

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANGUILLA

AXAHCVAP2017/0008

BETWEEN:

HENRY OWENS III

Appellant

and

ANGUILLA PARTNERSHIP ENTERPRISES LIMITED

Respondent

Before:

The Hon. Mde. Louise Esther Blenman
The Hon. Mr. Mario Michel
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Tara Carter for the Appellant
Mr. John Carrington, QC with Ms. Latoya Hobbs-Nurse for the Respondent

2019: June 3;
2020: September 15.

Civil appeal — Parties to a contract — Privity of contract — Assessment of damages following a default judgment — General damages awarded in accordance with pleadings and evidence — Standard of proof of special damages — Costs

The respondent, Anguilla Partnership Enterprises Limited, is a company engaged in the business of constructing and managing luxury villas in Anguilla. In 2012, the appellant, Mr. Henry Owens III, and the respondent entered into an arrangement for the construction of a villa ("the Villa") which was to be built as part of a project undertaken by the respondents called the Solaire Project. Mr. Owens did not want his Villa to be built according to the standard specifications of the other villas in the project, and gave specific instructions about its the design and construction.

The parties signed a short agreement dated 25 February 2014 ("the Note"), by which the Mr. Owens agreed to pay to the respondent a non-refundable sum of US\$150,000.00 by

31st July 2014 as a contribution toward the construction of the Villa. The US\$150,000.00 was not paid by the said date, or at all. The respondent however commenced construction of the Villa using its own funds.

On 7th November 2014, the parties signed a purchase and sale agreement for the Villa and for the land on which it was being built ("the PSA"). The PSA did not make reference to the Note but stipulated a purchase price of US\$1,160,000.00 to be paid as follows:

- (a) \$250,000.00 for the land (Parcel 294)
- (b) \$250,000.00 as a contribution towards the construction of the Villa
- (c) the balance of the purchase price on the occurrence of any one of three cash flow events:
 - i. the sale of another villa in Anguilla owned by Mr. Owens;
 - ii. the sale of Mr. Owens' home in Cape Cod, USA;
 - iii. the receipt by Mr. Owens of certain monies owed to him.

The PSA also stipulated that if none of the cash flow events occurred by 1st June 2015 the PSA would be considered void and all monies paid to the respondent would be refunded less \$250,000.00 which would be kept by the respondent as a non-refundable deposit.

Also on 7th November 2014, Mr. Owens and a party by name of A.P.E. Construction Inc ("APE Inc") signed a document titled "Construction Contract". The Construction Contract provided that Mr. Owens was to pay the contractor (APE Inc), the sum of \$910,000.00 for the construction of the Villa. This sum was to be paid in like manner to the payment terms under the PSA: two payments of \$250,000.00 each and the balance of \$610,000.00 when one of the cash flow events listed in the PSA occurred. The construction contract stipulated that all payments were to be made directly to the "Seller (APE)" as distinct from the "contractor". Mr. Owens did not pay any part of the \$500,000.00 by the due date of 7th November 2014.

The parties to the PSA then signed an addendum to the PSA on 26th November 2014 ("the Addendum"). The Addendum provided that Mr. Owens would borrow \$500,000.00 "... to fund the construction of the villa." The Addendum repeated similar payment terms to those in the PSA. The Addendum also stipulated that if Mr. Owens was unable to pay the balance owed, by 1st July 2015 the sale would be considered void and the \$250,000.00 deposited will be forfeited by the respondent.

The Note, PSA, Construction Contract and the Addendum are referred to collectively hereinafter as "the Agreements".

Mr. Owens did not make any payments to the respondent and the respondent filed a claim against him on 11th March 2016. The respondent claimed the following relief:

- i. The sum of \$250,000.00 for breach of the PSA
- ii. In the alternative, specific performance of the PSA, the Addendum and the Construction Contract
- iii. Special damages for breach of the PSA and the Construction Contract

- iv. Interest and costs
- v. Further or any other relief as the court deems just

Default judgment was entered against Mr. Owens. He applied to set aside the default judgment but the application was dismissed. The matter proceeded to assessment of damages where the learned master made the following awards:

- i. \$25,000.00 for breach of the PSA in respect of the sale of land
- ii. \$803,400.00 damages for breach of the Construction Contract
- iii. \$87,500.00 as reimbursement of the cost of borrowing funds to carry out the construction of the Villa
- iv. \$12,881.00 as reimbursement of costs incurred for procuring valuations of the Villa
- v. Prescribed costs of \$48,968.06.

Mr. Owens appealed broadly challenging his liability for breach of the various agreements and the master's quantification of damages.

Held: allowing the appeal and setting aside the order of the master; awarding the respondent \$250,000.00 as general damages, \$100,381.00 as special damages and prescribed costs of the proceedings in the court below based on the reduced award of \$350,381.00; and awarding to the appellant costs of the appeal at the rate of two-thirds of the amount awarded to the respondent in the court below as prescribed costs; that:

1. It was not open to Mr. Owens to raise issues of the lack of enforceability of the Agreements at the assessment of damages hearing. The court is not required to re-open an application to set aside default judgment or a request for default judgment; and it would not be appropriate to go behind the default judgment or assess the merits of the pleadings in relation to the cause of action while the default judgment stands. The issue of the appellant's liability was settled by the default judgment and the Agreements are not void for failure of consideration or otherwise. The parties intended to create legal relations and the Agreements, with the exception of the construction contract, are enforceable against the appellant.

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993 considered; **Michael Laudat and another v Danny Ambo** [2010] ECSCJ No. 329 applied.

