

**EASTERN CARIBBEAN SUPREME COURT  
TERRITORY OF THE VIRGIN ISLANDS**

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

**Claim No. BVIHCV 2015/0143  
BETWEEN:**

**CHIVERTON CONSTRUCTION LTD.**

**Claimant**

**And**

**[1] JAMES DOUGLAS TRUNBULL**

**First Defendant**

**[2] PRINCESS QUARTERS CONSTRUCTION COMPANY LIMITED**

**Second Defendant**

**[3] MARCUS WELSH**

**Third Defendant**

**[4] ONB RIDGE VILLA ONE LLC**

**Fourth Defendant**

**Appearances:** The Claimant represented by Mr. Junior Chiverton, Managing Director but with legal submissions presented by Mrs. Patricia Archibald-Bowers of J.S Archibald and Co. Mr. Dave Marshall of Collas Crill, L. P. for the Defendants

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**2021: November 9<sup>th</sup> – 10<sup>th</sup>**  
**2022: August 17<sup>th</sup>**  
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**JUDGMENT**

[1] **ELLIS J.:** The Claim before the Court concerns the alleged breach of a Contract dated 12<sup>th</sup> November 2012 (together with an Addendum dated 8<sup>th</sup> January 2013) for the performance by the Claimant of construction of a luxury villa at Oil Nut Bay, Virgin Gorda in the Territory of the Virgin Islands and entered into between the Claimant and the Fourth Defendant, ONB Ridge Villa One LLC

("the Contract"). The Claim seeks damages for detainee and conversion of the Claimant's tools, punitive and or exemplary damages, the sum of \$910,300.00 for unpaid invoices and unpaid work, breach of contract, interest and costs.

- [2] The background facts reveal that on 12<sup>th</sup> November 2012, the Claimant by one of its directors, Mr. Junior Chiverton entered into a contract with the Fourth Defendant to perform certain works on Ridge Villa 1 at Oil Nut Bay. The contract made provisions for additional work to take the form of Change Orders but all works outlined in the said Orders were to be approved by the Contractor and the Fourth Defendant and executed by both Parties as well. The Contract also stipulated that either party may terminate the contract by giving 30 days' written notice.
- [3] The Claimant's responsibilities were superbly detailed in the contract. The main obligations highlighted by the Claimant include:
- (a) Provide transportation to the site daily of the entire work force;
  - (b) Provide all necessary material;
  - (c) Provide all necessary transportation of material;
  - (d) Provide necessary equipment excluding excavation;
  - (e) Provide site foreman;
  - (f) Provide sufficient skilled manpower to perform the work per the plans and time table;  
and
  - (g) Provide all necessary tools (hand and power tools, mixers, generators and truck at Oil Nut Bay.
- [4] The contract also provided for an agreed schedule ranging from 5<sup>th</sup> November 2012 to 29<sup>th</sup> March 2013 and that any changes or additions caused by site conditions or added by the Fourth Defendant will result in an agreed extension of the schedule.
- [5] The Claimant commenced work on Ridge Villa 1 in November, 2012 pursuant to the Contract with the Fourth Defendant. The Claimant contends that the Project went on for 15 months due to changes and additional work approved by the Fourth Defendant.

- [6] Records were kept reflecting all works done under the Contract and works done pursuant to all variations and change orders. The Claimant further contends that during the course of the Contract there were no weekly checks or notices issued by the Defendants about any defective works on the part of the Claimant. However, according to the Claimant, the Fourth Defendant in breach of the Contract terminated same without the required written notice and without just cause. When the Contract was terminated the Claimant was required to leave the premises; and the Claimant contends that it was unable to access all its tools and equipment that were stored on site. It asserts that several requests were made by the Claimant's servants or agents to recover its tools and equipment, however, all such requests proved futile.
- [7] The Claimant does not dispute that payments were made in respect of the invoices issued during the construction period. Similarly, Lien Waivers were executed based on the invoices that were submitted. The invoices that were submitted after the contractual period were for works performed pursuant to the change orders which the First Defendant refused to sign and which the First Defendant was aware of at all times. The Claimant contends that the Defendants have refused to settle all outstanding amounts owed to the Claimant for works performed on Ridge Villa 1 and to compensate the Claimant for its tools and equipment that they kept, despite the numerous requests made by the Claimant for same.
- [8] The Claimant therefore claimed, jointly and severally: -
- (a) Against the First Defendant as an employee on a work permit of the Claimant, in the capacity of Project Manager and as agent of the Fourth Defendant;
  - (b) Against the Third Defendant as an employee on a work permit of Princess Quarters Construction Company Limited (formerly the Second Defendant) as Senior Project Manager; and
  - (c) Against the Fourth Defendant as the other party to the Construction Contract and owner of the villa in respect of which the Construction Contract was concluded;
    - (i) Damages for (1) detinue and (2) conversion of tools and equipment;
    - (ii) Damages for future loss arising from the alleged conversion of the said tools and equipment;
    - (iii) Punitive and or exemplary damages (which the Claimant has abandoned);

- (iv) The sum of US\$910,300.00 for alleged unpaid invoices and unpaid work under the Contract; and
- (v) Damages for the alleged unlawful termination by the Defendants of the Contract on 21 February 2014, including aggravated damages. The Claimant has also abandoned its claim for aggravated damages.

[9] In its Counterclaim, the Fourth Defendant claimed against the Claimant:

- (a) Damages for fraud against the Claimant as a result of the Claimant fraudulently billing, and the Fourth Defendant paying, \$167,060.00 for work that the Claimant never performed or had already been paid for;
- (b) Damages for fraud as a result of the Claimant submitting fraudulent draw requests claiming to have completed a much higher percentage of electrical and plumbing work than it actually completed resulting in an overpayment to the Claimant in the amount of \$61,341.24; and
- (c) Damages for the Claimant's breach of the Construction Contract in the amount of \$138,893.00 to fix the Claimant's defective workmanship and to complete work that the Claimant never performed as required under the Construction Contract.

[10] Over the course of several case management conferences, the relevant issues between the Parties were significantly refined and narrowed. The result is that the issues to be determined at the Trial were as follows: -

- (a) Regarding the Claimant's claim concerning tools and equipment: -
  - (i) With respect to the claim grounded in detinue, whether the Defendants wrongfully detained the Claimant's tools such that (a) the Claimant made an unconditional and specific demand for the return of the tools; and (b) the Defendants categorically refused, after a reasonable time, to comply with said demand.
  - (ii) With respect to the claim in conversion, whether the Defendants have misappropriated tools and equipment belonging to the Claimant such that (a) the Defendants have engaged in conduct concerning the said tools and equipment which was inconsistent with the rights of the Claimant; (b) that if the Defendants have engaged in such conduct, that it was deliberate and not accidental; and (c) that any such conduct by the Defendants was so extensive an encroachment on the rights of the Claimant as to exclude it from use and possession of the tools and equipment.
  - (iii) In the event that either (i) or (ii) above is established, whether the Claimant is entitled to damages, including damages for future loss and if so, the measure of such damages.

- (b) Regarding the Claimant's claim for a debt due under the Contract, whether the Fourth Defendant owes the Claimant the sum of \$910,300.00 for alleged unpaid invoices and unpaid work, or any sum for any unpaid invoices and unpaid work at all;
- (c) Regarding the Claimant's claim for breach of the Contract: -
  - (i) Whether the Fourth Defendant terminated the Contract without providing thirty days' prior notice to the Claimant without just cause and therefore in breach of the Construction Contract;
  - (ii) Whether, in the event that the Claimant's claim at 10(c)(i) above is made out, the Claimant suffered consequential loss and damage on the evidence;
  - (iii) In the event that either 10(c)(i) or 10(c)(ii) above is established, whether the Claimant is entitled to damages for breach of contract and if so, the measure of any such damages.
- (d) On the Fourth Defendant's counterclaim for breach of the Contract: -
  - (i) Whether the Claimant was in breach of the Construction Contract by;
    - i. performing defective work; and/or
    - ii. omitting to perform work which it was required to do pursuant to the terms of the Construction Contract.
  - (ii) In the event that (d)(i) above is established,
    - i. whether the Fourth Defendant was entitled to terminate the Construction Contract without providing thirty days' prior notice to the Claimant; and/or
    - ii. whether the Fourth Defendant is entitled to damages for breach of contract and if so, the measure of damages.

