

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

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

SLUHCv2008/0659

BETWEEN:

**1. BENJAMIN DRAKES
2. GERALD FRANCIS trading as TURNKEY ENGINEERING
CONTRACTORS INTERNATIONAL LIMITED**

Claimants

and

1. PLANTATION BEACH ST. LUCIA LTD

Defendant

APPEARANCES:

Benjamin Drakes Jnr. for the Claimants
Stanley Felix for the Defendant

2019: February 26th
2019: March 28th

JUDGMENT

- [1] **SMITH J:** The claimants, Benjamin Drakes and Gerald Francis, trading as Turnkey Engineering Contractors International Limited ("Turnkey"), claim damages of \$529,325.23 against the defendant, Plantation Beach St. Lucia Ltd ("Plantation") for breach of a construction contract. Plantation denies the alleged breach of contract and counterclaims for \$252,548.42 as overpayment made to Turnkey.
- [2] In March 2007, Plantation contracted Turnkey to undertake retrofitting/completion works ("the works") on some townhouses and villas ("units") at Cas en Bas. Facts not in dispute are that the contract, which was partly oral and partly written, was to

be completed within three months (26th March to 26th June 2007); Plantation was responsible for supplying materials, fixtures and fittings while Turnkey would supply certain locally sourced materials for which it would be reimbursed; defective electrical wiring and plumbing hidden behind concrete walls were only discovered after the works had commenced and had to be remedied (“the additional works”); the works were not completed within three months; and Plantation terminated the contract by letter dated 30th October 2007 for failure to complete.

[3] Turnkey’s fundamental contention is that Plantation unlawfully terminated the contract because Turnkey’s failure to complete on schedule was caused by Plantation’s failure to provide fixtures and fittings on time, having assured Turnkey that those materials would be readily available. Secondly, the additional works, which Plantation agreed had to be executed, caused the works to be extended beyond the deadline.

[4] In its amended statement of claim, Turnkey therefore claimed the sum of \$529,325.23 broken down as follows:

“Claimants’ Expenditure (purchase of sundry items).....	\$163,297.44
Charge and Interest on Goods Purchased and Transported to Site	
Warehouse (35% of Claimants’ Expenditure).....	\$57,154.10
Extra Remedial Works Completed On Units.....	\$165,907.56
Supervisor/Manager’s Fee (15% of Extra Work Completed	\$24,886.13
TOTAL	\$411,245.23
Cheques Received From Defendants Up to 31/10/2007	\$688,000.00
Less	
Claimants’ Expenditure and Extra Remedial Work	
Completed But Not Included In Agreed Contract Sum	\$411,245.23
TOTAL ACTUALLY PAID	\$276,754.77
Original Agreed Contract Sum	\$806,080.00
Less	
Actual Amount Paid	\$276,754.77
Outstanding Amount Owing to Claimants	\$529,325.23”

[5] Based on the above, Turnkey appears to be claiming compensation under three heads, namely:

- (1) Reimbursement for supply of locally sourced materials provided to Plantation (\$163, 297.44) plus 35% commission/interest on the value of those materials (\$57,154.10);
- (2) Compensation for the additional works executed, plus a supervisor's fee of 15%; and
- (3) Balance of the agreed contract sum of \$806,080.00, which Turnkey was prevented from completing when its contract was terminated.

Turnkey also claims exemplary/aggravated damages, interest and costs.

[6] Plantation admits that Turnkey supplied locally sourced materials but states that receipts and invoices provided totaled \$120,415.23, which was reimbursed to Turnkey within its monthly evaluation payments as stipulated in the contract.¹ It denies agreeing to a 35% commission or any commission.

[7] In relation to the claim for additional works, Plantation admits that Turnkey was entitled to be paid a reasonable sum for works done but that, in the absence of requests for payment (save for one request dated 17th July 2007), Plantation valued the additional work done and paid Turnkey accordingly.²

[8] In relation to the claim for units Turnkey was prevented from completing when the contract was terminated, Plantation says that, under clause 13 of the contract, it was entitled to remove those units from the works.

¹ Defendant's amended defence, paragraph 11.

² Defendants amended defence, paragraph 15.