2. The Construction Contract was between Mr. Owens and APE Inc, a separate legal entity. Therefore, despite the respondent pleading in its statement of claim that it entered into the Construction Contract with Mr. Owens, and despite the fact that the rules relating to pleadings and default judgments mean that this statement is deemed to be admitted by Mr. Owens, the evidence before the master could not, without more, support a finding that APE Inc was not a separate legal entity and that the respondent could claim the benefits under the Construction Contract.

3. The effect of the doctrine of privity of contract is that only persons who are parties to a contract can sue on it, and a stranger to a contract cannot take advantage of provisions of the contract even where it is clear from the contract that some provision in it was intended to benefit the third party. In the instant case, the respondent was not a party to the Construction Contract and therefore cannot seek to claim damages for itself under that contract.

Scruttons Ltd v Midland Silicones Ltd. [1962] AC 446 applied; **Verlin Crabbe v Kensley Wheatley and Inter Island Traders Limited** [2008] ECSCJ No. 229 applied.

4. When conducting an assessment of damages, a claimant is entitled to only such damages as are pleaded and the claimant is bound by his or her pleading. The respondent, having pleaded a claim for general damages of \$250,000.00 should not have been allowed to expand its claim to seek reliefs which were not pleaded. In the circumstances the master erred in allowing the respondent to pursue a claim for general damages for breach of the Construction Contract that was substantially different from the pleaded claim.

Ian Charles v The Board of Governors of the H. Lavity Stoutt Community College [2011] ECSCJ No. 114 applied; **Dr. Miranda Fellows v Carino Hamilton Development Company Limited** NEVHCV2009/0125 (delivered 11th August 2015, unreported) applied; **Bertha Francis v First Caribbean International Bank (B'dos) Ltd. formerly CIBC Caribbean Ltd.** [2008] ECSCJ No. 55 applied; **Photo Production Ltd v Securicor Transport Ltd** [1980] 1 All ER 556 considered.

5. Special damages are the amount of pecuniary loss that a claimant can prove to have followed the particular facts set out in its pleadings. The respondent's pleaded claim for special damages of \$760,000.00 did not meet the requirements for particularity in a claim for special damages as it represents the value of the partially constructed Unit, and not the expenses incurred in building it. The particulars of the expenditure were not pleaded and no supporting documents were adduced. The respondent instead invited the master to treat the expenditure as part of its claim for general damages which was unsustainable, as the respondent was not a party to the construction contract. The learned master was however entitled to find the pleaded and proven sums of \$87,500.00 as cost to the claimant of obtaining financing to commence and continue construction on the defendant's custom villa and the sum of \$12,881.00 being reimbursement of the costs incurred for valuations after the claim was filed could be allowed as special damages as the evidence provided a sufficient nexus between these expenses and the actions of Mr. Owens.

Chitty on Contracts (31st edn., Volume 1, Sweet and Maxwell 2012) considered.

6. The quantum of the award of damages in the court below having been varied, prescribed costs in the court below will also be varied and calculated using the new damages award.

JUDGMENT

- [1] **WEBSTER JA [AG.]:** This is an appeal by Mr. Henry Owens III (“Mr. Owens”) against the judgment of the learned master on an assessment of damages following the entry of judgment in default of defence by Anguilla Partnership Enterprises Limited (“the respondent”) against Mr. Owens.

Background

- [2] The respondent is a company operating in the Territory of Anguilla, specialising in the construction and management of luxury villas. At the material time, the respondent was involved in the development of the Solaire Project consisting of four luxury villas in Anguilla. Sometime in 2012, Mr. Owens met with the principals of the respondent and expressed an interest in purchasing villa number 1 of the Solaire Project (“the Villa”) or (“the Unit”). Mr. Owens did not want the Villa to be built according to the standard specifications of the other villas in the Solaire Project. Instead, he gave the respondent detailed instructions and specifications about the design and construction of the Villa.
- [3] On 25th February 2014, the parties entered into a short, written agreement (“the Note”) on the following terms:

“Henry Owens agrees to pay Anguilla Partnership Enterprises (developer) US\$150,000 (non-refundable) by July 31, 2014 as a contribution towards his purchase of a custom villa on Lot 1 at Solaire Anguilla. This amount will be deposited directly to the developer and will be available for the developers for immediate use towards construction. This amount will be credited towards Henry Owens total purchase price of US\$1,160,000, the remainder of which will be paid to Anguilla Partnership Enterprises according to the terms set out in the purchase and sale agreement.

Upon execution of this agreement, Anguilla Partnership Enterprises will begin construction of the Henry Owens custom villa. If between this date and July 31, 2014 Henry Owens decides not to purchase his villa or execute the

purchase and sales agreement, he must still transfer US\$150,000 to Anguilla Partnership Enterprises by 31 July 2014, per the terms of this agreement.”

The Note was signed by or on behalf of both parties.

- [4] The parties did not sign the purchase and sale agreement by 31 July 2014 as contemplated by the Note and Mr. Owens did not pay the \$150,000.00¹ non-refundable deposit to the respondent for use in the construction of the Unit. However, the respondent commenced construction of the Villa using its own funds.
- [5] On 7th November 2014, the parties signed a purchase and sale agreement (“the PSA”). The PSA did not refer to the Note or to the condition that Mr. Owens pay US\$150,000.00 to the respondent. It refers to the sale of the land described as parcel 294 (“the Parcel”), and to the construction of a villa on the Parcel by the respondent for Mr. Owens’ benefit. The structure of the purchase price of US\$1,160,000.00 is set out in the PSA as follows:
- (a) \$250,000.00 for the land (Parcel 294)
 - (b) \$250,000.00 as a contribution towards the construction of the villa
 - (c) the balance of the purchase price on the occurrence of any one of three cash flow events listed in the PSA. If none of the events described in the PSA as “the major cash flow events” occurred by 1 June 2015 the Agreement would be considered void and all monies paid to the respondent would be refunded less \$250,000.00 which would be kept by the respondent as a non-refundable deposit. The three cash flow events are:
 - i. the sale of another villa in Anguilla owned by Mr. Owens;
 - ii. the sale of Mr. Owens’ home in Cape Cod, USA;
 - iii. the receipt of certain monies owed to Mr. Owens.

