

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV 2010/0662

BETWEEN:

KHOULY CONSTRUCTION AND ENGINEERING LIMITED

Claimant

And

EDMUND MANSOOR

Ancillary Claimant

And

JESSY KHOULY

Ancillary Defendant

Appearances:

Mr. Anthony Astaphan, S.C., Mr. Kendrickson Kentish, Mr. Kelvin John and Mr. Loy Weste for the Claimant
Sir. Gerald Watt Q.C., Dr. David Dorsett and Mr. Jared Hewlett of Watt & Associates for the
Defendant/Ancillary Claimant
Mr. John Fuller and Mr. Cedric Dyer of John E. Fuller & Co. for the Ancillary Defendant

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2018: May 8, 9, 10, 11
2019: February 25
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JUDGMENT

- [1] **HENRY, J.;** The claimant contracted with the defendant to build a 6000 square feet residence. The plans and specifications for the house were designed by Jessy Khouly, the Ancillary defendant. The claimant contends that the claimant did the works, including the extra works on the instructions of the defendant, for which it had not been paid. The claimant also asserts that the defendant wrongfully excluded it from the work site, has repudiated the contract by unlawfully preventing the claimant from completing the works it was contracted to do and by his refusal to pay monies due it.

[2] The claimant therefore claims against the defendant as follows:

- a) Damages for Breach of Contract or the sum of EC\$588,255.65 by way of damages for Breach of Contract;
- b) Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act, Cap 143 at such rate and for such period as the court seems just and
- c) Costs.

[3] The defendant by his Amended Defence and Counterclaim pleads breach of an implied term of the contract that the work would be carried out in a professional and workmanlike manner and with proper materials of good quality, and that the work, when completed would be suitable for its required purpose. The Defendant/Ancillary claimant also claims against the Ancillary defendant for breach of an agreement dated 12th May 2006, in that the Ancillary defendant, trading under the name of Architecture Design Works, failed to observe, detect and correct certain defects and deficiencies in the construction of the defendant's house by the claimant and by one Raymond Khouly, the engineer on the project.

The Pleadings

- [4] The claimant pleads that, at all material times, it carried on business as a building contractor. In paragraph 2 the claimant avers that on or about 14th February 2008, by written agreement made between the claimant and the defendant, the claimant agreed to construct a 6000 square feet, two story dwelling house for the defendant at McKinnons, including the construction of a Generator Room, Driveway A and Retaining Walls at the total cost of EC\$3,168,100.00. The full scope of the works agreed was set out in the Project Manual Bid Set dated October 29, 2006. Pursuant to the contract, the claimant commenced construction in or about the month of February 2008. After the commencement of the works and up to the month of March, 2010, the defendant requested certain extras and variations, amounting to 88 items of extras and variations to the original contract, the aggregate value of which was EC\$1,954,165.42.
- [5] Paragraph 5 avers that the claimant performed work valued at EC\$2,691,127.00, which together with the extras and variations requested, amounted to the total sum of EC\$4,645,292.42. Further, the claimant has, pursuant to the Building Contract, applied 39 headings of savings and/or credits in

favour of the defendant in the aggregate sum of EC\$760,616.36. Between February 14, 2008 and February 26, 2010, the claimant was paid the sum of EC\$3,305,883.13. On 12th March 2010, the defendant in breach of contract terminated the said Building Contract and requested that the claimant remove his belongings from the building site altogether. To date the defendant has failed and/or refused to pay the claimant the amount claimed to be due and owing notwithstanding repeated demand therefor.

- [6] As a result, the claimant employed one Ronald Gardner, a Chartered Surveyor to assess the value of the work done on a quantum merit basis in addition to the extras and variations and the value of the credits due to the defendant. The Report is attached to the Claim. The claimant therefore claims the costs and expenses of Mr. Gardner, all totaling EC\$588,255.65

The Defence and Counterclaim

- [7] In its Amended Defence and Counterclaim, the defendant states that the contract between himself and the claimant was not totally contained in the agreement dated 14th February 2008. He asserts that the contract included the conditions contained in two letters, one dated February 7th 2008 and the other dated February 14th 2008, both written to the defendant by one Raymond Khouly, Managing Director of the claimant, and the person performing engineering services for the project.
- [8] Further, by agreement dated 12th May 2006, the defendant entered into an agreement with Jessy Khouly of Architecture Design Works Limited whereby Jessy Khouly was to design "a two storey residential building approximately 6000 square feet on an acre of land located in Paradise View. By the said agreement Jessy Khouly agreed:
- (i) To prepare Schematic Design Documents consisting of the preliminary sketches, drawings and other documents;
 - (ii) To prepare Design Development documents consisting of drawings and other documents establishing and describing the scale and character of the project, its architectural engineering, structural, mechanical plumbing and electrical systems, as well as materials and other elements as may be appropriate;
 - (iii) That the engineering, structural and related drawings should be such that all the structures must withstand a category 5 hurricane and be compatible with Zone 4 earthquake requirements.

- [9] Further, that it was an implied term of the contract that the work would be carried out in a professional and workmanlike manner and with proper materials of good quality and that the work, when completed would be suitable for its required purpose, that it was fit for human habitation. [By the court's Ruling of 14th February 2017, the court granted leave to the defendant to amend his Defense and Counterclaim to plead the particulars in respect of the Standard of workmanship required under the contract. The breach had already been pleaded. The defendant took the opportunity in his Amended Defense and Counterclaim to expand the aspects of the breach of implied term to include that the work would be carried out with proper material of good quality and that the work, when completed, would be suitable for its required purpose that is, fit for human habitation. These additional aspects go beyond the limited leave that was granted and will therefore not be considered by the court].
- [10] The defendant further avers that as a result of the claimant's failure to use all professional skill and care, the said building has developed numerous cracks resulting in damages to the interior and exterior finishes as a result of water leaks. Particulars of cracking are as follows;
- (a) Where the front step joins the building
 - (b) the open area next to the front steps;
 - (c) the entertainment room; and
 - (d) the garage and storage areas.
- [11] As a result of the extensive cracking to the building, the defendant engaged the services of Philip T. Sobers, a Civil and Structural Engineer who prepared a comprehensive report on the 11th July 2012.
- [12] The defendant does not admit the claimant's averments in regard to the variations. The defendant states that there were certain changes in the project, these changes were accepted by the defendant as itemized in a letter from the defendant to Raymond Khoully dated September 26, 2008.
- [13] In April 2009, the construction on the house had reached the roof stage, the defendant reminded Raymond Khoully that the plans called for the roof to be built to withstand a category 5 hurricane, The claimant advised him that he could not guarantee that the galvanize roof as specified on the architect's plans could serve that purpose, and advised that the defendant would have to authorize

the construction of a concrete roof. A cost estimate was provided which provided two options. They both agreed to option #1 with an increase in rafter size from 3x6 to 3x10.