Issues

- [9] The following issues arise for the determination of the Court:
- (1) What was the contract?
 - (2) Was the contract made under duress?
 - (3) Was the contract lawfully terminated?
 - (4) What sum, if any, is owed to Turnkey for materials supplied?
 - (5) What sum, if any, is owed to Turnkey for the additional works?
 - (6) Is Plantation entitled to reimbursement for overpayments to Turnkey?
- [10] At the start of the trial, Mr. Benjamin Drakes Jnr, counsel for Turnkey, applied for permission to rely on the witness statements of Mr. Anthony Eugene and Mr. Gerald Francis, both of whom had given evidence at the first trial of this matter in October 2011 but were not available for this trial. In the intervening years pending the delivery of judgment in the first trial, and the hearing of the appeal against that judgment in May 2018, Mr. Eugene had died and Mr. Francis emigrated to the United Kingdom. This Court delivered an ex tempore decision on Mr. Drakes' application. Suffice it to say that, there being no objection from Mr. Stanley Felix, counsel for Plantation, permission was granted for Turnkey to rely on the witness statement of Mr. Eugene. The Court, for the reasons stated in that oral decision, refused permission for Turnkey to rely on the witness statement of Mr. Francis since it was not satisfied that the requirements of section 6 of the **Evidence Act**³ had been met.

What was the contract?

- [11] In its amended statement of claim, Turnkey states:
- “7. The said agreement between the parties was made partly orally and partly in writing”.
 8. In so far as it was oral the said agreement was made at meetings and in discussions and in several conversations with Ian Harrison, Gavin French and Martin Matthews of the Defendants and Benjamin Drakes and Gerald Francis of the Claimants...

³ Chapter 4.15 of the Laws of Saint Lucia.

9. In so far as the agreement was in writing the said agreement was in part to be inferred from a contractual letter and document prepared solely for presentation to the Defendants' bank and signed by Ian Harrison of the Defendants and Benjamin Drakes of the Claimants and noted 'not as per original contract'."

[12] In its amended defence, Plantation states:

- “3.1 The Defendant admits that discussions took place among Benjamin Drakes and Gerald Francis acting on behalf of the Claimants and the Defendant acting through Michael Pilgrim, Gavin French, Martin Matthews and Ian Harrison.
- 3.2 The Defendant further states that the said discussions culminated in an undated Agreement...executed in or about May 2007...
- ...
7. ... the whole of the agreement between the parties as it relates to the retrofitting of buildings was made in writing and contained in the Agreement ... This said contract was varied orally where the Defendant agreed to an extension of time for the Claimants to complete the contract within a reasonable time after the 26 June 2007 deadline.”

[13] Though undated, it is not in dispute that the written agreement (“the Agreement”) to which both parties refer was made in May 2007. Mr. Benjamin Drakes had requested of Mr. Ian Harrison, quantity surveyor for Plantation, a document to present to his bank in order to get a loan to finance payment to his workers. Mr. Drakes signed the Agreement and made the notation “Not as per original agreement” beneath the signatures. Since this Agreement was not made until May of 2007, what was the understanding between the parties when Turnkey commenced works in March 2007? What was the original contract to which Mr. Drakes referred? Turnkey contends that the original contract was for completion works on fifteen units at the price of \$806,000.00. Plantation, on the other hand, contends that the contract was always for works on 13 units at the price of \$698,310.00.

[14] In an email to Mr. Drakes dated 27th February 2007, Mr. Harrison attached an indicative bill of quantities (BQ) for the works to be done. The BQ indicated the original work items together with a column marked “progress to date” which identified the work to be completed on that item. Unit A6 was attached as an

example and Mr. Drakes was asked to price the scheme based on A6. By email dated 8th March 2007, Mr. Drakes replied, attaching a price offer in relation to A6, stating that “a detailed tabulation of BOQ will be sent to you on Friday 9th”. Mr. Harrison replied in an email dated 10th March 2007, acknowledging receipt of the quotation for A6 and attached a schedule of proposed rates. He stated that Plantation had adopted his rate for A6 and used this as a basis for valuing the other units and that Mr. Drakes would be given the opportunity to quote for the sundry materials as detailed in the item coverage. He concluded that email stating: “Please review this document. Once we have an agreement on all aspects we will be happy to incorporate these rates into a formal contract.” (underlining supplied). As already observed, no formal agreement was signed until May 2007.