Payments (a) and (b) above totalling \$500,000.00 were due on the signing of the PSA on 7th November 2014 but were never paid and none of the cash flow events occurred by 1st June 2015.

¹ All references to “\$” in this judgment are to dollars in the currency of the United States of America unless stated otherwise.

- [6] On 7th November 2014, Mr. Owens signed a document described (and hereinafter referred to) as a “Construction Contract” with a party described as A.P.E. Construction Inc. (“APE Inc”), an entity about which there are no details and whose status was neither proved or disproved at the assessment hearing. I will return to this issue below.²
- [7] The schedule of payments in the Construction Contract repeats that there were two payments of \$250,000.00 each and the balance of \$610,000.00 when one of the cash flow events listed in the PSA occurred. Further, that “all payments shall be transferred directly to Seller” which is undoubtedly a reference to the respondent which was not listed as a party to the Construction Contract. It is noteworthy that these are the same payments referred to in the PSA and the Addendum, both of which provide that the payments were to be made to the respondent.
- [8] Following the failure by Mr. Owens to pay any part of the \$500,000.00 by the due date of 7 November 2014, the parties signed an addendum to the PSA on 26 November 2014 (“the Addendum”). The Addendum provided that Mr. Owens would borrow \$500,000.00 “... to fund the construction of the villa.” The respondent agreed to co-sign the loan on condition that Mr. Owens transfer his interest in his other villa in Anguilla to the respondent as security for the arrangement. The Addendum also made provision for –
- (a) the \$500,000.00 loan proceeds to be a part of the full purchase price of \$1,160,000.00 for the villa of which \$250,000.00 would be for the land and the remaining \$250,000 would count towards the \$910,000.00 due on the Construction Contract;
 - (b) the payment of the balance of \$610,000.00³ “due to the seller” (respondent) to be paid on the occurrence of any one of the three cash flow events listed in the PSA;

² See paragraphs 26 - 33 below.

³ The correct amount is \$660,000.00 as is apparent in the following paragraph of the Addendum.

- (c) if the balance of the purchase price of \$660,000.00 was not paid by 1 June 2015 the sale would be considered void and Mr. Owens would be refunded all money deposited less \$250,000.00 which would be retained by the respondent and considered non-refundable.

I will refer to the \$250,000.00 as “the Deposit”

- [9] The Note, PSA, Construction Contract and the Addendum are referred to collectively in this judgment as “the Agreements”.
- [10] Mr. Owens made numerous promises to the respondent that he would meet his financing obligations under the Agreements but failed to make any of the payments due to the respondent. Induced by such promises the respondent commenced and continued the construction of the Villa using its own resources.⁴
- [11] On 11th March 2016 the respondent, as claimant, filed a claim against Mr. Owens in the High Court of Anguilla claiming the following relief:
- (i) The sum of \$250,000.00 for breach of the PSA.
 - (ii) In the alternative, specific performance of the PSA, the addendum and the Construction Contract.
 - (iii) Special damages for breach of the PSA and the Construction Contract.
 - (iv) Interest and costs.
 - (v) Further or any other relief as the court deems just.
- [12] Mr. Owens acknowledged service of the claim but failed to file a defence within the specified time. On 20th April 2016, the court, on the application of the respondent, entered judgment in default against Mr. Owens for an amount to be decided by the court. The matter was then adjourned to a judge in chambers to assess the damages

⁴ Paragraphs 15 and 16 of the statement of claim

payable by Mr. Owens to the respondent. Mr. Owens applied to set aside the default judgment. The application was dismissed. This cleared the way for the assessment of damages to proceed.

The assessment

[13] Mr. Owens raised two sets of complaints at the assessment hearing. Firstly, that although this was an assessment of damages following the entry of a default judgment, there were issues regarding his liability under the Agreements that went to the quantification of damages. Secondly, there were disputed issues relating to the quantification of damages.

[14] The assessment was heard by the learned master. He delivered a written decision on 9 November 2017 and made the following awards:

- (i) \$25,000.00 for breach of the PSA in respect of the sale of land.
- (ii) \$803,400.00 damages for breach of the Construction Contract.
- (iii) \$87,500.00 as reimbursement of the cost of borrowing funds to carry out the construction of the Villa
- (iv) \$12,881.00 as reimbursement of costs incurred for procuring valuations of the Villa.
- (v) Prescribed costs of \$48,968.06.

[15] Mr. Owens was dissatisfied with the master's decision and appealed to this Court. As with challenges at the assessment of damages before the master, the notice of appeal challenged the award of damages on the grounds of his liability for breach of the Agreements and as to the quantification of damages.

Issues on the appeal

[16] The following issues arise for consideration on this appeal:

- (i) The effect of the default judgment on Mr. Owens' liability under the Agreements.

- (ii) Whether the master should have awarded damages to the respondent for breach of the Construction Contract.
- (iii) The pleaded case for damages.
- (iv) The award for general damages.
- (v) The award of special damages.

