

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

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

CLAIM NO. BVIHCV 2011/0159

BETWEEN:

OIL NUT BAY INC.

First Claimant

OIL NUT BAY PROPERTY RENTALS LIMITED

Second Claimant

AND

YATES ASSOCIATES CONSTRUCTION COMPANY LTD

First Defendant

CHRISTINA YATES

Second Defendant

Appearances:

Mr. Gerard Farara Q.C. with him Mr. Menelick Miller for the First and Second Claimants

Mr. Terrance Neale for the First and Second Defendants

2013: July 23rd – 26th
2014 May 26th -28th
2014: December 15th

JUDGMENT

- [1] **BYER J.:** This dispute arose out of a building contract between the First Claimant and the Second Defendant for the construction of a home to be known as Oil Nut Bay Beach Villa Lot 3. The construction of the said villa did not go as planned. The First Claimant now claims sums of money from the First Defendant under the said contract. The First Defendant claims for certain sums of money for extras and variations as against the First Claimant. The Second Claimant claims for rental sums they argue have been lost as a result of the construction not having been completed as planned and the First Defendant claims against the Second Defendant damages for defamation for statements allegedly made by the Second Defendant.

Factual Background

- [2] By Letter of Intent dated the 22nd March 2010 ("the Agreement") as between the First Claimant and the First Defendant, the First Defendant agreed to construct a home on Oil Nut Bay known as Lot 3 ("BV3").
- [3] The only parties to the said agreement were the First Claimant who signed by its principal David Johnson and the First Defendant who signed by its principal Christina Yates.
- [4] Oil Nut Bay ("ONB") was not the owner of the said BV3 but was acting on behalf of its owner, one Mr. Roskam who we are told nothing about during the entire proceedings.
- [5] By paragraph 2 of the said Agreement the First named Defendant was solely responsible as follows:

"Construction Costs. Yates shall be solely responsible for all construction costs, including (i) hard construction costs, such as payment for all labour, materials, equipment, tools, heat, utilities and transportation, not for workers ONB ferry service for workers, necessary for the completion of the Home in a good workmanlike manner; (ii) exterior improvements including swimming pool, pond, driveways ~~beccc ball court~~ and walkways; and (iii)

all soft costs incurred in connection with the construction of the Home, including, without limitation, insurance premiums, survey costs, license, permit and all other fees should have been paid already and costs payable to any governmental authority having jurisdiction, for all the construction of the Home."¹

- [6] By paragraph 3 it stated that the total cost of the home including all hard and soft costs were as follows:

"Total Home Cost. The total cost of the Home, including hard and soft costs and all materials, fixtures and finishes in the Home, is Two Million Six Hundred Fifty Thousand Dollars and 00/100 U.S. Dollars (\$2,650.00 USD) (the "Total Home Cost"). ONB shall pay to Yates the Total Home Cost in periodic installments as construction progresses."

- [7] Paragraph 5 of the Agreement provided for

"Changes. ONB shall have the right to request changes to the plans and specifications. Changes shall be stated in a written change order signed by ONB and Yates. The change order shall specify a detailed description of the change and the cost or credit of the change. For changes requested by ONB after the plans and specifications have been approved by the ultimate owner of the Home, ONB shall pay to Yates the cost of the change plus ten percent (10%) (15%)².

- [8] The First Defendant also agreed to complete construction of BV3 on or before 1st March 2011, and warranted that the work would be performed in a good workman like manner and that *"all allowances and specifications provided by Yates will be adequate to complete all aspects of the Home"*³.

- [9] Time however was not made of the essence specifically in the Agreement and there were no penalties for failing to meet the estimated date of completion.

- [10] The parties also agreed to make progress payments of \$200,000.00 per month towards the total home costs.

¹ Reference to the hand written amendments to the Agreement

² Reference to the handwritten amendments to the Agreement

³ Reference paragraph 6 of the Agreement

- [11] The construction commenced in March 2010 and a Certificate of Occupancy was issued by the BVI Building Authority on 8th July 2011 some four (4) months past the given date of completion.
- [12] During the currency of the construction, the First Defendant at the behest of the owner made several changes to the plans and specifications which as claimed by the First Defendant, alternatively either increased or decreased construction costs.
- [13] Before the issuance of the Certificate of Occupancy BV3 being substantially complete, the First Claimant and the First Defendant prepared a "punch list" of all the items to be completed to which both parties agreed and work on the same was commenced by the First Defendant.
- [14] Subsequent to the Certificate of Occupancy and by all accounts, while the First Defendant was working on the agreed "punch list", an inspection report of BV3 was commissioned by the First Claimant and prepared itemizing some three hundred plus visible "defects" of BV3.
- [15] The First Defendant was subsequently supplied with this report and commenced working on those items as identified remaining on the premises until November 2011.
- [16] In November 2011, after the First Defendant had indicated that they had completed all the items they classified were within their control to complete, the First Claimant commissioned a re-inspection of BV3. Upon this re-inspection, it was indicated that there still remained one hundred fifty plus items outstanding that required either completion or remedial work. The First Defendant was never given a copy of this re-inspection report and has claimed that they saw it for the first time upon the filing of the claim as it stands before the Court, in December 2011.

[17] Additionally, November 2011, saw the First Defendant submitting to the First Claimant an invoice based on what they perceived as the cost of construction of BV3 "as built". This is the invoice that forms the basis of the counterclaim in this claim.

[18] The First Claimant disputed the sums as claimed in the invoice and filed a claim seeking the following prayers:

A. As against the First Defendant:

1. The sum of \$191,227.08 USD as the cost of remedying each item contained in the Re-Inspection Report.
2. The sum of \$105,000.00 USD in respect of the transportation costs incurred by the First Claimant from and after the Completion Date to transport the First Defendant's employees and/or subcontractors to the Residence.
3. The sum of \$80,134.00 USD as the cost of repairing defective work to the pool and replacing the pool and koi pond pumps at the Residence.
4. The sum of \$122,169.69 USD for contract credits owed to the First Claimant under the Agreement.
5. The sum of \$257,267.44 USD for sums paid by the First Claimant for materials and supplies that were to be paid by the First Defendant under the Agreement.
6. Damages for breach of contract.

B. As against the Second Defendant

1. Damages for defamation and injury to business reputation.

C. As against the Defendants:

1. Costs
2. Further or other relief as the court deems just.

THE SECOND CLAIMANT CLAIMS against the First Defendant:

1. The sum of \$267,260.00 USD for lost rental income as a result of First Defendant failing to complete the Residence by the Completion Date.
2. Damages
3. Costs
4. Further or other relief as the court deems just.

[19] In response the First Defendant filed a defence refuting all the prayers and filed a counterclaim in the following terms:

1. Payment by the First Claimant to the First Defendant of the sum \$1,130,197.04 in respect of works carried out under the Agreement as per the November 18, 2011 invoice after making allowance for the matters [at paragraphs 56-57 in the defence]
2. Alternatively payment by the First Claimant on a quantum meruit for work carried out on the Residence at the First Claimant's request and for which the First Claimant has taken the benefit.
3. Alternatively damages against the First Claimant for breach of contract.
4. Interest at such rate and for such period that the court deems just.
5. Costs
6. Further or other relief.

THE EVIDENCE

[20] The principal of the First Claimant Mr. David Johnson testified and the First Claimant called five other witnesses to give evidence. These were Brendan O'Reilly, the First Claimant's site superintendent, Terri Nelson, the First Claimant's Chief Financial Officer and three others David Rosa who prepared the Inspection Report, Stephen Sinclair who prepared an agreed expert report on the swimming pool and Koi pond and Craig Noblett of EMCS who prepared the costing for the items noted in the Inspection Report of Mr. Rosa.

- [21] Mr. Rosa and Mr. Noblett were objected to by Counsel for the Defendants as being experts, on the basis that they were not engaged as experts at the time of the creation of their respective reports.
- [22] The Court allowed their evidence to be led but indicated at the time of that evidence that its weight will be duly assessed and I stated that I will make a finding in due course on that very issue.
- [23] The First Defendant gave evidence by its principal Christina Yates and the Project Supervisor for the First Defendant Michael McDonald.
- [24] The Claimant's case by Mr. David Johnson essentially was that they and the First Defendant had entered into an Agreement for the construction of BV3 which constituted a fixed price contract. That BV3 was to be built for the sum of \$2,650,000.00 USD and that the First Defendant was responsible for acquiring and purchasing all materials and supplying all the labour for the project.
- [25] Mr. Johnson insisted to this Court that this was the entirety of the contract.
- [26] He also told this Court that there was a provision for variations to be made where changes were required but he told this Court that these changes had to be authorized by his company not the owner who was not a party to the contract.
- [27] This witness further sought to emphasize that at no time did he or anyone in his company sanction any variations to the contract and certainly there were no written or signed change orders for any variations. He said at no time did the First Defendant by Christina Yates produce any document indicating changes and costs for those changes until the produced invoice in November 2011.
- [28] Further, Mr. Johnson told this court that the First Defendant had breached the Agreement having failed to produce the said BV3 on the date stated in the

contract and when it was finally handed over, it had so many defects that the First Defendant had also breached the Agreement in failing to adhere to good workman like practices for which they must now be liable.