- [15] Turnkey contends that the agreement was reached after it accepted Plantation’s schedule of proposed rates (bill of quantities) for the value of \$806,080.00 that was attached to Mr. Harrison’s email of 10th March 2007. Mr. Ian Harrison, the main witness for Plantation, stated under cross-examination that “the final document was the document that amounted to \$806,080.00; that would be the contract schedule of works or contract bill of quantities.” He was asked whether that document formed the basis upon which Turnkey commenced work and he replied “yes”. Mr. Michael Pilgrim, a director of Plantation, also agreed, under cross-examination, that the agreement was based on the costing proposal sent by Mr. Harrison to Turnkey. He agreed that the parties proceeded on the basis that the contract sum was \$806,080.00. I therefore conclude that when Turnkey commenced the works in March 2007, the understanding between the parties was that the works would be based on schedule of works/bill of quantities submitted by Plantation to Turnkey.

- [16] The schedule of works/bill of quantities is set out in full below:

“Plantation Beach – Proposed Schedule of Contract Rates

A	B	C
Building Ref.	Builders Work	MEP (Plumbing,
Sundry		electrical, AC) Materials

(Optional)

A1	46,000.00	7,530.00
A3	44,000.00	7,530.00
A4	44,000.00	7,530.00
A5	44,000.00	7,530.00
A6	45,000.00	7,530.00
A7	44,000.00	7,530.00
A8	46,000.00	7,530.00
A16	29,000.00	7,530.00
A22	42,000.00	7,530.00
A23	46,000.00	7,530.00
A25	46,000.00	7,530.00
A26	45,000.00	7,530.00
E1	48,000.00	9,240.00
C1	47,000.00	9,240.00
D5	72,000.00	9,240.00

Contract Sum

688,000.00	118,080.00	806,080.00
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Item Coverage

Column A	Price includes for all labour, tools, tackle, supervision, preliminaries, overheads and profit to complete the builder's work within each property.
Column A	Prices are based on assessment of works remaining as detailed in indicative BQ emailed to you on 27 Feb 2007. Works include all interior and exterior works, excluding MEP items.
Column B	In light of your bid for the builder's works in A6, dated 7 March 2007, being close to our overall budget, we have opted to provide you with our allowances for the MEP works.
Column B	Price includes for all labour, tools, tackle, supervision, preliminaries, overheads and profit to complete the builder's work within each property.
Column C	Please quote for the sundry material items to complete each property. PBL will be providing all major fit out items such as tiles, sanitary work, electrical plates etc.

[17] From the above, it is clear that the scope of works included twelve townhouses (A1, A3, A4, A5, A6, A7, A8, A16, A22, A23, A25 and A26), one great house (E1) and two villas (C1 and D5) to be retrofitted for the contract sum of \$806,080.00. It is common ground that this was a labour only contract, meaning that Plantation was responsible for providing materials, fittings and fixtures. Sometime after the commencement of the works, the parties agreed that Turnkey would supply certain locally sourced materials such as paint, thinners, timber, tile grout, drywall and the like.

[18] In May 2007, the parties signed the following document:

“Contract: Plantation Beach, Cas en Bas
Contract no. : PBL/01/TECCC
Subcontractor : TECCC
Main Contractor: Plantation Beach (St. Lucia) Ltd
Description of Works: General Building Works

SUBCONTRACT AGREEMENT

1. Main Contractor shall provide all attendances as scheduled separately.
2. Subcontractor shall provide sufficient labour to execute the works within programme.
3. Subcontract commencement – 26 March 2007
4. Duration of Subcontract – 3 Months
5. Completion date – 26 June 2007
6. Subcontractor to be responsible for all PAYE and NIS contributions in respect of his employees.
7. Subcontractor is responsible for payment of all overtime, sickness benefit etc. due to his employees.
8. Withholding tax will be deducted from all gross payments in the absence of a tax exemption certificate.
9. There shall be no Retention withheld.
10. Payments will be made 7 days from the receipt on each monthly valuation submitted by the subcontractor.
11. Subcontract rates are fixed.
12. Subcontract sum is EC\$698,310.00 as per the attached schedule of Rates.
13. Subcontract is not subject to remeasure, however if buildings are deleted from your scope of works then the Contract sum shall adjusted using the rates as per the schedule.
14. Subcontractor shall have an experienced supervisor on site at all times.
15. Main contractor shall ensure that sufficient areas are available to progress the subcontract works.