Effect of the default judgment

[17] Counsel for Mr. Owens, Ms. Tara Carter, argued that notwithstanding the default judgment, there were issues that went to the merits of the defence that were still open to Mr. Owens to challenge, so long as they did not go to the issue of liability determined by the default judgment. She submitted that the master did not consider these issues. Ms. Carter relied on authorities from the Caribbean and England, and the statement of the Privy Council in **Kok Hoong v Leong Cheong Kweng Mines Ltd**⁵ that:

“... default judgments, though capable of giving rise to estoppels, must always be scrutinised with extreme particularity for the purpose of ascertaining the bare essence of what they must necessarily have decided and, to use the words of Lord Maugham LC⁹ [*New Brunswick Railway Co v British & French Trust Corporation Ltd* [1939] AC 1, 21], they can estop only for what must ‘necessarily and with complete precision’ have been thereby determined.”

[18] Relying on these authorities, Ms. Carter submitted that there were issues on the pleadings, including the defence that was filed after the default judgment was entered and later rejected by the lower court, that should have been considered and determined by the master in assessing the damages. The matters included:

- (i) The PSA was not signed by Mr. Owens and in any event no payments were made by him under the PSA and that the agreement failed for lack of consideration.

⁵ [1964] AC 993 at 1012.

- (ii) The Note, the PSA (which he said he did not sign), and the Construction Contract were all tactics used by the respondent to market the project and seek financing, and there was no intention that they were binding or legally enforceable.
- (iii) The terms of the Addendum are inconsistent with the PSA.
- (iv) The PSA was contingent on at least one of the cash flow events listed in the Agreement occurring, and none of these events occurred within the stipulated time, thereby rendering the PSA void.
- (v) The partial construction of the Unit by the respondent was not done in reliance on any promises made or held out by Mr. Owens.
- (vi) The Construction Contract was between APE Inc and Mr. Owens and the respondent cannot claim any benefits under this agreement.

[19] These challenges are reflected in and approximate to grounds (a) to (h) of the notice of appeal. They have to be viewed in the context of the default judgment that was entered against Mr. Owens.

[20] Ms. Carter submitted that the master did not make findings regarding Mr. Owens' liability under the Agreements and/or the merits of his defence, and it was therefore open to him to raise issues of the lack of enforceability of the Agreements in the appeal. Had the master considered these issues he would have found that there was no proper claim from which an award of damages could be made. The Agreements were either void for failure of consideration or for the non-occurrence of any of the cash flow events in the PSA, or they were not enforceable because the parties did not intend them to be. Further, the respondent was not a party to the Construction Contract, and the respondent cannot make a claim for damages under that contract.

[21] I do not accept Ms. Carter's submission that the master did not deal with the various points relating to the enforceability of the Agreements. The master dealt with these points in his judgment at paragraphs 11 to 20 and concluded that they go to the issue of liability and were resolved by the default judgment.

[22] The principles regarding the effect of a default judgment on issues of liability and the assessment of damages have been considered by several cases. The general position is encapsulated in the case of **Michael Laudat and another v Danny Ambo**⁶ where Edwards JA stated at paragraph [30]:

"Ordinarily, at an assessment of damages hearing the court would not enquire into matters of liability because the defendant, having failed to file an acknowledgement of service and/or a defence is taken to admit liability as pleaded. At the assessment of damages hearing, the court is not required to re-open the application or request for default judgment; and it will not be appropriate to go behind the default judgment order or assess the merits of the pleadings in relation to the cause of action while the default judgment stands. The issue of the defendant's liability having been settled by the default judgment, the only issue for the court is how much in compensatory damages is due to the claimant upon the evidence adduced by the claimant in proof of any special damages claimed and the general damages. Where damages for any pleaded cause of action have not been proven by the evidence, the claimant would generally not be entitled to damages under that head of claim."

[23] The learned master relied on this case and the statement by Edwards JA, and decided at paragraph 14 of his decision that –

"APEL submits that the 'liability as pleaded' is liability for breaches of the PSA, its addendum and the construction agreement. It makes the point that once a default judgment has been obtained, there can be no re-examination of the merits of the claim or any defence that could have been presented by Mr. Owens. Once the pleadings have sufficiently set out the existence of a contract between the parties and the breach of the contract by one of the parties, the cause of action must be taken as being proven. The only outstanding matter would be the assessment of damages due to the claimant for a defendant's breach of the contract. Therefore, Mr. Owens cannot, at this

⁶ [2010] ECSCJ No. 329

stage, dispute the validity and enforceability of the contracts, that is to say, whether there was an intention to create legal relations, whether consideration was given, whether the contracts are finalised or were binding. he is limited to disputing the quantum of damages to be paid to APEL.”

[24] Subject to what I say below regarding the Construction Contract, (referred to by the master in his decision as a construction agreement), I agree with the master’s treatment and conclusions on the issue of Mr. Owens’ liability under the Agreements, and in particular the PSA. I affirm his overall conclusion that the Agreements are not void for failure of consideration or otherwise, the parties intended to create legal relations and the Agreements are enforceable against Mr. Owens. The issues relating to his liability were conclusively determined by the entry of the default judgment.

[25] It follows from all that I have said so far that Mr. Owens breached the Agreements, and in particular the PSA, by failing to make any of the payments due under the Agreements and he is liable in damages to the respondent for breach of contract. The master found that that his liability extended to damages for breach of the Construction Contract. I do not share the latter conclusion of the master and I will now analyse the issue of the claim for damages under the Construction Contract.