- [14] By letter dated 4th August 2009, Mr. Khouly presented a costs estimate for extra work for a net total sum of \$1,216,328.00. That estimate substantially increased the initial sum quoted on the concrete roof. On 2nd September the defendant responded enclosing a cheque for \$218,000.00 and indicated that he was in the process of reviewing the cost estimate for extra work done.
- [15] On 5th October 2009, Mr. Khouly presented to the defendant, another cost estimate for extra work done. The net sum was \$1,274,265.00. In subsequent meetings the figures were questioned and a number of issues raised by the defendant. The issues were contained in a detailed document provided to the claimant by the defendant on 17th October 2009. There was no response by the claimant except for a letter dated December 2nd claiming payment of \$350,000.00 for the completion of extra work, not included in the contract.
- [16] The defendant contends that the construction of the concrete roof was not properly constructed by the claimant and has resulted in substantial cracks and numerous leaks throughout several rooms of the building. Further the tiles covering the roof were improperly laid which contributed to the leaks.
- [17] On 15th February 2010 Mr. Khouly presented two additional cost estimates for extra work done: One in the amount of \$63,388.00 and the other in the amount of \$13,791.95. On 18th February 2010, Mr. Khouly presented an amended cost estimate in respect of the work to be done and reduced the said figure. The parties exchanged further letters. Following a meeting between the defendant and Mr. Khouly, the defendant sent an email to Raymond Khouly dated 10th March 2010 by which he indicated that:
- (i) cost estimates for additional work should be negotiable
 - (ii) a demand for a cost breakdown in respect of additional work to the "pink bathroom";
 - (iii) a revised completion date, as well as a matching project schedule
 - (iv) a completion date to be mutually agreed on and final agreement on the extras on the project.
- [18] Further emails were exchanged and the defendant engaged the firm of BCQS, a firm of quantity surveyors to inspect the project and to advise him as to the quality and cost of the contractual work as performed by the claimant. There was a meeting on site on 15th March 2010 between Sanjay

Amin, the Director of BCQS and Raymond Khoully. There were further meetings and telephone discussions. The defendant also sought professional assistance by engaging the company Civil and Structural engineering Limited (CSE) to undertake an inspection of the drawings and partially built property. The inspection was undertaken by Chris Conway, who visited the site on 27th and 28th March 2010 and compiled a report dated 8th April 2010. The report contained some 30 recommendations.

- [19] Mr. Khoully responded to the recommendations by letter dated 23rd April 2010. He accepted and agreed to comply with (9) of the recommendations.
- [20] The defendant also elicited the assistance of Addison Workman Engineers to review the project with specific attention to the retaining walls.
- [21] The defendant pleads that on 12th May 2010, and not on 12th March as stated in the Statement of Claim, the defendant terminated the contract, and ordered the claimant to quit the premises forthwith or in any even, no less than seven days from receipt of the letter. Further as a result of his concerns, the defendant consulted Wayne Martin and Brian Lynn both of Associated Engineers Partnership specializing in construction project management. He asserts that both Martin and Lynn continue in the ongoing process of corrective remedial action and the completion of the defendant's project. As a result of the claimant's breach, the defendant has been forced to incur additional expenses in respect of additional professional assistance and added cost of materials and labour. The defendant counterclaims for Special Damages in the sum of EC\$3,077,466.50

Reply to Amended Defence and Defence to Counterclaim

- [22] In its Reply, the claimant admits that the contract between the claimant and defendant also comprised the letters dated the 7th February 2008 and 4th February 2008 as alleged in the Defence.
- [23] The claimant denies that there is an implied term of the contract that the claimant would carry out the works in a professional or workman like manner as alleged or at all. With regard to the roof, the claimant provided two options to the defendant. The defendant selected an option and the claimant was required to do no more than construct the roof, and it in fact constructed the roof as instructed by defendant in its letter dated April 20th. The construction of the roof with tiles was completed before 24th September 2009. The claimant was first informed of leaks from the roofs on 11th September 2011, nearly two (2) years after the completion of the roof

- [24] With regard to the Defence to Counterclaim, the claimant denies that he is guilty of the alleged or any breaches of contract as alleged in the counterclaim or at all.

The Termination of the Contract

- [25] Throughout the pleadings and evidence the claimant and defendant have asserted different dates on which the defendant allegedly terminated the contract by locking out the claimant from the site. The claimant alleges in paragraph 8 of the Statement of Claim, that the defendant on 12th March 2010, in breach of the contract, requested that the claimant remove his belongings from the building site altogether. In the Witness Statement of Raymond Khouly, he asserts that no work was done by the claimant after 12th March 2010. In his Amended Defence, the defendant avers that it was the 12th May 2010 and not the 12th March 2010 that the defendant terminated the contract and ordered the claimant to quit the premises.
- [26] The email leading up to and including the 10th March 2010 shows that there was an ongoing dispute between the parties over the estimates provided by Mr. Khouly for additional work; delays in completion of the project; the additions and variations made and the resulting delays in the arrival of materials on the Island. There was also expressed dissatisfaction with the construction of the retaining walls. In the email of 10th March 2010, at 2:15 pm the defendant again expressed dissatisfaction with the estimates provided by Mr. Khouly and what he perceived as Mr. Khouly's unwillingness to negotiate down his rates. The defendant wrote:
- "In the circumstance, you have left me no other option but to request that all work cease today Wednesday, March 10, 2010 until we have agreed on the following: (a) a new completion date that is inextricably linked to a project schedule that is reviewed at least every three days; (b) a cost breakdown of the changes in the pink bathroom ; (c) an itemised breakdown of the savings that are due to me for the main structure , the generator room, retaining walls and pathways etc."
- [27] The defendant concluded the email by stating: "In the interim, I will be placing security on the site 24 hours daily with immediate effect. Access to the site can be granted only by me."
- [28] The defendant, on the other hand, points to the letter written by him to the claimant dated 12th May 2010. It reads:

"Further to our teleconference yesterday and further to the position that you have taken that you will not resume any work, including the remedial work, unless you are paid monies which are not due to you, kindly arrange to have all of your belongings removed from the site forthwith, and in any event, no later than seven days from receipt of this notice."

- [29] The email of March 10, 2010 reveals that the parties were seeking to arrive at an agreement on the issues raised. But they were not able to arrive at a consensus. The parties had contemplated the resumption of the work by the claimant and the undertaking of remedial work recommended by the experts. However, because of the inability to reach an agreement on the amount due and owing, and the conditions for completion of the remedial work, the work never resumed and the letter of 12th May 2010 followed. While it is accurate to say that the email of 12th March 2010 suspended work at the site, it was with a view to holding negotiations on the outstanding issues. In the court's view, it was therefore the letter of 12th May 2010 that terminated the contract.

The Claimant's Case

- [30] The evidence of Raymond Khouly on behalf of the claimant is that at the stage of the shutdown of the project, the claimant had completed EC\$2,691,127.00 of the original work and provided EC\$1,954,165.42 in extra work. The size of the home had been expanded from 6000 square feet to 17000 square feet. The construction of the defendant's home, with all of the additions and alterations, was approximately 85% complete. The remainder of the work left to be completed was largely painting, tiling installation of doors and the installation of drop ceiling and other minor finishes. His evidence is buttressed by that of his expert Ronald Gardner

Report of Ronald Gardner

- [31] According to the report the amount of the completed work per the original contract \$2,869,828.70

Assessment of extras		1,954,165.42
Sub-total		4,823,994.12
Less:		
Assessment of savings	926,016.16	
Previous payments	3,305,883.13	
	\$4,231,889.49	
Final Balance due on contract		\$592,094.63

[32] The defendant admits that there were some variations. He states that by letter dated 26th September 2008 addressed to Raymond Khoully, he accepted and confirmed certain changes to the construction of the home, namely:

- (1) Rearranging the configuration of the cisterns, apartment, pump room, utility service room and garage;
- (2) Rearranging the configuration of the steps leading from the ground floor to the patio;
- (3) Rearranging the configuration of the steps leading from the garage to the first floor;
- (4) Adding an open patio due north of the ground floor's apartment bedroom (as a result of engineering concerns related to the foundation) and erecting a retaining wall on the eastern end of the patio;
- (5) Rearranging the configuration of the kitchen and laundry room;
- (6) Rearranging the configuration of the party and entertainment room and the patio south of it;
- (7) Rearranging the configuration of the sinks and toilet west of the entertainment room

[33] According to the defendant, he received a letter dated 4th August 2009 from Raymond Khoully providing a cost estimate for the extra work on the house. He was taken aback by the estimate of \$1,216,328.00. This was after savings of \$53,980.00 and a discount of \$50,000.00 were deducted. A lot of the additional costs appeared to be associated with the roof increasing rafter size from 3"x6" to 3"x10". His previous understanding was that the change in the roof would be at a cost of \$96,500.00. He also agreed that he requested that Mr. Khoully install drop ceilings in a number of rooms. However, there was ongoing disagreement over the costs for the extra construction. A cost estimate for the extra work was again submitted by letter dated October 5th, 2009. This estimate gave the total amount of extras at \$1,274,265.00. A number of meetings and correspondence between the defendant and Raymond Khoully followed. Partial payments were made by the defendant while discussions continued. However, the parties were unable to reach agreement on the costs for the extras.