16. Subcontractor is responsible for making good all defective works.
17. Subcontractor shall maintain his working area in a safe and tidy state.
18. Main contractor shall free issue all specialist finishing items, namely, but not limited to, sanitary ware, showers, faucets and the like, tiles, kitchen surfaces and work tops etc.
19. Subcontractor shall supply all other "locally available" materials, namely but not limited to, paint, sealants, stains, fixings, cornice, skirting, sundry timber, tile grout, thinset, drywall, compound and the like. All said materials shall be delivered to and registered in to the Main Contractors stores and then re-issued for use in the works by the Main Contractor's staff. The cost of the said materials shall be reimbursed to the Subcontractor within his monthly valuation payments.
20. The Main Contractor has provided documents detailing the duty free concessions available on the project and the Subcontractor is to ensure all materials are purchased and billed at the relevant duty free prices where applicable.
21. The sum of EC\$2,400.00 is included within each building cost detailed on the schedule of rates in respect of vanity cupboards. This sum shall be deducted from the building cost in the event that the Main Contractor provides and installs this item.
22. The sum of EC\$4,320.00 is included within each building cost detailed on the schedule of rates in respect of wardrobes. This sum shall be deducted from the building cost in the event that the Main Contractor provides and installs this item.

Agreed for and Behalf of
Plantation Beach (St Lucia) Limited

Agreed for and on
Behalf of TECCC

SGD. Ian Harrison
Project Quantity Surveyor

SGD. Benjamin Drakes"

Appearing beneath the signatures was the notation "N.B. Not as per the original agreement". And beneath that notation there appears the signature of Mr. Benjamin Drakes and the date 18/05/07.

- [19] The attached schedule of rates mentioned at paragraph 12 of the Agreement provided as follows:

"Plantation Beach – Proposed Schedule of Contract Rates

Building Ref.	A Builders Work	B MEP (Plumbing, electrical, AC)
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A1	46,000.00	7,530.00
A3	44,000.00	7,530.00
A4	44,000.00	7,530.00
A5	44,000.00	7,530.00
A6	45,000.00	7,530.00
A7	44,000.00	7,530.00
A8	46,000.00	7,530.00
A16	29,000.00	7,530.00
A22	42,000.00	7,530.00
A23	46,000.00	7,530.00
A25	46,000.00	7,530.00
C1	47,000.00	9,240.00
D5	72,000.00	9,240.00

Contract Sum

597,000.00	101,310.00	698,310.00
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[20] From the above, it will be observed that units A26 and E1 were removed from the Schedule of Contract Rates; that clause 13 of the Agreement provides that buildings may be deleted from the scope of works; and the contract sum is adjusted from \$806,080.00 to \$698,310.00. How did these variations come about?

[21] In his witness statement, Mr. Harrison stated that sometime in May 2007, Plantation noticed that Turnkey had not commenced works on a number of critical units and therefore it would not have been prudent to include those units in the formal contract. Plantation, he stated, would undertake them directly in order to meet the deadline requirements of the owners of those units. He stated that around that time Mr. Drakes contacted him for a copy of the formal contract, as he needed it to seek funding from a local bank. The contract he presented to Mr. Drakes for signature did not include A26 and E1 and the contract sum was adjusted to take account of this.

[22] Turnkey appears to have adapted three different positions in relation to this Agreement. In his witness statement, Mr. Drakes stated that the document (the

Agreement) had nothing do with the original agreement and was intended only for presentation purposes to the bank. At the trial, he appeared to be saying that he did not sign the Agreement. In closing submissions, Turnkey then contended that it was signed under economic duress. In addition to those positions, Turnkey submits that the Agreement should not be regarded as containing what was agreed between the parties because: (1) it provided no machinery for variation or amendment on important aspects such as material deliveries or additional works; (2) when the document was signed all parties knew of the need for additional works, yet Plantation did not provide for this in the Agreement; (3) it allowed for the unilateral deletion of units and reduction in contract price; (4) Turnkey had objected to Agreement as evidenced by the notation “Not as per original agreement”; and (5) on the face of the Agreement Turnkey was effectively obligated to provide materials to Plantation at cost price – a wholly inequitable and un-businesslike basis not consented to by Turnkey.