The Construction Contract

[26] As stated above, the respondent, ex facie, is not a party to the Construction Contract. The contracting party was APE Inc, about which there are no details. The master did not make a specific finding whether the respondent was a party to the Construction Contract. What he decided was that even if APE Inc. was a separate entity-

“...there is still ample evidence on the documents (to which Mr. Owens is a party) and the pleadings to show Mr. Owens’ obligations to pay APEL under both the PSA and the construction agreement. The court is empowered to award damages for his failure to honour those obligations.”⁷

[27] The effect of the master’s finding is that Mr. Owens was obliged to pay the respondent for the Parcel and the construction of the Villa, and it did not matter whether the

⁷ See the master’s judgment at paragraph 18.

obligation arose under the PSA or the Construction Contract. The obligation to pay under the PSA is clear based on my finding in the previous paragraph. However, the obligation to pay under the Construction Contract is a heavily contested issue in this appeal and requires an examination of the pleadings and evidence, not unlike the exercise carried out by the master.

[28] Dealing firstly with the pleadings, the relevant provisions of the statement of claim are:

Paragraph 9 - "The Claimant and the Defendant also entered into a Construction Agreement (hereinafter called "the Construction agreement") on the 7 November, 2014 whereby the Defendant contracted with the Claimant for the Claimant to construct on the Parcel the custom villa for the sum of US\$910,000."

Paragraph 13 - "In accordance with Section 6 of the Construction agreement the Defendant was to satisfy the construction cost of the custom villa in accordance with a payment schedule [in the construction agreement]."

Paragraph 14 - "The Defendant has failed and or refused to pay the construction cost in accordance with the schedule [of the Construction agreement]."

Paragraph 15 - "Despite being in default, the Defendant maintained his commitment to fulfilling his obligations under Construction agreement and had promised to the Claimant that he would obtain the funds necessary to satisfy the construction cost, inducing the Claimant to continue with the construction of the custom Villa."

Paragraph 17 - "The claimant on numerous occasions requested the Defendant specifically [to] perform his obligations pursuant to the terms of the PSA and the Construction Agreement and despite the Defendant's numerous promises and undertakings to fulfil his obligations, the Defendant has refused and or failed to make any payments under the PSA and the construction agreement."

Paragraph 19 – “The Claimant remains ready, willing and able to fulfil its obligations under the PSA and the Construction agreement upon the defendant paying the Claimant the sums owed.”

- [29] Turning to the Agreements, there are copious references to the Construction Contract in the PSA. Clause 2 of the PSA, which, despite its heading “Purchase Price of Parcel”, deals with the payment of the purchase price for the Parcel and the cost of constructing the Unit. The relevant parts of clause 2 linking the respondent with both the PSA and the Construction Contract are as follows:

“THE PURCHASER⁸ shall also simultaneously transfer such amount of funds to the SELLER that will satisfy all instalment payments then due and owing to the SELLER as set out in the payment schedule of this Agreement and/or the Construction Agreement (unless otherwise agreed between the Parties).

Payment of the deposit: (Payment of portion of Purchase Price), a minimum of US \$250,000 due and payable on the date of this Agreement, which shall be transferred directly to SELLER. PURCHASER will also contribute an additional \$250,000 to Seller upon signing of this Agreement as towards costs outlined in and agreed to in the Construction Contract that accompanies this document.

Balance of Purchase Price: The balance of the Construction Contract will be paid upon occurrence of one of the three cash flow events outlined above and will be paid in accordance with schedule outlined in Construction Contract.”

- [30] Clause 3 of the PSA provides that “All money will be transferred directly to Seller. No money will be held in ESCROW” and clause 5 provides that “The transfer of title to the Parcel contemplated in this Agreement shall be consummated by (i) the completion of payments outlined in the Construction Contract.” The Construction Contract itself treats APE Inc as a separate person described as “Contractor” and the payment schedule ends with the direction that “All payments shall be transferred directly to

⁸ All references in the PSA to “SELLER” and “PURCHASER” are references to the Respondent and to Mr. Owens respectively.

SELLER (APE).” This statement would not have been necessary if APE Inc was one and the same person as the respondent.

[31] I find, on a plain reading of the Agreements, that the parties entered into binding agreements in the form of the Note, the PSA, and the Addendum to the PSA, for the sale of the Parcel by the respondent to Mr. Owens, the construction of the Unit on the Parcel by the respondent at the expense of Mr. Owens, and the method of payment for the land and the construction of the Unit. The PSA unequivocally contemplated that the parties would enter into a construction contract setting out, among other things, the details and costs of construction, and the payment therefor. That contract was made between Mr. Owens and APE Inc.

[32] The respondent pleaded in paragraph 9 of its statement of claim⁹ that it entered into the Construction Contract with Mr. Owens on the same day that the PSA was signed. Under the rules relating to pleadings and default judgments this statement is deemed to be admitted by Mr. Owens. This deemed admission is one that could have been supported or disproved by evidence if the case had gone to trial. However, the evidence that was before the master does not disclose that the Construction Contract was between the respondent and Mr. Owens. It was between Mr. Owens and APE Inc. The master could have looked to the Construction Contract in interpreting the deal between the parties as set out in the Note, the PSA and the Addendum, but that does not necessarily mean that the Construction Contract was between the respondent and Mr. Owens, and that the respondent could claim benefits under that contract.

[33] This raises two issues: was there privity of contract between the respondent and Mr. Owens under the Construction Contract and, did the deemed admission in the statement of claim create a relationship under which the respondent could sue Mr. Owens for breach of contract.

⁹ See paragraph 28 above.