### **The Claimant's Evidence**

- [11] In support of its claim, the Claimant relied on three witnesses including Lincoln Dennis, a carpenter and mason who worked for the Claimant on the Oil Nut Bay project from 2012 – 2014. In a brief statement, Mr. Dennis gave details of the work which he did on the Ridge Villa. He indicated that his job was to check the quality of the work being done and to make sure that each worker worked to an acceptable standard. He stated that he completed logs which were handed over to the Company when the contract was terminated.

- [12] Mr. Dennis also recalled that date in February, 2014 when Marcus Welch informed him and other workers on the site that they would not be working there anymore but that they would be paid. They returned the next working day but were informed that they were on the premises illegally and were directed to leave. He witnessed the workers packing up tools in the sheds prior to leaving the site. Mr. Dennis was not cross examined.
- [13] The Claimant also relied on the evidence of Mr. Lyndon Chiverton, an electrician who also worked on the Ridge Villa of the Oil Nut Bay project. He recalled details of his work on the project and stated that he was responsible for carrying the tools on to the job site. He identified a number of tools which he would have transported to the job site via private boat. He also recalled that in February 2014, he was informed that they would no longer be needed on the job and they were instructed to pack up their tools and leave. The workers had already started to pack up the tools in the work shed. Mr. Lyndon Chiverton was also not cross-examined.
- [14] Finally, the Claimant relied on the evidence of Mr. Junior Chiverton who is the managing director of the Claimant Company. He filed an amended witness statement on 27<sup>th</sup> March 2020 numbering some 72 paragraphs and with numerous documents attached. This witness statement served as the evidential fulcrum of the Claimant's case. However, when he was examined under oath, it quickly became clear that Mr. Chiverton is illiterate and therefore could not have read and understood the contents of the witness statement or the attached documents. He also revealed that the contents were not read over to him before he executed the same. This is perhaps not surprising because he never informed his attorneys about his illiteracy.
- [15] The Court was therefore compelled to consider the admissibility of this evidence bearing in mind the requirements of CPR Part 29. Mr. Junior Chiverton's witness statement was signed, dated, contained his name and address, had a certificate of truth attached to it and indicated that it contained matters within his knowledge, information and belief and to that extent it was in compliance with CPR Part 29.5. However, it is clear from his oral evidence that he could not have read its contents and that they would not have been read over to him before he signed the witness statement.

- [16] In the Court's judgment, a court order requiring witness statements is not a mere formality. Witness statements are critical documents in any litigation. It is imperative that a court be satisfied that the statement is what it purports to be; namely, the true and accurate statement of the witness who purports to give it. The certificate of truth is in essence a guarantee of authenticity. Although the ECSC CPR (or the relevant Practice Direction) does not address the issue of signing of witness statements by persons who cannot read, the Court is satisfied that in the absence of local rules of court regulating this procedure that by virtue of section 11 of the Eastern Caribbean Supreme Court (Virgin Islands) Act ("the Supreme Court Act"), the Court must have regard to the law and procedure operating in the English High Court of Justice<sup>1</sup>. This has certainly been the practice and procedure adopted in the Eastern Caribbean where similar legislative provisions are found.<sup>2</sup>
- [17] The effect of section 11 of the Supreme Court Act is to import into the practice of the court in the Virgin Islands any rule of court for which no special provision is made in the domestic rules, and specifically the law and practice as to the admissibility or sufficiency of any document. The English Practice Direction 22 A stipulates that a witness statement made by a person who cannot read or write must contain a certificate by an 'authorized person' stating that the witness statement has been read to the witness, who appeared to understand and approve its contents; that the statement of truth has been read to the witness; that he appeared to understand it and the consequences of making a false statement and that he then signed in the presence of the authorized person.<sup>3</sup> By doing this, the authenticating witness is certifying to the court and the opposing party that the intended witness knows the contents of the statement and has accepted the statement as his own.
- [18] In accordance with section 11 of the Supreme Court Act this practice extends to the Virgin Islands. It requires that an attestation clause be appended to such a witness statement, describing the conditions under which it was recorded and signed. This practice was clearly not adopted in relation to the taking and recording of Mr. Junior Chiverton's witness statement. The document is therefore defective and consequently not a witness statement within CPR Part 29. Moreover, the evidence

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<sup>1</sup> Section 11 of the Eastern Caribbean Supreme Court (Virgin Islands) Act 1969

<sup>2</sup> *Hugh Marshall Snr v Antigua Aggregates Ltd and Ors*, Civil Appeal 23 of 1999, Antigua and *Igor Kippers and Ors v Stanford 6 International Bank Limited*, HCVAP2010/0025

<sup>3</sup> An authorised person defined is a person able to administer oaths and take affidavits but need not be independent of the parties or their representatives

contained therein would be inherently unreliable as the Court cannot be certain that the Claimant is even aware of its contents or that of the documents which were attached.

[19] The Court has taken into account the fact that this defect was revealed during the course of the Claimant's case as well as the fact that the Claimant is without the benefit of legal representation though given every opportunity to secure the same. The Court has also considered the impact on the Claimant's case were this evidence to be excluded.

[20] However, given the extent of the defect, this witness statement cannot stand. It necessarily follows, because of Part 29.11(1), that the intended witness cannot be called unless the court gives permission. This is the sanction specified by the rule itself. This is an example of an automatic sanction that comes into effect without any further action by either the court or any of the parties.

[21] For these reasons the Court determined that the witness statement of Mr. Junior Chiverton is inadmissible and the Claimant is not permitted to rely on the same.

### **The Defendant's Evidence**

[22] The Defendants relied on the evidence of Ms. Jaime Rae Turnbull who was involved in the project management and marketing of the parcel in Oil Nut Bay and who was responsible for securing the services of the Claimant. She detailed the several problems which the Defendants experienced with the Claimant's performance including poor workmanship (which she estimated exceeded \$300,000.00), numerous acts of fraud including submitting draw requests which falsely represented the percentage of work completed, billing for work that was never performed and seeking duplicative payments for invoices which had already been paid. Included among these invoices were those requesting payment for 22<sup>nd</sup>, 23<sup>rd</sup>, 24<sup>th</sup> and 27<sup>th</sup> of February 2014 when it is clear that the Claimant Company would have been terminated on 21<sup>st</sup> February 2014. She complained that the Claimant refused to produce written daily logs detailing days worked, names of employees on site and the number of hours worked and specific tasks performed.

- [23] The Defendants also relied on the evidence of Mr. James Douglas Turnbull who acted as the project manager. He provided much more detail on the Claimant's defects in workmanship, omissions and failure to adhere to the sanitary standards. In that regard, he pointed to the February 2014 report from Systems Engineering which showed that the Claimant breached its obligations and failed to rectify defects in its workmanship despite being required to do so. A "**Punch List**" was created from that report which was never actioned and Mr. Turnbull claimed that the Fourth Defendant had incurred costs in the amount of \$138,893.00 to fix the defective workmanship and finish the work which was to have been completed. Mr. Turnbull also provided evidence as to the purported fraudulent billing in respect of work which had not been performed.
- [24] He denied any liability in respect of loss, rental and replacement costs for the Claimant's tools stating that after the contract was terminated, the Claimant was afforded sufficient time and opportunity to remove these tools and equipment which were stored in the store rooms on the Ridge Villa ONE premises. However, the Claimant failed or refused to remove the same despite repeated calls to its principal Mr. Junior Chiverton and an attempt to physically deliver the same up to him.
- [25] Finally, Mr. Turnbull denied the Claimant's claim for unpaid invoices asserting that all approved invoices for November – December 2012, February – November 2013, were paid in full pursuant to documentary evidence which included wire transfer and lien waivers signed on behalf of the Claimant. Mr. Turnbull however, does concede that the invoices No. 101 in the amount of \$11,520.00 were not paid. He explained that this was because the Claimant's principal had been informed on multiple occasions that the correct amount was \$8,400.00 because of the date of termination and the fact that he had been advised to reduce the number of clean up staff to 1 person per day. Similar issues were taken with invoice No. 102 and No. 103 in respect of which the Defendants contend that the correct amount is \$3,500.00 and \$30,180.00 respectively. Mr. Turnbull denied that the Fourth Defendant had any liability in respect of Invoice No 104 because all of the work claimed was previously billed and paid in full in previous invoices.
- [26] The Defendants' final witness was Marcus Welsh who was employed as the senior project manager of Princess Quarters Construction Limited. He referenced the Systems Engineering Report of February 2014 and the "Punch List" and the follow-up inspection which revealed that the Claimant

had failed to rectify any defects of workmanship. He explained the reasons for terminating the contract and described how he went about it on 21<sup>st</sup> February 2014. He also claimed that the Fourth Defendant incurred costs in the amount of \$138,893.00 to fix the Claimant's defective workmanship and to finish work that he had failed to complete.

