

**EASTERN CARIBBEAN SUPREME COURT
FEDERATION OF ST. CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

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

SUIT NO: NEVHCV2011/0121

BETWEEN:

Beyond Homes Ltd.

and

Claimant

Kevin Huggins

Defendant

Appearances:

Mrs. Sherry-Anne Liburd Charles with Ms. Liska Hutchinson for the Claimant

Mrs. Dahlia Joseph-Rowe with Mr. Jomokie Phillips for the Defendant.

2014: December 3, 4
2015: March 3
2015: July 7

DECISION

[1] **WILLIAMS, J.:** The Claimant is a company incorporated under the Laws of St. Christopher and Nevis.

[2] The Defendant is a Bank Employee residing in Prospect, in the Parish of St. John's in the Island of Nevis.

- [3] The Claimant and the Defendant entered into a "Labour only" Agreement dated 2nd June 2010 whereby the Claimant agreed to construct a 12 unit Apartment complex for the Defendant for the contract price of \$308,990.00.
- [4] The Contract Agreement was for Labour only and excluded inter alia kitchen cabinetry, plumbing and electrical work. The contract also provided that the Defendant was fully responsible for the purchasing, handling, delivery and security of all materials.
- [5] The Claimant has sued the Defendant for breach of contract claiming as follows:
- a) The sum of EC\$86,162.53 being the balance of monies due under the Contractor Agreement plus Interest on the outstanding amount.
 - b) The sum of EC\$347.47 being the cost of rental of scaffolding.
 - c) The sum of EC\$9101.90 being the cost of changes and fixes.
 - d) The sum of \$1384.00 being the balance outstanding for items purchased by the Defendant from the Claimant on credit.
- [6] The Defendant has filed a Defence and Counterclaim claiming as follows:
- a) The sum of EC\$162,970.00 for the cost of removal and installation of improperly installed tiles.
 - b) The sum of EC\$4595.00 for cost of materials to re-plaster walls.
 - c) The sum of EC\$118,000.00 for labour costs for twelve vanities and twelve closets.
 - d) The sum of \$2310.00 for the cost of rental of scaffolding for 21 days at \$110.00 per day.
 - e) The sum of EC\$35,000.00 for Liquidated Damages for late delivery of the building project.

[7] **The Issues to be determined at the Trial**

1. Is the Claimant entitled to the sum of \$86,162.53 for work performed under a contract.
2. Is the sum of \$1384.55 due to the Claimant from the Defendant for materials purchased on credit by the Defendant.
3. Whether the Claimant is entitled to the sum of \$9101.90 or any other sum for the cost of changes and fixes carried on the Defendant's project.
4. Whether the sum of \$347.47 being the cost of rental of scaffolding is due and owing to the Claimant and whether the sum of \$2310.00 is due to the Defendant for the rental of scaffolding for 21 days.
5. Whether the sum of \$18,000.00 being the costs of twelve vanities and twelve closets is due and owing by the Claimant to the Defendant.
6. Whether the Defendant is entitled to \$4595.00 for re-plastering of walls.
7. Whether there were there defects in the tiling and plastering of the building and if so, should deductions be made for the alleged defects.
8. Whether the Claimant is liable to pay penalties for the late completion of the project.

Issue No. 1

- [8] The evidence for the Claimant surrounding this Issue came from Curtis Liburd part owner and Managing Director of the Claimant Company who said that he had been in the construction business for over ten years.

- [9] In or around the first week of May 2010, he received Architectural drawings to provide a material and labour estimate for the construction of a 12-unit Apartment complex for the Defendant.
- [10] On or about the 14th May 2010, a counter proposal, was made by the Defendant to the Claimant, and on that same date a further counter offer was made to the Defendant in the sum of \$308,990.00 inclusive of painting and tiling.
- [11] On the 2nd June 2010, the Claimant signed a Labour only contract with the Defendant. The terms of the contract were specific to the work required by the Defendant and set out the terms agreed to by the Parties.

Evidence of the Claimant

- [12] The Claimant states that when he began the project he had an average of twelve workers on the site and two foremen Oscar Liburd and Junior Newton.
- [13] Mr. Liburd further states in his evidence that about the 5th June 2010, the Defendant informed him that the foundation had been marked out but that the **setbacks** were not as per approved drawings.
- He said further that it was the responsibility of the Claimant that when a plan is approved by the Nevis Island Authority, it is submitted to the Department of Planning for further approval by the guidelines of the Planning Department.
- [14] The Claimant defined “setbacks” and stated that setbacks are usually the distance from the owner’s property boundary to the outside of the building to be constructed.
- [15] Mr. Liburd states in his witness statement that he had warned Mr. Huggins that the measurements were to be as approved by the drawings submitted to the Department of Physical Planning, and that there was a possibility of being issued with a stop order if he ignored the measurements.

- [16] Consequently, Mr. Liburd claims that he and Mr. Oscar Liburd and Junior Newton had to reposition and redo the marking out of the foundation according to the approved drawings.
- [17] In January 2011, Mr. Liburd states that he received a report from the Department of Physical Planning that his company Beyond Homes Ltd. was constructing a generator room for the Defendant which had not been approved in the drawings. He claims that he immediately refuted the allegation from the Department of Physical Planning that any such construction was being done by his company and learnt later that the said generator room was being constructed by the Defendant with other persons.
- [18] Mr. Liburd claims that Mr. Huggins the Defendant was late with most of his payments from the start of the construction of the building, and that his Bank statements reflected balances brought forward that attracted Interest due to the Defendant's late payments.
- [19] Mr. Liburd also stated that the Defendant contracted Mr. Berly Walwyn as an Independent contractor to complete the plumbing and electrical work on the building. Mr. Walwyn was not a full time contractor and much of his work was completed at evenings, after the workers of Beyond Homes Limited had finished their tasks.
- [20] Mr. Liburd claims that as a result of Mr. Walwyn's work after hours, he experienced several delays, and discovered defects and errors with the electrical work, and cutting and jack hammering of walls by the subcontractors after plastering was complete.
- [21] Mr. Liburd claims that in an effort to ensure that the building was constructed safely and properly, many of these errors were repaired and fixed by himself and other workers of his company. This was done according to Mr. Liburd to prevent further delays in Construction, and an Invoice was issued to the Defendant for the cost of the changes and fixes.