Privity of contract

[34] The rules relating to privity of contract are settled and were relied on by Ms. Carter. The leading case is the decision of the House of Lords in **Scruttons Ltd v Midland Silicones Ltd**.¹⁰ which confirmed that it is a fundamental principle that only persons who are parties to a contract can sue on it, and a stranger to a contract cannot take advantage of provisions of the contract even where it is clear from the contract that some provision in it was intended to benefit the third party. In the instant case, the respondent was not a party to the Construction Contract and cannot seek to claim damages for itself under that contract. What it can do is to claim such damages as are permitted under the PSA which it has done in the form of the claim for \$250,000.00 general damages, and special damages.

[35] The second issue on this point is whether the statement in paragraph 9 of the statement of claim, that the parties entered into the Construction Contract, gives the respondent the right to sue Mr. Owens for damages for breach of the contract.

[36] Ms. Carter drew the Court's attention to the case of **Verlin Crabbe v Kensley Wheatley and Inter Island Traders Limited**¹¹ where the claimant obtained a default judgment for breach of contract against the personal and corporate defendants and proceeded to assess damages against both defendants. The learned trial judge found that the corporate defendant was not a party to the disputed contract and there was no valid claim against it. She therefore concluded –

“However, if the judgment stands, clearly there is no valid claim against the Company and on an assessment of damages pursuant to that [default] judgment the claimant cannot establish any loss for which the Company can be held liable. Accordingly, no award of damages can be made against the Company.”¹²

[37] I have come to a similar conclusion in this case. The respondent was not a party to the Construction Contract, and, as a matter of law, it cannot take benefits under that

¹⁰ [1962] AC 446.

¹¹ [2008] ECSCJ No. 229.

¹² Ibid paragraph 20.

Contract by claiming damages from Mr. Owens. Any such claim that it makes must be under the PSA which, in fact, is what it did. I therefore find that the respondent is not entitled to an award of general damages for breach of the Construction Contract. It would have been an entirely different matter if the respondent was a party to the Construction Contract or there was evidence that APE Inc was merely an arm of the respondent and not a separate legal entity.

- [38] However, this is not the end of the matter and I will deal with Mr. Owens' further submission that as a matter of pleading, the respondent was not entitled to general damages over and above the claim for \$250,000.00.

The claim for general damages

- [39] It is interesting to trace the development of the respondent's claim for general damages. The claim as set out in the claim form and statement of claim is for "[t]he sum of US\$250,000.00 for breach of a Purchase and Sale Agreement dated 7th November, 2014." In paragraph 12 of the statement of claim, the respondent pleaded that it was entitled to rescind the PSA and demand payment of the Deposit together with interest thereon and payment of the respondent's costs and expenses. The claim for the \$250,000.00 is for the Deposit, which, as Ms. Carter submitted and I agree, was a claim for general damages.
- [40] The relevant evidence is contained in the affidavits and witness statements filed on behalf of the respondent in the assessment proceedings. In the affidavit of Thomas McInerney Jr., filed on 20 July 2016, he deposed in paragraph 23 that "[t]he Claimant Company is therefore seeking as damages the payment of the deposit under the PSA in the sum of US \$250,000.00."¹³ In paragraph 24, he also claimed damages for breach of the Construction Contract of \$100,000.00 and asserted a total claim in paragraph 27 of \$365,300.00. The claim for \$100,000.00 appears to be a further claim for general damages. It was not pleaded.

¹³ Record of appeal, Bundle 1 of 2, pg. 000155.

- [41] Mr. Thomas McInerney Sr. stated in paragraph 14 of his witness statement, filed on 20 June 2016, that “[t]he Defendant having breached the terms and conditions of the Sale and Purchase Agreement owes to the claimant the sum of US\$250,000.”¹⁴ In paragraph 31, he also claimed \$100,000.00 “taking into account the value of the construction agreement and the appraised value of the villa.” Again, this was not pleaded.
- [42] The respondent filed opening submissions in the lower court on 20th July 2016.¹⁵ The submissions asserted claims for the said \$250,000.00 and \$100,000.00 plus special damages, amounting to a total claim for \$601,802.00.
- [43] The expanded claim for general damages for breach of the Construction Contract first appeared in the respondent’s closing submissions in the assessment of damages filed on 23rd June 2017.¹⁶ In these submissions, the respondent effectively abandoned its claim for \$250,000.00 as damages for breach of the PSA by asserting that that claim was no longer available because Mr. Owens had not paid the deposit of \$250,000.00. Therefore, there was nothing for the respondent to forfeit as a non-refundable deposit.
- [44] The respondent did not apply to amend its claim at any stage to assert the expanding claim for unliquidated general damages, nor that it was no longer claiming the \$250,000.00 damages which remained a part of its claim in the statement of claim. The claim for unliquidated damages does not sit well with the pleaded claim for the \$250,000.00.
- [45] This was a state of the pleadings, evidence and written submissions when the parties proceeded to the assessment of damages.

¹⁴ Record of appeal, Bundle 1 of 2, pg. 000159.

¹⁵ Record of appeal, Bundle 1 of 2, pg. 000031.

¹⁶ Record of appeal, Bundle 2 of 2, pg. 000339.