[23] The difficulty with those five points raised by Turnkey above is that Turnkey and Plantation both signed the Agreement, which, in my view, contained sufficient information to stand as a workable and enforceable contract. It included a schedule of the units to be worked on and the contract price. Turnkey apparently presented this contract to the bank to get a loan to finance payment to its workers. The fact that it does not provide for how variations are to be made does not render it void or voidable. Plantation concedes that Turnkey did additional works even though this was not expressed in the Agreement. The fact that the Agreement gives the right to Plantation to delete units from the scope of works (in circumstances where there was a tight completion deadline) does not render the Agreement void or voidable.

[24] If one party, presented with a written contract for signing by the other party, observes that it is different from what they had previously orally agreed to, but nevertheless signs that written contract and endorses below the signatures the words “*Not as per original agreement*”, such a notation does not render the contract void, voidable or otherwise ineffective. Mr. Drakes, who described himself as having 38 years of

experience working in the construction industry throughout the Caribbean, the United Kingdom and Germany, obviously read the contract, noted the discrepancy and nevertheless signed it. I therefore find that while the original contract was for works to be done on fifteen units at the price of \$806,080.00, this agreement was later superseded by the formal, written Agreement, which removed two units from the scope of works and adjusted the contract price to \$698,310.00.

Was the contract made under duress?

[25] Turnkey contends that Mr. Drakes signed the Agreement under economic duress. He relied on **Keating on Building Contracts**⁴ for the proposition that an agreement made under duress, in the form of illegitimate economic pressure which amounts to a coercion of will and which vitiates consent, may be voidable.

[26] In determining if whether there was coercion of will which vitiates consent, the Court will consider the following four factors, namely, whether: (1) there was a protest; (2) at the time of the alleged coercion there was an alternative course open to him such as an adequate legal remedy; (3) there was independent advice; (4) after entering the contract, the party who signed under duress took steps to avoid it.

Protest

[27] I do not think that the notation “Not as per original contract” could amount to a protest. At paragraph 13 of Mr. Drakes’ witness statement he stated “...*Because [the Agreement] had materially departed from our original contract, I was careful to sign the document with the qualification that it was not as per the original contract. This statement signifies that the [Agreement] had nothing to do with the terms of the contract as we agreed it.*” It appears that Mr. Drakes voluntarily signed the Agreement thinking that, by endorsing the words “Not as per original agreement” this would somehow qualify the Agreement or limit its effect. His witness statement contains no evidence that he lodged any actual protest with Mr. Michael Pilgrim, Gavin French or Martin Matthews with whom he said he had negotiated the original

⁴ Sweet & Maxwell, 7th Edition.

contract. There is no evidence that he refused to sign or was threatened with contract termination or any other form of coercion if he refused to sign. The fact that the bank would not give a loan without a copy of the formal contract is not a situation in which Turnkey was placed by Plantation.

- [28] In his witness statement, Mr. Harrison stated that at about 1:00 p.m. that particular day Mr. Drakes entered his office for the contract, read it and said it was not in line with the original contract as some of the units had been removed. Mr. Harrison states that he agreed but reminded Mr. Drakes of the earlier decision to remove some of the units and Mr. Drakes signed the agreement and left. Under cross-examination, Mr. Harrison stated *"It wasn't a document for me, it was for him. It was up to him. He wanted a document to get a loan, so I prepared a document including variations up to that point."* It was put to him that the contract was an ultimatum. He denied this and stated that *"Mr. Drakes could have made an argument and the document could have been changed"*. He stated that from that day until his departure from the site in October 2007, Mr. Drakes never raised that issue with him again. I conclude that, based on the testimony of Mr. Harrison and by the fact that, other than the bare notation, Mr. Drakes neither did nor said anything else, his actions did not rise to the level of being a protest.