[27] In regard to the Claimant's tools and equipment, Mr. Welsh stated that after the workmen vacated the site, the Claimant failed to take all of the tools and equipment from the job site. These were left out in the open and within two storerooms located on the site. He contacted Mr. Junior Chiverton on several occasions urging him to collect all of the Claimant's tools and equipment but he failed to do so. This compelled the Fourth Defendant to store the same at a cost. He contended that these tools and equipment were eventually removed (without notice) and secured in one room belonging to Tyrone Stevens. However, he stated that at some point he accessed the building where the items were stored in order to remove a compressor which belonged to the project and which had been wrongly included amongst the Claimant's tools. Mr. Welsh trenchantly denied that the Claimant's tools and equipment were used to carry out any works on the site on behalf of the Fourth Defendant following the termination of the contract.

[28] He reiterated that he made repeated calls to Mr. Junior Chiverton asking that he accept delivery of the tools and equipment but he at every instance refused. There were at least two attempts made to physically deliver the tools and equipment but Mr. Junior Chiverton refused to accept delivery of the same and instead responded with threats. Mr. Welsh therefore denied that he at any time refused delivery of the tools and equipment. In fact, he asserts that just prior to the Hurricanes in 2017; he once again spoke to Mr. Junior Chiverton about the tools and equipment. Mr. Chiverton responded that the tools were not worth anything to him at that point and that they could do what they pleased with them. Following the passage of the 2017 Hurricanes the building and all the tools and equipment stored therein were destroyed.

[29] The Defendants' witnesses were cross-examined by Mr. Junior Chiverton. In respect of Ms. Jamie Rae Turnbull although she would not have personally sent correspondence to the Claimant about defective works, she was clearly familiar with the Systems Engineering Report which identified the defective and unfinished works. In the case of Mr. James Turnbull, Mr. Chiverton's cross examination

focused largely on the claim in respect of unpaid invoices. After Mr. Chiverton meticulously took this witness though the several individual claims, the following quickly became clear:

- i. There were a number of lien waivers which were submitted to the Fourth Defendant on behalf of the Claimant. Lien waivers are often used in the construction industry throughout phases of projects and are essentially a written agreement between a payer and a counterparty whereby the counterparty gives up their right to place a lien on the payer's property or goods. In the case at bar, the document indicated the name of the Claimant, the value of the lien and the period which is intended to be covered. It also represents that *"the undersigned warrants that all employees labourers subcontractors employed by it and all suppliers from which it has acquired materials, services and or equipment rental have been paid their respective portion of prior claims and that none of such employees, labourers subcontractors or suppliers have any claim of lien against the project through [a given date]."*
- ii. The lien waivers would have been prepared by and signed on behalf of the Claimant. Some of the waivers which were processed were undated but this would not without more have affected their validity.
- iii. The Claimant's contention appears to be that while the lien waiver makes it seem that they were processed and paid; in reality the Claimant never actually received any funds by way of payment. However, after examining the documents it was clear that there are invoices and wire transfers which correspond to each and every lien waiver and which demonstrates that the Claimant was paid for the period and work covered in each lien waiver.
- iv. The waivers would have been executed once the Claimant's submitted invoices had been verified and payment forwarded via bank wire transfer and following receipt of the relevant funds.
- v. However, there are instances where the actual amount claimed on the invoice does not correspond to the amount forwarded in the wire transfer. This would have occurred when the Fourth Defendant would have made deductions. Mr. Turnbull initially could not recall the justification for such deductions. However, he eventually recalled that these deductions would have been made during the period when the Claimant would have been using tools and equipment which belonged to the Fourth Defendant. The sum of \$1000.00 would have been deducted to compensate the Fourth Defendant for such use.

[30] Finally, Mr. Marcus Welsh was briefly cross examined about the Claimant's tools and equipment which remained on the job site following termination of the Contract. Mr Welsh did not deviate from his evidence in his witness statement and categorically denied that the tools and equipment were subsequently used in any of the 4 different jobs/projects at Oil Nut Bay. He further denied having any conversation with Mr. Junior Chiverton when this would have been represented.

[31] The Court will now consider the issues arising in the Parties' respective cases and in doing so the Court has considered the legal submissions advanced by Counsel on behalf of both sides. In that regard, the Court notes that during the trial, the Claimant was represented by its managing director, Mr. Junior Chiverton but presented closing legal submissions from J.S. Archibald and Co.

## **COURT'S ANALYSIS AND CONCLUSION**

### **I. The claim in detinue and conversion in respect of the tools and equipment**

[32] The Claimant seeks damages in respect of detinue and conversion. Although the tort of detinue is closely related to, it is not the same as the tort of conversion. It may be defined as the wrongful or unlawful detention of another's goods. Unlike conversion, detinue does not entail any denial of the claimant's title. On the other hand, in an action for conversion, the wrongful act may take the form of any intentional dealing or interference with the chattel inconsistent with the rights of the person entitled to its possession. Conversion therefore is a single act where the cause of action accrues at the date of the conversion. Detinue, however, is a continuing cause of action. It accrues at the date of the wrongful refusal to deliver up goods and continues until delivery up of the goods, or judgment in an action for detinue.

[33] Importantly, because the goods in question are being sought, proof that the defendant is in possession of the goods is an essential element of the tort of detinue. In order for a claimant to establish a case in detinue he must also prove a demand for the return of the property detained and a refusal after a reasonable time, to comply with such a demand. It follows that an action for detinue will ordinarily only lie if, at the time of the demand for delivery up of the goods made by the person entitled to possession, the defendant was in actual possession. Moreover such demand must be unconditional and specific.<sup>4</sup> The reason for the necessity of a demand for delivery before there can be liability in detinue is that the defendant may have acquired possession in ignorance of the claimant's claim. The defendant must therefore be given an opportunity to determine whether the claim is valid.

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<sup>4</sup> (per Byer J in *Derrick Daniel v The Attorney General of Saint Vincent and the Grenadines* at al SVGHCV2011/0029 at [23])

[34] In **Clerk & Lindsell On Torts (18<sup>th</sup> ed.)** at paragraphs 14-11, conversion is defined in these terms:

“Anyone who without authority receives or takes possession of another’s goods with the intention of asserting some right or dominion over them, or deals with them in a manner inconsistent with the right of the true owner is prima facie guilty of conversion, provided that there is an intention on the part of the person so dealing with them to negative the right of the true owner or to assert a right inconsistent therewith.”

It is clear that it is the inconsistency which is the gist of the action. It is irrelevant that a defendant had no intention to deprive the owner permanently of the goods.<sup>5</sup>

[35] In **Carol Campbell v The Transport Authority of Jamaica**<sup>6</sup> McDonald J comprehensively set out the law relating to the tort of conversion in the following manner: -

The courts have determined that in the absence of wilful and wrongful interference there is no conversion even if by the negligence of the defendant the chattel is lost or destroyed (see **Ashby v Tolhurst** [1937] 2 KB 242). Further the authorities show that every person is guilty of conversion who without lawful justification takes a chattel out of the possession of anyone else with the intention of exercising a permanent or temporary dominion over it because the owner is entitled to use it at all times (see **Fouldes v Willoughby**)... But, a mere taking unaccompanied by an intention to exercise dominion is no [sic] conversion. Further, the detention of a chattel amounts to conversion only when it is adverse to the owner or other person entitled to possession – that is, the defendant must have shown an intention to keep the thing in defiance of the owner or person entitled to possession. The usual way of proving that a detention is adverse within the meaning of this rule is to show that the party entitled demanded the delivery of the chattel and the defendant refused or neglected to comply with the demand... it is evident that the key to the establishment of the tort is wrongful interference or unjustifiable interference with the chattel so as to question or deny the owner's title to it (see **Kuwait Airways v Iraqi Airways** [2002] 2 AC 883).

[36] Having considered the totality of the evidence, the Court finds that the Claimant omitted to remove its tools and equipment from the construction site upon termination of the Contract. The Court further finds that notwithstanding numerous requests made by the Defendants to the Claimant to do so, and notwithstanding the Defendants' attempt to deliver the Claimant's tools and equipment to it, the Claimant refused to take possession of the same. The Defendants therefore never deliberately, nor otherwise sought to retain custody of the Claimant's tools and equipment.