- [22] Mr. Liburd claims that during the construction of the building, Mr. Huggins accused him of theft of steel; consequently he requested that his name and other agents of Beyond Homes Ltd. should not be authorised to sign or collect materials.
- [23] According to Mr. Liburd Mr. Sterling Heyliger and Mr. Kevin Huggins, they were now responsible for requesting materials needed for the project on the accounts of Mr. Huggins.
- [24] Mr. Liburd further states that notwithstanding Mr. Heyliger's appointment as agent for Mr. Huggins, he had to use the trucking service of Beyond Homes Ltd. at least fifteen times to collect materials on behalf of the Defendant, to avoid delays.
- [25] Mr. Liburd also claims that over the course of Construction, he received numerous complaints from workers on the construction site in relation to materials arriving late, and were insufficient or incorrect.
- [26] In January 2011 according to Mr. Liburd the Defendant informed him that he was having several issues with the tiling of the floors, and he then offered the Defendant Mr. Huggins the option of a refund to which he received no response or indication that he should stop his workers from tiling.
- [27] In relation to the Kitchen cupboards, closets and finishings, Mr. Liburd stated that he was informed by Mr. Donald Hendrickson of Island Mouldings Ltd. that he had been contracted to build the cupboards, closets and finishings in the said Apartment Complex.
- [28] According to Mr. Liburd, there was no agreement with Mr. Huggins that this said work would be outsourced or that any deductions would be made from the amount to be paid for this work.
- [29] Mr. Liburd also indicated that the Architectural drawings he received did not make any provisions for spouting and consequently this was not contemplated in the Contractor

- Agreement. However during a walk-thru on the 4th April 2011, Mr. Liburd stated that Mr. Huggins accused him of failing to provide spouting for the property. It was subsequently decided that the Claimant Company would install the spouting if the material was provided by Mr. Huggins.
- [30] Mr. Liburd claims that while the material was provided for the spouting Mr. Huggins did not provide adequate scaffolding to use during the installation of the spouting, and while this was indicated to Mr. Huggins, he refused to provide additional scaffolding, claiming that the workers had adequate scaffolding to complete the job. An Invoice for the rental of the additional scaffolding was sent to Mr. Huggins which he refused to pay.
- [31] According to the evidence on the 18th March 2011, a walk-thru was held at the premises, after which a comprehensive report was generated based on workers instructions of the Claimant Company, which was sent to Mr. Huggins which he has refused to pay.
- [32] Mr. Liburd states that despite numerous demands for payment, Mr. Huggins continued to refuse to make payments despite the building being rented by Medical students. Further Beyond Homes completed the work it was contracted to do and made the necessary deductions and penalties.
- [33] Under **cross-examination** by Mrs. Dahlia Joseph-Rowe, Counsel for the Defendant, Mr. Liburd admitted that he drafted the Construction contract, however in relation to the changes and fixes, Mr. Huggins did not sign any change orders, but he paid for the changes in the Basement and Laundry, although there were no written change orders, and changes were made through verbal agreement.
- Mr. Liburd also admitted that Mr. Huggins was advised of every change that took place and included every costing and Invoice in the Final report.

- [34] Mr. Liburd further stated that while the changes in the plan did not require a resubmitting of the plan, but Mr. Huggins did not tell him that the vanities and closets were to be outsourced to Island Moulding Ltd. , although they had been included in the Contract Agreement.
- [35] In relation to the bonding agent Mr. Liburd reiterated that the product was not adequate for the job. Although the label on the bucket had said that it was for use on concrete. Mr. Liburd also claimed that it was because of the bonding agent that was used and supplied by the Defendant that the walls were shelly and not because of poor workmanship on the part of Beyond Homes Ltd. He stated further that the project was to be completed in January 2011 and was completed on the 13th March 2011.
- [36] The evidence from the Claimant's witnesses in particular Junior Lewis Newton and Oscar Liburd the Foreman on the project supported the Claimant's testimony in their witness statements. Mr. Newton testified that he was a Construction worker for over twenty years and that he was present during the tiling of the Apartment Complex and had supervised the tiling of the floors of the Apartment. He stated that he had highlighted the manufacturing defects in the tiles to the Defendant, and the Defendant had never expressed any dissatisfaction in the work being done.
- [37] Kevin Huggins, the Defendant in this matter stated in his witness statement that he had entered into a "Labour only" contract with Beyond Homes Ltd, the Claimant on the 2nd June 2010 to construct an Apartment Complex for him. He was responsible for the supply materials for the project which he provided in a timely manner. However he stated that he and Curtis Liburd, the part owner of Beyond Homes

Ltd had a verbal agreement that he would make any request for materials at least five days in advance. Mr. Huggins claimed that Mr. Liburd did not adhere to that arrangement with the result that the relationship deteriorated and he then removed Mr. Liburd as a signatory on his accounts for materials for the project and replaced him with his friend Sterling Hyliger who was authorized to take materials requested by Mr. Liburd or his workers.

[38] Mr. Huggins states that he provided scaffolding for the project and scaffolding which he had rented was always present on the job site.

However Mr. Liburd in his evidence claimed that during a walk-thru on the 4th April 2011, Kevin Huggins had accused Beyond Homes of failing to provide spouting for the property. After an extended disagreement it was agreed that the Claimant Company would install the spouting; the material for the spouting was provided but according to Mr. Liburd, Mr. Huggins refused to provide additional scaffolding to erect the spouting on the roof.

[39] The Court then heard the evidence of Kennedy Bryan, Quantity Surveyor with exhibited credentials who had submitted a report to the Court pursuant to Rule 32.3 and 32.4 of the **CPR 2000**.

The scope of his work as an Expert Witness was to;

1. Visit the premises of Kevin Huggins under construction and evaluate and assess the merchantability of the facility and fitness for its intended use.
2. Provide a description of the premises and to include any noticeable topographical features that would affect construction costs.
3. Provide an assessment of the nature, quality and value of construction work carried out on Kevin Huggins' premises.