[34] After work was suspended, the defendant engaged the services of Mr. Sanjay Amin of BCQS. The first Report of Sanjay Amin dated April 2010 was a cost assessment of extras. The report in summary gives the total cost of the additional work at \$1,450,803.20. The total omitted work is fixed at

\$799,626.62. This gives a net estimate for the extra work as \$651,176.58 compared with \$1.2 million submitted by the claimant

[35] The claimant submits that the court ought to accept the evidence of Mr. Gardner over that of Sanjay Amin for the following reasons:

1. Mr. Amin failed to comply with the requirement of Rule 32.4 of the CPR 2000;
2. Mr. Amin did not provide any analytical basis for his assessment. All that he did apparently was shop around for the cheapest possible rates and process;

[36] Further, in oral evidence Mr. Amin admitted that he was not in a position to deny that the claimant had used the same rates until expulsion. The claimant submits that Mr. Amin sought to assess the value of work done by the claimant on rates or processes which were never agreed to by the claimant.

Analysis

[37] Normally, in a standard form contract or a contract professionally drafted, provision would be made for the rates to be applied to extra work done during construction. This contract was drafted by the parties and makes no provision as to the rates to be applied. In the absence of agreement by the parties, the court must assess the extra work done on quantum merit basis. A contractor is entitled to the cost of carrying out work as have been reasonably incurred by him and without fault on his own part.

[38] The court has before it the Reports of two experts. Part 32.4 of the CPR sets out the way in which expert's duty to the court is to be carried out. In **Yates Associates Construction Company Ltd v Blue Sand Investments Limited**¹¹, the court stated:

"Expert evidence must be considered together with all of the evidence which is before the court and which the judge has accepted. The judge must determine what weight to attach to the expert evidence. It is necessary for an expert to present the analytical process by which he or she reached the conclusion in the report. It is insufficient that an expert merely supplies his or her conclusion on a matter in issue between the parties."

¹¹ Claim No BVIHCVAP2012/0028

- [39] The court in **Yates** found that the expert, in providing his pricing quotations, had relied on the reports of other experts who were not called as expert witnesses in the matter. The expert was also in breach of a number of the mandatory provisions of Part 32. The court held that the trial judge ought not to have accepted this expert report or at most should have attached very little weight to it.
- [40] In Mr. Amin's assessment, he sets out the rates used by the claimant in one column. In the next column he sets out his rate and in the third column he shows the variance. However, he fails to indicate how he arrived at his rates. In the schedule of Architectural work, there is a column headed "BCQS Comments". In some instances it states that BCQS stands by its rates, but again fails to indicate how he arrived at his rates. Under these circumstances, the court will accord the report little weight.
- [41] In the court's view, the best indication of the reasonable rates applicable to the extra work, is the evidence of the rates used by the claimant in the initial works and which had been agreed and paid by the defendant. The evidence is that in compiling the estimates, the claimant used the same rates it used under the initial contract. These are the rates used by Mr. Gardner. The court accepts the report of Mr. Gardner as the amount due to the claimant in respect of the works completed. Accordingly, judgment will be granted in favour of the claimant against the defendant for the sum of \$588,255.65 less any amount found due to the defendant for defective works under the counterclaim.

The Implied Term of the Contract

- [42] The defendant has pleaded breach of an implied term of the contract that the work would be carried out in a professional and workmanlike manner, which has resulted in numerous cracks resulting in damages to the interior and exterior finishes as a result of water leaks.
- [43] The claimant has denied that there is an implied term of the contract as pleaded. The claimant asserts that in regard to the roof, the claimant had provided two options to the defendant. The defendant selected an option and the claimant was required to do no more than construct the roof as instructed by the defendant in its letter dated April 20th to the claimant.
- [44] The claimant therefore submits that the implied term pleaded at paragraph 7 of the Amended Defence is irreconcilable with the express contractual obligations pleaded in paragraph 6; and that in **Johnson v Unisys Limited** [2001] 2 WLR 1076 at paragraph 37 the House of Lords held that an implied term may not contradict the express terms of a contract.

[45] Further, the claimant directs the court to the provisions in Construction Law Volume II, Routledge, where the author considered the obligations of a contractor required to act in accordance with particular specifications. The author at paragraphs 14.8 and 14.09 Construction Law Volume II said:

“....The obligation of a contractor who has agreed to perform work in accordance with a particular specification is to render a faithful performance of what is called for by the specification. If a contractor does so, it will have given its client what he contracted to get, and thereby have performed its contractual obligations. If a contractor is required to perform its works in accordance with a particular specification, it is not permitted to depart from that specification without the consent of its client (or the client’s agent). Hence, where a contract specifies the type of material to be used in construction, or the type of work method to be applied, the contractor is not permitted to use a different type of material, or to work to a different method, even if the alternative material or method proposed to be used by the contractor is considered by it to be equivalent or better than that specified.

“On the other hand, if the contractor faithfully follows the specification it has been required to work to, but due to inadequacies in the specification itself, the contractor’s works turn out to be defective, the contractor will not be liable for the shortcomings in the work, unless it has expressly agreed to accept contractual responsibility for them or the specification”

[46] The Claimant submits that the reasons set out above in Construction Law Volume II are clear. On this basis alone, the Defendant’s case on the implied term ought to fail. This is especially the case with the construction of the roofs. There is no pleading or allegation that the Claimant failed to comply with the specifications for the construction of the roof agreed to and directed by the Defendant.

Conclusion

[47] The contractor must carry out his works using all proper skill and care, and the standard required in the particular case is to be gathered from all the circumstances of the contract.

[48] Secondly, the provisions from Volume II of the Construction Law only means that If the contractor is instructed, for example, to use a particular size of rafter, he is not free to increase or decrease as he wishes unless the contract gives him authority. He is not free to change those specifications. This is not to say that if the specifications call for him to lay foil insulation, that in applying same he

is relieved from his duty to do so in a professional and workman like manner using proper skill and care. The implied term continues to apply to the manner in which he carries out his instructions.

- [49] The case pleaded by the defendant is that the claimant failed to carry out the works in a professional and workman like manner. In the court's view there is no conflict.

Was there a breach of a fundamental term or the Contract by the Claimant which justified Rescission?

The Defendant's Evidence.

- [50] In April 2009 the construction had reached the roof stage. He reminded Raymond Khouly that the design plans called for a roof that would withstand a category five hurricane. Mr. Khouly advised that he could not guarantee that the galvanize roof specified in the plans prepared by the Ancillary Defendant would survive category five hurricane conditions. He advised that a concrete roof would be necessary. He indicated that if a concrete roof was to be part of the house, then the defendant would have to authorize him and his company to construct the same. The defendant admits that he was presented with several options. After consultation, he chose option 1 with some modification.
- [51] In the defendant's letter to Mr. Khouly dated 20th April 2009, the defendant instructed the following changes:

'Roof: all roofs will have as a minimum, treated 3 X 10 rafters and bigger as designated by the Project Engineer, 1 X 6 tongue and grove V-joint, reflective foil insulation, galvanize fence wire, 2 ½ inches concrete on roof, concrete tiles.

Patio South Of Kitchen to Accommodate Patio Upstairs

- Flat concrete roof with use of two steel beams to accommodate an open patio upstairs
- Concrete steps as a continuation of the existing steps to reach the open patio
- Open patio to be tiled
- Appropriate down drains to collect water from open patio
- Architectural treatment of open patio such that protective railing resembles part of a roof as discussed with the architect.'

- [52] The defendant also emailed Mr. Khouly regarding the retaining wall. He drew his attention to the drawings which called for an 8" concrete retaining wall. The defendant pointed out that Mr. Khouly had, without consultation, substituted a block wall and had charged him extra for work shown in the original drawings. The defendant stated: "You never discussed with me any changes related to the retaining wall. I only realized that you had put up a concrete block wall when I began querying why you would be charging extra to put up the beam".

The Report of Chris Conway

- [53] Mr. Conway states that a full inspection was carried out of the inside and outside of the property. He visited the property on the 27 and 28th March 2010. Mr. Conway also inspected the drawings of the property and had the aid of photographs taken during the construction period.

- [54] In regard to the rafters, under the heading "Site Inspection" at paragraph 25 he states:

"The rafters have been stained around the property and it is apparent that there is some problem with discolouration. It appears as if there may have been moisture in the rafters when the stain was applied. The rafters would be likely to tend to dry out in the location that they are in with the resulting moisture coming out through the surface of the timber. This would tend to cause the stain to be removed, and the discolouration seen."

- [55] Under the heading "Discussion with the Contractor", Mr. Conway states: "The discoloured rafters are likely to be due to the moisture in the rafters migrating to the outside of the timber and taking the stain off the outside of the timber. The contractor informed me that the timber was a special order and that the timber had been prepared for sizing, then shipped and pressure treated and that there was approximately 3 months between order and the site delivery. The contractor agreed to re-stain the rafters.

- [56] Mr. Conway was informed by the contractor that the 5" thick slab contained #4 @ 6" steel. The contractor also confirmed that the 2.5" slab also contained BRC mesh. The contractor stated that the steel was lapped with the beam steel. Mr. Conway informed the contractor that this does not appear to be the case as the steel is visible in the photographs as only just turning into the beams at that level. It would have been prudent for the rafters to have been checked for structural adequacy with the concrete just being used as a mass topping as it is unlikely that the concrete could work on its own with the current layout of steel in the 5" slab. If the rafters were satisfactory for the expected

loading of the concrete and the tiles then the topping just becomes a dead weight to resist the uplift forces during time of high winds. The alternative would be to design the sloping roof slab to be designed to be structurally adequate, and to use the timbers architecturally.

- [57] In regard to the concrete roof system, under the heading "Site Inspection", Mr. Conway notes that over the master bedroom and the entertainment room and the front dome to the entry area a 5" slab was installed. Over the remaining roof areas a 2.5" slab was installed." At paragraph 26 – 28 he states:

"There is a copper valley gutter present at the locations of all the valleys to the sloping roofs. The tiles on the roof are bedded on a mortar base to secure them to the roof concrete. At the junction between the mortar and the copper there is a crack that is visible. This is as a result of the differential thermal expansion between the copper and the cementitious products. The valley gutter detail on the drawings also shows a screed build up under the waterproofing to allow water to drain from the center of the roof to the outside locations and away. The flat roofs present at the side appear to have the concrete poured flat and do not have any screed laid to falls. There was evidence in the staining on the roof that the water is ponding. There is some mortar overspill to the roof tiles around the property."

- [58] Under the heading "Discussion with the Contractor" Mr. Conway records that the waterproofing to the flat roofs was discussed with the contractor. He told me (after phoning his subcontractor) that the waterproofing had lapped at least 4" up the walls around the flat roof area and that the plaster over the top of the wall waterproofing had been installed with the expanded metal lath in place to prevent any cracking. This is different from the photograph which clearly shows the waterproofing only being fixed approximately 1 to 2" up the wall, this photo graph was shown to the contractor. It could not be confirmed if expanded metal lath was installed, however there were no apparent cracks on the walls.

- [59] It was also pointed out that there were not sufficient falls on the roof. The contractor agreed that he had to return to site to relay the screed so that there were adequate falls, and that the water proofing at that time must be laid up the wall and preferably laid into a joint in the wall so that the water can pass over the tip and away from the roof.

- [60] The Report ends with some 30 recommendations, nine (9) of which Mr. Khouly agreed to implement.

[61] During cross-examination, Mr. Conway indicated that during his visual inspection he saw no cracks on the walls. He was satisfied that the staining of the rafters was caused by moisture coming out of the rafters and not from the hip roof.

[62] The defendant's complaints in regard to the breach of the implied term of workmanship at that time consisted of four areas:

1. The construction of the rafters;
2. The construction of the retaining wall;
3. The construction of the reinforced concrete roof system including leaks from the tile roofs; and
4. Excessive cracking in the building

[63] The claimant denies the defendant's allegations that claimant breached the contract in failing to perform the contract in a workmanlike manner. An expert report by Thomas Walcott dated 13th July 2012 was submitted on behalf of the claimant. In his report Mr. Walcott stated in his conclusions:

"The structure was well laid out and fits in with the general topography. Distress wherever evident is due mainly to shrinkage as explained in 7a) Because of the size of the structure, a small observation regime should be put in place in order to monitor some of the distress as indicated by the owner. The load bearing shear wall concept was well reflected in this structure. The structural sizes indicated here are adequate and any analysis carried out on the structure for live, dead, wind and seismic loads would result in a factor of safety greater than that what is structurally required."

[64] The claimant points to emails written by the defendant immediately before the shutdown of the project. The claimant's position is that in none of these did he complain of cracks or leaks.

[65] Further, Chris Conway was shown a number of photographs and selected those he needed for his report. He selected photographs of the sloping or hip roofs under construction. He made no adverse comment or criticism or mention of cracks or leaks. Mr. Conway also admitted in cross-examination that during his visual inspection he saw no cracks on the walls or leaks from the roofs. In fact he made a number of references in his report to good workmanship, and in cross-examination said 'the workmanship on the site was good.' The Claimant's expert Mr. Walcott, who visited the property on the 15th June 2012 said in his report that he was satisfied that the Claimant had met accepted

construction standards. He went on to say that the structural sizes are extremely well established and adequate, and any analysis carried out on the structure for live, dead, wind and seismic loads would result in a factor of safety larger than which is structurally required. The Defendant has therefore wholly failed to prove any breach as required by the burden and standard of proof on his implied term.

[66] In addition to the details set out above, the Conway report included the following among his 30 recommendations:

- The waterproofing to the flat roofs should be removed and the screed re-laid to falls to the drainage on the roof. Following the completion of the screening a new waterproofing membrane must be installed in accordance with the manufacturer's instructions.
- The voids in the bathroom slab should be filled with a cementitious repair compound to protect the steel from exposure to the atmosphere and from water.
- The voids through external walls should be filled using an expanding foam in the case of large voids and should be filled with an appropriate mastic for smaller voids around pipes
- The discolored rafters should be sanded back to bare timber to remove the stain. The rafters should then be allowed to dry (this can be checked with a moisture meter). Once the timber has stabilized then the stain can be reapplied.
- The flat roof should be re-laid as detailed above
- Confirmation should be obtained from the window manufacturer that they are satisfied with the fixing details adopted by the contractor with particular regard to the method used. The window to the entertainment room should be removed and the sill (made of broken block) removed and re-concreted.

[67] The Notes and Minutes of the meeting on 26th April 2010 between the claimant and the defendant indicate that the claimant agreed to comply with all the above recommendations.

[68] According to the defendant's evidence, by email dated 15th April 2010 Mr. Khouly was invited by the defendant to visit the site to see evidence of leaking roofs and walls. According to the defendant, there were leaks in every room in the house. The only rooms which did not have leaks were the living room, the dining room and the kitchen. The defendant's evidence is that Mr. Khouly attended

the site but no corrective action was taken by him. The court notes that at this time, works at the site were still under suspension with security in place.

[69] Mr. Khouly does not address this meeting in his witness statement. He does state that the first time the defendant brought any issues of leaking to his attention was in or around September 2011, more than a year and a half after the claimant stopped working on the house. That email was not included in the defendant's bundle of documents.