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<sup>5</sup> The Playa Large [1983] 2 Lloyd's Law Reports

<sup>6</sup> Claim No. 2011 HCV 01215 at [28]

- [37] Accordingly, there is no evidential basis which supports the Claimant's claim in detinue as the Defendants have not wrongfully detained the Claimant's tools since; (a) the Claimant did not make an unconditional and specific demand to the Defendants for the return of the tools and equipment; and (b) in any event, the Defendants have never categorically refused, after a reasonable time or at all, to comply with any such demand.
- [38] Similarly, no claim arises in favour of the Claimant in conversion because the Claimant has failed to prove on a balance of probabilities that the Defendants misappropriated tools and equipment belonging to it. The Court is unable to conclude that the Defendants engaged in conduct concerning the said tools and equipment which was inconsistent with the rights of the Claimant, or which was so extensive an encroachment on the rights of the Claimant as to exclude it from use and possession of the tools and equipment. Instead, the totality of the evidence reveals that the Claimant repeatedly ignored every opportunity to collect its tools and equipment when it was well within its ability to do so.
- [39] Moreover, even if the Claimant were able to prove its case, it is clear that the normal measure of damages for conversion is the market value of the goods converted.<sup>7</sup> In this case the burden of proof lay with the Claimant to prove the value of the goods as at the date of conversion. Unfortunately, the Claimant has not advanced any admissible evidence in that regard. It follows that even if the Court were to find that there was detinue or conversion of the Claimant's tools, the Claimant has adduced no evidence of loss in relation either to the value of the tools, their replacement cost or evidence of loss of use as pleaded in its claim. This claim would likely not have been maintainable in any event.

## **II. The Claimant's claim for damages for breach of the Contract**

- [40] The Claimant herein contends that the Defendants breached the Contract when they unilaterally terminated the services of the Claimant without cause and without the requisite notice period. The relevant clause in the contract reads as follows:

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<sup>7</sup> Hall v Barclay [1937] 3 ALL. E.R 620

## **“CONTRACT TERMINATION**

This contract may be terminated by either party with 30 days written notice.”

- [41] In written submissions, Counsel for the Fourth Defendant accepts that it (by its agent the Third Defendant) terminated the Contract on 21 February 2014, without giving the Claimant the requisite 30 days' prior notice in writing as prescribed by the Contract. Paragraph 11 of the Defence pleads that:

“However, **due to fraudulent billings, defective work and worker misconduct and the Claimant failing to cure the same despite a myriad of warning and notices that the Claimant would be terminated if such actions and in actions continued**, the Claimant was terminated from the Ridge Villa One Project on February 21 2014.” Emphasis mine

- [42] Each party to a contract is entitled to perfect performance of the terms of the contract by the other party. A party will be in breach of the contract when they fail to perfectly perform one of the warranties, conditions or innominate terms (i.e. the terms of the contract) they have promised to perform. The nature and the consequences of a breach of contract will depend upon the term that has been breached.

- [43] Where a contract contains express provisions entitling one or both parties to bring the contract to an end, it is clear that any condition precedent to its exercise must be strictly fulfilled.<sup>8</sup> It is clear that where a contract provides for the giving of a notice by a certain date, or the occurrence of some event, these conditions must be fulfilled precisely. In **Mannai Investment co Ltd v Eagle Star Life Assurance Co. Ltd.**<sup>9</sup> (after applying the case of **Hankey v. Clavering [1942] 2 K.B. 326**), Lord Hoffman put the position in these terms:

“Lord Greene M.R. said at pp. 329-330, that because such notices have unilateral operation, the conditions under which they may be served must be strictly complied with. I have already said that this principle is accepted on both sides. But, as an explanation of the method of construction used in **Hankey v. Clavering**, it begs the question. **If the clause had said that the notice had to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease.**” Emphasis mine

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<sup>8</sup> *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia* [1997] A.C. 850 at page 870

<sup>9</sup> [1997] A.C.749

[44] In **Afivos Shipping Co SA v Pagnan (R) and Lli (F)**<sup>10</sup> a charter party gave the owner the option of withdrawing the ship failing punctual and regular payment of the hire. However, before exercising the option the owner was required to give 48 hours' notice. The House of Lords held that, since the 48 hours' notice under clause 31 of the charter party could not validly be given before the hire had become "due and not received" at midnight on June 14/15, 1979, the notice given at 16.40 hours on June 14 was bad because it had been given before breach of the obligation to pay the hire.

[45] In the case at bar, it is clear from the termination provisions that: (a) either party could terminate the contract (b) termination need not be based on cause (or the fault of any party) (c) the party terminating needed to give 30 days' notice to the other party and; (d) such notice needed to be in writing. It is common ground between the Parties that the Fourth Defendant failed to adhere to the provisions of this clause and did not fulfil the substantive conditions when it purported to terminate the contract on 21<sup>st</sup> February 2014. In justifying this, the Fourth Defendant points to the Claimant's repeated breaches of the Contract in carrying out defective work in the construction of Oil Nut Bay Ridge Villa One and failing to remedy the same within a reasonable time when called upon to do so. The Fourth Defendant asserts that this amounted to a repudiatory breach of the Contract, which entitled the Fourth Defendant to treat the Contract as having been terminated. This is of course trenchantly denied by the Claimants.

[46] It is an established principle of law that in a contract to perform services, there will generally be an implied term that the party performing the services will do so with reasonable skill and care. It is also implied that the work must be of good workmanship and the materials of good quality.<sup>11</sup> In **Hancock v Brazier (BW) Anerly Ltd**<sup>12</sup> Lord Denning observed:

"It is quite clear from *Lawrence v. Cassel* and *Miller v. Cannon Hill Estates Ltd.* that when a purchaser buys a house from a builder who contracts to build it, **there is a threefold implication: that the builder will do his work in a good and workmanlike manner; that he will supply good and proper materials; and that it will be reasonably fit for human habitation.** Sometimes this implication, or some part of it, may be excluded by an express provision...."

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<sup>10</sup> [1983] 1 W.L.R 195

<sup>11</sup> *Stewart v Ravell's garage* [1952] 2 QB 545; *Lawrence v Cassel* [1930] 2 K.B. 83 and *Miller v Cannon Hill Estates Ltd* [1931] 2 K.B. 113

<sup>12</sup> [1956] 1 WLR 1317 at 1332

[47] In this case, the Parties were clearly not content to rely on implication and by clause 6 of the Contract expressly required the Claimant to maintain the "*highest quality of workmanship at all times*." The Contract further provided that:

"...all work quality will be monitored by ONB Ridge Villa Once LLC and its representatives. Any work that is not acceptable will be corrected by the Contractor at the Contractor's expense."

[48] Leading judicial authorities on repudiatory breach such as **Johnson v Agnew**<sup>13</sup> and **Photo Productions v Securicor Transport Ltd**<sup>14</sup> have established that where a party fails to comply with a contractual term which goes to the heart of the contract, the injured party can either: treat the wrongdoer as having repudiated the contract, accept the repudiation, and proceed to claim damages for the breach (both parties being discharged from further performance of the contract) (where a party elects to bring the contract to an end, he must "accept the repudiation").<sup>15</sup> Where the innocent party chooses to accept the repudiation, the acceptance will bring the contract to an end, meaning that the parties to the contract will be discharged from further performance of obligations under the contract.

[49] However, a practical difficulty for any party to a contract is to determine whether a breach of the contract by another party to the contract amounts to a repudiation of the contract. This is because where a party mistakenly takes the view that a breach by the other party amounts to a repudiation and purports to accept the repudiation, the party may, in fact, be wrongfully repudiating the contract. Whether a breach of contract amounts to a repudiation is therefore "*a serious matter not to be lightly found or inferred*."<sup>16</sup> What has to be established is that the defaulting party has made his intention clear beyond reasonable doubt no longer to perform his side of the bargain. Proof of such intention requires an investigation *inter alia* of the nature of the contract, the attendant circumstances and the motives which prompted the breach. In **Mersey Steel and Iron Co v Naylor Benzon & Co**.<sup>17</sup> Lord Selbourne observed:

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<sup>13</sup> [1980] AC 367

<sup>14</sup> [1980] AC 827

<sup>15</sup> The aggrieved party need not personally, or by an agent, notify the repudiating party of his election to treat the contract as at an end. It is sufficient that the fact of the election is clear and unequivocal and comes to the repudiating party's attention, e.g. notification by an unauthorised broker or other intermediary may be sufficient.