[40] Mr. Bryan testified that the plans of the project did not contain a laundry room. According to paragraph 14 (d) of his report he stated that the tiling was generally acceptable although

15% of the floor tiling sounded “hollow”. This happened he stated when the bedding material was not spread sufficiently beneath the tile.

He stated further that 15% of the tiles were sitting up at the edges, and this could have been caused by a number of factors which he outlined in paragraph 14 (d) (i) (ii) (iii) of his report Mr. Bryan also stated that it is the norm for Tiles not to be completely perfect, but fall with reasonable acceptable limits.

He opined that 85% of the tiles were laid properly and it could have meant that someone else laid the other 15% **OR** the tiler was working with improper materials.

Mr. Bryan stated further that normally when tiles were laid, there had to be a curing time of 12-24 hours. It also depended on the mortar mix and how much water was in the mortar, so if the tiles were laid in the day and someone walked on the tiles in the evening, there is the probability that the tile would shift or be depressed.

He continued in his testimony by stating that what he looked for was to see whether the other end of the tiles sitting up was depressed and most of the tiles were not. Tiles do not bend so if one end is sitting up, the other side would be sitting down.

[41] Mr. Bryan stated that from his observations, he was led to believe that some of the tiles were warped, and the warped tiles, could have caused the hollowness of the tiles and the tiles sitting up at the edges.

He testified further that if there was more weight on the tile than it can bear, the tile would crack and it would show up the Hollowness of the Tile.

[42] Mr. Bryan stated categorically that when he visited the property of Kevin Huggins in 2012, one year after completion of the project, he did not notice any cracks on the tiles and neither did Mr. Huggins point out any cracks or superimposed weight to him and he did not include this in his report to the Court.

[43] In relation to the “shelly” walls, Mr. Bryan stated that walls became “shelly” when the plaster does not adhere to the wall; he opined that an incorrect bonding agent could cause “shelly” walls, and that there were different forms of bonding agents, but concrete has a specific bonding agent.

[44] Mr. Bryan was also of the opinion that jackhammering could cause shelly walls and that after plastering, it would take at least 24 hours before jackhammering could take place as the bonding agent would deteriorate.

[45] Mr. Bryan was of the view that Mr. Liburd’s full retention should be paid and that the problem Mr. Huggins claimed was more of an aesthetic problem than a functional problem and this fell within the norms of acceptable standards of building.

Mr. Bryan also commented on the use of dishwashing liquid and stated that this was used to give the mortar a more plastic look, and it assists in adhering the mortar to the wall; he also stated that dishwashing liquid does not cause shelliness and was a trade secret.

[46] In commenting on the Expert evidence report of Warren Thompson, a witness for the Defendant, Mr. Bryan in reference to paragraph IV of Mr. Thompson’s report stated that generally tile layers did not lay chipped tiles unless it is the last tile, however he did not notice chip tiles on the premises. He also noted that the tiles were grouted, and if there were defects in the tiles by warpage or unevenness, it would be readily seen if they were put against each other as opposed to if the tiles were warped and had grout between the tiles.

Mr. Bryan’s recommendation was that removing all floor tiles is excessive and it was not necessary to remove the Bath tiles unless they popped loose and broke.

[47] Under cross-examination by Mrs. Dahlia Joseph-Rowe, Mr. Bryan restated that tiles do not bend, so if one end is up, the other should be down.

Mr. Bryan concluded that the unevenness of the floor could have caused the tile to sit up, but the manufacturing process may cause warpage in some tiles. He stated that the tiles would pop loose if there is moisture beneath it or the building was hot. It was not a consequence of hollowness. However he did not observe any tiles popping up in his Inspection of the building.

- [48] The Defendant also presented an expert witness in the person of Warren Thompson a Civil Engineer, who testified that he was instructed by Mr. Kevin Huggins to prepare an Expert report based on his assessment of their Apartment building complex belonging to Mr. Huggins.

Mr. Thompson testified that when he assessed the building he came upon issues such as tiles being uneven and the hollow sound on the tiles in 55% of the building.

He opined that to replace those tiles would create difficulties and to try to take them out one at a time would actually cause other tiles to become shaken, and the surrounding tiles may have to be broken.

Mr. Thompson's recommendation was that the floors of the premises be capped because the floors were not level and a number of tiles were tilted.

Mr. Thompson also stated that the hollowness of the tiles came from the Installer of the tiles not properly buttering the tiles or not having cement on the entire tile on the floor. He also claimed that the tilting of the tiles was not due to warpage because the tiles should not have been used in the first place.

- [49] Mr. Thompson was of the opinion that the replacement of tiles is not a matter of Aesthetics, but a matter of function and he disagreed with Mr. Bryan's estimate that 15% of the tiles were hollow or uneven. His observation was that 70% of the tiles needed replacement.

[50] Mr. Thompson disagreed with Mr. Bryan's estimate of a cost replacement of \$2.00 per tile and estimated that the replacement cost per tile should be \$20.00.

[51] Under cross-examination by Counsel for the Claimant Mrs. Sherry-Ann Liburd-Charles, Mr. Thompson was referred to several parts of his Expert report which were identical to that of Mr. George Gilbert, Quantity Surveyor, who had previously prepared an Evaluation report on the premises of Kevin Huggins and was dated 31st August 2011. Mr. Thompson admitted that his conclusions were similar to that of Mr. Gilbert, but denied that it was a carbon copy of the Gilbert report and that he did not plagiarise the report.

[52] Mr. Thompson's recommendations in his report were as follows;

- a) All of the "hollowed" tiles should be removed in the bathrooms and replaced with new ones.
- b) All the floor tiles should be removed and disposed off site.
- c) Hack and clean floors.
- d) Ensure that floors are level
- e) Cap floors with mortar
- f) Get a professional tile fixer to lay the new tiles.
- g) After tiling, the tiles and surrounding areas were to be clean.

[53] In relation to the Cost Analysis presented in his report, Mr. Thompson contended that he had based his recommendations on the square footage of the building which was 5600 square feet and the total cost would be \$156,720.00

[54] However Mr. Thompson agreed that he had not provided any documentation to support the cost analysis, and he had not provided any Estimate for the cost of the work to be done or any Invoice for the cost of the tiles that he had recommended for replacement.

Mr. Thompson also agreed that he had copied the figures he used in the report from

Mr. Gilbert's report as he had agreed with those figures.

Mr. Thompson emphatically denied that his report was not impartial, was plagiarised and a carbon copy of Mr. Gilbert's report.

Mr. Thompson had recommended a total cost of \$158,970.00 to remedy the defects he claimed he observed in relation to the tiling of Mr. Huggins premises.

[55] In relation to the determination of Issue No. 1, the Court must determine whether the building in question was substantially completed. The Court has been presented with the **Labour only contract** between the Claimant and the Defendant signed on the 2nd June 2010.

Article 2 of the said contract provided that "The work to be performed under this contract... shall be substantially completed on or before 32 weeks from the said letter."

[56] Two persons were appointed by the Court as Experts and two reports were filed namely the Expert report of Warren Thompson (the Defendant's expert) filed on the 16th May 2012 and the Expert report of Kennedy Bryan (the Claimant's expert) filed on the 29th May 2012. The two Expert reports are dissimilar in every material aspect and the report of Mr. Warren Thompson appears to be incredibly plagiaristic of Mr. Gilbert's report. I find this to be mindboggling and unacceptable as a report prepared for the assistance of the Court.

[57] Accordingly I reject in its totality the report of Mr. Warren Thompson and will rely on the Expert report of Mr. Kennedy Bryan as being more credible and reliable to determine the Issues of tiling and plastering of the work in the building.

[58] Further I accept the evidence of Curtis Liburd, Managing Director of the Claimant Company and the two foremen of the Claimant Junior Lewis Newton and Oscar Liburd that the building was substantially completed in March 2013.

[59] Mr. Kevin Huggins in his evidence under cross examination stated that when the keys were given to him in March 2011, the building was substantially completed as certain major items had been completed, and at least one Tenant had occupied the Apartment complex by 1st May 2011.

The Law

[60] Substantial completion according to learned authors of **Halsbury Laws of England 4th Edition Vol. 4(2) at paragraph 360** is as follows;

“Most contracts provide that the contractor is to carry out and complete the works described in the contract. Even where it is not stated, then if the extent of the work is defined, a duty to complete the work is implied, the contractor having a correlative right to complete the work...

The obligation to complete included an obligation to provide anything which is indispensably necessary to complete the work.”

[61] **Paragraph 362** states that;

“Where a contract provides for a specific sum to be paid on completion of specified work, the Courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions; In the absence of a very clear stipulation that entire completion is a condition precedent to the contractor’s right to payment, the contractor can claim the contract price if he can show that **he has substantially completed the contract.** (My emphasis)

In such a case, the contractor can recover the price subject to the deduction of the reasonable cost of completing the defective work.

- [62] This principle is bolstered in the locus classicus case of **Hoeing vs Isaacs**¹ where Lord Denning LG at page 18 of the Judgment stated that;
- “When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are defects or omissions... The promise to complete the work is therefore construed as a term of the contract, but not as a condition; it is not every breach of that term which absolves the Employer from his promise to pay but only a breach which goes to the root of the contract, such as abandonment of the work when it is half done. Unless the breach goes to the root of the matter, the Employer cannot resist payment of the price. He must pay it and bring a cross claim for the defects and omissions; the measure is the amount which the work is worth less the cost of making them good.”
- [63] Also in the case of **Bolton vs Mahadeva**² Cairns L.J stated that;
- “In considering whether there was substantial performance, it is relevant to take into account both the nature of the defects and the proportion between the cost of rectifying them and the contract price.”
- [64] Therefore on the preponderance of the evidence, and with the Court placing reliance on the Expert report of Mr. Kennedy Bryan, **Conclusions and Recommendations** at paragraph 16, it is my considered view that the Claimant is entitled to the sum of \$86,162.23 since the project was substantially completed on the 13th March 2013.
- [65] The Claimant Beyond Homes Ltd. Is also entitled under **Section 12 of the Contract** to be paid financial charges of 1.5% on the outstanding balance since work had ceased pending

¹ [1952] 2 A11ER 176

² [1972] 2A11 ER 1322

resolution of the dispute regarding outstanding payments to the contractor; that application of Interest would apply to the outstanding balance calculated in paragraph 64.

[66] **Issue No. 2** – Is the sum of \$1384.55 due and owing to the Claimant by the Defendant for materials purchased on credit by the Defendant?

[67] The Claimant contends that the Defendant opened an account during the construction of the Apartment complex building and took several items on credit over a period commencing June 2010 to February 2011.

Sterling Hyliger in his evidence under cross-examination by

Mrs. Sherry-Ann Liburd-Charles stated that he could not recall if he had opened an account at Beyond Homes or if Mr. Huggins had opened an account. He recalled picking up items at Beyond Homes on credit or on instructions from someone that were already paid for. He did not pay any monies to Beyond Homes when he picked up the items and had signed the Invoice to indicate that he had picked up the items. He categorically denied he was the Agent for Mr. Huggins.

Mr. Huggins in his evidence denies that he took or authorised any goods to be taken on credit from Beyond Homes.

[68] In relation to the goods taken on credit, I am not satisfied that Mr. Hyliger or Mr. Huggins are truthful witnesses, and I am of the opinion that items were purchased on credit by Mr. Hyliger as an agent for Mr. Huggins for the construction of the building and have not been paid for by the Defendant up to the time of this trial. The evidence is that Mr. Hyliger was authorised by the Defendant to approve and sign for materials for the building project which he did.

Therefore the Claimant is entitled to be paid the sum of \$1384.55 by the Defendant according to the Invoices presented.

[69] **Issue No. 3** – Changes and fixes by the Claimant.

The Claimant contends that it is entitled to be paid the sum of \$9101.90 which represents the amount for outstanding changes and fixes carried out by it. The Claimant states that the actions of the subcontractors on the project caused impediments to the Contractor in the performance of the contract and caused the Contractor/Claimant to incur expenses.

The Claimant also contends that the cost of the changes/fixes should be borne by the Defendant as he benefited from the changes and fixes and the Claimant is entitled to compensation.

The Claimant further contends that much of its completed work was destroyed by the subcontractors employed by the Defendant, and as a consequence, the Claimant had to redo the completed work.

[70] The Claimant contends that the fixes included:

- a) Measurements in conduits in inches which were incorrect.
- b) Blockage of electrical conduits.
- c) Damage to walls due to independent contractors search for electrical boxes.
- d) Cutting and jackhammering of walls after plastering was completed.
- e) Substandard conduit.
- f) Pressure testing of water lines.
- g) Pipe work from septic tank to soak away.

Further that the fixes and changes were necessary for the Claimant to complete its work, but caused the Claimant to incur loss of time and money.

[71] The Defendant contends that he engaged the services of an Electrician and a Plumber as per the Contract Agreement, and that the Claimant was not required to complete or remedy any work which was specifically identified to be done by those individuals, consequently the Claimant is not entitled to be paid by the Defendant for the costs of remedial works.

The Defendant further contends that the Claimant had no authority to perform those works under the contract, and the said work was done without the knowledge and approval of the Defendant.

[72] According to the learned authors of **Chitty on Contracts**, Chapter 21 paragraphs 37-071.

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

Where a contractor is required to obtain materials, then the implied term as to workmanship requires the contractor to make a proper inspection of the materials before using them and the contractor will be responsible for defects in the materials obtained by him.”

At paragraph 37-208 of **Chitty's** it states under **Defective work**,

“Where after completion, there are defects in the works, then the Employer will normally be entitled to Damages equal to the costs of making good the defects (sometimes referred to as costs of reinstatement). However whilst such an award of Damages puts the Plaintiff (Employer) into the position he would be in if the contract had been properly performed in the first place it is still for the Plaintiff to show that reinstatement is a reasonable response to the Damage in question.

See: Atkins vs Scott.³

[73] In Halsbury Laws of England Vol. 4(2) paragraph 372- Extra Work and variations

it states;

“Unless the building contract expressly provides that the contractor is obliged to comply with the requirements of the Employer to change the works contracted for (whether by way of addition, alteration or omission) the contractor is not obliged to do so. They must form the subject of a new contract or be a variation of the original contract.” (My Emphasis)

If a contractor carries out unauthorized work, he is **not** entitled to be paid in the absence of special circumstances. If the work falls outside the scope of the contract, the Employer may be liable to pay if a promise to pay can be found.

See: Holland Hannen Cubitts (Northern) Ltd. Vs Welsh Health Technical Services⁴

[74] According to **Article 7(3)** of the Contact Agreement, “The contractor may at its discretion engage subcontractors (for example, electrician, plumber etc.) to perform work hereunder **ONLY** if the owner or his authorized representative refuses to provide or causes delays for the Contractor. The owner shall fully pay the subcontractors immediately and in all instances remain responsible for loss of time if any incurred.

[75] It is my considered view that in relation to the changes and fixes, there is no evidence that Mr. Huggins expressly or otherwise gave permission to Mr. Liburd to incur the expenses for remedial work to the premises. The Claimant appeared to have unilaterally incurred these expenses to avoid delays (as he claimed) and it should have been the sub-contractors responsibility to remedy the defects which they caused.

³ [1990] 7 Const L.J 215 C.A

⁴ [1987] 37 BLRC C.A

I am not satisfied that Article 7(3) ought to have been invoked by the Claimant as the evidence does not show that Mr. Huggins refused to provide sub-contractors or caused delay to the contractor.

Accordingly I will disallow the claim of the Claimant for \$9101.90 for changes and fixes and adopt the intent of Article 7(3) of the Contract Agreement.

[76] **Issue No. 4-** Whether the cost of rental of scaffolding is due and owing to the Claimant.

The Claimant contends that the sum of \$347.00 is due and owing to it as costs for rental of scaffolding for installation of spouting which was not agreed to in the original contract.

In the witness statement of Oscar Liburd, foreman of Beyond Homes, at paragraphs 29-30, he submits that when he received the plans for the Apartment Complex, there were no provisions for spouting to be placed on the building, and therefore no provisions were included in the Contract or Estimate.

Mr. Kevin Huggins in his evidence stated that there were twenty pairs of scaffolding on the site, and he told the contractor this was enough to do the spouting. Each scaffolding was 6 feet high and the building was 18 feet; therefore two sets of scaffolding plus the height of the worker was adequate.

It was the contractor's opinion that the scaffolding was inadequate and he was made aware that the additional scaffolding was \$345.47. Mr. Huggins did not agree to the additional scaffolding.

[77] It is my considered opinion that having heard the evidence surrounding this issue, that the Defendant is clearly not liable to the Claimant for the cost of the additional scaffolding in completing the Apartment complex. It was the Defendant's responsibility to provide the scaffolding required by the Claimant as required under Article 10 (7) of the Contract

Agreement. I therefore find that the Defendant is not liable to reimburse the cost of the additional scaffolding of \$345.47 which was rented by the Claimant.

[78] The Defendant Kevin Huggins has counterclaimed for the sum of \$2310.00 for rental of scaffolding for 21 days. I am at a loss to understand the nature of this claim, when no evidence has been led to substantiate this claim, and further the contract with the Claimant was for "Labour only". The provision for scaffolding was the responsibility of the Defendant. Accordingly the counterclaim of the Defendant on this item is dismissed.

[79] **Issue No. 5-** Whether the sum of \$18,000.00, being the costs of twelve vanities and twelve closets is due and owing by the Claimant to the Defendant?

In his testimony, Mr. Kevin Huggins stated that he had hired Mr. Hendrickson of Island Mouldings to do vanities and closets on the 17th February 2012 after he and Curtis Liburd had agreed to that.

He stated further that the agreement with Island Mouldings was outside the agreement with Beyond Homes, and that his agreement with Curtis Liburd was not in writing; it was his word against the Claimant.

Mr. Huggins also stated that at the time he hired Island Mouldings it was not at the stage of construction of the Apartment Complex but he had to give them six months' notice to construct the closets and vanities; however Curtis Liburd had consented to the work being performed by Island Moulding Ltd.

[80] On a perusal of the Contractor Agreement- (Labour only) dated 2nd June 2010 and signed between Mr. Liburd of Beyond Homes Contractor, and Mr. Kevin Huggins owner of the premises, **Article 1 scope of work** clearly states that "The contractor shall **not** furnish any of the materials within or outside the estimate **but** shall perform all of the work exclusive of Kitchen Cabinetry shown or not shown on the drawings."

[81] Further at Article 3 of the said Contract Agreement, it states that the owner shall pay the Contractor for Labour.....subject to additions and **NO** deductions pursuant to authorized change orders.

[82] In my respectful opinion and according to the Contract Agreement, the cupboards and vanities for the Apartment Complex were to be constructed by Beyond Homes Ltd., the Claimants.

[83] I am also of the view that the Defendant has again not impressed me as a witness of truth and that the Claimant has provided the Court with far more credible evidence with what transpired between the Defendant and himself on that issue.

The Defendant Kevin Higgins contracted the services of Island Moulding Ltd. contrary to the Contractor Agreement and he must therefore bear the cost of the vanities and closets in the sum of \$18,000.00.

[84] **Issue No. 6-** Whether the Defendant is entitled to \$4595.00 for re-plastering the walls and were there defects in the building and tiling and if so, should deductions be made for the alleged defects.

The Claimant on this issue contends that the work was carried out in a professional and workmanlike manner and that the building was erected and finished in a merchantable condition and was fit for its intended use.

The Defendant however has counterclaimed for the cost of materials to re-plaster the walls of the buildings as he claims that the walls were “shelly” because dishwashing liquid was used to plaster the walls.

Mr. Huggins further contends that the Claimant is totally responsible for the costs of those materials for re-plastering, although he admits that he has not provided any costs for those materials.

[85] Mr. Huggins also counterclaimed for \$162,970.00 which he stated was also for the replacement of hollow tiles and to make good the defective tiling.

[86] In the Expert report of Mr. Bryan Kennedy which the Court again relies on for guidance in this matter, at paragraph 14:0 **Tiling**, Mr. Bryan states as follows;

“Porcelain tiles were used for tiling the floors throughout the building. The job was generally a good one. About 15% of the floor tiling sounded “hollow”; this happens when the bedding material is not spread sufficiently beneath the tile; about 15% of the tiles are sitting up at the diagonal edges approximately 1/8 in some areas.

According to Mr. Bryan this may be the result of,

- a) Improperly laid tiles...
- b) Pressure being applied to one end of the tile before the thinset dried beneath it.
- c) Warped tiles from the Manufacturer e.g. Chinese retailers usually have one set of goods at very cheap rates and the purchase of these cheaper tiles would translate into more labour going into installation of these tiles which may be warped or cracked.

In relation to **Plastering**, Mr. Bryan stated that the render appeared to be of normal acceptable quality, and about 5% of the plastering sounded hollow, but did not show any sign of cracking.

[87] Mr. Bryan also concluded that the “structure as created and finished is generally merchantable and fit for its intended use as an Apartment type housing unit for University students as it is being used at present, and that the Contractor be immediately paid his full retention except in the following cases in order of importance;

- i. The absence of secondary exits for the four units.

- ii. 15% of the Tile replacements, please note that this is not so much of a functional problem, but more of an aesthetic problem and acceptable standards in places where the offending tiles can be observed.
- iii. 5% of the plastering replacement. This is an item that is not necessarily an observable defect.
 - a) If there is insistence that the tiles appear to be not properly laid then a sample of Tiles in their original state should be inspected for any signs of warping, to ascertain whether the tile problem was with the Manufacturer, if this were the case, then the problem would be the Developer's and not the Contractor's to correct.
 - b) If this were not the case, the contractor should be given the option to correct the issues at his own cost provided that the Issues were raised during the defects liability period.
 - c) If the Developer wants to fix the issues himself, then the contractor must be paid his full retention less 15% of the original cost of laying the tiles plus 15% $\times$ 5600 sq. feet- 840 $\times$ 2 sq. feet=\$1680.00 for labour to cut out the offending tiles plus the cost of replacing approximately 100 sq. feet of plaster at \$7.50 per sq. foot.

[88] Counsel for the Defendant Mrs. Dahlia Joseph-Rowe in her written submissions posited, that the starting point for determining the quality of workmanship and the corresponding duties which are then incumbent on the Claimant must be the standard of care which must be exercised in the circumstances. Counsel cited the case of **Debra Annus vs. Augustin**

Williams⁵ where Georges J stated that the “builder ought to exercise the care and skill of a prudent builder.”

This duty of care has also been discussed in the House of Lords case of **Young and Marten Ltd. Vs Mc Manus Childs Ltd.**⁶ per Lord Upjohn in reference to the case of **Duncan vs. Blundell**⁷;

“Where a person is employed in a work of skill, the employer buys both his Labour and his Judgment. He ought not to undertake the work if it cannot succeed, and he should know whether it will or not; of course it is otherwise if the party employing him chooses to supersede the workman’s Judgment.”

[89] Under Article 7:1 of the Contractor Agreement, it provides as follows:

1. “All work shall be completed in a workmanship like manner
and in compliance with approved drawings.”

Article 7:7 states further;

“The contractor shall not be responsible for theft of materials on the construction site, or loss of materials resulting from Act of God or any other mishaps. This Contract is for Labour and therefore the owners are fully responsible for the purchasing, handling delivery and security of ALL materials.”

[90] The Inclusion of Article 7:1 in the Contract Agreement certainly puts the onus on the Claimant to perform the contract in a workmanlike manner. Equally so, it is incumbent on the Defendant to provide the materials which are fit for the purpose for which they were intended.

⁵ SLUHCV2007/0606

⁶ [1969] 1 A.C 454

⁷ [1820] 3 Stark 6

[91] The witness statement and testimony of Mr. Oscar Liburd, foreman of Beyond Homes is instructive.

At Paragraph 8-17 he states from the outset that when he commenced placing tiles as Mr. Huggins had directed him, he realized that the Tiles were unevenly cut and were not all the same size. As a result he could not get a proper finish to the tiling. Additionally, several of the tiles had manufacturing flaws which caused them to be curved or bumped in the middle.

Mr. Oscar Liburd continues in his evidence to state that Mr. Huggins had instructed him to use the floor tiles on the wall and although he had informed him that these tiles were too heavy to be placed on the wall and could fall off and injure persons on the property, he however demanded that the tiles be placed on the wall.

This evidence was not refuted by the Defendant.

[92] The preponderance of the evidence on this Issue shows that the defects in the tiling could not be attributed to the Claimant, because even after the said defects were identified to Mr. Huggins, he still instructed the Contractor and his Foreman to use the defective tiles.

[93] Further the evidence reveals that the Claimant offered a refund to the Defendant and the option of obtaining another Tiler to complete the work, along with an Engineer. All of these requests were refused by Mr. Huggins as stated in the witness statement of Mr. Curtis Liburd and which was not refuted by the Defendant.

[94] In the circumstances, I have great difficulty in attributing fault to the Claimant for the laying of the tiles in the premises of Kevin Huggins. I am satisfied that the Claimant applied due skill, care, diligence and workmanship of a prudent contractor in the laying of the tiles.

[95] In relation to the **Plastering of the walls**, I am again guided by the report of Mr. Kennedy Bryan. In his report at paragraph 15, he stated;

“The render appeared to be of normal acceptable quality (b) about 5% of the plastering sounded hollow, but did not show any signs of cracking.”

Mr. Bryan in his testimony stated that walls are shelly when the plaster (sand, water and cement) is put on walls to have a smooth finish. Sometimes the plaster does not adhere to the walls, and this would cause a similar sound, that wall and plaster are not continuous.

Mr. Bryan states further that an incorrect bonding can cause shelly walls...., Concrete has a specific bonding agent, and bonding agents come in different forms;

He also testified that jackhammering could cause shelly walls since plastering dries from the outside/in; when looking at the surface of a wall, it may appear dry, but inside may be wet.

He testified further that it depends on temperate conditions and the quantity of water in the mix. In plastering a wall, one would have to give it at least twenty four hours before jackhammering as the bonding agent can deteriorate.

[96] Mr. Curtis Liburd in his witness statement and testimony contended that he was aware that Berly Walwyn was contracted as an Independent contractor to complete the plumbing and electrical work on the building. He stated further that most of the work by Mr. Walwyn was completed on evenings after the workers of the Claimant had left.

Mr. Liburd also submitted that he had discovered certain defects with electrical work including... cutting and jackhammering of walls after plastering was complete.

[97] Mr. Berly Walwyn in his witness statement at paragraphs 4,5,6,7 did not deny that he used a jackhammer to break the wall but he claimed that every time he used the jackhammer the plaster was cured, as he did so a few days after the wall was plastered. He also stated that if he had to break a wall he hired someone to re-plaster the portion of the wall he broke.

[98] From the evidence adduced, it appears that many persons other than Curtis Liburd and his workers broke and plastered walls and that the subcontractors also had cause to jackhammer, break and re-plaster the walls. Therefore I am of the view that liability cannot be attributed to the Claimant for the walls that appeared to be shelly since there was also jackhammering of the walls by Berly Walwayn the subcontractor and other persons who worked on the premises. The Expert report of Mr. Bryan refers to a 5% of the plastering sounding hollow, but did not show any signs of cracking. Mr. Bryan also refuted the claim that dishwashing liquid was the cause of the walls being shelly. He said that the dishwashing liquid was a trade secret which was sometimes used in construction to give the mortar a better adherence to the wall. It also did not cause shelliness.

[99] In the premises and based on the evidence and in particular the Expert report of Mr. Bryan the contents of which I accept, I am of the opinion that the Claimant would only be liable to replace 5% of the plastering where it appeared to be hollow. In essence the contractor should replace 100 sq. feet of plaster at \$7.50- per sq. foot in accordance with the Expert report of Mr. Bryan.

[100] **Issue No. 8** – Whether the Claimant is liable to pay liquidated damages, penalties and compensation for late completion of the project?

Article 2 of the Contract Agreement provided that “The work to be performed under this contract shall be commenced on the day indicated in the “Letter to commence” and shall be substantially completed on or before 32 weeks from the said “letter to commence” barring Act of God, delay of materials and any other circumstances beyond the control of the Contractor; **ALL** unforeseen circumstances will be logged and reported to the owner.”

Article 5 states that if the project is not completed by the stipulated date with the addition of days due to circumstances as per **Article 2** of this Agreement, the contractor shall pay the owner the sum of EC\$1000.00 per week or part thereof.

[101] The Defendant has counterclaimed for the sum of \$35,000.00 for Liquidated damages for late delivery of the building, that is that the Contractor was late in delivery by 35 weeks. The Contractor Agreement already cited above.

[102] According to the learned authors of **Halsbury Laws England Vol. 4 (2)** at paragraph 364, "When time is not of the essence of the contract, but a time for completion is specified, the Employer will be entitled to Damages upon the Contractor's default; where there is no completion date specified the Contractor must complete the work within a reasonable time. In either of the above situations, or when time has ceased to be of the essence by waiver or agreement, then, a reasonable time for performance having elapsed, the employer can serve a Notice requiring completion by a certain date, and dismiss the Contractor on a failure to complete by the fixed date.

If by reason of the breach of contract or by reason of extra work ordered by him, the Employer prevents the Contractor from completing the work by the date fixed or materially abridges the period for execution of works; then unless the contract clearly provides to the contrary, the employer can only insist on completion within a reasonable time.

The onus of proof that delay has been caused by some act or default of the Employer is on the contractor.