Alternative Course

- [29] Mr. Drakes says that, at the time he was required to sign the Agreement, he had no alternative course open to him. Obtaining the facility with his bank was necessary for him to access funds to pay for wages and operating expenses. He relies on admissions made by Mr. Harrison under cross-examination – that Turnkey had been working for at least a month before it received its first payment from Plantation; that Turnkey was meeting expenses out of pocket; that, had Mr. Drakes never requested the document from him, it would not have come into existence; and that he had not, prior to their signing the document, discussed its contents with Mr. Drakes – as evidence of coercion.

[30] The difficulty with this position is that Plantation did not require Mr. Drakes to sign any document. It was he who asked Plantation for a document to present to the bank as proof of contract in order to get a loan. At paragraph 13 of his witness statement, he said *"Also during the meeting of the 19th March, 2007 I requested a formal letter to our bankers establishing payment assignment. This letter was eventually received well over one month later."* It is clear that Mr. Drakes requested this Agreement from Plantation. Plantation cannot be faulted if Mr. Drakes negotiated a contract in which he was not provided with mobilization funds upfront but was left to meet operational and workers' expenses out of pocket until he received his first payment from Plantation. Plantation did not place him in that position. There is no evidence that he attempted to re-negotiate the written agreement with Mr. Harrison or with Messrs. Pilgrim, French or Matthews. I am therefore unable to conclude that he had no alternative course open to him.

Independent Advice

[31] I do not think that the fact that Mr. Drakes saw the Agreement for the first time when Mr. Harrison presented it to him and did not get legal advice on it contributes to establishing duress. It was he who requested it to present to the bank; he was a highly experienced contractor with regional and international experience; he obviously understood what he was signing; and he made no attempt to re-negotiate the contract at the moment it was presented or any time thereafter.

Steps to avoid Contract

[32] Turnkey contends that, after signing the Agreement, it continued to operate on the basis of the parties' original agreement and submitted bills for work and materials on the original agreement. There is no evidence, however, that Turnkey worked on or was paid for units that had been removed under the Agreement. There is simply no evidence to support this assertion. I am therefore not satisfied that there is any basis whatsoever on which it could be concluded that the Agreement was signed by Turnkey acting under economic duress.

Was the contract unlawfully terminated?

- [33] On 30th October 2007, Plantation terminated the contract and required Turnkey to hand over the work site. In its defence, Plantation stated that it did so because the works would not have been completed within “the extended deadline” as “work had not commenced on four of the units and the others were not near completion”. Acting under clause 13 of the Agreement, it therefore deleted the four units from the contract as well as the balance of the work to be done on the other units. Alternatively, says Plantation, because of the failure of Turnkey to complete the contract within a reasonable time it had no choice but to bring the contract to an end.
- [34] Turnkey does not deny that on 30th October 2007 it had not completed the works. It maintains, however, that its failure to complete was caused by Plantation’s failure to provide materials on time and by the additional works it had to undertake due to unanticipated defects found only after the works commenced and which Plantation agreed had to be remedied. In his witness statement, Mr. Drakes stated that Mr. Matthews and Mr. French assured him that all materials to complete the units were either in containers on docks in Castries, in transit between England and Saint Lucia or due to leave England in the next ten days. He stated that at a subsequent meeting on 22nd February 2007, Turnkey was assured that the final supplies of materials necessary for completion of the project were en route to Saint Lucia via Geest Line shipping company.
- [35] Mr. Drakes gave the following examples of the delays experienced:
- (1) Work held up for three days whilst we waited the Plantation Beach architect’s instructions for the redefining of concrete rings on all columns in unit numbers 10, 12, 13, 14, 16 and 25.
 - (2) Awaiting tiles for unit numbers 10, 12, 13, 14, 16 and 25 from the 24th May 2007, on arrival of the tiles on the 29th May, workers were quickly frustrated in their efforts to fit them as supplies had run out by 11:15 a.m.

(3) On 30th May 2007 we were instructed that unit 25 was to be given priority with “all hands on deck”. Once assembled, ready to work on unit 25 our workers discovered that there were no adequate supply of tiles available for the rooms and so it was impossible to employ the labour of all members of our workforce on this particular unit.

[36] Turnkey submitted, firstly, that Plantation, having breached the implied term of the contract that materials would be provided within a reasonable time, could not take advantage of its own wrong or default against Turnkey. Secondly, clause 13 of the Agreement did not give Plantation lawful authority to terminate the contract.