[46] One of the principles relating to an assessment of damages for breach of contract, or any other claim, is that the claimant is entitled to only such damages as are pleaded and the claimant is bound by his or her pleading – per Hariprashad-Charles J in **Ian Charles v The Board of Governors of the H. Lavity Stoutt Community College**.¹⁷ Further, as noted in **Dr. Miranda Fellows v Carino Hamilton Development Company Limited**,¹⁸ a claimant cannot expand his claim to seek reliefs that are not pleaded. Ms. Carter relied on these cases as well as **Bertha Francis v First Caribbean International Bank (B'dos) Ltd. formerly CIBC Caribbean Ltd.**¹⁹ where Mason J refused a late application by the claimant to amend her claim. The learned judge opined at paragraph 28 of her judgment that –

“In applying these considerations to the case at bar, I am of the view that the court cannot ‘embark upon substantive judicial consideration of the issue[s] that have not been previously canvassed.’ It is therefore the obligation and duty of the Claimant to have pleaded her case on liability and damages in advance so that the Defendant would have a fair idea of the case it has to meet. Not having done so, in order to fit within the scope of “further or other relief”, the claimant would need permission to raise, plead and seek the relief that she now wishes to seek.”

[47] These cases deal with full trials, but in my opinion the same principles apply to an assessment of damages following a default judgment.

[48] While maintaining her position that no award for general damages should be made, Ms. Carter submitted that if an award is made it should be for the \$250,000.00 claimed in the statement of claim which she submitted was a claim for liquidated damages. The respondent could not expand his claim to seek reliefs that were not pleaded. In the circumstances, the master erred in allowing the respondent to pursue a claim for general damages for breach of the Construction Contract that was substantially different from the pleaded claim, thereby resulting in an award for general damages that moved from the pleaded amount of \$250,000.00 to the award of \$803,400.00.

¹⁷ [2011] ECSCJ No. 114.

¹⁸ NEVHCV2009/0125 (delivered 11th August 2015, unreported).

¹⁹ [2008] ECSCJ No. 55.

[49] Mr. John Carrington, QC who appeared for the respondent, responded by submitting that notwithstanding the statements in the PSA and the Addendum that those agreements were void for non-payment of the deposit and the balance of the purchase price by Mr. Owens, the agreements remained alive for the purpose of vindicating the respondent's rights. The default judgment resolved those rights in favour of the respondent and it was entitled to pursue its claim for damages. The \$250,000.00 that Mr. Owens should have paid as the deposit on the PSA was not paid and was unavailable to be forfeited by the respondent in accordance with the terms of the PSA. This was Mr. Owens's primary obligation under the PSA and the Construction Contract. Having failed to pay the Deposit (and the other payments) the respondent was left without its primary remedy under the PSA of forfeiting the Deposit and it had to resort to its secondary remedy of suing for unliquidated damages. He relied on the speech of Lord Diplock in **Photo Production Ltd v Securicor Transport Ltd**²⁰ in support of his submission that general damages were now at large and the master was entitled to award general damages of \$803,400.00 for breach of the Construction Contract. This argument is very attractive, but for it to succeed I have to reconcile it with the pleading point.

[50] The Deposit is described variously in the PSA and the Addendum as a non-refundable deposit liable to forfeiture on breach by Mr. Owens,²¹ and as liquidated damages for all claims.²² In fact, clause 9a of the PSA describes the Deposit as both a non-refundable deposit and as liquidated damages. The clause reads-

"In the event (i) PURCHASER fails to perform any of the covenants and agreements set forth in this Agreement on its part, then the Deposit shall, at the option of SELLER, be retained by SELLER on demand as consideration for its execution of this Agreement and in full settlement of, and as liquidated damages for any and all claims for damages occasioned by the PURCHASER's default, and upon such election, this Agreement shall terminate, expire, cease and become null and void and thereafter, PURCHASER and SELLER shall be relieved of any and all further obligations and liabilities to each other under this Agreement. SELLER shall

²⁰ [1980] 1 All ER 556.

²¹ Clause 2 of the PSA and the final paragraph of the Addendum.

²² Clause 9a of the PSA.

have the option, in lieu of retaining the Deposit as liquidated damages, for PURCHASER'S failure to perform prior to closing, to proceed in equity to enforce its rights under this Agreement against PURCHASER by suing PURCHASER for specific performance of PURCHASER'S obligations hereunder."

- [51] On my reading of the Agreements, and in particular clause 9a of the PSA, the parties intended that if Mr. Owens breached the PSA the Deposit would be retained by the respondent and treated as liquidated damages. The fact that it was not paid by Mr. Owens is of no moment. The respondent chose to proceed with the construction before receiving the Deposit with the result that it had to file a claim for the Deposit as damages.
- [52] The character of the Deposit, whether as a non-refundable deposit or as liquidated damages, is not decisive in this case. What is important is that the respondent claimed the Deposit as general damages, did not amend its pleading, and the claim for the Deposit as damages was not abandoned until closing submissions.
- [53] There was no separate pleaded claim for damages for breach of the Construction Contract. The claim was not amended and, as stated above, it was converted by legal submissions into a claim for unliquidated damages for breach of the Construction Contract. As such, the master erred in two ways – by awarding general damages for an amount that exceeded the \$250,000.00 Deposit, and by awarding damages for breach of the Construction Contract.²³
- [54] For the foregoing reasons I would set aside the master's award of \$803,400.00 for general damages for breach of the Construction Contract and the \$25,000.00 that he awarded for breach of the PSA in respect of the sale of the land. These claims are subsumed under and limited by the claim for \$250,000.00 for general damages. I would award general damages of \$250,000.00 for breach of the PSA as claimed in the pleadings and make no award for breach of the Construction Contract.

²³ The latter point is dealt with in paragraphs 26-36 above.

Special damages

[55] Special damage, as per **Chitty on Contracts**,²⁴ is the amount of pecuniary loss that a claimant can prove to have followed the particular facts set out in his pleadings.