[103] At paragraph 368 of **Halsbury Laws Vol. 4 (2)** it states;

"Time is said to be at large in situations where a building contractor is prevented from completing by the time specified in the contract by an act of the Employer or an act for

which the Employer is responsible under the contract, such as a breach of contract or ordering additional or varied work.

In such situations as those the Contractor's obligation to complete by the contract date or within the contract period or extended date or period is discharged, but nevertheless an obligation to complete within a reasonable time or within a reasonable period remains.

Where the right to recover liquidated damages is dependent upon a failure to complete by the contract completion date or extended date, that right will fall, with the discharge of the contractor's obligation so to do."

See: Peak Construction (Liverpool) Ltd. Vs Mc Kinney Foundation Ltd. ⁸

- [104] At paragraph 367, it states that "generally contracts for construction works usually provide that in the event of the contractor's failure to complete by the date specified for completion, the contractor is to pay a specified sum, or that the employer may deduct a specified sum from money due to the Contractor.

There must be a definite date from which Liquidated damages are to run; if there is no specified date or if the date for completion is invalidated by an Instruction to the Contractor to carry out additional work, the Employer's right to claim or deduct liquidated damages will be lost."

See: Dodd vs Churton⁹

- [105] The Claimant contends that it does not owe the Defendant the sum of \$35,000.00 as a claim for Liquidated damages as the Liquidated damages amount was already deducted from the final invoice given to the Defendant (Bundle 1 page 21).

⁸ [1970] 69LGR 11

⁹ [1897] 1QB 562

- The Claimant further contends that it was unable to complete the project in the 32 weeks timeline stated in the contract for the reasons outlined in paragraph 24 of the Claimant's skeleton arguments filed on the 14th November 2014.
- [106] The Claimant also contends that since "time was not of the essence" the Defendant can only expect completion within a reasonable time. The Claimant submits that the 13th March 2011 was a reasonable time for completion of the project, although the estimated date of completion was January 12th 2011.
- [107] The Defendant on the other hand in his witness statement claims that he did not cause any delays and that he provided all the materials and equipment for the project in a timely manner, and it was the poor workmanship of the Claimant that caused the delays in completion of the project. The Defendant further contends that the only additional work which he instructed and consented to was the addition of a Laundry and pump room which he paid the Claimant for separately. He was therefore not responsible for any other alterations or use of materials that were bad.
- [108] The Defendant contends that on the 31st March, he submitted a Punch List to FINCO and the Claimant, indicating that certain items were incomplete or not done, however he did not indicate that those items were to be rectified by 4th April 2011. He states further that on the cover note to the Financial Institution he requested that arrangements be made for the Claimant to start the work no later than 4th April 2011 and that the building be completed satisfactorily by 15th April 2011.
- [109] On the totality of the evidence presented, I am not satisfied that Time was of the Essence in this contract and I am of the opinion that the Law as described in Paragraph 368 of the **Halsbury Laws** is applicable in this situation.

In my respectful view, the estimated time for completion of the building complex by the 20th January 2011 was no more than a forecast in the circumstances.

The Defendant seeks Liquidated damages in the sum of \$35,000.00 and I find this to be unduly excessive, and I would allow a period of one month as compensation for the delay in delivery of the Apartment complex. I am also of the view that delays are also attributable to the Defendant in requesting changes and fixes which were not contemplated under the Contract and Architectural drawings.

[110] I would accordingly allow 4 weeks at \$1000.00 per week as penalty fees for the delay in completion of the Apartment complex.

I accept the evidence of the Claimant that the project was substantially completed and delivered on March 13th 2011 due to variations, delays, untimely payments to the Claimant and late delivery of materials to the work site.

[111] In my opinion the Claimant has contended and fully demonstrated that it was the Defendant who was responsible for the untimely completion of the Apartment complex in accordance with the terms of the contract.

[112] As a general rule the measure of Damages, according to the authors of **McGregor on Damages 17th Edition at pages 675-676** is the cost to the owner of completing the building in a reasonable manner less the contract price.

In the case of **East Ham Corporation vs. Bernard Sunley**¹⁰ the House of Lords accepted and applied as the normal measure of Damages the cost of reinstatement, this cost being taken as at the time the defects were discovered.

[113] In the case at Bar, I am of the view that that the cost of Damages is to include the cost of necessary remedial work and satisfactory completion of the Building project.

¹⁰ [1966] A.C 406

I have already awarded the sum of \$4000.00 for the delay in completion of the project.

[114] In relation to the Defendant's counterclaim under **Particulars of Loss and Damage**

Item (1) cost to remove and replace tiles improperly installed \$162,970.00.

I have not been presented by the Defendant with any estimate and quotation from any builder or tiler to substantiate that claim, Mr. Warren Thompson the Defendant's witness admitted that he did not obtain estimates or quotations in his cost Analysis and recommendations to replace 100% of the Tiles at the Apartment complex.

As I have already stated, I accept the recommendation of Mr. Kennedy Bryan that 15% of the tiles have to be replaced where they were found to be sitting up at the diagonal edges approximately 1/8 "in some areas"

[115] I have already dealt with the other items claimed by the Defendant in the Judgment.

There is not sufficient cogent compelling and satisfactory evidence for me to reliably award the Defendant some of his claims under his counterclaim, and therefore Items (a) (b) (c) (d) are dismissed.

With regard to Item (e) I award the Defendant a sum of \$4000.00 for late delivery of the Apartment building for the reasons I have outlined, and the sum of \$9101.90 for unapproved changes and fixes.

[116] In the circumstances Judgment is awarded to the Claimant;

a. in the sum of \$86,162.53 being the balance of monies due under the Contractor Agreement plus interest accruing on outstanding amounts from the date of the claim to date of payment minus the sums awarded to the Defendant.

c. the sum of \$1384.55 by the balance outstanding for items purchased on credit from the Claimant.

d. the sum of \$345.00 being the cost of rental of scaffolding is disallowed.

[117] The Defendant will also pay the Claimant's prescribed costs in accordance with **CPR 2000 65.5 (3).**

[118] I am grateful to Counsel on both sides for their spirited and erudite submissions, and for their Industry and Research in this matter.

Lorraine Williams
High Court Judge.