[37] Mr. Harrison frankly admitted during cross-examination that Turnkey did experience delays in receiving materials from Plantation and that, within that whole period, there was delay on certain elements of the works. He admitted that, four months into a three-month contract, there was delay in supplying materials and that this was part of the reason Turnkey was not able to deliver within the three months. He denied that Plantation had represented that all materials, fittings and fixtures were available but rather that enough would be available for Turnkey to make progress on the works.

[38] He countered, however, that he had requested a programme of works from Turnkey identifying their resource levels and methodology, which would have assisted in the logistics of getting materials supplied to Turnkey’s workforce, but never received one. He stated that, at a later meeting between himself and Mr. Drakes, he once again requested it, but it was not until late May that Turnkey finally submitted one which was insufficient as it only applied to one unit and did not detail the number of workers for each trade and each aspect of work. He said he therefore required Mr. Drakes to submit a proper programme, but he never did. Plantation therefore contends that Turnkey is partly responsible for the unavailability of materials at the time requested since Mr. Harrison constantly requested a work programme in order to prioritize the procurement of materials, as Plantation had other contractors on

site. Turnkey, says Plantation, failed to provide one then unreasonably expected that materials would be supplied upon request. Plantation further contends that any delay on its part was cured by the agreement with Turnkey that the deadline of 26th June 2007 would be extended to “a reasonable time” after that date. Apparently, no actual date was agreed upon.

[39] I was impressed by the candor and forthrightness displayed by Mr. Harrison as a witness. He openly stated that Plantation was responsible for some delay; that though Turnkey and Plantation never agreed upon the scope and price of the additional works, Turnkey did execute additional works for which they should be compensated; and though there was no agreement about commission on supply of materials, Turnkey should receive the industry standard of 12% “overhead”. I found his evidence to be detailed, comprehensive, and methodical. On the other hand, Mr. Drakes constantly prevaricated. He was unnecessarily evasive on the question of whether he had signed the Agreement, which he obviously had. His narrative about signing the agreement under duress lacked credibility. The overall coherence of his oral testimony was affected by his reluctance to answer questions in a direct manner. I therefore prefer the evidence of Mr. Harrison over that of Mr. Drakes.

[40] On the question of delay, I conclude that Plantation was partly responsible and that Turnkey was partly responsible by not providing the requested works programme. Turnkey, realizing that the additional works would require more time, beyond the three-month deadline, ought to have requested an extension. After discovering the hidden defects, it nevertheless signed the Agreement in May without requesting any adjustments to the June 2007 deadline. In any event, Turnkey had four additional months to complete the works. The examples of delay illustrated by Mr. Drakes in his witness statement did not amount to more than a few days here and there. Turnkey offered no evidence that, during the additional four months, it made any representation to Plantation that it needed further time. In my view, the additional four months adequately compensated for any delays attributable to Plantation.

Turnkey did not produce any evidence to demonstrate that four months, in the circumstances, was not a reasonable extension.

- [41] Clause 13 of the Agreement entitled Plantation to remove units from the scope of works and to adjust the contract sum accordingly, which it did. I am persuaded by the detailed reports and photographs compiled by Mr. Harrison and contained in the trial bundle that the degree of incompleteness of the works as at 30th October 2007, entitled Plantation to lawfully terminate the contract. Turnkey was therefore entitled to be compensated on a *quantum meruit* basis and not, as it claimed, for the units deleted from the scope of works or for the units it was not permitted to complete on termination.

What sum, if any, is owed to Turnkey for materials supplied?

- [42] It is common ground that Turnkey supplied locally sourced materials to Plantation. Mr. Drakes averred that on 26th March 2007, he received a telephone call from Mr. Matthews in which they agreed that Turnkey would supply sundry local items at a rate of 35% of the cost of those items. Mr. Drakes' invoices to Plantation for these materials included this 35% markup. Mr. Harrison, on the other hand, admits that the statements from Mr. Drakes included this 35% markup, but denies that Plantation ever agreed to such a commission. He said he checked with all the directors and no one confirmed any such agreement. He stated that Mr. Matthews recalled a conversation with Mr. Drakes about the payment of a commission but there was no agreement as to the amount. Mr. Harrison said he nevertheless authorized payment of the industry standard of 12% for overheads. Turnkey made no application to have Mr. Matthews summoned as a witness, nor was he a witness for Plantation. Clause 19 of the Agreement states that the cost of supplied materials shall be reimbursed to the subcontractor within his monthly evaluation payments.
- [43] According to the evidence of Olivia Felicien, storekeeper for Plantation at the relevant time, she recorded all deliveries of materials supplied by Turnkey along with the supporting invoices on which they would both sign. These supplies were

then stored in a dedicated warehouse and disbursed to Turnkey as requested. Materials belonging to Plantation were kept in a separate warehouse. When later presented with a statement for reimbursement, Plantation would check the statement against the invoices previously handed in.

- [44] While Turnkey referenced several statements of account submitted to Plantation for materials supplied which included the 35% commission, it simply failed to discharge its duty to satisfy the Court, on a balance of probabilities, that it was not reimbursed for materials actually supplied. Statements submitted to Plantation for reimbursement are not proof that such materials as contained in the statements were purchased and supplied. Turnkey, apparently, did not keep (or put into evidence) its own set of invoices to show that it was not properly reimbursed for materials purchased and supplied to Plantation. The greater weight of the evidence supported Plantation's version of events. Neither was I satisfied that Turnkey and Plantation had agreed to a 35% commission. Turnkey simply failed to make out its case under this head.

What sum, if any, is owed to Turnkey for additional works?

- [45] Plantation admits that Turnkey did execute additional works. Mr. Harrison stated that he was informed of the general need for additional works; Turnkey, however, never itemized the additional works nor was any price agreed. Turnkey failed, he stated, to submit any contemporaneous record of the work done and failed to give any prior cost for the works. Mr. Harrison said he therefore assessed the value of the additional works claimed by Turnkey and paid accordingly.
- [46] In the absence of any itemized list of additional works and costing; any agreed price for the execution of such additional works; any actual documentation or evidence to back up the sums claimed for additional works, I am not satisfied that Turnkey has made out its case for compensation for additional works, beyond that which was paid to it by Plantation. The evidence of an expert would have been helpful in determining the extent and value of additional works carried out by Turnkey.

Whether owing to time constraints or trust of Plantation, Turnkey appears to have left much to chance by failing to document and get written approvals for variations. Ultimately, the Court's decision is based on the evidence placed before it.

The Counterclaim for Overpayment

- [47] Plantation contends that, having done a valuation of the work completed by Turnkey at the time of their departure, it found that Turnkey had been overpaid in the amount of \$208,071.75. It had in evidence a table of Mr. Harrison's assessment of the value of the work done by Turnkey. Firstly, the evidence of Mr. Harrison on the issue of overpayment has to be treated with caution, as it cannot be considered independent testimony. This evidence ought to have been produced through an independent expert.
- [48] More importantly, Mr. Harrison demonstrated that he had been meticulous in checking all of Turnkey's payment requests before authorizing payment. He had checked claims for reimbursement of materials supplied against stores, valued claims made for additional works and for works done on the units before authorizing payments. There was no evidence that any lump sum prepayment had been made to Turnkey. Clause 10 of the Agreement expressly stated that payments would be made seven days from the receipt of each monthly valuation submitted by Turnkey. Mr. Harrison confirmed that this was how payments were made after he had checked the monthly valuation submitted by Turnkey. It is true that Mr. Harrison was re-assigned in August of 2007 and was thereafter no longer responsible for checking Turnkey's monthly valuations. He did state, however, at paragraph 41 of his witness statement that Carlyle Octave, who apparently assumed some of Mr. Harrison's responsibilities, sought his assistance as a quantity surveyor to verify his calculations, that is, simply to "comp check" in the sense of adding up his numbers. Plantation certainly left the Court with the impression that, even after Mr. Harrison's re-assignment, the monitoring system remained in place. I am therefore not satisfied that Plantation has made out its case that it was entitled to a refund based on overpayment.

Conclusion

[49] Based on the foregoing, I make the following orders:

- (1) The Claim is dismissed.
- (2) The Counterclaim is dismissed.
- (3) Neither side having succeeded on its respective claims, there is no order as to costs.

**Justice Godfrey Smith
High Court Judge**

By the Court

Registrar