[70] In the court's view, the Conway findings set out above, as well as the Workman Report in respect to the retaining walls, are indicators of evidence of poor workmanship on the part of the claimant. The defendant however, has pleaded additional defects based on the expert reports of Sobers and Schamber.

[71] It has to be remembered that at the time of the act of rescission on 12th May 2010, the defendant had the benefit of three (3) expert reports: the Amin Reports, the Conway report and the report of Addison Workman in respect of the retaining walls. The other expert reports which provided substantially more details of defective work were not available to the defendant and therefore their contents could not have formed the basis for the rescission. While these reports are relevant in determining the full extent of any damages due to the defendant, in analyzing whether there existed a repudiatory breach, the court must examine all the circumstances existing at the time of the repudiation.

Did the defects identified by the Conway and Addison Reports amount to a fundamental breach

[72] In Civil Appeal No. 19/2001 **William Locke Jr v Bellington Limited** (Court of Appeal, Barbados) Simmons CJ stated:

'83] Repudiation is a drastic action which should only be held to arise in clear cases of a refusal to perform contractual obligations, where the matter goes to the root of the contract. In considering whether there has been a repudiation of a contract by one party, which is a question of fact, it is necessary to examine that party's conduct as a whole and ask the question: 'does that conduct indicate an intention to refuse performance of the contract or abandon the contract?' Clearly, the conduct of the repudiating party must be evaluated objectively.

[84] It is all a matter of construction. The court must construe the language used by the light of the contract and the circumstances of the case to see whether there was a renunciation of the contract. The entire circumstances must be looked at.'

[73] In Hudson on Building and Engineering Contracts, the author states that whether a term of a contract is so fundamental as to justify rescission will be a question of fact, and often of degree. The author notes that failing to proceed with due diligence, if persisted in after reasonable notice, will entitle an owner to rescind for breach of an implied fundamental term. He again advises as follows:

"Equally, an unjustified and continued failure to remedy defective work which requires removal or repair before further work should reasonably take place will also be a breach of a fundamental implied term, it is submitted- no owner can be expected to watch helplessly while defective permanent work is built into his land and covered up, with later reinstatement at reasonable cost or without serious delay progressively less likely."

[74] The alleged basis for the rescission of the contract by the defendant is pleaded in paragraphs 10 to 35 of the Amended Defence. There are three (3) broad areas in respect of which there are alleged breaches:

1. The retaining walls – the report of Addison Workman sets out adverse findings against both the designer and Contractor in the execution of their functions. Mr. Workman noted that in a large construction project such as this one, the retaining walls play a major role. Mr. Workman also reported vertical cracks traversing the entire height of the wall almost 1" wide. The second retaining wall was 8ft in height. There were several cracks in different areas of the wall. Mr. Workman noted that the wall was not topped with a ringbeam; In a letter dated 23rd April 2010, Mr. Khouly on behalf of the claimant responded to the recommendations of Mr. Conway. He responded "No comment" to seventeen (17) of the thirty recommendations. He accepted his share of culpability and agreed to the installation of a beam on the top of the back wall. He also agreed to demolish and rebuild the other. In addition he agreed to comply with another six of the recommendations.
2. The adverse findings of the Conway report, which are set out above. While Mr. Khouly accepted and agreed to nine of the recommendations, yet the parties were

unable to reach consensus on the terms for the completion of the remedial work;
and

3. The cost of the extra work

- [75] The court accepts the vast majority of the findings and recommendations of the Conway report were valid and accurate. Those recommendations to which Raymond Khoully responded that he would comply are indications of their validity and acceptance. The ones to which the claimant responded with "No comment" are deemed to be among those that the court finds to be valid. Also, the fact that the claimant agreed to demolish and rebuild one wall, indicates that that wall was constructed with serious defects. Given the importance of the retaining walls to the project, this was not a minor issue.
- [76] The defects found in the construction of the roof, in the court's view, represent another major breach. The roof, along with the four walls, comprises the essential parts of the building. The defects found in the construction of the roof were serious and together with the defects in the retaining walls constituted fundamental breaches by the defendant.
- [77] The claimant asserts that the defendant wrongfully excluded it from the work site and wrongly denied it the opportunity to complete the work and comply with Conway's recommendations and that by shutting out the claimant and denying it the right to comply with the recommendations and complete the works, the defendant is precluded from claiming any sums from the claimant.
- [78] The issues raised by the Conway report, and the contents of the Workman report when combined with the costs issue would have only deepen the concerns and undermined the confidence the defendant had placed in the claimant. The impasse between the claimant and defendant continued for some time. In the court's view, the issues were fundamental and having reached an impasse in trying to come to an agreement on the way forward, the defendant was entitled to rescind the contract at that stage.

Damages for Breach of the Implied Term of the Contract

- [79] The defendant seeks special damages as follows:
- (a) \$1,560,980.00 in respect of remedial work on defective construction, including provisional costs for remedial work or sinking garage floor, defective large retaining wall, water leaks and cracks in roof and structural inadequacy of roof;

(b) \$1,220,144.00 in respect of the Value of work, for which defendant has been over charged as valued by BCQS;

(c) Estimated professional services and consulting fees

[80] The defendant seeks damages in respect of eight (8) pleaded failures of the claimant to meet the required standard of workmanship. They include:

1. The DPP rafters and T & G ceiling were propped and used a form work while constructing the reinforced concrete roof and installing the tile bed and tiles. They subsequently have become permanent support for the roof system;
2. The reinforced concrete roof system is "resting" on the ring beam around the perimeter of the room. The slab should have been structurally tied into the ring beam;
3. The vertical re-bars shown are not sufficient to form the structural connection required to transfer the loads in the event that they need to receive support from the ring beam during the superimposed live loads;
4. The reinforced concrete slab is designed as a suspended slab supported in the ring beam. The re-bars shown in the floor slab are #4 bars @ 6" c/c. These bars are not tied into the ring beam. The reinforced concrete slab ought to be structurally connected in such a way as to form part of the ring beam and suitably reinforced, for the system to be effective;
5. There are serious water ingress problems through the concrete tile roof system and leaking into the exterior walls, and exiting into the building interior or behind and below the exterior gutter system;
6. The tile roof system installation is not in keeping with international industry standards or the concrete tile manufacturing installation requirements;
7. There was inappropriate use of aluminium foil as a subsurface protection barrier and its installation was also in the incorrect location of the roof assembly stopping at the inside of the exterior wall, thereby contributing to the substantial water ingress and finish damage; and

8. The claimant has failed, as traditional industry standards require for a tropical environment, to install continuous waterproofing underlay from ridge to eave under the concrete tile system.

[81] The alleged defects are based, not only on the reports of Conway and Workman, but also on the subsequent expert reports of Sobers, Davis and Schamber.

[82] The evidence is that after the contract with the claimant was rescinded, the defendant hired one Stanislaus Moore to complete the work and he also retained the engineering firm of Associated Engineers Partnership to oversee the work. Mr. Brian Lyn of that firm was designated as the Project Manager. The evidence of the defendant is that as the construction was being carried out he observed that one of the concrete columns on the southern steps appeared cracking and separating from the main building. He engaged Mr. David Hart to conduct concrete tests on site. Further tests, including soil tests were carried out. No claim in respect of soil test was pleaded. The defendant next engaged Mr. Wayne Martin of Associated Engineers Partnership. Mr Martin found problems with the construction and design of the stair structure to the south of the building. The defendant also engaged Mr. Oliver Davis of Davis Engineering Services to examine the roof in the master bedroom. According to the defendant the roof leaks in the building were constant, which caused substantial damage to the interior of the home. Suggestions made by Mr. Lyn and others did not alleviate the problem with the leaks. He therefore engaged Mr. Hugh Schamber of Weathershield Systems Caribbean Limited to deal with the roofing problems and the leaks which was giving rise to mold issues.

[83] The observations and findings of the experts are critical to the issue of damages, I therefore set them out below..

.Report of Oliver Davis

Pursuant to a written request dated 31st January 2011, Mr. Oliver Davis was engaged to inspect and provide an analysis of the roof loading and support system of the master bedroom. Inspection took place on 11th January 2011 and a final inspection on 2nd June 2011. His report is dated 10th June 2011. In the introduction, Mr. Davis states that the report is restricted to the result of inspections of the roof systems where there are reinforced concrete (RC) slabs on the roofs and the master bedroom in particular, to determine their ability to support the existing dead loads, as well as possible superimposed live loads. The other roofs include three other bedrooms, the foyer area and the entertainment room.

According to the report, the RC roof system is resting on the ring beam around the perimeter of the room. The slab should be structurally tied into the ring beam. Photographs of the construction show #4 bars cast vertically into the ring beam. These bars are presumably bent into the roof slab. His view is that the vertical re-bars shown are not sufficient to form the structural connection required to transfer the loads in the event that they need to receive support from the ring beam during super-imposed live loads. His further opinion is that these bars are not tied into the ring beam. The design should have allowed the RC slab to be structurally connected in such a way as to form part of the ring beam and suitably reinforced for the system to be effective.

[84] His conclusions are:

1. The dead load, size and spacing of rafters are adequate to withstand the effect of hurricane wind loads;
2. The roof system has not failed to date because the concrete and reinforcement as described are presently providing some support to the dead load as constructed
3. A seismic occurrence severe enough to precipitate failure of the inadequate roof and ring beam connection would put the concrete in tension. Concrete is weak in tension: and the tension in RC design is supplied by steel reinforcement. Inadequate reinforcement would cause the full load of the roof to be transferred to the rafters;
4. The rafters would subsequently be subjected to stresses approximately 46% in excess of the allowable stresses in the existing constructed system.

The Schamber Report

[85] In order to compile his report, Mr. Schamber reviewed historical construction photos and undertook a condition survey on the morning of the 12th September 2011 to assess the extent of the roofing problems at the residence. Under the heading "Roofing Problems", Mr. Schamber states that following an interior and exterior survey of the vaulted hip roofs, water ingress and finish damage to both the interior and exterior walls along the lower eave of these vaulted roofs was identified in many locations. Rainwater was obviously getting through the concrete tile roof system and leaking into the exterior walls where it would exit into the building interior or behind and below the exterior gutter system.

[86] He further stated that the source of the water ingress problems is that the tile roof system installation is not in keeping with international industry standards or the concrete tile manufacturer (Eagle Roofing Products) installation requirements. Additionally, the same photos confirm the

inappropriate use of aluminium foil as a subsurface protection barrier and its installation being in the incorrect location of the roof assembly and that its partial coverage of the building interior, stopping at the inside of the exterior wall; all contribute to the substantial water ingress and finish damage being experienced. He further notes that these roof systems are notoriously porous and vulnerable to water ingress by wind driven rain and capillary action. Traditional industry standards for a tropical environment application require that a continuous waterproofing underlay be installed from Ridge to Eave under the concrete tile system. He points to photo 5 as revealing that no waterproofing underlay or perimeter metal drip edge flashing was installed under the concrete tile roof system. Other photos make it apparent that an aluminium foil layer is installed improperly and in the wrong location to function as a waterproof or protection barrier. Not only does aluminium deteriorate when exposed to wet cement, the aluminium foil layer is punctured by numerous nails used to anchor the concrete reinforcement over it and most importantly it stops short of the exterior edge at the inside of the exterior wall.

The Sobers Report

[87] Mr. Sobers of Consulting Engineers Partnership Ltd, was tasked with conducting an evaluation of the numerous cracks existing throughout the property; reporting on the cause(s) of the cracks and providing recommended solutions for repairs. He was also asked to evaluate and report on damages to interior and exterior finishes as a result of water leaks and cracks and provide recommended solutions for repairs. His inspection of the residence took place on the 29th and 30th June 2012. His report is dated 11th July 2012. His observations revealed:

1. Where the front step joins the building: horizontal, vertical and diagonal cracks in the walls, beams and ground bearing slabs in this area. Many of the cracks he describes as unsightly and of significant widths. He refers to photos 1 to 4.
2. The open area next to the front steps: the ground bearing slabs have noticeable and significant cracks in the top of the slab. These cracks meander in various directions when viewed on plan and are unsightly;
3. The entertainment room: horizontal, vertical and diagonal cracks were noted. These cracks were located in the walls and beams of the structure. The horizontal cracks in particular were noted at lintel level above the doors of the south elevation. There was also visual evidence of significant water ingress on some previous occasion(s)

4. The garage and storage areas: two vertical cracks were observed in the beams supporting the floor over the garage. The floor of the garage exhibited cracks in the top surface of the slab and the garage floor slab exhibited a definite slope into the building.
5. Cracks in other distressed areas: horizontal, vertical and diagonal cracks were observed in the guest bedroom, the blue room, the pink room the foyer, the master bedroom, the living room and the walls and stair flight on the south elevation.

[88] In his analysis, Mr. Sobers states that in normal construction contracts the water tightness of the building falls under the purview of the Architect. It is the project Architect who specifies the materials and prepares the details which are intended to result in a watertight building, provided that the contractor has followed the specifications and details. On this project he notes his understanding that the contractor provided the engineering details which were subsequently drawn by the Architect. The drawings indicate that both the original and revised project drawings were designed by J. Khoully. Mr. Sobers is therefore of the view that the responsibility for the waterproofing failures which led to water ingress through the walls and the cracks in the walls lies with the Architect and the contractor.

[89] Mr. Sobers indicates his conclusion that reinforced concrete may crack for many reasons. These include:

- a) Insufficient or incorrect placement of the reinforcement within the concrete
- b) Plastic shrinkage and drying shrinkage
- c) Settlement of the subgrade or loss of support
- d) Excessive loads and deflection
- e) Excessive vibration

The Claimant's submissions

[90] The claimant submits that the defendant was required to plead, and more importantly prove, that the Claimant's lack of professional workmanship (the implied term) directly caused cracks and leaks in the building, notwithstanding the intervening actors and works from around June 2010 or thereabouts, and June 2012 when Sobers visited the property.

[91] The claimant submits that there were numerous exchanges of emails, letters and memos between the claimant and defendant. There were also punch and snag lists made by the defendant and

sent to the claimant. In none of these correspondence or memo did the defendant mention cracks on the walls of the buildings or leaks from the roofs. The claimant relies on the timeline established by the documents to support its case.

[92] The claimant never mentioned cracks or leaks in the building when he accused the claimant of breaching the contract.

- f) In regard to Mr. Schamber's evidence, the claimant submits that it must be considered within the context of all of the evidence, including Conway's, Walcott's and Sobers.
- g) Finally, the claimant submits that the defendant took the risk of replacing the Claimant and retaining contractors to work on the building and roofs after the 10th March 2010. This resulted in the replacement of all roofs installed by the Claimant with disastrous consequences for the Defendant. The Claimant cannot be liable to the Defendant's actions as alleged or at all.

Construction works to the Roof after 12th May 2010

[93] The defendant's evidence is that after the rescission of the contract, he made notes as to what was to be accomplished and hired Mr. Moore to complete the works and Mr. Lyn as Project Manager. Mr. Moore did not give evidence but Mr. Lyn did. His evidence is that he started work on 12th July 2010 and had the responsibility of overseeing the work done by Mr. Moore and his construction team. According to Mr. Lyn, Mr. Moore was requested to rework the flat roof to have it adequately sloped. As part of the work, Mr. Moore and team had to remove parts of the existing roof including the torch applied membrane on the roof. Whatever works were done, the leaks persisted. According to the defendant, he also implemented Mr. Schamber's recommended roofing solution. Installing the new roof took about six weeks. He notes that there was a lot of jack hammering going on. The defendant does not give a date, but Mr. Schamber's report was dated 19th September 2011, so it was sometime after this that the entire roof was replaced.

Analysis and Conclusion

[94] The court does not accept the conclusion that because Mr. Conway saw no evidence of cracks or leaks up to March 2010, that the cause of these defects cannot be attributed to the claimant's work. Mr. Conway for example when speaking about the roof system and the adequacy of the rafters for the dead weight of the concrete roof, stated: "The roof system should be subject to further design checks and inspected at regular intervals to confirm ongoing structural adequacy". Mr. Conway was

conveying in that statement the possibility that something, not seen at the time of inspection, could develop as a result of the current condition of the roof system. The court accepts that Mr. Walcott made general statements of good workmanship, however they are not sufficient to counteract the evidence of other witnesses and the numerous findings of the other experts of specific instances of defects in workmanship before Mr. Walcott's report and prior to the replacement of the roof.

[95] Having examined all the reports and evidence of the various witnesses, the court finds that the defendant is entitled to recover damages in respect of the remedial work for the following defects:

(1) the roof: remedial work for both the flat and hip roofs. The application of the torch applied waterproofing membrane was faulty; the flat roof had insufficient falls so that any water landing on the roof could drain away. Mr. Conway found evidence of ponding. The contractor agreed that there were not sufficient falls on the roof. He agreed to go back and relay the screed so that there would be adequate falls. (This was part of the corrective work undertaken by Mr. Moore);

(2) The Rafters: Mr. Conway noted that the rafters were checked structurally and they do not work for the loading of the roof concrete as a dead load;

(3) Cracks: The evidence of the appearance of cracks started soon after the rescission of the contract and increased culminating with Mr. Sobers report. However because of the evidence that the flat roof was reworked, including the removal of the roof constructed by the claimant, and the use of machinery, including jack hammer. The evidence of Mr. Sobers is that excessive vibration can cause cracking. It was for the defendant to show that the reworking of the roof did not contribute to the cracking seen in that part of the house covered by the flat roof. This the defendant has failed to do.

[96] However, the court notes that when Mr. Lyn took over he observed cracks in the south exterior stairs, garage floor, north retaining wall, and the northern basement floor. In addition the garage floor was sloped incorrectly.

[97] There were cracks in the stairs attached to the main building. The cracks, in Mr. Martin's opinion, were serious enough that separation of the stairs and building was inevitable. It is unlikely that the cracks described by Mr. Martin to the stair structure and to the cracks to the open area next to the front steps; the cracks to the garage and storage areas can be attributed to the work on the flat roof,

given the opinions of Mr. Martin as to the cause of those cracks, which the court accepts. The defendant is therefore entitled to recover for the remedial work in respect of those cracks;

Leaks

- [98] Leaks in that part of the house covered by the flat roof have also not been shown to be attributable to the claimant. Having considered the findings of the other experts and the circumstances, the court accepts the expert evidence of Mr. Schamber concerning the interior and exterior survey of the hip roof; his findings of water ingress and damage to the finishes of the walls. The court accepts his finding that the aluminum foil layer was improperly installed and in the wrong location to function as a waterproof or protection barrier.
- [99] The court also accepts Mr. Sobers analysis and his opinion that responsibility for the waterproofing failures which led to water ingress through the walls and the cracks in the walls lies with the Architect and the Contractor.
- [100] The defendant is therefore entitled to damages to compensate him for remedial work in respect of damage from leaks in the hip roof and through the cracks in the walls in the master bedroom to include damage to the interior walls and finishes caused by the leaks.
- [101] The claim for \$1.2 million, the value of work overcharge as valued by BCQS is denied.

The Ancillary Claim

- [102] In his ancillary claim, the defendant/ancillary claimant alleges that Jessy Khouly entered into an agreement with the defendant in which he agreed to design a two story residential building approximately 6000 square feet in size; that Jessy Khouly breached the said agreement in that he failed to observe, detect, and correct certain defects and deficiencies in the construction of the said house and that there are patent errors in the specifications for and the construction of the north and south retaining walls which contributed to incorrect construction of the said walls by the claimant. The defendant therefore seeks damages.
- [103] In his Defence, Jessy Khouly admits that by he entered into an agreement dated 12th May 2006 whereby he agreed to design a two-storey residential building approximately 6000 square feet on the defendant's property. He states that under the said agreement the scope of his basic services was limited to providing schematic and design services, preparing construction and bidding

documents and obtaining DCA and GBH approvals for the project. Additional services would be provided by him only if requested by the defendant. The defendant never requested that he provide any additional services. His responsibilities under the agreement did not include the supervision of the construction of the project.

[104] Jessy Khouly further states that he was not privy to the initial discussions relative to changes to the scale of the project. He was subsequently informed of the decision made in respect of the changes and the defendant then requested that he redraft the original drawings to reflect those changes.

[105] He admits that it was an implied term of the agreement that he would exercise reasonable care and skill as an architect/designer in the performance of his obligations under the said agreement and that he did so. He denies that there were patent errors in the specifications for construction of the East Wall. The original drawings and redrafted drawings depict the east retaining wall on pages A2-01, A2-02, A4-01 and A6-05. The specifications stated on those pages were for the construction of an isolated retaining wall not attached to the said residential building. The East retaining wall so constructed by Raymond Khouly did not correspond with the said specifications. There were no specifications relative to a west retaining wall since it was not a part of the original design and drawings and he states that Raymond Khouly constructed a west retaining wall without any specifications or instructions from him.

[106] Jessy Khouly avers that he never received a copy of the Conway Report nor did he and the defendant have discussions concerning any recommendations therein. He received the Workman Report from the defendant when he was served with the court documents. He admits that he was present at the onsite meeting held on 15th March 2010 and that he never gave instructions to Raymond Khouly relative to the construction of the retaining walls.

The Scope of the Ancillary defendant's responsibilities under the Contract

[107] Under clause 1a of the agreement, Jessy Khouly was to first prepare Schematic Design Documents consisting of preliminary sketches, drawings and other documents that illustrate the relationship of the project components required by the program of requirements. Under clause 1b following the approval of the Schematic Design Documents, and any adjustments authorized by the Owner, Jessy Khouly was to prepare Design Development Documents consisting of drawings and other documents establishing and describing the scale and character of the project, its architectural, engineering,

structural, mechanical, plumbing and electrical systems, as well as materials and other elements as may be appropriate. The design should include an architecturally compatible fence, retaining walls where necessary, driveways and walkways, a generator room and a storage room. It was agreed that the engineer, structural and related drawings should be such that all the structures must withstand a category five hurricane and be compatible with Zone 4 earthquake requirements.

- [108] The agreement also provided that the Owner shall give prompt written notices to Jessy Khoully if the Owner becomes aware of any fault or default in the project or nonconformance with the contract documents.

Additional Services – Clause 3a

- [109] The agreement provided that services required by the Owner, that are not included in the scope of Basic Services outlined in Clause 1, shall be furnished by Jessy Khoully as Additional Services and shall be paid for by the Owner in addition to compensation for Basic Services. Additional Services must be authorized by the Owner and may include:

- I Providing project management services during the construction phase of the project;
- ii Providing services made necessary by the default of the Contractor, by major defects or deficiencies in the work of the Contractor or by failure of performance of either the Owner or Contractor; and
- iii providing services in evaluating an extensive number of claims submitted by the Contractor or others in connection with the work.

Additional Responsibilities

- [110] By virtue of the implied term, Jessy Khoully had to exercise care and skill in the performance of his obligations under the agreement.

Did the defendant authorize Additional Services

- [111] Jessy's position is that Clause 3a of the contract was never triggered. The defendant never requested him to provide any additional services and that his responsibilities under the agreement did not include the supervision of the construction of the project. His evidence is that the only time

during the construction of the house where he agreed to provide supervision was in or about February 2010, when he agreed to be present during the laying of the tiles.

- [112] Although the Ancillary Claimant's Statement of claim, avers that at no time during the supervision of the construction the house did the ancillary defendant ever draw certain errors to his attention, there are no circumstances pleaded by which it is alleged that the supervisory duties under 3b were triggered. Further, although the witness statement of the Ancillary claimant refers to breaches by Jessey Khoully, no mention is made of how the supervisory clause was triggered. If there was never a request or payment for same, a claim under clause 3a cannot be sustained.

Errors in the Drawings and Specifications

- [113] The Ancillary claimant relies on the findings contained in the Workman and Conway reports in support of his claim that there were patent errors in the specifications of the East and West retaining walls which contributed to incorrect construction of the said walls by the claimant
- [114] Mr. Workman made reference to five (5) different drawings. He concluded that minor changes do exist between the two sets of drawings and that both the designer and the contractor have exhibited poor execution of their functions. The Designer has given his client poor quality work by issuing unchecked drawings which contain conflicting information. He further found that the Contractor should have noticed the inclusion of the ring beam in some of the details and asked about the walls which showed no ring beam details.
- [115] Mr. Workman found that the designer issued un-checked drawings on at least two occasions and the drawings did not show details for reinforced concrete walls although some were specified. Concrete block retaining wall stems showed the same reinforcement for all heights. Sufficient care was apparently not taken to check the true properties of the foundation material. The court accepts these findings
- [116] The claimant has already taken responsibility for its part in the construction of two defective retaining walls. Jessy Khoully however, has denied that his drawings or specifications were defective in any way. His position is that the claimant did not build the walls in accordance with his drawings. For example, his drawings called for ring beams and French drains, which were omitted by the contractor. Further, that the claimant made changes to the specifications of the wall that were not authorized by him.

- [117] The court accepts that there were aspects of drawings that were not fully implemented by the contractor in constructing the wall, and for that he must bear responsibility. However, the court also accepts the findings of Mr. Workman that there were drawings issued that were unchecked and that contained conflicting information, which contributed to the defective construction of the wall.
- [118] Therefore the cost to repair/or replace the defective retaining walls should be borne by both the Architect and the Contractor.

Breach of the Implied Term

- [119] The Ancillary claimant has also asserted that Jessy Khouly has failed to exercise any or any reasonable care and skill.
- [120] According to Jessy after a few weeks into construction, he was contacted by the defendant. He was told that the defendant and Raymond Khouly agreed to make changes to the house and requested that the plans be redrafted to reflect the changes. Jessy Khouly's evidence is that he was not present during the discussions with Raymond Khouly and the defendant regarding the changes that they agreed to. He was informed of the changes and agreed to prepare further drawings to reflect the changes that they agreed.
- [121] It is not unknown that an owner may press his own ideas upon an Architect as to material to be used or plans to be followed. Where the owner's suggestions or wishes are likely to lead to an unsatisfactory result, the architect's duty will be discharged if he gives a sufficient warning². Here there is no pleading or evidence that the architect on being presented with the changes proposed by Raymond Khouly and the defendant gave any warning that the plans were likely to lead to an unsatisfactory result. An example is the stairs to the south of the building. They were not a part of the original drawing. They were part of the variations allegedly agreed between Raymond Khouly and the defendant. Jessy states that after construction of the stairs started he was instructed to prepare drawings for the stairs, which he did. If Jessy was of the view that the parts already constructed and the plans he was asked to draw would lead to an unsatisfactory result, he had a duty to give a warning. He therefore cannot avoid liability on this ground

² Hudson's Building and Engineering Contracts

- [122] With regard to the roof, Jessy Khouly's position is that he was not privy to any discussions between the claimant and the defendant/ancillary claimant regarding the construction of a concrete roof. His original drawings called for 20 gauge galvanise sheeting on 3" x 6" rafters and therefore cannot be held liable for any defects to the roof.
- [123] However, the Architect's contract with the defendant required him to design a roof that would withstand a category 5 hurricane and a zone 4 earthquake. The court finds that the changes were necessary because the roof system designed by the architect with 20gauge galvanize and only 3 x 6 rafters was not adequate. This was pointed out by the Contractor, and he had an obligation to do so as part of the implied term of the contract to perform in a professional and workmanlike manner. The Contractor's assessment has not been challenged. So even though Jessy may not have been the designer of the concrete roof, which replaced his design, the roof he did design failed to meet the required standard required in his contract.
- [124] The ancillary defendant is therefore in breach of the contract and of the implied term of the contract and the defendant is therefore entitled to damages apportioned between the claimant and the ancillary defendant.

Measure of Damages

- [125] The learning is that if the error in design is discovered at an early stage, the owner should normally, as part of the duty to mitigate damages, give the architect or engineer an opportunity to correct it³. However, this would not apply if the design was quite useless or the defect such as could reasonably be expected to destroy any further confidence in the professional adviser. The design failure relates to the structure itself then the question of cost of repairs is raised. In this case the changes in question were not early in the construction. Therefore the applicable damages is the cost of repairing the defects less any fees for work already completed not forming part of the defective works. The costs of repairs are to be apportioned between the claimant and the ancillary defendant.

Conclusion

- [126] The claimant is entitled to recover from the defendant the amount of \$588,255.65;

³ Hudson's Building and Engineering Contracts paragraph 2-111 citing Columbus Co v Clowes [1903] 1 K.B. 244 at 247

[127] The defendant is entitled to recover the cost of remedial works in respect of the following defects:

1. The roof: the costs of remedial works to the defective roof are to be apportioned between the claimant and the ancillary defendant – 50% payable by the claimant and 50% by the ancillary defendant.
2. Cracks to the stairs to the South of the building: to be apportioned 50/50
3. In additions Cracks in the following areas: the open area next to the front steps; cracks to the storage areas; cracks to the north basement floor
4. The retaining walls: cost of remedial work to be apportioned 75% payable by the claimant and 25% by the ancillary defendant.
5. Leaks: damage done to the interior from leaks to the hip roofs and through cracks in the walls of the master bedroom

[128] The cost of said remedial work is to be assessed if not agreed within 30 days.

[129] The defendant/ancillary claimant is entitled to also recover the professional fees in respect of the following experts:

1. Associated Engineers Partnership
2. BCQS
3. Chris Conway
4. Addison Workman
5. Oliver Davis of Davis Engineering
6. Mr. Sobers
7. Mr. Schamber

[130] The court will disallow the fees in respect of Mr. Hart. There was no implied term pleaded in respect of fitness of materials

[131] The said professional fees are to be apportioned 60% payable by the claimant and 40% by the ancillary defendant.

[132] Accordingly, Judgment is entered as follows:

- 1) In favour of the claimant against the defendant in the sum of \$588,288.65
- 2) In favour of the defendant/ancillary claimant against the claimant on the Counterclaim as follows:

- (a) 50% of the cost of remedial repairs to the roof, stairs to the south of the building
 - (b) 75% of the costs of remedial works to both retaining walls
 - (c) 100% of the cost of remedial works to the floor in the garage, cracks to the open area next to the front steps, cracks to the storage areas, and the north basement floor;
 - (d) 100% of the damage done to the interior from leaks to the hip roofs and through cracks in the walls of the master bedroom.
 - (e) 60% of the professional fees in respect of the experts
- 3) In favour of the ancillary claimant against the ancillary defendant as follows:
- (a) 50% of the cost of remedial repairs to the roof, stairs to the south of the building and leaks
 - (b) 25% of the cost of remedial repairs to the retaining walls
 - (c) 40% of the professional fees of the experts.
- 4) Damages to be assessed if not agreed within 30 days;
- 5) Costs to be assessed.

Clare Henry
High Court Judge

By the Court

Registrar