<sup>16</sup> *Ross Smyth & Co Ltd v Bailey, Son & Co.* [1940] 3 ALL ER 60 at page 71

<sup>17</sup> (1884) 9 App Caps 434 at pages 438 – 439

“.. I am content to take the rule as stated by Lord Coleridge in **Freeth v. Burr** (1), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part.”

[50] Case law prescribes that a mere honest misapprehension, especially if open to correction will not justify a charge of repudiation. Rather, there must be an absolute refusal to fulfill his obligations.

[51] A second class of case in which a party is entitled to treat himself as discharged from further liability obtains where, without expressly or implicitly repudiating his obligations, a party commits a fundamental breach of the contract. In construing the term “fundamental breach” the Court is guided by well-established case law which prescribes that no breach will discharge the innocent party from further liability unless it goes to the whole root of the contract, not merely to a part of it<sup>18</sup> or unless it goes so much to the root of the contract that it makes further performance impossible<sup>19</sup> or unless it affects the very substance of the contract.<sup>20</sup> **Hudson’s Building and Engineering Contracts**<sup>21</sup> sets out a number of situations which give rise to the right of the innocent party to terminate a contract because of a breach by the other, which includes:-

“Where there is a breach of the term which, while not by itself sufficiently serious, may be so protracted or repeated, despite protest or notice by the injured party, that it either evinces an intention not to be bound by the contract, as in the case of deliberate and continued breaches (however minor), or simply an objective inability to perform the contract properly.”

[52] In the case at bar, the relevant evidence relied upon by the Defendants is set out in the Third Defendant’s amended witness statement, where he states that in January 2014, Systems Engineering carried out an inspection of the “RV1 Project and produced a Report which detailed several areas of the Claimant’s defective workmanship. The purported report which is attached to his witness statement is essentially an undated and unsigned 2 paged document (exclusive of photographs) entitled **RVI: -Snagging of Concrete** and lists a number (31) of defects. This evidence was unchallenged in cross-examination. The Third Defendant further states that the following month

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<sup>18</sup> Davidson v Gwynene (1810) 12 East 381 at 389

<sup>19</sup> Hong Kong Fir Shipping Co. Ltd v Kawasaki Kaisen Kaisha Ltd [1962] 2 QB 26 at page 64

<sup>20</sup> Wallis, Son and Wells v Pratt and Haynes [1910] 2 KB 1003 at 1012

<sup>21</sup> 14<sup>th</sup> Edn at paragraph 8-004

February 2014, Systems Engineering carried out a second inspection of the RV1 Project which confirmed that the Claimant had failed to rectify the list of defects in its workmanship. Again, attached to his evidence is an undated and unsigned 2 paged document (exclusive of photographs) entitled **RVI: - Snagging of Concrete Revised 25<sup>th</sup> February – Outstanding Items** which now lists a number (17) of defects described as “outstanding”. This evidence was similarly unchallenged in cross-examination.

- [53] The Third Defendant states even prior to the Systems Engineering report, Mr. Junior Chiverton was warned on numerous occasions about the Claimant’s defective workmanship. He contends that Mr Chiverton was later made aware of the defect identified in the January 2014 Systems Engineering Report and Mr. Chiverton undertook to remedy the same. However, the Claimant failed to do so.
- [54] At paragraph 5 of his amended witness statement, the First Defendant stated that he ensured that the Claimant was provided with the relevant plans and specifications relative to the construction of the Villa prepared by the architect and Systems Engineering and that he insisted that the Claimant perform its obligations by delivering the highest quality of work and workmanship. He recounts that during weekly inspections and walk-throughs, he gave feedback and verbal warnings about the defects in workmanship which the Claimant failed to remedy. At paragraphs 9 – 11 of his amended witness statement he sets out a number of complaints which culminated in a work stop notice issued on 17<sup>th</sup> October 2013. The Fourth Defendant nevertheless elected to continue with the Contract but the First Defendant says that he “repeatedly required the Claimant to improve its performance and ....*provided such guidance as deemed necessary to assist the Claimant its servants or agents in carrying out the remedial works identified...*”
- [55] It appears that by January 2014, the Fourth Defendant commissioned Systems Engineering to inspect the project works and produce a report. From that report a Punch List was prepared in January 2014 which disclosed defective and negligent workmanship. This was later revised in February 2014. The First Defendant stated that these issues were not addressed despite the fact that he had “*several conversations with Junior Chiverton, the principal of the Claimant as well as with the Claimant’s servants and agents in relation to the reports of Systems Engineering.*” It is surprising

that the Fourth Defendant took no steps to memorialise its concerns in writing but the Claimant's case did not exploit this.

[56] Although, the Claimant has generally denied that there was ever a complaint of substandard workmanship communicated to it whether orally or in writing in its pleadings, the Claimant has no admissible evidence before the Court which addresses the specific allegations. Moreover, during the course of the trial, Mr. Chiverton elected not to cross-examine the First or the Third Defendant on this specific issue but instead put the Claimant's case to Ms. Jaime Turnbull whose evidence on these issues could carry little to no weight.

[57] In addition to the defective workmanship, the Defendants have also sought to rely on what is described as repeated instances (outlined in the Amended Witness Statement of the First Defendant (at paragraphs 21 – 31) where the Claimant submitted invoices to it for work in respect of which payment had already been made, or which had never been performed as further grounds for the termination of the Contract.

[58] However, when the Court has regard to the actual evidence, it is pellucid that the decision to terminate was summarily taken by the Third Defendant on 21<sup>st</sup> February 2014 and his evidence in that regard is telling. It is clear that the purported wrongful invoicing was not the basis for terminating the Contract. At paragraph 8 – 9 of his amended witness statement he states:

The Claimant's principal, Junior Chiverton was informed on numerous occasions of the defective workmanship and the January 2014 Systems Engineering Report which we referred to as the "Punch List" and Junior Chiverton said that the defects would be repaired. However, the Claimant failed to repair the items on the Punch List. In addition, its work on the RV1 Project was not progressing to my or the owner's satisfaction and I was very disappointed with the management of the Claimant's efforts by Junior Chiverton and his management team. Work was moving much too slowly, including the stone work there was continual misapplication of resources, refusal to follow directions and defective work. When I saw four of the Chiverton's servants riding a pickup truck hauling plywood to the construction trailer, rather than to the house as had been explained on multiple occasions, I came to the conclusion that it was time to terminate the Claimant's involvement in the RV 1 Project.

On 21<sup>st</sup> February 2014, I gathered all the Claimant's servants ....and explained to them that I was shutting down construction effective immediately..."

- [59] Given the size and value of the project it is surprising that the Contract contained only the barest of provisions addressing remediation of defective workmanship. Customary provisions governing notice of defects, the manner of communicating the same and prescribing a deadline for remediation are notably absent from the Parties' written agreement.
- [60] The case for the Defence was overwhelming and corroborative. The witnesses all represent that the "Punch List" of defective workmanship was communicated to the Claimant's managing director, Mr Junior Chiverton "*on numerous occasions*" to no apparent avail. Although the Claimant disputes this, it is however apparent from the documentary evidence that the original Punch List arising out of the January 2014 Report had a list of 31 items requiring redress. The Fourth Defendant also provided photographs which demonstrated the purported defective workmanship. However, weeks later (by the 25<sup>th</sup> February 2014) and 4 days after the termination the revised list showed a reduced outstanding list of 17 items. Moreover, in a number of the items list (nos. 1, 22, 4, 7, 10, 11,) there is a record of the progress (expressed in percentages) which had been observed and a note as to what was left to be done. This suggests to the Court that contrary to what is represented by the Claimant, the defects were in fact communicated to the Claimant's servants or agents and efforts were being made to address the same. It also suggests to the Court that contrary to what is indicated by the Defendants, the Claimant would in fact have been in the process of addressing the items listed in the "Punch List" when the Contract was terminated on 21<sup>st</sup> February 2014.
- [61] Having reviewed the totality of the evidence, the nature of the Contract and all of the attendant circumstances, the Court is unable to conclude that the Claimant would have made its intention clear beyond reasonable doubt that it no longer intended to perform its side of the contract.
- [62] However, the Court has had regard to the subject matter of this Contract and Clause 6 which mandated the Claimant to maintain the "*highest quality of workmanship at all times* and which made clear that "*all work quality will be monitored by the Fourth Defendant and its representatives and that any work that is not acceptable will be corrected by the Claimants at its expense.*" It is clear to the Court (as it would have been clear to the Claimant) that this obligation would have been of critical importance to the Fourth Defendant and it is unlikely that it would have entered into the contract unless it had been assured of strict and substantial performance of this clause.

[63] The Fourth Defendant contends that the Claimant failed to fulfil its contractual obligations and had persisted in doing so despite repeated exhortations. The Fourth Defendant produced evidence of the defective workmanship which is unchallenged. In the wake of this significant evidence, the failure to confront the Defence's witnesses in cross-examination is telling. Although there appears to have been some effort made to repair the defects, the failure to complete remediation within a reasonable time, coupled with the repeated instances of defective workmanship could amount to a fundamental breach of the contract which could lead one to conclude that the Claimant was unable to perform the contract properly or was intent on deliberately breaching its obligations.

[64] In the absence of cogent evidence to the contrary, the Court is obliged to conclude that there was a fundamental breach on the part of the Claimant which would have entitled the Fourth Defendant to rescind and terminate the Contract thus discharging it from further liability. The Court therefore finds that the claim for breach of contract should be dismissed.

[65] If the Court is wrong on this and the Fourth Defendant was not entitled to rescind and terminate the Contract then the Court finds that on the way in which the Claimant's case is pleaded and given the absence of any cogent evidence substantiating any loss or damage, (apart from a possible nominal award) that it is unlikely that the Court could properly assess an award of damages in any event.

### **III. The Claimant's claim of \$910,300.00 for unpaid invoices and unpaid work**

[66] The Claimant claims the sum of \$910,300.00 as a debt due under the Contract for unpaid invoices and unpaid work, which the Claimant claims to have carried out pursuant to the expanded scope of work beyond that contemplated under the original contract dated 12<sup>th</sup> November 2012.

[67] On its pleaded case, the Fourth Defendant frankly acknowledges that the original scope of work under the Contract was varied and that this necessitated an addendum to the Contract on 8<sup>th</sup> January 2013 which reflected an additional sum of \$218,242.00 over and above the original sum of \$540,500.00.

[68] The Fourth Defendant also acknowledges that it refused to pay the Claimant \$8,400.00 owed under Invoice No. 101; \$3,500.00 owed under Invoice No. 102; and \$30,180.00 under Invoice No. 103 on account of the Claimant's breaches of the Contract and the loss and damage suffered as a result. However, the Fourth Defendant denies that it owes the Claimant the remaining amount of \$868,220.00. The Fourth Defendant's rational is summarised as follows:

- (a) The normal procedure followed by the Parties would see the Claimant submitting invoices for work done, in respect of which payment would be effected by the Fourth Defendant by way of wire transfers paid to the Claimant. On each occasion that the Claimant received a payment from the Fourth Defendant, the Claimant would execute a lien waiver which it released, waived and quitclaimed all rights of a construction lien in respect of improvements to, materials to, services rendered to, and/or equipment rented for the property described as ONB Ridge Villa One LLC up to the date of the relevant invoice. The Claimant executed lien waivers confirming the payment to it of monies due by the Fourth Defendant throughout the duration of the Contract for work done between 14<sup>th</sup> November 2012 and 2<sup>nd</sup> December 2013.
- (b) In his amended witness statement of the First Defendant<sup>22</sup> he detailed evidence of wire transfer payments which the Fourth Defendant made to the Claimant and lien waivers signed on behalf of the Claimant which coincide with invoices submitted by the Claimant which it alleges it had not been paid. The Fourth Defendant submitted that if the Claimant was of the genuine belief that it was owed the sum of \$910,300.00 in unpaid invoices as alleged, it would not have caused these lien waivers to be executed on its behalf.
- (c) The Defendants submitted that the payments made by the Fourth Defendant and the lien waivers corresponding to those payments signed on behalf of the Claimant encompass all construction services which the Claimant provided to the Fourth Defendant for the duration of the Contract.

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<sup>22</sup> (see in particular paragraphs 38 – 56) to which is exhibited at "JDT11"

- [69] Counsel for the Defendants submitted that as a result of Junior Chiverton's amended witness statement being struck out, any evidence whatsoever being adduced by the Claimant in support of its claim for unpaid invoices totalling \$910,300.00 (save for the sum which the Fourth Defendant admits it owes) ought, on its own, to result in this aspect of the Claimant's claim being dismissed. The Court finds that there is much force in this argument.
- [70] However, in cross examination Mr. Junior Chiverton took the opportunity to extensively test the Defence witnesses on their evidence. This exercise did not assist the Claimant's case in any respect. At one point during the cross examination of the First Defendant, Mr. Junior Chiverton put to Mr. Turnbull that he (Mr. Chiverton) had never before seen or signed the lien waivers appearing at pages 238, 239, 240, 247, 248, 249, 256, 257, 258, 331 and 332 of Volume 1 of the Trial Bundle. Mr. Chiverton also put to Mr. Turnbull that the lien waivers appearing at pages 426, 427 and 428 of Volume 3 of the Trial Bundle were not in fact signed by him on behalf of the Claimant notwithstanding that what appeared to be Mr. Chiverton's signature appeared on those very lien waivers.
- [71] During the course of this litigation, the parties engaged in multiple case management conferences and had the opportunity to amend their pleaded case and their evidence. Given the extensive case management, the Court finds it surprising that the Claimant would choose to raise a challenge the authenticity of the signature on these documents for the first time during the course of the trial. The Claimant's submissions also ignore the fact that by letter dated 2 September 2016 from Richard Rowe of DenJen Law, the then legal practitioners on record acting on behalf of the Claimant to Dancia Penn & Co, who were then acting on behalf of the Defendants, Mr. Rowe on behalf of the Claimant referred to "*several lien waivers signed by him [Junior Chiverton] and that signed by his son...*"
- [72] It was evident that there was substantial variance between the questions put by the Claimant to the First Defendant in cross-examination, as compared to the incontrovertible documentary evidence before the Court. By way of illustration, Mr. Junior Chiverton put to Mr. Turnbull in cross-examination (notwithstanding his previous insistence that he had never before seen the lien waivers) that the Claimant Company never received a wire transfer before signing a lien waiver, but rather, that the Claimant Company always signed the lien waivers prior to receiving payment. This was obviously

inconsistent with the documentary evidence before the Court. This showed that the lien waivers were invariably signed on behalf of the Claimant after it had received a payment by wire transfer on the basis of invoices submitted by the Claimant to the Fourth Defendant. The First Defendant's evidence on re-examination was convincing and the Court was left in no doubt of the plausibility of his statement that:

*"The lien waiver was a way to show that all work that had been completed by the contractor Chiverton Construction was accounted for and listed and the total was paid. So it was a mechanism to indicate that, I will use hypothetically the date of, let's say the month of July. At the end of July when the waiver was signed, it was a mechanism to show that there was [sic] no outstanding funds owed to Chiverton Construction for any work that had been done to date... and that process was followed month after month after month..."*

- [73] Counsel for the Defendants also submitted that the evidence led by both Parties also exposes the implausibility of the Claimant's argument that the sum claimed for unpaid work in the invoices dated April 2015 concerned additional work performed by workmen on the site of the ONB Ridge Villa One project. On re-examination, when explaining the process of invoicing under the Contract, the First Defendant explained that it was the Claimant which indicated by its invoices the number of men that were on site at any given time and their respective professions. This is consistent with the Claimant's own evidence as adduced through its witness, Mr. Lincoln Dennis who, at paragraph 3 of his witness statement stated that his job included visiting the site "and checking on how much work each worker did on each job." Mr. Dennis further stated in his Witness Statement that he checked twice a day at 10:00 in the morning and at 2:30 in the afternoon, every day and that he created logs for this. Presumably, these logs would have been used to prepare the Claimants invoices for each pay period.
- [74] The First Defendant was also questioned about the consistent shortfall of \$1000.00 (between the invoiced sum and the wire transfer evidencing payment). Although this initially caused some concern it quickly became clear that these deductions acknowledged that the Claimant would have been utilising the Fourth Defendant's tools and equipment to carry out the works and services under the Contract. These deductions would have been made over the course of several invoices apparently without objection from the Claimant.

[75] Mr. Chiverton also put to the First Defendant in cross-examination that on a day-to-day basis there were significantly more workers employed on the job site. The Claimant's amended statement of claim asserts that unpaid work remains outstanding for workmen numbering as many as; 14 foremen, 152 tradesmen and 47 labourers for 14 days during the period 1<sup>st</sup> to 30<sup>th</sup> March 2013; 21 foremen, 253 tradesmen and 78 labourers for 21 days during the period 2<sup>nd</sup> to 30<sup>th</sup> April 2013 and 21 foremen, 260 tradesmen and 77 labourers for 21 days during the period 1<sup>st</sup> to 31<sup>st</sup> May 2013.

[76] However, the First Defendant testified that the number of workmen on site ranged between 22/24 and 30/32 per day. Counsel for the Defendants has submitted that the First Defendant's evidence on this point is to be preferred having regard to the invoices submitted by the Claimant during the course of the Contract. By way of illustration he cited the following examples based on the evidence led at trial in the First Defendant's Witness Statement:

- (a) The Claimant's Invoice appearing on page 307 of Volume 2 of the Trial Bundle shows that there were 22 workmen on site (1 for trucking from site to BOH; 3 for site cleaning; 12 tradesmen; 1 for boat transportation; 2 foremen and 3 labourers) on Saturday 16 February 2013;
- (b) The Claimant's Invoice appearing on page 316 of Volume 2 of the Trial Bundle shows that there were 25 workmen on site (1 for trucking from site to BOH; 1 for boat transportation; 14 tradesmen; 2 foremen; 5 labourers and 2 for site cleaning) on Saturday 2 March 2013;
- (c) The Claimant's Invoice appearing on page 323 of Volume 2 of the Trial Bundle shows that there were 27 workmen on site (1 for trucking from site to BOH; 1 for boat transportation; 17 tradesmen; 2 foremen; and 6 labourers) on Saturday 16 March 2013;
- (d) The Claimant's Invoice appearing on page 335 of Volume 2 of the Trial Bundle shows that there were 35 men on site (1 for trucking from site to BOH; 1 for worker transportation by boat; 20 tradesmen; 2 foremen; 8 labourers and 3 for site cleaning) on Saturday 23 March, 2013;

[77] Given the documentary evidence before the Court it is therefore hardly surprising that when Mr. Chiverton put to the First Defendant that the sum of \$518,850.00 was owed to the Claimant under Invoice 002 dated 15<sup>th</sup> April, 2015, the First Defendant in response said that: -

"I'm looking at the document, the numbers of individuals that supposedly were on site there are astronomical and we had paid everything as we moved incrementally to Mr. Chiverton. We had lien waivers for every month, after month, after month, after month. I'm not sure what else we could have done in that regard."

[78] Further, the Defendants invited the Court to reject the Claimant's claim for unpaid invoices and unpaid work for the following additional reasons:

- (a) A letter dated 2 April 2014 (that is, after the termination of the Contract) from Maximea & Co. the then legal practitioners for the Claimant, to the First Defendant (presumably as agent for the Fourth Defendant) alleges that the Claimant is owed an outstanding amount of \$219,300.00 under the Contract and not the \$910,300.00 now claimed;
- (b) Unlike the invoices which the Claimant submitted to the Fourth Defendant during the currency of the Contract, copies of which have been annexed to the First Defendant's Witness Statement, the Claimant has not submitted into evidence any timely invoices under which it alleges the Fourth Defendant owes in the total sum of \$910,300.00, because they do not exist.
- (c) The Claimant's own witness, Mr. Lincoln Dennis said in his Witness Statement that it was his responsibility to visit the site and check on how much work each worker did on each job and that he did so twice daily and created logs for this. It is therefore inconceivable that work done by the large number of workmen alleged by the Claimant would have been omitted from the invoices submitted by the Claimant to the Fourth Defendant during the course of the Construction Contract.
- (d) If the Claimant's case were to be believed, the Claimant would have foregone payments to it (and as a result, it must follow as a matter of logic, the ability to pay a large number of workmen that the Claimant alleges to have been working on the RV1 project) exceeding \$900,000.00 over the course of some 15 months, which the Claimant never reduced into writing until in excess of one year after the termination of the Construction Contract.
- (e) The invoices numbered 001, 002, 003 and 004 which the Claimant annexed to its amended statement of claim are dated 15 April 2015, over a year after the termination of the Contract and were never served on the Defendants by the Claimant's Counsel until 2 September 2016, over 2 years after the termination of the Contract. The Claimant has never alleged that it submitted these 2015 Invoices to the Fourth Defendant during the currency of the Contract.

[79] In the Court's judgment these disclose glaring evidential lacunas in the Claimant's case which are ultimately fatal. Having had an opportunity to observe the Defence witnesses during their oral evidence, it became clear that their evidence was consistent with the documentation which was before the Court. Their evidence was plausible and credible and was not significantly disproved during the course of the trial. In contrast, the Claimant's case was inconsistent with the documentary evidence and generally lacked plausibility.

[80] The Fourth Defendant has however admitted that the invoices numbered 101 – 104 inclusive which were submitted to the Fourth Defendant during the currency of the Construction Contract remain unpaid. It follows that the sum of \$42,080.00 remains due and owing to the Claimant. The Court therefore finds that save for the sum of \$42,080.00 which the Fourth Defendant acknowledges is owed, the balance of this claim for relief must be dismissed.

## **THE COUNTERCLAIM**

### **The Parties' Cases**

[81] By way of counterclaim the Defendants contend that the Claimant breached the Contract in the following material respects: -

- (i) Failing to perform its obligations under the Contract by failing to deliver and maintain the required quality of work and workmanship at all times during the currency of the Contract.
- (ii) Failing to remedy at its own expense, any defects and/or omissions in the works under the Contract such that the Fourth Defendant suffered loss and damage by being forced to retain the services of another contractor to remedy the defective work performed by the Claimant.
- (iii) Engaging in fraud by-
  - I. Issuing invoices for work that had previously been performed and paid for as confirmed by lien releases signed by representatives of the Claimant:
  - II. Issuing invoices for work that the Claimant never performed: and
  - III. Submitting fraudulent draw requests claiming to have completed a much higher percentage of electrical and plumbing work than it actually completed, resulting in overpayments to the Claimant.

[82] Prior to the trial of the matter, the Defendants made it clear that they would no longer be pursuing the allegations of fraud and so in closing submissions Counsel for the Defendant submitted that the counterclaim seeks damages for the Claimant's breach in failing to maintain the highest quality of workmanship required under the Contract, producing defective work and failing to remedy the same at its expense despite repeated requests by the Defendants to do so.

- [83] These contentions are advanced both as a shield and as a sword. The Defendants have contended that the Fourth Defendant was justified in terminating the Contract with the Claimant without providing thirty days prior notice to the Claimant after the Defendants brought these breaches to the attention of the Claimant and the latter failed to remedy same. The Fourth Defendant relies on the documents identifying the defects in the Claimant's work performed on the Villa, together with evidence of the work undertaken to remedy those defects. It contends that it is entitled to judgment entered in its favour on the counterclaim, and an award of damages in the sum of \$138,893.00.
- [84] The witness statement of Junior Chiverton having been ruled inadmissible, the Claimant's defence of the counterclaim hinged solely on the evidence of Mr. Dennis who very briefly averred that there was never any substandard work done on the site. He stated that his job on the project was to check the quality of the work being done and to ensure that each worker worked to an acceptable standard. He indicated that he kept logs of his site visits which he turned over to the Claimant. Mr. Dennis was not cross examined on his evidence.

#### **COURT'S ANALYSIS AND CONCLUSION**

- [85] In written legal submissions, Counsel for the Fourth Defendant reiterated that, an innocent party may terminate a contract where there is a breach of the term which, while not by itself sufficiently serious, may be so protracted or repeated, despite protest or notice by the injured party, that it either evinces an intention not to be bound by the contract, as in the case of deliberate and continued breaches (however minor), or simply an objective inability to perform the contract properly. Thereafter, the innocent party may sue for damages for any loss it suffered by reason of the breach. However, to claim damages, the injured party will have to show that the breach caused a loss and that the loss is not too remote from the breach. Damages are intended to put the injured party in the position that they would have been in had the breach not occurred. Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

[86] The Fourth Defendant, claims damages for the Claimant's breach of the Contract in failing to maintain the highest quality of workmanship required by the Contract, producing defective work and failing to remedy the same at its expense despite repeated requests by the Defendants for it to do so. Counsel for the Defendants submitted that as a result of the defective work performed by the Claimant, the Fourth Defendant suffered loss and damage in order to remedy the defects. It relies on the Punch List identifying the defects in the Claimant's work performed on the Villa together with the evidence of work undertaken to remedy those defects and the costs incurred in doing so.

[87] Where a party has acted reasonably in effecting remediation works to repair defective workmanship, the normal measure of damages is the cost of reinstatement or remedying the defects to ensure that they correspond to the specification. The costs being taken as at the time when the defects were discovered. If however, the cost of remedying the defects is disproportionate to the end attained, the damages fall to be measured by the value of the building had it been built as required by the contract less its value as it stands. In a judgment which was heavily relied upon by the Defendants, Lord Lloyd in **Ruxley Electronics and Construction Limited v Forsyth** had this to say;<sup>23</sup>

"In building cases, the pecuniary loss is almost always measured in one of two ways; either the difference in value of the work done or the cost of reinstatement. Where the cost of reinstatement is less than the difference in value, the measure of damages will invariably be the cost of reinstatement. By claiming the difference in value the plaintiff would be failing to take reasonable steps to mitigate his loss. In many ordinary cases, too, where reinstatement presents no special problem, the cost of reinstatement will be the obvious measure of damages, even where there is little or no difference in value, or where the difference in value is hard to assess. This is why it is often said that the cost of reinstatement is the ordinary measure of damages for defective performance under a building contract."

[88] The Counterclaim clearly contemplates that the sum claimed is to be reviewed as against the purported "Punch List" which would have demonstrated that defective works requiring redress as at the date of termination. The Counterclaim sought the sum of **\$388,000.00** and pleaded as follows:

"The Claimant's failure to remedy at its own expense any defects and or omissions in the works under the Construction Contract **as detailed in the PUNCH LIST dated 7<sup>th</sup> April 2014 and February 2014** which resulted in additional costs in excess of \$388,000.00 to the Fourth Defendant." Emphasis mine

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<sup>23</sup> [1996] AC 344, 365 at page 366

[89] The Court has had regard to the progress of remediation and the “*outstanding items*” identified as defective works by Systems Engineering in the **Revised 25<sup>th</sup> February** list, and what is clear is that it bears little resemblance to the extensive list of items set out in the summary of costs exhibited to the Third Defendant’s witness statement. The discrepancy between the pleaded case and the Defendant’s evidence was not explained and the fact that the source and date of the purported summary is unknown did not assist. The dissimilarity is startling and caused concern for the Court. It appears (although it is not at all certain) that the summary of costs reflects not only work done to correct defective workmanship identified in the revised Punch List but also other previously unidentified and unproved defects and /or work which ought to have been completed and which was billed for but which was not in fact completed.

[90] In the Court’s judgment the fact that the Claimant has not specifically treated with this evidence would not relieve the Fourth Defendant of its burden to advance a credible case on a balance of probabilities. Unfortunately, although the Fourth Defendant disclosed a barrage of documents, they lacked coherence and were impossible to verify. It was impossible for the Court to discern the purported defects from the works which are alleged to have been incomplete as at the date of termination but yet would have been billed and paid for by the Fourth Defendant.

[91] The Court is however satisfied that the Claimant was in breach of the Contract and that some measure of damages is due to the Fourth Defendant by way of compensation notwithstanding the lack of certainty. The Court is therefore obliged “*to do its best on such evidence as it feels able to accept to place some kind of value on*” even if the precise identity cannot be established and its value is in doubt.”<sup>24</sup> Consistent with the Fourth Defendant’s pleaded case, the Court has therefore carefully endeavored to dovetail the **Revised 25<sup>th</sup> February Punch List** with the summary presented and has awarded the sum of \$42,750.00.

[92] The Fourth Defendant also claims that it is entitled to damages in the sum of \$228,401.24 as overpayments made to the Claimants broken down as follows: -

- (i) \$167,060.00 for work which the Claimant had either not performed at all or in respect of which payment had already previously been made;

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<sup>24</sup> Zabihi v Janzemini [2009] EWCA 851; Biggin v Permanite [1951] 1 KB 422 at page 438

- (ii) \$61,341.24 which represented an overpayment by the Fourth Defendant to the Claimant for work which had not yet been completed but in respect of which an over payment had been made at the time of the termination of the Contract.

[93] Counsel for the Defendants submitted that the measure of damages payable by a contractor for breach of a part-completed building contract includes an amount to compensate the employer for an overpayment for work done.<sup>25</sup> In support of this head of claim, the Fourth Defendant relies on the amended witness statement of the First Defendant. At paragraphs 23 – 25 of his witness statement, he set out particulars of the sums which the Fourth Defendant claims was paid to the Claimant for work which had either not been performed at all or in respect of which payment had already been made; or for work which had not yet been completed but in respect of which an over payment had been made at the time of the termination of the Contract.

[94] First, the Court notes the First Defendant's averment that he would have acted as the project manager on the Ridge Villa One Project and in that capacity would have had oversight of the construction and management of contractors. The Court also notes that he would have had access to the financial records which pertained to invoicing, drawdowns records and project reports and other documentation relative to this case. He made clear that his duties included the review and approval of the Claimant's invoices for payment. Given his oversight role, the allegations of overpayment are surprising more so because he contends that from the commencement of the works, he monitored the work of the Claimant by holding meetings, inspections and walkthroughs with the Claimant and its representatives.

[95] Notwithstanding this, the First Defendant exhibited a summary which attached documentation which he contended proves the disputed invoices between January 2014 and March 2014. This evidence posed a difficulty for the Court for the following reasons:

- i. The documentary evidence is not consistent and on its face does not support the contention. By way of example, the disputed charges on the invoice of 11<sup>th</sup> February 2014 would have reduced the total sum due from \$21,320.00 to \$19,200.00. The

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<sup>25</sup> In support Counsel for the Fourth Defendant cited the judgment of Belle J in *Benjamin Drakes and Gerald Francis v Plantation Beach St. Lucia Ltd*<sup>25</sup> where at paragraph [40] he applied the judgment in *D.O. Ferguson & Associates (A Firm) v Sohl*

corresponding wire transfer would have disclosed that the sum of \$36,080 was paid. This amount is presumably made up of the sum of \$16, 880.00 and the \$19,200.00 reflected in the attached lien waivers. It therefore appears that the disputed sums would, in fact have been deducted from the sum paid.

- ii. Apart from the wire transfers of 11/08/2013, 11/20/2013, 12/05/2013, 12/20/2013, 01/31/2014, 01/24/2014 and 02/14/2014 there is no proof the Claimant was ever paid for the invoicing which is disputed.

[96] The sum of \$61,341.24 is said to represent overpayments in respect of electrical and plumbing works. The contention is that the relevant draw requests claimed to have completed a much higher percentage of electrical and plumbing works than was actually completed. The First Defendant again attached a summary sheet which he contended represented the actual percentage completion invoiced and paid compared to the actual percentage completed and what would have been paid. Unfortunately, apart from the rather bare representation set out in the summary, the Fourth Defendant has advanced no cogent evidence which demonstrates its contention that only 30% of the electrical and plumbing works were actually completed.

[97] The plausibility of this contention was further eroded when the Court had regard to the plethora of draw requests which were submitted over the duration of the project which demonstrated the progress of these works. The Court notes that these draw requests would have been reviewed by servants or the agents of the Fourth Defendant (stamped approved by Doug Turnbull in some cases) and that no issue would have been taken over the course of the project.

[98] Although the Claimant advanced no direct evidence to refute the Fourth Defendant's contentions, the Fourth Defendant was put to strict proof. The evidential lacunas, lack of coherence and consistency in the documentary evidence undermined the claims set in the counterclaim and in the context where the First and Third Defendants professed to have been monitoring the progress of these works; on a balance of probabilities it is implausible that the Fourth Defendant could have overlooked the significant overpayments which are alleged. The Court will therefore dismiss this part of the counterclaim.

## **COSTS**

[99] Given the Court's findings herein and the partial success of both Parties, the Court is satisfied that the result should be costs neutral.

[100] **It is therefore ordered as follows:**

- i. Judgment is entered for the Claimant in the sum of \$42,080.00.
- ii. Judgment is entered for the Fourth Defendant on the counterclaim in the sum of \$42,750.00.
- iii. All other claims for relief are dismissed.
- iv. No order as to costs.

**Vicki Ann Ellis  
High Court Judge**

**By the Court**

**Registrar**