[56] The pleaded claim for special damages is for breaches of the PSA and the Construction Contract. Particulars of claim are set out in paragraphs 15 to 18 of the statement of claim. In paragraph 15 the respondent pleaded that Mr. Owens induced the representatives of the respondent to continue the construction of the Villa, and in paragraph 16 that -

“In reliance upon the defendant’s statement, the claimant to the defendant’s knowledge incurred expenses for constructing the custom Villa.

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i. For carrying out laying of foundation, construction of walls, roof, plastering and windows and doorways, Value of work completed inclusive of materials US\$760,000.”

[57] Paragraph 17 of the statement of claim refers to Mr. Owens’ repeated promises to fulfil his obligations and his continued failures to pay.

[58] The background to the claim for construction expenses of \$760,000.00 starts with the Note which provided that Mr. Owens would pay \$150,000.00 to the respondent on the signing of the Note and the respondent would commence construction of the Unit immediately. Further, that Mr Owens would pay the balance of the purchase price of \$1,160,000.00 according to the terms of a purchase and sale agreement.

[59] The PSA provided that Mr. Owens would pay a deposit of \$250,000.00 and a further \$250,000.00 towards the cost of construction as outlined in the Construction Contract. The Addendum varied the terms of payment but maintained the generally

²⁴ (31st edn., Volume 1, Sweet and Maxwell 2012) para. 26-010.

agreed scheme that Mr. Owens would pay to the respondent the initial payments amounting to \$500,000.00 and the balance of \$660,000.00. The respondent would use these monies to finance the cost of constructing the Villa.

[60] Despite Mr. Owens' failure to make any of the payments, the respondent continued the construction of the Villa, using its own funds. The claim for \$760,000.00 is based on a valuation of the Villa after the respondent stopped construction. The claim in this form does not meet the requirements for particularity in a claim for special damages as it represents the value of the partially constructed Unit, and not the expenses incurred in building it. The deficiency could have been met by the evidence in the assessment proceedings that the respondent had expended \$414,959.00 in construction costs. However, this point was not argued by the respondent who rested its case on the theory that this was a part of the general damages for breach of the Construction Contract which I dealt with above. Even if the \$414,959.00 expenditure could be treated as special damages, I would refuse the claim for the following reasons:

- (1) As stated above the claim for \$760,000.00 lacked particularity and the deficiency was not cured by the evidence of the respondent's witnesses that the amount actually expended on construction costs was \$412,959.00.²⁵ The particulars of the expenditure were not pleaded and no supporting documents were adduced. The respondent invited the master to treat the expenditure as part of its claim for general damages.
- (2) The Agreements did not make provision for the respondent to spend its own funds on the construction and be reimbursed by Mr. Owens.
- (3) The Parcel is owned by the respondent and the property retains the value of the partially constructed Villa. The respondent therefore received and retained the benefit of money expended on the construction. I have

²⁵ Affidavit of Thomas McInerney Junior – Record of Appeal Core Bundle Tab 5 paragraph 19 and witness statement of Thomas McInerney Senior - Record of Appeal Core Bundle Tab 6 paragraph 21.

considered the respondent's complaints that the Unit was custom build and as a result of its design it would be difficult to realise a quick sale.²⁶ This may be so, but the respondent retained the benefit of the partially constructed Unit which was valued in the statement of claim at \$760,000.00.

[61] In the circumstances I would disallow the claim for \$760,000.00 being the value of construction.

[62] The other items of special damage that were pursued in the assessment were:

(i) Cost to the claimant of obtaining financing to commence and continue construction on the defendant's custom villa: US\$120,000.00; EC\$322,584.00)²⁷ which the respondent reduced to \$87,500.00.²⁸

(ii) Reimbursement of the costs incurred for valuations conducted by Messrs. Connor and Meldrum in 2017 after the claim was filed - \$12,881.00.

The master found that the evidence provided a sufficient nexus between these expenses and the actions of Mr. Owens.²⁹ The claim for each of item is separate from the claim for \$760,000.00 and is particularised and supported by documents. The learned master allowed these amounts and there is no reason to disturb his finding. I would allow special damages of \$100,381.00.

Costs

[63] Mr. Owens opposed the claim in the lower court arguing that the respondent was not entitled to damages. This Court has concluded that the respondent is entitled to a total of \$350,381.00 as general and special damages. The respondent will have its

²⁶ Witness statement of Thomas McInerney Sr. - Bundle 1 of 2 of the Record of Appeal, page 000162, paragraph 32.

²⁷ Paragraph 18(iii) of the statement of claim.

²⁸ Paragraph 24 of the master's judgment.

²⁹ Paragraph 51 of the master's judgment.

prescribed costs of the proceedings in the lower court calculated on the said \$350,381.00. Mr. Owens will have his costs of the appeal.

Conclusion

[64] I have found that the respondent is not entitled to an award of general damages for breach of the Construction Contract; that the pleaded claim is for \$250,000.00 general damages for breach of the PSA is allowed and the master erred in awarding unliquidated damages for breach of the Construction Contract; and that the respondent is entitled to some but not all of the special damages claimed. In the circumstances I would make the following orders:

- (1) The appeal is allowed and the order of the master is set aside.
- (2) The respondent is awarded \$250,000.00 as general damages and \$100,381.00 as special damages.
- (3) Prescribed costs of the proceedings in the court below to the respondent based on the reduced award of \$350,381.00.
- (4) Costs of the appeal to the appellant at the rate of two-thirds of the amount awarded to the respondent in the court below as prescribed costs pursuant to order 3 above.

[65] I gratefully acknowledge the assistance of counsel and those assisting them and apologise for the delay in the delivery of this judgment due mainly to the pressures of work.

I concur.
Louise Esther Blenman
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar