation or stipulations in the contract which has or have been broken.”

- [54] Whether the full extent of the terms of a contract are reduced to writing, or the contract itself is either completely or partially oral, there are certain terms which are not considered to be fundamental to its performance. In other words, a breach of such a term may not entitled the innocent party to repudiate the contract altogether. His remedy in the case of such a breach may be limited to damages for the particular stipulation. On the other hand, there are terms which are so fundamental to the obligations of the parties to a contract, that a breach would entitled the innocent party to bring the contract to an end. If that type of breach has in fact occurred, then the innocent party retains the option to bring the contract to an end and sue for damages in general, or affirm the contract and limit any action in damages for that which is a direct result of the specific breach. An attempt to rectify the breach at that point is irrelevant to the innocent party's rights.
- [55] Counsel for Mr. Drouet submits that there are two approaches adopted by the court when determining whether a breach is a fundamental one. The first is the traditional approach which focuses ultimately on the nature of the term which was allegedly breached. That approach of categorizing terms as either conditions or warranties implies that the actual consequences of a breach or the gravity of the breach was not a relevant factor in considering whether a contract was discharged for breach. Counsel argues that this approach is the one to be

adopted in this case, as the second approach as explained in the case of ***Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd.***⁸ is adopted in the interpretation of contractual terms which are rather more complex.

- [56] In determining the question of whether a term of a contract is a warranty or a condition, the following passage in the case of ***Bentsen v. Taylor, Sons & Co (No. 2)***⁹ is helpful:

“There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one’s mind whether the intention of the parties, as gathered from the instrument itself, will be best carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability”.

- [57] It is counsel for Mr. Drouet’s submission that “the determining factor in a court’s classification of a term as being either a condition or a warranty is whether the parties’ intention, as objectively ascertained based on an assessment of the evidence, will be best promoted by classifying the term as one or the other.” Counsel’s submission is that there was no breach of a fundamental term of the contract. Even if the court were to find that Mr. Drouet was to have assembled the railings with a semi-gloss finish, that does not go to the root of the contract and does not amount to a fundamental term entitling Ms. Cadenhead to repudiate the contract altogether. It is argued, and perhaps conceded by Ms. Cadenhead, that there was no term of the contract stipulating that the railings were to be factory manufactured or sprayed. It is further submitted that the railings were in fact not defective. Mr. Drouet denies that the railings were in fact flaked. There was one scratch which he agreed to address, as it was caused by one of his workers.

⁸ [1962] 1 All ER 474

⁹ [1893] 2 QB 274

[58] It is also submitted, on behalf of Mr. Drouet, that the contract for the installation of the shower doors was completely severable from that of the railings. Therefore, there is nothing in the evidence which would have entitled Ms. Cadenhead to repudiate this aspect of the agreement.

The Court's Conclusions

[59] Based on the evidence presented in this case, I find that Ms. Cadenhead did in fact contract with Mr. Drouet for the finishing of the railings to be semi-gloss rather than matte. Based on Mr. Drouet's own admissions in cross examination and in examining the correspondence exchanged between them at the time of the making of the contract, the selection of the colour on the RAL's website was just that. The finishing however, insofar as it related to the shine, was to be semi-gloss. Ms. Cadenhead had expressed this desire in response to Mr. Drouet's enquiry on 4th October, 2018.

[60] On the other hand, I find as a matter of fact, that Mr. Drouet did not agree, nor was he obligated to supply railings which were factory "baked". Ms. Cadenhead was aware that he would have assembled and sprayed the railings in Anguilla and there was no agreement between them that the railings were not to have been sprayed in the colour she had selected; albeit in a semi-gloss finish. She too accepted in cross examination that this demand which she had made in December, 2019 was not communicated to Mr. Drouet prior to that date.

[61] In my view therefore, it would not have been open to Ms. Cadenhead to demand that the railings be factory baked after the fact. The substance of her claim would therefore rest on whether Mr. Drouet's failure to ensure that the finishing was in semi-gloss was a breach of the contract, and if so, whether she was entitled to repudiate the entire contract as a result. Perhaps if it can be said that this was a

repudiatory breach, then her specific demands for a factory manufactured railing could be considered, given her right at that point to terminate the contract. The court must also consider whether the railings were defective in standard and quality.

[62] I find that indeed, Mr. Drouet did breach the contract in his failure to assemble the railings in semi-gloss as opposed to matte finishing. However, I do not find that this breach in and of itself goes to the root of the contract so as to amount to a repudiatory breach. Ultimately, the contract was to supply railings to the building. That was to entail the metal frames of the railings along with glass and rubber casings. It was Mr. Drouet's evidence that the rubber casings and glass had not yet been installed as they were to have been done afterwards. There is no evidence here to suggest otherwise. However, based on the complaints about the finishing, he was not allowed to complete the installation.

[63] It was only at a meeting to attempt to resolve the issue did Ms. Cadenhead note that she would not accept the railings unless they were "factory baked." To my mind she was not entitled to repudiate the contract on the basis of Mr. Drouet's failure to accept that proposal; as that was not what the parties had initially agreed and the failure to provide a semi-gloss finish was not a repudiatory breach on Mr. Drouet's part.

[64] There appears to me to have been somewhat of a misapprehension here regarding the actual finishing which Mr. Drouet was obligated to carry out. He seemed to have been of the mistaken impression that the selection of the colour on the RAL website was inclusive of the finishing of the railings. In cross examination he accepted that he was wrong about that but offered to redo the finishing in semi-gloss. Ms. Cadenhead's refusal to accept that proposal appears to have been based on demands which were not agreed to prior.

[65] In the case of *Greenbank Road Company Limited et al v David Clasen et al*¹⁰ Ellis J. noted that ***“When assessing the gravity of the breach, a court will look at the entirety of the commercial agreement between the parties and any steps taken to remedy the breach.”*** When one examines the evidence taken as a whole, I am not of the view that the finishing in semi-gloss was quite the deal breaker here. Whilst Ms. Cadenhead said in evidence that the semi-gloss finishing was important to her, it is the evidence of the actual agreement of the terms of the contract and the surrounding circumstances which the court must take into account; not what she has expressed after the fact. I am not of the view, that had a third party, at the time of the negotiation of the contract, enquired as to whether such a misapprehension had taken place, the parties would have considered the contract to have come to an end, the answer would have been in the affirmative. It does not appear to me that the finishing in semi-gloss in and of itself would have been considered then to be a fundamental breach of the contract.

[66] In considering the evidence therefore, I note firstly that the issue of the semi-gloss finishing was only raised in a brief WhatsApp message between the two parties upon an enquiry from Mr. Drouet. That message in and of itself does not seem to make it clear that this was to be a fundamental term of the contract for which repudiation would be an option. Counsel for Ms. Cadenhead states that the issue of the semi-gloss finish was also a feature of the photographs of her residence in Hawaii which Ms. Cadenhead had sent to Mr. Drouet. However, in Ms. Cadenhead’s own evidence she accepted that this was not done so as to bind Mr. Drouet into making the railings in a manner which was identical to that which was installed in Hawaii. Mr. Drouet’s reliance on the selection of the colour on the RAL website appears to me to be more a misapprehension of what had been agreed to rather than a repudiatory breach of the agreement altogether. In light of this I also find that his evidence does not amount to any misrepresentation on the part of Mr. Drouet as alleged by Ms. Cadenhead.

¹⁰ BVIHCV 2015/0112

[67] Secondly, it does appear to me that even after it was discovered that the railings were not semi-gloss in finish, Ms. Cadenhead's main objection appeared to be the fact that the railings were not assembled and sprayed in a factory. In a WhatsApp message, she was shown some photographs of various parts of the railings by Mr. Drouet and insisted that this was not acceptable to her because she thought that it appeared to be more like the finishing of a skillet than what she had wanted. Having had sight of the photographs myself I am unable to agree with Ms. Cadenhead's conclusions. Mr. Drouet attempted to remedy this problem but that was rejected for reasons other than the actual shine of the railings.

[68] I do appreciate that it was her house and she was entitled to have what she wanted installed, but it would have been important for Ms. Cadenhead to have adequately highlighted all of these issues to Mr. Drouet from the inception. In short, taking all of the facts and circumstances as a whole, I do not find that the main objection here is the fact that the railings were not semi-gloss in finish but rather that it was not assembled and sprayed in a factory. That was not what was agreed to by the parties. There was nothing to suggest that the re-spraying of the railings could not have solved the issue of the shine. Ms. Cadenhead's substantive issue therefore was that she wanted the railings to be "factory baked". However, this was not what she had agreed with Mr. Drouet. To my mind therefore, the matte finishing does not amount to a repudiatory breach.

[69] It is therefore important to examine the evidence in light of Ms. Cadenhead's assertion that the railings were not completed in a workmanlike and professional manner. She complained that the railings were flaked and therefore unacceptable to her for what would have been an outdoor railing. She brought portions of the railings to court to show that they were flaked and not of a good standard. However, as was pointed out by Mr. Drouet, these railings, which were eventually left on Ms. Cadenhead's property, have been lying around from December 2019. In fact they were constructed as far back as July, 2018. The matter was heard in

court in November, 2022. I do accept that the appearance at this stage shows some of the underlying white colour of the aluminum beneath. However, I am not of the view that the evidence is enough to substantiate the notion that all 74.1 meters of this railing were so flaked so as to amount to a breach of the contract. I accept Mr. Drouet's evidence where he said that at the time there was some scratching on the railing caused by one of his employees. He offered to rectify that problem. Again, Ms. Cadenhead's issue was that she didn't want this railing sprayed in Mr. Drouet's workshop.

[70] Ms. Cadenhead, as well as her witness, Mr. Troin, spoke about the appearance of the metal parts of the railings. Mr. Troin is a competitor in the market and neither he nor Ms. Cadenhead was able to point to any structural defect in the railings; this is especially the case as neither was presented as an expert witness in the matter. I do appreciate that these were to be outdoor railings and the appearance would have been a major feature. However, Ms. Cadenhead's pleaded case was that the railings were defective in quality. There is no doubt a difference between the quality of the railings and the finishing which Ms. Cadenhead may have wanted. On balance I do not find that there was sufficient evidence to conclude that the railings were defective in standard and quality. Ms. Cadenhead's main quarrel was with the appearance of the railings.

[71] I also agree with counsel for Mr. Drouet where it is argued that the finishing in the bathroom was severable from that of the railings. I can find no reason on the evidence for Ms. Cadenhead to have repudiated the contract for the installation of the shower doors. I appreciate that at that point in time the relationship between the parties had broken down and Ms. Cadenhead had simply taken her business elsewhere. However, I find that there is no basis for the repudiation of this aspect of the contract.

[72] In these circumstances I am of the view that Ms. Cadenhead has not substantiated her case and I am prepared to find that although there was a breach of contract in the fact that the finishing of the railings was not semi-gloss,

this was not a repudiatory breach. I also find that there was no misrepresentation, neither was there any unjust enrichment on Mr. Drouet's part. In those circumstances, Ms. Cadenhead was not entitled to rescind the contract altogether.

[73] As it relates to Mr. Drouet's own counterclaim, his counsel has noted that there is a limitation on the damages he can claim, if it is proven that Ms. Cadenhead was the one in breach of the contract. The agreement states that he remains the owner of the railings until they are installed. He states that he invested the deposit into the construction of the railings and has not been paid for his labour. As such, counsel states that Mr. Drouet's damages are limited to the payment of the remainder of the contract.

[74] I have to confess that I also have a difficulty in unraveling this aspect of the contract. If Mr. Drouet gets to keep the railings on the basis of the contract, having not actually installed them, then the question is what is the position he would have been in had the contract not been breached. That must take into account the fact that he would have divested himself of the railings and Ms. Cadenhead would have taken possession of them. Can he now claim a right to keep the railings and claim damages for the payment of the remainder of the contract? I doubt that very much. The same may very well be the case with the shower glass. What would be the purpose of including a right to retain ownership of the items produced whilst retaining a right to the full benefit of the contract price? I am of the view that the circumstances of this case are such that the contractual relationship between the parties have broken down, perhaps due to their own misapprehensions and the failure to adequately communicate and clarify their relevant obligations. I would not award damages to either party in this case.

[75] In the circumstances the claim for damages against Mr. Drouet is dismissed. The claim for damages against Ms. Cadenhead is also dismissed. Each party will bear their own costs.

Ermin Moise
High Court Judge

By the Court

Registrar