[29] Mr. Johnson also indicated that if however the contract could not be considered as a fixed price contract, as they submit, then the First Claimant was entitled to any decrease in construction costs that the Defendant was able to effect.

[30] This witness also informed this Court that the First Defendant was liable for the transportation costs of the workers to come to the site after March 2011 date had not been met even though he grudgingly admitted that this fact had never been conveyed to the Defendant.

[31] Then finally this witness told the court that he had been defamed by comments made by the Second Defendant to a prospective buyer and in the press for which he was entitled to damages.

[32] The evidence of Brendan O'Reilly spoke to the creation of the "punch lists" itemizing items that remained incomplete or required remedial works in BV3 just around the time of the issuance of the Certificate of Occupancy. While Terri Nelson the First Claimant's CFO, who was not employed by the First Claimant at the time that the Agreement came into being or during its currency, came to give evidence to substantiate the figures as claimed.

[33] The First Claimant's witnesses were then followed by Christina Yates on behalf of the First Defendant and in her personal capacity as Second named Defendant.

[34] Ms. Yates told this court that it has never the intention of the parties to make the Agreement a fixed price contract.

- [35] She told this court to have agreed to do so, would have meant she has operating at a loss especially when she did not have the full specifications at the time that the Agreement was negotiated. She told this Court that the price that was quoted in the Agreement was therefore the base price and would have made provision for allowances to produce ultimately an "as built" cost.
- [36] She denied that the price had been given in the hope that she would become the builder of choice for the entire development but did admit then when her figures were allegedly provided to another contractor to enable them to underbid her, she said she felt as if she had been "**had**".
- [37] Ms. Yates also told this Court that she believed that all the changes given to her by the owner's agent were in fact sanctioned by the First Claimant as they also had a representative visit the site and over see the work and never sought to stop her.
- [38] She did admit that she had been asked periodically for the costings of any variations but she told this court they were never prepared as she just never had the time to do so.
- [39] She said she was aware that at time of the Certificate of Occupancy that there were items to be completed and she worked with the agreed "punch list" established by herself and Mr. O'Reilly but she certainly did not consider the items stated in the Inspection Report in August 2011 as defects as several of the items stated there were not provided for by the plans and specifications from which she worked.
- [40] She admitted that when she left BV3 in November 2011 that there were some items left undone but that was due to the fact that those items were really owner supplied related and could not be completed until the materials were delivered. She was therefore always willing and able to complete the items.

- [41] Ms. Yates told this court that she had authorized the First Claimant to deduct \$40,000.00 from her progress payments for items she said were easier for the First Claimant to order. But she never authorized deductions in the sums as claimed although she did later admit that there was in excess of \$200,000.00 worth of materials that had been paid for by the First Claimant for which she had been ultimately responsible.
- [42] Ms. Yates therefore stated that she was entitled to be paid for the extra work or variations that resulted in an increase in the overall cost of BV3 together with all outstanding sums due under the Agreement of the original \$2.65 million.
- [43] Ms. Yates also clearly stated that when she made the comment to the prospective buyer it has meant as a joke and indeed was taken as one and further at the time she told the press that the First Claimant owed her, they did, as she had already produced her "final" invoice, which has not been paid and her comments were by no means meant to defame any one.
- [44] Michael McDonald, the First Defendant's Project Supervisor, simply came to give an indication of the fact that there were "punch list" items being worked on up until they left in November 2011 and that they only left to await arrival of the materials.

The Experts

- [45] In this trial, the First Claimant sought to rely on three individuals who they touted as experts or having prepared a report.
- [46] Two of those were objected to as experts by the Defence.
- [47] In those two instances, the Court allowed the evidence but indicated the objections would be seen in relation to the weight to be ascribed to what was said.

[48] The First of these individuals was David Rosa who produced the DSR Inspection Report in August 2011 identifying what he said were 336 defects in BV3 and the Re-Inspection Report in November 2011 with 154 defects.

[49] Mr. Rosa, as it came out in evidence, was in fact hired by the Claimant before the matter became litigious. He accepted that he had not been instructed about the procedure necessary to become an expert witness.⁴ He also admitted that his main field of specialty was chemical engineering but he has now branched into construction. He admitted it was after he had produced the reports that he was then given the instructions for experts (as required by the Rules of Court) but he was unable to produce the nature or text of the instructions first issued to him prior to the production of the reports. He admitted he was not a qualified electrical engineer or a qualified electrician but that he felt competent to comment and disparage the final electrical inspection certificate issued by the relevant local authority. He admitted that he was unable to verify certain items he had on his re-inspection report but when he had stated that they were incomplete it was more that it was a *likelihood* of them being incomplete.

[50] Throughout the cross examination of this witness it was clear that the qualification of this witness to comment on certain items he identified as "defects" was lacking and the Court on a balance of probabilities did not believe that he was in fact independent or qualified to comment on the majority of the works undertaken at BV3.

[51] The Court has therefore ascribed little weight to the evidence of Mr. Rosa.

[52] The other disputed individual was Mr. Craig Noblett.

⁴ Foot note reference page 97 Transcript 26/5/14

- [53] Mr. Noblett came to this Court having prepared a document purporting to be costings associated with the inspection and re-inspection reports as prepared by Mr. Rosa.
- [54] Mr. Noblett was objected to by the Defence on the basis that both his former company and his present company were in fact employed by the First Claimant and met none of the standards as required for an expert who gives evidence before the Court.
- [55] The Court, like Mr. Rosa, allowed Mr. Noblett to give his evidence in a hope that these objections would become of little consequence.
- [56] However, upon cross examination it was very clear to this Court that Mr. Noblett's evidence was solely based on the Reports of Mr. Rosa. He admitted he had not visited the site, he had not actually seen the "defects" referred to and produced the exact same costings with his new company as he had done with his old.
- [57] This Court is therefore not prepared to place any weight on these figures submitted by this witness and finds on a balance of probabilities that there is no proper basis given for the figures ascribed.
- [58] The only individual accepted as an expert was Mr. Stephen Sinclair who gave evidence to the issues seen with the swimming pool and the koi pond.
- [59] Mr. Sinclair admitted he was unable to directly observe many of the defects himself and sought to rely on what was seen by Mr. Rosa and from other reports.
- [60] He admitted that items he identified personally having seen them, may in fact not have been defects but as a result of specific requirements contained in the specifications which he could not assess himself.

[61] He also admitted that he had not seen any structural deficiencies in the koi pond and the pool equipment had been installed according to accepted standards.

[62] On balance of probabilities this Court finds that this witness was forthright in making his admissions where his personal knowledge was in fact deficient. This Court therefore accepts this report in so far as personal knowledge was utilized but disregards the portions in which he sought to rely on the evidence and observations of others.

Issues

[63] Both Counsels identified a number of issues for determination and by and large although stated differently many of them cover the same subject matter.

[64] The Court has in an attempt to assimilate them all has encapsulated them as follows:

- (i) What was the nature of the agreement between the parties – was the Agreement a fixed price contract or a Bill of quantities contract?;
- (ii) Did the Agreement make provision for changes or variations to the Agreement?;
- (iii) Did the First Defendant carry out variations or additional work on BV3 and is the First Defendant entitled to seek compensation for that work including the issue as to whether the First Claimant is estopped from denying such liability?;
- (iv) Is the First Claimant entitled to claim for contract credits in respect of work undertaken by the First Claimant that was the responsibility of the First Defendant or where the construction costs to the First Defendant were cheaper than stated?;

- (v) Did the First Defendant breach the agreement by failing to perform work in a good workman-like manner and as such is the First Defendant liable for any remedial costs including any remedial work to the swimming pool and koi pond?;
- (vi) Is the First Defendant liable to pay the cost of materials paid for directly by the First Claimant?;
- (vii) Is the First Claimant in breach of its obligations under Clause 9 of the Agreement to allow the First Defendant an opportunity to rectify any repairs for which they were responsible?;
- (viii) Was the First Defendant in breach of the Agreement in failing to provide BV3 on the date stipulated in the Agreement and if so are they liable for any loss of rental income?;
- (ix) Is the First Defendant liable to pay the sum for transportation costs incurred after the stated completion date?;
- (x) Did the letter to the First Defendant's employees and statements in the media amount to defamation by the Second Defendant of the First Claimant resulting in injury to the First Claimant's business reputation?

1. What was the nature of the Agreement between the parties – was it a fixed price contract or a bill of quantities contract?

[65] Both parties in the case at Bar agreed that the terms of the Agreement as between the First Claimant and the First Defendant were contained in the Letter of Intent dated 22nd March 2010.

[66] As this will be referred to continuously throughout this judgment it may be useful at this point to set out the terms of that letter in its totality here:

"Chris Yates
Yates Associates Construction Company Ltd.
P.O. Box 63
Virgin Gorda
British Virgin Islands

Re: Letter of Intent Regarding Oil Nut Bay Beach Villa 3

Dear Chris:

This letter of intent is entered between Oil Nut Bay Inc., a company incorporated under the laws of the British Virgin Islands, with offices at 125 Main Street, Road Town, Tortola British Virgin Islands ("ONB") and Yates Associates Construction Company Ltd., a company incorporated under the laws of the British Virgin Islands, the address of which is P.O. Box 63, Virgin Gorda, British Virgin Islands ("Yates") to set forth the proposed terms and conditions of a Construction Agreement that will be structured as set forth below.

1. **Purpose.** ONB desires to hire Yates to construct a home (the "Home") on the parcel of unimproved land known as Oil Nut Bay Beach Villa Lot 3 and shown on the attached Exhibit A ("the Lot"). This letter of intent is intended to set forth the parties respective obligations and understandings to date regarding the construction of the Home.
2. **Construction Costs.** Yates shall be solely responsible for all construction costs, including (i) hard construction costs, such as payment for all labour, materials, equipment, tools, heat, utilities and transportation ~~not for workers ONB ferry service for workers,~~ necessary for the completion of the Home in a good workmanlike manner; (ii) exterior improvements including swimming pool, pond, driveways ~~beeee ball-court~~ and walkways; and (iii) all soft costs incurred in connection with the construction of the Home, including, without limitation, insurance premiums, survey costs, license, permit and all other fees ~~should have been paid already~~ and costs payable to any governmental authority having jurisdiction, for all the construction of the Home.⁵
3. **Total Home Cost.** The total cost of the Home, including hard and soft costs and all materials, fixtures and finishes in the Home, is Two Million Six Hundred Fifty Thousand Dollars and 00/100 U.S. Dollars (\$2,650.00 USD) (the "Total Home Cost"). ONB shall pay to Yates the Total Home Cost in periodic installments as construction progresses."

⁵ Amendments made in hand by the parties to the contract

4. **Home Design.** The Home shall be constructed in accordance with the plans, specifications and elevation attached hereto as Exhibit B (all of which are subject to final approval by the ultimate owner of the Home) and shall comply with all restrictions and architectural controls adopted or as modified, for the Oil Nut Bay development. The cost of obtaining the initial plans and permits shall be borne by ONB⁶.
5. **Changes.** ONB shall have the right to request changes to the plans and specifications. Changes shall be stated in a written change order signed by ONB and Yates. The change order shall specify a detailed description of the change and the cost or credit of the change. For changes requested by ONB after the plans and specifications have been approved by the ultimate owner of the Home, ONB shall pay to Yates the cost of the change plus ten percent (10%).^{15%}⁷
6. **Timing.** Yates shall immediately commence the process for the construction of the Home and shall complete the construction on or before March 1, 2011. ONB shall grant Yates, its agents, employees, and subcontractors access to the Lot at all reasonable times. Yates shall retain control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the construction of the Home but shall provide ONB written ~~weekly~~ monthly updates on the progress. Yates shall enforce strict discipline and good order among its employees, contractors, subcontractors, agents and other persons carrying out the construction of Home. Yates warrants to ONB that materials and equipment furnished and used in constructing the Home shall be of good quality as agreed upon by the parties, that the work will be performed in a good workmanlike manner, that all allowances and specifications provided by Yates will be adequate to complete all aspects of the Home and that best construction and management practices will be administered. Yates shall refrain from creating on the Home any easements, liens, charges, encumbrances, or any other interests without ONB's express written consent.⁸
7. **Review.** During the construction of the Home, ONB, its authorized representatives and agents, shall have the right to inspect the progress and to offer to Yates its suggestions and recommendations.
8. **Indemnification and Insurance.** Yates shall indemnify, defend and hold harmless ONB, its shareholders, directors, officers, employees, agents, successors and assigns from any and all claims, actions, damages, liabilities and expenses, including reasonable attorney's fees, whether based on contract, tort, negligence or otherwise, arising from any act or omission of Yates, its agents, representatives, employees, contractors, or subcontractors.

⁶ Amendments made in hand by the parties to the contract

⁷ Amendments made in hand by the parties to the Agreement

⁸ Amendments made in hand by the parties to the Agreement

At all times during construction of the Home, Yates shall procure or cause to be procured, and keep in full force and effect, public liability and property damage insurance ~~contractors all risks insurance~~ on an occurrence basis for the benefit of Yates and ONB in the sum of at least Three Million and 00/100 U.S. Dollars (\$3,000,000.00 USD) combined single limit coverage. Prior to commencing construction of the Home and extending until construction is completed, Yates shall carry worker's compensation insurance ~~social security~~ and shall indemnify ONB from any and all claims arising from injuries incurred by Yates, its agents, representatives, employees, contractors, or subcontractors. All insurance described hereunder shall name ONB as additional insured and shall provide that such policy shall not be amended or canceled without thirty (30) days prior notice to ONB. Yates shall deliver evidence of the required insurance to ONB on demand.⁹

9. **Warranty.** Yates warrants that the Home will be free from defects in material and workmanship for one year from the date the Home is substantially complete and ready for occupancy. Yates shall repair or replace any defective work, at Yates's option. Yates shall transfer to the ultimate owner of the Home all warranties given by the manufactures of any appliances, equipment or other complete products that are installed in the Home by Yates or any other party."
10. **Confidentiality.** The parties agree that all of the information they exchange with each other concerning the transaction described herein, their methods of doing business and operations, and any other matters as part of negotiating this letter of intent and the Construction Agreement shall be kept confidential and not used for any other purpose or given to any other parties or individuals except those related to ONB, Yates and their associated consultants and representatives as necessary for the proposed transaction. If the Construction Agreement is terminated, each party shall return to the other all originals and any copies they have made of the written information or disks provided by the other party, and the obligation not to disclose any information received under this letter of intent or the Construction Agreement shall survive the termination of this letter of intent or the Construction Agreement. The parties agree that the information they are exchanging is and shall be treated as trade secrets and that either party may enforce the confidentiality provisions of this letter before any court of competent jurisdiction and obtain specific performance or injunctive and other appropriate equitable relief to enforce the provisions of this section

{Signed by David Johnson as Chairman and Christina Yates for Yates Associates Construction Company Ltd}

It is therefore clear that the parties made an agreement in relation to purpose, construction costs, total home cost, home design, changes, timing, review, identification and insurance, warranty and confidentiality.

⁹ Amendments made in hand by the parties to the Agreement

- [67] Thus, it was clear that the parties had negotiated all relevant areas in relation to the construction of BV3. Where the parties diverge is where they place different interpretations on what the negotiated terms of this Agreement represented in the final analysis.
- [68] Counsel for the Claimant has submitted and indeed the entire Claimant's case has been, that what was negotiated was a fixed price contract. That is, that the First Defendant agreed to build BV3 for a flat or fixed sum of money which was \$2,650,000.00 and that sum was to be cover all labour and material costs associated with the completion of the construction.
- [69] The Claimant maintains that the First Defendant had in its possession all plans, specifications and estimates at the time of the signing of the Agreement and as such had sufficient information upon which to formulate the sum attributed to construction.
- [70] The Claimant submitted that there were no other documents other than the contract that could be referable to the agreement as it was reached between the parties. The document which appeared to be an estimate and upon which the First Defendant maintained was evidence that there were in fact produced allowances, formed no part of the Agreement there being no mention therein as an appendix or annexed thereto.
- [71] They sought to advance before this Court that merely saying that the document formed a part of the Agreement was not enough on the part of the First Defendant and it must be that the whole of the Agreement was what the parties reduced into writing to bind them.
- [72] On this point Counsel sought to rely on the authority contained in the text The Law of Contract where it is states quite succinctly that "*when a contract is reduced*

to writing there is a presumption that the writing was intended to include all the terms of the contract but this presumption is rebuttable.¹⁰

- [73] The Claimant argued that having relied on the terms of the Agreement, it was for the First Defendant to rebut the presumption that this was not the entire contract. They submitted that this could only have been achieved by the evidence of Christina Yates herself as she was the sole person who said that the Agreement was a mere estimate of costs. However, they stated that her evidence was anything but credible in this regard when it was apparent that she had failed to make any amendment to the Agreement to reflect this fact especially when it was clear that she had amended other parts. They further submitted that it was clear from Christina Yates own testimony, that it was apparent she knew she would have to absorb any overages and that further there was no mention of the estimate document in the contract nor was it incorporated into the Agreement by signature or otherwise.
- [74] The contention of the First Claimant therefore was that it was abundantly clear that the Agreement constituted the entire contract. It was a fixed price contract and the First Defendant was liable for all costs associated with the construction whether or not costs had increased or decreased from the quoted sum.
- [75] The First Defendant from their case has vehemently denied this interpretation of the contract.
- [76] The First Defendant submitted to this court that the Agreement was never intended to be a fixed price contract but a bill of quantities contract or an **"as built"** contract.

¹⁰ **The Law of Contract** 12th ed at page 214

- [77] The First Defendant submitted that even though the Agreement made reference to the First Defendant being responsible for all construction costs and that the total home cost was to be \$2,650,000.00 it was also stated that BV3 would be built according to plans, specifications and elevations as attached to the Agreement which were never attached, therefore the Agreement itself in its wording was faulty.
- [78] They argued that the bill of quantities or estimates which the First Claimant submitted were not part of the Agreement, were in fact part and parcel of the Agreement and made allowances for several different aspects of the construction.
- [79] The First Defendant further submitted that it was always clear, from the evidence of Christina Yates, that it was recognized that there may have been changes undertaken as the building was constructed and that there would therefore have had to have been a set of rates and allowances which could be utilized to price any such changes.
- [80] The very fact that there was a claim by the First Claimant for contract credits also clearly meant that they too recognized the First Defendant's contention that it was not a fixed price contract.
- [81] The First Defendant submitted it was therefore evident that the First Claimant could not simply rely on the wording of the contract but that the contract had to be construed as to make business sense in all the circumstances.
- [82] Thus, for the First Defendant the cumulative effect of 1) the bill of quantities forming part of the Agreement, 2) the plans, specifications and elevations being incomplete 3) credit being given to the First Claimant in the final invoice for items built more cheaply than envisioned by the Bill of quantities 4) the claim for contract credits by the fact First Claimant 5) the illogical effect of boxing a contractor into a price regardless of cost of fitting and fixtures and 6) the documentary evidence

that BV3 was to be built on a bill of quantities basis, all meant that it was clear that the Agreement could not be considered a fixed price contract.

Court's consideration and analysis

[83] Fixed price contracts have been defined as "***contracts where a fixed price or prices are quoted for carrying out and completing the work described in the drawing and specification***".¹¹

[84] In the agreement entered into by these parties clause 2 is clear "***Yates shall be solely responsible for all construction costs including (i) hard construction costs... (ii) extension improvements... and (iii) soft costs***" and clause 3 "***the total cost of the Home including hard and soft costs and all materials fixtures and finishes in the home is Two million six hundred and Fifty thousand dollars US Dollars...***"

[85] In interpreting any Agreement or contract that purports to bind two parties, this Court is in agreement with Counsel for the Defendant's submission that all the surrounding circumstances should be considered. However even in doing so it must be borne in mind, that although it is a rebuttable presumption, it is a presumption nevertheless, that what was reduced into writing was intended to include all the terms of the contract as agreed between the parties.¹²

[86] So in the case at Bar, it is clear that the parties came to an Agreement as to the construction of BV3.

[87] Both parties agreed that it took place over a process of negotiation as between the parties. The First Defendant first offered a cost of \$2,380,829.74, which was later revised to \$2,718,394.16 and as was admitted by the First Defendant "***on this***

¹¹ Hudson's Building and Engineering Contracts 11th ed vol. 1 para 3 - 012

¹² see the Law of Contract 12th ed Edun Pell para 6 - 013

same day Mr. Johnson...asked me to round it...to \$2,650,000.00 for the house as designed at the time and promised we would start three of them Mr. Heizinger on villa site 2, Roskam on site 3 and one for him on site 4”.

[88] It is therefore clear to this court that this figure of \$2,650,000.00 was based on some tangible information and other considerations that were weighed by the First Defendant including the fact that they were involved in significant construction projects on the property.

[89] As stated by the First Defendant's witness Ms. Yates, she had entered into the contract for BV3 in the hope that the First Defendant would have been the contractor of choice for Oil Nut Bay for the anticipated homes to be built there.¹³

[90] This Court is therefore of the opinion that the First Defendant and the First Claimant entered this agreement fully aware that this agreement was to be taken as the entirety of the obligations as between themselves as the First Defendant was positioning itself to 'make up on the swings what they had lost on the roundabout' by being the project's contractor.

[91] I am even more fortified in this view by the fact that these parties, both experienced, had made several amendments to the Agreement before its signature but allowed the term that clearly spoke to the contract being a fixed term contract to remain unblemished. It is not lost on this Court that constant mention was made of the First Defendant's many years of experience and expertise, and having said so, it is clear that those years of experience and expertise was brought to bear on this Agreement in the terms as it was presented to this Court.

[92] This Court is not convinced on the balance of probabilities, given the evidence in this matter that the First Defendant did not deliberately, at the time allow the Agreement to remain intact with regard to the "total home cost". This Court is

¹³ See official transcript of testimony 28//5/14 39 - 40

convinced that the First Defendant hedged its bets in the hope that it would be the contractor of choice allowed this "sweetheart deal" to be signed favourable to the First Claimant. However when the relationship started to deteriorate and it was apparent that the First Defendant had lost its edge, that it then sought to place another interpretation on the Agreement and rely on the suggestion, that "if the Agreement did not say it was a fixed price contract by the use of those words then it could not amount to a fixed price contract".¹⁴

[93] I am therefore in agreement with Counsel for the First Claimant on this issue, that this Agreement having been "*considered with reference to its objects and the whole of its terms*"¹⁵ was a fixed price contract with a determinative price for the construction of the entire building.

[94] Having so determined I therefore find that the document as executed marked the actual conclusion of the Agreement as between the parties and contained all the terms of the contract.¹⁶

II. Did the Agreement make provision for changes or variations to the Agreement?

And

III. Did the First Defendant carry out additional work on BV3 and is the First Defendant entitled to seek compensation for that work including the issue whether the First Claimant is estopped from denying any such liability.

[95] For the parties it is manifestly clear that provision was made for changes or variations to be made to the Agreement.

¹⁴ See official transcript testimony of 27/5/14 page 193

¹⁵ Charity on contracts 13th ed Vol. 1 para 12 - 063

¹⁶ See the Law of Contract Op cit

[96] This was captured by clause 5 of the Agreement

"Changes. ONB shall have the right to request changes to the plans and specifications. Changes shall be stated in a written change order signed by ONB and Yates. The change order shall specify a detailed description of the change and the cost or credit of the change. For changes requested by ONB after the plans and specifications have been approved by the ultimate owner of the Home, ONB shall pay to Yates the cost of the change plus ten percent (10%) (15%)."¹⁷

[97] The First Claimant submitted that it was clearly provided for in clause 5 that changes could be made once the parties followed and adhered to the agreed conditions, namely that they were in writing and were signed.

[98] The First Claimant submitted that they were not in receipt of any such documents and any changes that had been undertaken by the First Defendant were done so without the requisite authorization and therefore the First Claimant could not be liable for the same.

[99] The First Claimant further contended that having failed to produce any signed authorized change orders it was not open to the First Defendant, at trial, to seek to introduce the idea of any such change orders by oral evidence.

[100] The First Claimant further submitted that the First Claimant having repeatedly asked the First Defendant for changes and they having failed to so produce them, the First Defendant could not now seek to make a claim ostensibly defeating the very clause which Ms. Yates told this Court, she had insisted upon inserting into the Agreement.

[101] The First Claimant also submitted to this Court, that in any event, the changes if they were accepted as such were ordered by persons who were not parties to the Agreement and who had no such authority to give those directions. It was

¹⁷ As amended

therefore abundantly clear that the First Claimant could not be held responsible for any such changes.

- [102] The First Claimant therefore submitted that there being no authorized changes with the appropriate prerequisites having been adhered to, they could not be held liable for any alleged increase in costs of the building. The only concession was that they would pay for two changes that they sanctioned those being the gym and the pump room at a "reasonable rate".
- [103] The First Defendant in response to this issue, however made it quite clear that despite there being a requirement for change orders under clause 5 of the Agreement to be in writing and signed, it was clear that all the changes effected by the First Defendant were in fact requested by persons who the First Defendant says were authorized by the First Claimant.
- [104] The First Defendant submitted that it was abundantly clear that BV3 was not built as originally envisioned and that all changes which were made, were done with the intention of providing the approved end product.
- [105] Thus, having done such variations, the First Defendant submitted that they were entitled to claim. They submitted to this Court that an owner who authorized such variations could not now benefit from the variation or change and not be liable for payment of the same whether directly or through the person or persons who acted as requisite agent.
- [106] The First Defendant contended that it was with the silent concurrence of the representatives of the First Claimant that the variations effected occurred in the first place and it on that basis that they must now be estopped from denying liability when they had themselves set the precedent of giving oral variations with regard to the pump room and the gym.

[107] Thus, the Defendants submit that the First Claimant cannot now deny its liability to the First Defendant and must compensate the First Defendant for all the works which they have now taken the benefit.

Court's consideration and analysis

[108] Having found that the Agreement between the parties constituted a fixed price contract, the Court must now consider whether provision was made for the variation of that Agreement and if so in what manner.

[109] In the text **Keating's Building Contracts**¹⁸ it is stated:

"A Contractor frequently carries out, or is asked to carry out, work for which he considers he is entitled to payment in excess of the original contract sum. To recover such payment he must be prepared to prove: (1) that it is extra work not included in the work for which the contract sum is payable; (2) that there is a promise express or implied to pay for the work; (3) that any agent who ordered the work was authorized to do so, and (4) that any condition precedent to payment imposed by the contract has been fulfilled."

[110] Thus, it is clear that it is within the realm of possibility that even on a fixed price contract that the parties can agree to make changes but it must be done unequivocally and an agreement must be had for payment of those extras.

[111] By clause 5 to the agreement, these parties agreed the manner in which changes or variations would be undertaken, that is by way of written change orders, signed by both parties, setting out the description of the change and the cost or credit of the change. Any change after the plans and specifications had been settled would also attract a 15% additional cost to the cost of the actual change cost.

¹⁸ 4th ed page 62

- [112] So these are the parameters set by the parties themselves.
- [113] "Extra works" in a contract where there is provision for a lump sum payment has been defined as ***"work not expressly or impliedly included in the work for which the lump sum is payable."***¹⁹ *(my emphasis)*
- [114] It has been contended by the First Defendant that they performed in excess of half a million dollars worth of extra work. It is also further contended that despite the agreed regime for the authorization of those changes not being adhered to, that it is clear from the evidence that changes were in the contemplation of the parties and concomitantly the requirement to pay for them.
- [115] It is however clear from the authorities that matters of this nature are not encapsulated by a simple formula, that is, that once there is performance there must be payment when it comes to extra works.
- [116] It is therefore necessary in the instant case to make an assessment as to whether the works that the First Defendant alleges were carried out were covered by the original contract (either expressly or impliedly) or whether they were in fact extra work for which the First Claimant is now liable to pay.
- [117] The variations claimed are contained in what I will call the "infamous November 2011" invoice, in which the First Defendant claimed the sum of \$629,820.57 purportedly representing variations and/or extra works conducted on BV3.
- [118] It is the First Defendant's case that BV3 was not built to the original specifications but that changes were made periodically throughout the construction phase which resulted in additional costs being attributable to the building.

¹⁹ Keatings Building Contracts Op Cit page 62.1

[119] A forensic analysis is therefore required of the work undertaken to see whether they should have been subsumed under the original contract or were in fact extras as claimed.

(a) **Systems beams to slab an additional sum of \$17,209.27.**

This arose, from the evidence of Ms. Yates, from changes that occurred due to the revision of the structural designs at the instance of the First Defendant. The revised designs were in an attempt, in the words of Ms Yates, to build a structurally sound building and to which she stated, the First Claimant agreed. The evidence that emerged was that the final designs were obtained on the day after that the Agreement was signed thus making it was clear that this was a matter that was in the contemplation of both parties at the time of execution. It is therefore also clear to me that this cost should have been taken into account when the cost of the total house was provided. The First Defendant admitted that the floor plan given to them was one by CSE Engineering completed in 2009 and knew it would have required changes, even if not to the extent that eventually occurred. On this issue, I accept the evidence of the First Claimant that this was a decision made by the First Defendant and as such this was necessary to the actual works and the house could not have been built without the same being implemented and therefore would form part and parcel of the original works, and is therefore disallowed as a variation.

(b) **East cistern in the sum of \$9,102.30.** This claim also arose out of the changes that resulted from the revision of the same structural designs and therefore flowed from the decision of the First Defendant. As such I consider that it was part and parcel of what is described as being "***indisputably necessary to complete the whole work***."²⁰ This is disallowed as a variation.

(c) **Cistern #2 in the sum of \$6,915.46.** For the reasons stated at (a) and (b) above this is disallowed as a variation.

²⁰ **Williams v Fitzmaurice** [1858] 3 H & N 844

- (d) **Pump room in the sum of \$36,770.54.** Both parties are in agreement that this is one of the two variations agreed between the parties. This is therefore allowed as a variation and although the First Claimant has disputed the cost ascribed to this variation they have not offered an alternate sum.
- (e) **Koi Pond in the sum of \$20,936.17.** Changes were made to the design and finish of the Koi Pond. The redesign resulted in the pond being made deeper. The First Defendant contends that this redesign was at the instance of the First Claimant and the owner's representative. The First Claimant claims that they had no knowledge of this change and it was therefore ultimately unauthorized. It is however allowed as a variation. I do not consider that this work would have been done as either as part of the original work or that would have been a redesign done at the instance of the First Defendant.
- (f) **Main level floor in the sum of \$30,309.65.** In the witness statement of David Johnson he stated the following: ***"The First Defendant built all of the pile caps and gray beams off of the concrete piles instead of backfilling around the piles and bringing the pad up to grade. It was the First Defendant's choice to do this and Christina Yates assured me that they would be no additional costs to the First Claimant. I agreed to these methods based on Ms. Yates' assurances that it would result in a cost savings for the First Defendant and would save time. As a result of the First Defendant's failure to backfill, it was necessary to suspend the slabs for an additional cost of \$21,015.00. Further, the revised structural designs that the First Defendant obtained from CSE Engineering resulted in additional costs of \$7,927.62 for increased steel in the slabs and \$10,735.00 for increased concrete in the slabs".***²¹
- On the basis of the consideration contained in paragraphs (a), (b) and (c) above this is disallowed as a variation.

²¹ Paragraph 101(b)(vi) Witness Statement of David Johnson

- (g) **Columns to beams in the sum of \$35,490.28.** It is disputed by the First Defendant that this additional charge was due to the changes that emanating from the decision to revise the structural designs. However, it is clear from the evidence of Christina Yates that it indeed was the design changes which resulted in this cost but it is unclear to the Court that this change was due to the instructions of the First Claimant. The changes indeed resulted in variation but like (a) and others above, I disallow this as a variation which could be possibly attributable to the First Claimant.
- (h) **Beams in the sum of \$47,939.00.** This court is not convinced that this was a variation due to the First Claimant's request. I am of the opinion that this item like the above items that all flowed from the changes in design that this too falls in that category. I am of the opinion that this sum was wholly due like the others I have previously disallowed, was due to the failure of the First Defendant to adequately price the cost of construction for BV3.
- (i) **Roof in the sum of \$43,492.36.** This change was due to the concomitant change having been made to the pond. Additions were also made for the enclosure of the gym which now needed a roof. There was also an addition of the skylight to the design and some additional gutters and downspouts that would have been necessary given the changes. As a result these variations are allowed.
- (j) **Doors in the sum \$25,630.01.** The First Claimant states that there was no authorization for the changes effected regarding the doors. The First Defendant has indicated, which appears uncontroverted, that there were substantially more doors and windows installed due to the variations that took place regarding the design including the gym enclosure, which was agreed. This variation is allowed.

- (k) **Plumbing in the sum of \$51,509.39.** Having assessed the breakdown of the sums in this claim it is clear that several of them would have been covered by the phrase "*indispensably necessary to complete the whole work*" and which in my opinion should have been properly captured by the lump sum given. I am not prepared to allow this First Defendant a second bite of the cherry and claim for costs that should have been included. Thus, the only item allowed as a variation is the plumbing associated with the Koi pond in the sum of \$46,639.15 as a proper result of the variation.
- (l) **Electrical in the sum of \$13,965.02.** These amounts seem to have come from a change in the provision of electrical requirements which were agreed to in the August 2010 meeting with all parties. This is allowed as a variation.
- (m) **Air Conditioning in the sum of \$2,840.00.** The First Claimant agreed that changes would be made to the gym. I am of the opinion that if there were agreed changes, the consequences of those changes cannot be ignored or denied. This is allowed.
- (n) **Cabinetry in the sum of \$7,618.75.** There has been no substantiation in the evidence that this resulted entirely from variations requested. The only sum referable to a variation or extra work is the water heater box of \$188.12. This portion of the sum is allowed.
- (o) **Countertops in the sum of \$22,328.32.** This was not referable to any possible variation ordered but rather seemed to account for cost of the material that was selected. This is not allowed as a variation.
- (p) **Tiling/woodwork in the sum of \$109,905.30.** The same determination as given above is for this item. This is not allowed.

- (q) **Stone work in the sum of \$57,949.59.** The Court was been given little if no evidentiary basis for this and is therefore unsure as to how the sum was incurred. This is not allowed.
- (r) **Painting in the sum of \$17,860.28.** The same consideration as above is also attributed to this item. This is not allowed.
- (s) **Appliances in the sum of \$13,530.34.** The same consideration for above is also attributed to this item. This is not allowed.
- (t) **All other items in the invoice for parkways, extra reasoning, drop ceilings and Crestron system totaling in the sum of \$93,600.37** are all also disallowed as variations as there was no evidentiary basis as to how these came about to be justified as a variation.

[120] Thus, even though at this point this Court has found that **some** of the items claimed could be considered a variation or extra work from the evidence, it is still necessary to move onto the next question as to whether the First Defendant is entitled to be **paid** for the said items.

[121] Thus, the next question to be answered is whether there was a promise to pay for the extra work.

[122] It is clear from the evidence that several inquiries were made of the First Defendant as to the costing of any possible changes that may have occurred on the project.

[123] Counsel for the First Defendant very helpfully identified those pieces of correspondence from which it was clear that there was an acknowledgement on

the part of the First Claimant, that changes had been made but that they were ***"unaware of any dollar values ..."***²²

[124] Further, it was clear from the cross examination of Mr. Johnson with regard to the issue of whether there were change orders that the issue did not seem to be whether there were in fact change orders, although they insisted that there had not been any, but how much those changes would have cost them.

[125] Throughout the evidence it was clear that requests were made to the First Defendant for the production of change orders. It can only be for this Court that these were required to ensure that the First Claimant knew up front, what had to be paid.

[126] I therefore find that not only were extra works or variations done but that by the constant inquiry as to whether there were changes and that an insistence that the costs associated with those changes be provided, it is clear to this Court that the First Claimant became and is obligated to pay for any such changes.

[127] However, again there is still more that has to be considered even though I have now found that at least two aspects of the inquiry have been answered in favour of the First Defendant. So a third question that must now be considered is despite there being accepted variations, with a promise to pay for those variations, the next level of the inquiry must be whether those variations were properly authorized.

[128] Now, in law if a contractor has carried out work pursuant to the order of someone who is not party to the contract, the contractor must prove that either that party had authority to order extra work or that the work ordered was within his authority to so order.²³

²² Evidence David Johnson quoting from letter – official Transcript pages 35 26/7/13

²³ ***R v Peto*** [1826] 1 Y & JER 37

- [129] Thus the contractor must show that the person who he took instructions from could issue such instructions.
- [130] In this case at bar, there were some variations by the First Claimant who would have the obvious authority but some were admittedly also ordered by Ryan Formsma the agent of the ultimate owner who was not a party to the Agreement.
- [131] However, it was quite clear in the evidence that the First Claimant was very well aware that Mr. Formsma attended the building site and sanctioned certain changes.
- [132] Having not stopped the contractor from taking instruction from this individual, it is quite clear in this Court's mind that the First Claimant had ***"misled the [First Defendant] into thinking that [Mr. Formsma] [had] full authority... or... to have clothe him with ostensible authority to contract"***²⁴
- [133] Having assessed the evidence and the manner in which the First Defendant's employees interacted with Mr. Formsma I find that the First Claimant held Mr. Formsma out as their agent in regard to giving instructions and that Ms. Yates and employees of the First Defendant was entitled to rely on those instructions.
- [134] The final question to be answered therefore is whether the First Defendant was to adhere to any condition before payment could be issued.
- [135] In my mind, this is the biggest hurdle for the First Defendant.
- [136] It is clear that ***"contracts frequently provide that extras must be ordered in a certain manner. The purpose of these provisions is usually to prevent unauthorized or extravagant claims for extras. A frequent requirement is that there must be a written order signed by the architect and that no extras***

²⁴ Hudson's Building and Engineering contracts 11th ed para. 1621 p 16

will be paid for unless so ordered. In such a contract a proper written order is a condition precedent to payment for extras²⁵

- [137] In the instant case such a condition was included in the Agreement which was to be observed by the First Defendant and signed by both parties with more than sufficient details.
- [138] However, it is clear from both the First Claimant and the First Defendant, no written orders were ever prepared or submitted for any of the work done as variations or extra work.
- [139] On this basis and this basis alone the First Claimant has stated that the claim by the First Defendant must be defeated. No change orders. No money.
- [140] Indeed it is agreed by the authorities that the general rule is that once there has been non compliance with any condition precedent for payment, there can be no recovery of the sums expended even if the ultimate employer has the benefit of the work.²⁶
- [141] However those same authorities make exceptions to this rule and the main one is the implied promise to pay.
- [142] Thus, it may be from the circumstances, despite not having adhered to the strict requirement of obtaining the written orders, that the conduct of the person liable to pay requires that the inference would be to pay if "***any other inference would be to attribute dishonesty to the employer***"²⁷

²⁵ Keatings Building Contracts page 68

²⁶ **Kirk v Bromley Union** [1848] 12 Jur 85

²⁷ Hudson Building Contracts 6th ed. Page 313

- [143] In the instant case the evidence of the First Claimant is that, not that we didn't order the variations, not that we did not know that the variations had been executed but simply they did not follow procedure and as such are not entitled to claim.
- [144] This Court finds that this proposition is not only distasteful but flies in the face of all fairness. This is especially so when it is apparent that the First Claimant well knew that variations had occurred, not only did they order them, but they knew that the owner had done so as well and did obviously nothing but stand by, watch the First Defendant expend funds on them, then take the benefit of that expenditure and now say that the work was not properly ordered.
- [145] It is clear from the authorities that in such a case the employer, the First Claimant in this case, will have to pay for the value of the extra work.²⁸
- [146] I therefore find that the First Claimant is not in a position to state that there were no variations. I find that the First Claimant ordered several inclusive of the pump room and the enclosure of the gym room and further knew that the owner's agent had done so and took no steps beyond limited inquiries.
- [147] It was within their power to stop work and ensure that values were given and all was in order. It is clear from the evidence that in January 2011 it was a decision of the First Claimant that there was no intention to have the First Defendant by Ms. Yates take the time to ensure all was in order. In an email letter from Eric Munro an employee of the First Claimant, he had this to say "**Chris talks about changes that she has made and changes that Ryan Formsma has made. I am unaware of any dollar values and I have asked repeatedly for such change order request. Chris states every time that she isn't going to sit down and figure out any additional cost until at the end of the project. I haven't ever been in**

²⁸ Keating's Building Contracts page 70

this situation but I cannot afford Chris to pull off site to spend the time pulling all this information together either²⁹ (my emphasis)

[148] I therefore find that variations were made in terms of the items found as variations and that the First Claimant is to pay to the First Defendant the sum of \$190,461.30 in that regard.

IV. Is the First Claimant entitled to claim for contract credits in respect of work undertaken by the First Claimant that was the responsibility of the First Defendant or where the construction costs to the First Defendant were cheaper than stated?

[149] Having found that the Agreement between the parties is a fixed price contract, the First Claimant is not entitled to claim for contract credits of any nature.

V. Did the First Defendant breach the Agreement by failing to perform work in a good workman-like manner and as such is the First Defendant liable for any remedial costs including any remedial work to the swimming pool and the koi pond.

[150] The First Claimant submitted that it was an express term of the Agreement that the First Defendant was to perform the works in a good workman like manner.

[151] They further submitted that this had been clearly breached by the finding of the numerous defects by the experts and the evidence of David Rosa and Stephen Sinclair.

[152] They submitted that the work of the First Defendant was below the required standard for a luxury villa and as a result they would now be put to expense of carrying out remedial works.

²⁹ Reference to paragraph 111(d) of Defendant's submissions

- [153] The First Claimant contended before this Court that it having been clear to all parties that the construction was for a high-end luxury villa and that the findings of the experts making it abundantly clear that the construction by the First Defendant resulted in the myriad of remedial works that were indicated, meant nothing less than a breach of the contract.
- [154] Having so breached, the First Claimant submitted that the First Defendant must be liable for the cost of making good those defects.
- [155] The First Claimant submitted that there was sufficient evidence from the experts that works needed to be undertaken and that the experts indicated that the costs associated with those repairs by EMCS were reasonable and therefore the First Defendant should be ordered to pay that sum.
- [156] The First Defendant submitted in response that they had not breached this term of the contract.
- [157] The First Defendant submitted to this Court and stated in evidence that it has always been prepared to remedy any genuine defects which were their responsibility. However in any event, they submitted, that they had already done the majority of what was required of them when they had left the property in November 2011 leaving only those items that required owner provided materials.
- [158] The First Defendant refuted the costs ascribed to the repairs that were reportedly left to be done in November 2011. The First Defendant submitted that the cost report was not done by a properly constituted Court appointed expert, the Company in fact having been employed by the First Claimant. They further submitted that the figures made no logical sense and were excessive in any event having been prepared by an individual who never visited the site or made a personal assessment.

[159] The First Defendant also contended that the report of the alleged defects was also prepared by an individual who had no information as to the responsibilities of the parties to the contract and as such was flawed in many respects.

[160] It was therefore submitted on behalf of the First Defendant that based on all of these anomalies that the reports could not be relied upon and instead a realistic cost for the repairs or works to be completed would be in the region of \$10,000.00.

Court's consideration and analysis

[161] It is very apparent from the Agreement as between the parties that the First Defendant had undertaken to perform the works in a good workman like manner.

[162] However, as a result of defects in construction alleged to have been found in August 2011 and again in November 2011, after the First Defendant had been given an opportunity to do remedial works, the First Claimant has claimed the sum of \$191,227.08 as compensation for carrying out those works that they insist are still left to do.

[163] The First Claimant has relied on the evidence of David Rosa and Stephen Sinclair for the litany of defects which in August 2011 numbered in excess of 300 and by November 2011 approximately half of those.

[164] I have already indicated the Court's position regarding these individuals and their evidence and I maintain that here.

[165] I find that the evidence of Mr. Rosa was of limited, if any assistance at all, on the assessment of defects and that Mr. Sinclair although better suited for his task was still limited, he having failed to observe several items personally.

[166] However, be that as it may, the Court got clear admissions on the part of the First Defendant by Ms. Yates herself that there were items that needed to be completed when they left in November 2011, which fact was supported by the evidence of Mr. Michael McDonald.

[167] It is therefore clear, based on the admissions of the First Defendant that the question of liability for the defects cannot now arise but what must be considered by this Court at this juncture is the extent of that liability in money terms.

[168] I do not accept on the balance of probabilities that the defects noted by Mr. Rosa in November 2011 amounted to 150 items and further in any event if there was such a number as in the words of Mr. McDonald ***"it may sound as if its big but the work, as record, it may sound as a long project but it here and there"***³⁰

[169] Thus, I accept that there were in fact items that required attention by the First Defendant whether amounting to remedial work or completion.

[170] However, I am unable to accept the justification given to the cost of the repairs by Mr. Noblett first as an employee of Kraus Manning and then EMCS. Mr. Noblett did not imbue this Court with any confidence in the figures as touted which appeared to be without solid foundation or basis. I therefore completely reject the costings relied on by the First Claimant. I am further also not convinced by the figure given by the First Defendant as to the cost of the admitted 90 items.

[171] It is clear from the authorities that the ***"governing purpose of damages is to put the party whose rights have been violated in the same position so far as money can do as if his rights had been observed"***³¹

³⁰ Official transcript 28/5/14 page 190

³¹ Per Asquith LJ in ***Victoria Laundry Ltd. v Neuman Ltd*** [1949] 2 KB 528 at 539

[172] However, it is clear that there must be a limit to such recovery to those matters which arise naturally and which are foreseeable from the breach.³² Thus, in the instant case it would have been clear that having failed to complete the construction without defects that the contractor must be liable for the cost of the defects, that is, the cost of putting things right. This Court is of the opinion that this cannot be disputed.

[173] However, having not received, in this Court's opinion, any independent cogent evidence on the issue, this Court is prepared to award a reasonable sum for the remedial works to be undertaken.

[174] I believe that on a balance of probabilities that there are defects at least in the region of the admitted 90 as suggested by the First Defendant but that the figure of \$10,000.00 would be woefully inadequate to remedy the same in an admittedly luxury villa, while the figure as claimed of \$191,127.08 is greatly excessive.

[175] What is clear to me is that in looking at this cost as claimed that it had to include the costs for any defects to the koi pond and the swimming pool and those claims could not have been separate and distinct as pleaded before the Court. Thus, I award the sum of \$100,000.00 for all remedial and completion work that have to be undertaken on BV3 inclusive of any action to be taken on the koi pond and swimming pool.

VI. Is the First Defendant liable to pay the cost of the materials paid for directly by the First Claimant?

[176] The First Defendant admits that the First Claimant during the currency of this project undertook to and did in fact purchase materials for which the First Defendant had in fact been responsible. That being so the Court finds that the

³² Hadley v Baxendale [1854] 23 LJ ER 179

question of liability is now a moot one and awards the admitted sum of \$252,967.44.

VII. Is the First Claimant in breach of its obligation under clause 9 of the Agreement to allow the First Defendant an opportunity to rectify any repairs for which it was liable?

[177] By clause 9 of the Agreement it is clear that the parties had agreed the following:

“Warranty. *Yates warrants that the Home will be free from defects in material and workmanship for one year from the date the Home is substantially complete and ready for occupancy. Yates shall repair or replace any defective work, at Yates's option. Yates shall transfer to the ultimate owner of the Home all warranties given by the manufacturers of any appliances, equipment or other complete products that are installed in the Home by Yates or any other party.”* (my emphasis)

[178] The First Claimant contended that the First Defendant was given an opportunity to work on the list of defective items in August 2011 after they had gotten the initial “punch list” in July 2011.

[179] The First Claimant submitted that the First Defendant had ample time and opportunity to work through all the identified items and had unrestricted access to do so.

[180] The First Claimant therefore submitted that the First Defendant, having failed to complete the identified items, cannot now be saying that they got no such opportunity and as a result must now bear the cost of others to attend to make good the repairs.

[181] The First Defendant on the other hand says that they have always expressed a willingness to carry out any repairs as identified except those items which require owner supplied materials and over which they had no control.

[182] Having not had sight of the Second Inspection report in November 2011 before the First Claimant filed these present proceedings, meant for the First Defendant, that the First Claimant had acted unreasonably and was in fact in breach of their obligation to the First Defendant.

[183] The First Defendant stated that it is only if they had refused to carry out the repairs could there be justification to have a third party attend to make good the repairs.

[184] Thus, it was incumbent upon the First Claimant to give the First Defendant notice of the defects and an opportunity to make good those repairs.

Court's consideration and analysis

[185] It is now settled law that an owner cannot recover damages unless they have given the contractor an opportunity to remedy defects.³³

[186] Thus, the Court accepts that when the alleged defects were brought to the attention of the First Defendant and even prior to that, when the agreed "punch list" was settled with the First Claimant's representative Mr. O'Reilly, that the First Defendant was given carte blanche access to do whatever remedial or finishing work that was required.

[187] Further, I also accept the evidence of Ms. Yates and her project Supervisor Mr. McDonald that the First Defendant was always ready and willing to remedy any legitimate defects once all owner material had been supplied, which fact has not been disputed by the First Claimant.

[188] However, what is abundantly clear to this Court is that despite the First Defendant being given an opportunity from August 2011 to November 2011 to make good on the defects that were identified, disputed or not, the First Defendant failed to do so.

³³ Hudson's Building and Engineering Contracts 11th ed. para. 5 - 080

Even if the First Defendant now disputes that there may have been as many as 150 items still left to remedy, they did admit that there were certainly in excess of half of that number.

[189] Thus, although at first blush it may appear that the First Claimant failed in their obligation to allow the First Defendant to return **after** the November 2011 re-inspection, this Court is of the opinion that the First Defendant did not have an unqualified right to re-enter and remedy defects where it was apparent that the First Claimant having given them the opportunity had now lost confidence in the First Defendant's willingness or ability (more importantly) to remedy the defects satisfactorily.³⁴

[190] I therefore adopt the words of Joseph-Olivetti J. in the case of **Yates Associates Construction Co. Ltd v Blue Sand Investments Limited**³⁵ that the First Claimant "**had lost faith in the [First Defendant] and that their action in seeking alternative solutions was not unreasonable**" after November 2011.

[191] I therefore find that the First Claimant was not in breach of their obligation under clause 9 of the Agreement.

VIII. Was the First Defendant in breach of the Agreement in failing to provide BV3 on the date stipulated in the Agreement and if so, are they liable for any loss of rental income as claimed?

[192] The Second Claimant in this suit claims against the Defendants the loss of rental income from the failure to complete BV3 on time as per the Agreement.

[193] This therefore involves two arguments for the Claimants. Firstly, that there has been a breach for failing to complete by the 1st March 2011 and secondly, that the

³⁴ Hudson's Building Contracts 11th ed para 5-051

³⁵ BVIHCV 2010/0218 at para. 88

natural consequence of such breach, the Defendants knowing the purpose of the BV3, was the loss of rental income.

- [194] For the First Claimant it is clear that even though the original terms of the contract did not specifically make time of the essence, the fact that the parties agreed to the amendment for the progress payments upon the completion schedule being maintained, meant that time being of the essence had been incorporated into the Agreement.
- [195] Further, the First Claimant submitted that there having been no clause for liquidated damages for failure to complete or any clause for extension of time meant that the time specified in the Agreement was of the essence and could be the only reasonable interpretation of the Agreement as between the parties.
- [196] Thus, it was submitted that there being a breach that the First Defendants were liable for all natural consequences including loss of rental.
- [197] The Second Claimant who was responsible for the rental of BV3 relying on the evidence of Mr. Johnson, also submitted to this Court that the Defendants were always aware that BV3 had to be completed for the 1st March 2011 deadline and that this was for the purpose of show casing the villa at the anticipated Regatta.
- [198] Further it was submitted that the Defendants also knew that the property was for rental they having taken advantage of the legislation for duty free concessions for properties who participate in rental schemes.
- [199] The Claimants submitted that based on all these factors they were entitled to their claim for rental loss.

[200] The First Defendant's submission in relation to this claim is that the basis of the claim for loss of rental income was based on a breach of a contract to which the Second Claimant was in fact not a party.

[201] It was therefore argued on behalf of the First Defendant that there was no nexus or privity of contract as between the claim by the Second Claimant and the perceived breach of the Agreement. Further, they argued, that even if the Second Claimant was able to legally maintain this claim, there was no evidence to support it in any event, that the First Defendant knew or was aware of any contractual arrangement with the Second Claimant for the rental of the BV3.

[202] The First Defendant further submitted that the fact that they may have made use of the Hotel Aid Act could not have given the First Defendant any specific knowledge of any rental agreement which was never in fact produced. The bare figures given could only be considered speculative and as such could not form the basis of any proper claim.

[203] The First Defendant also submitted that this claim was an item of special damage which must be strictly proven. Having failed to provide any proper evidence – either a rental agreement or loss of rental meant that this claim must fail.

Court's considerations and analysis

[204] When the Court assess this claim, there are clearly two distinctly important aspects:

- (1) Whether there was a breach of the contract with regard to time being of the essence and;
- (2) If there was such a breach, is the Second named Claimant entitled to make a claim for loss of rental income consequential thereon.

- [205] It is without a doubt and admitted by all parties concerned, that the Agreement stated that the completion date was to be 1st March 2011. This date was not met and the earliest date for occupancy was with the issuance of the Certificate of Occupancy in July 2011. So it is manifestly clear that there was a prima facie breach of the Agreement at that stage.
- [206] However, the next question that must be then addressed is what was the effect of the amendment of adding the manner in which progress payments were to be made and whether without more, that then made time of the essence.
- [207] It has long been settled law that "**where time is not originally of the essence of the contract, time may be made of the essence where there is unreasonable delay, by a notice of the party who is not in default fixing a reasonable time for performance**"³⁶ However if this is not done, the question must then be whether time can be seen as being of the essence "**upon the true construction of the agreement or in other words upon the intention of the parties as expressed in or to be implied from the language they have used**".³⁷
- [208] It is clear to this Court that in December 2010 the First Claimant wrote to the First Defendant indicating there were concerns regarding the completion date and requested that the First Defendant make arrangements to work through the Christmas holiday period and start working seven days a week.
- [209] It is also clear from the evidence that the First Defendant agreed to do so.
- [210] It is therefore in the opinion of this Court that the First Defendant was aware of the importance of the completion date as early as December 2010. I therefore find that the issue of that notification made time of the essence in the contract, at that point.

³⁶ Elise Meyer v Shoal Bay Development Corporation AXAHCV2010/0028 per Blenman J. para. 150

³⁷ Aberfoyle Plantations Ltd. v Chengy PC Appeal 36/1958

[211] Having made time of the essence, and the First Defendant having failed to adhere to the time constraints, at first blush, may then be perceived as having breached the contract in that regard. However, what is clear to this Court and having so already determined that there had been variations and/or extras to the work as originally envisioned after 1st March date had been inserted into the contract, I find that in the instant case the First Claimant could not insist ***“upon completion by the date fixed or either the period limited but only for completion within a reasonable time”***³⁸

[212] I therefore find that even though there was a breach of the clause for the completion of BV3, that the breach does not give rise to the First Claimant obtaining damages for the same, namely the decision to withhold the monies that were due to the First Defendant under the contract and to consider the Agreement repudiated as they submitted to this Court had occurred.

[213] The Second Claimant based on this breach as found, has also sought to claim for loss of rental income for the period March 2011 to December 2011.

[214] In looking at this claim, the Court finds that the submissions on behalf of the First Defendant on this issue have great merit. It is indeed unclear to this Court, and the submissions of the Claimant were interestingly silent, as to the legal ability of the Second named Claimant to make this claim based on a contract to which they were not a party.

[215] **Chitty on Contracts**³⁹ in defining the doctrine of the privity of contract states that ***“a contract cannot (as a general rule) confer rights or impose obligations arising under it on any person except the parties to it.”***

³⁸ **Holme v Guppy** [1838] 3M& W 387 quoted in Halsbury's Laws of England Vol. 4 para. 1180

³⁹ 27th ed. paragraph 18-001

[216] It is therefore clear that unless the Second Claimant could have fitted itself within the parameters of this Agreement, they are not entitled to sue upon any perceived breach of its terms and I so find.

[217] If I am however wrong in this regard and further argument is allowed (which was not proffered to this Court) which places the Second Claimant in the position to maintain this claim, I disallow the claim in any event in the sum of \$267,260.00 for the period of March 2011 – December 2011 as rental.

[218] The Second Claimant produced no documentary evidence in the form of rental agreements, letter of intention or otherwise to substantiate this loss. While it may have been true that the First Defendant utilized the exemptions provided for under the Hotel Aid Act, the mere fact that they did so, without more, cannot in this Court's opinion be sufficient to substantiate this very specific claim. Bald figures thrown at the court, with absolutely no underpinning, is simply not enough. Mere construction of the building provides no guarantee of the reception of the projected rental income.⁴⁰

[219] I therefore disallow this claim.

IX. Is the First Defendant liable to pay the sum claimed for transportation costs after the stated completion date?

[220] The sole argument of the First Claimant in this regard is that the agreement between the parties for the provision of transportation of the First Defendant's workers by the First Claimant free of cost came to an end when the date for completion had passed.

⁴⁰ Wheatley et al v Water point Caribbean Homes ANUHCv 2010/0029 quoted in Clearlie Todman v Melvin Rhymmer BVIHCv 2009/0195 at para. 104 per Hariprashad-Charles J.

[221] Therefore the First Claimant claimed a reasonable sum, in their opinion, for a round trip for the workers of the First Defendant between March 2011 and November 2011.

[222] The First Defendant however submitted that this was an unsustainable claim for the following reasons:

1. The boats utilized during that period also took the First Claimant's workers and thus that expense was not only attributable to BV3 incompleteness.
2. No notification was given to the First Defendant of the intention to charge the First Defendant.
3. That the First Defendant was working on 3 different projects and transportation was a condition of all three projects so it was not possible to allocate cost to a particular project.
4. That there were periods when there were work stoppages during the claimed period and there is no given basis for the schedule apparently relied upon.
5. That the number of employees changed dramatically over the course of the construction and this was not taken into account.
6. That the delay in completion was due to the First Claimant.
7. That at no time was an indication given that the First Claimant would seek damages when the completion date was not kept but in fact the First Claimant had seemed to waive their right to rely on the same.

[223] For all these reasons the First Defendant states that this claim should be denied.

Court's considerations and analysis

[224] The Court has looked at the nature of this claim.

[225] It is without dispute that the provision of transportation for the First Defendant's workers was an agreed term of the Agreement and from all accounts an issue that entertained these parties in all their dealings.

[226] It was therefore incumbent, in this Court's opinion, on the party responsible for the provision of the service to indicate any variation of the same. Having failed to do so, this Court finds that the term could not be unilaterally varied to the detriment of the First Defendant. I therefore disallow the claim.

X. Did the letter to the First Defendant's employees, the comment to the prospective buyer and statements in the media amount to defamation by the Second Defendant of the First Claimant resulting in injury to the First Claimant's business reputation?

[227] The First Claimant has complained of three instances in which they say the Second Defendant uttered defamatory statements.

[228] The First Claimant submitted that these were firstly when Mr. Johnson was taking a prospective purchaser on a tour at the Oil Nut Bay Development and Ms. Yates commented that Mr. Johnson did not write cheques on time, secondly that Ms. Yates told her employees in December 2011 that they would not be getting their usual vacation pay due to the First Claimant owing them money and thirdly that Ms. Yates gave an interview to an online news publication that the reason the First Defendant was in financial problems was because the First Claimant and other creditors were not paying their bills on time.

- [229] The First Claimant submitted that in relation to the statement to the prospective purchaser that it was clearly slanderous. It was submitted on its behalf that the statement was slanderous of the First Claimant even though the First Claimant could not show that they had suffered damage as a result thereof.
- [230] The First Claimant submitted that the only inference this statement could have given was that there was a ***"reluctance to write cheques...due to [the] company's poor financial health and/or insolvency"***⁴¹
- [231] The First Claimant submitted that it was now permissible for a company to sue for allegations in relation to its business and they did not have to prove any damage as it was actionable per se.
- [232] In relation to the statements made to the employees of the First Defendant, the First Claimant submitted that not only were the statements not true but they were also defamatory in that they imputed again to the First Claimant that they were bad creditors.
- [233] This submission was also made in relation to the statements made to the online media publication.
- [234] In totality the First Claimant submitted that the statements cannot be taken in isolation but must be seen as a part of a campaign by the Second Defendant as against the First Claimant to paint them in the worst possible light.
- [235] The Second Defendant in answer to this claim for defamation submitted that in relation to the statement to the prospective purchaser, that if any slur was made it was as against Mr. Johnson himself and not the First Claimant as a separate legal entity.

⁴¹ Paragraph 19.3 Claimant's closing submissions lodged 19 June 2014

- [236] They therefore submitted that it was not for the First Claimant to make this claim in that they had no locus standi and by necessity therefore this claim must fail.
- [237] The Second Defendant submitted that in any event it was clear that the words were not defamatory and that the First Claimant had failed to show that they had suffered any specific loss.
- [238] In relation to the statements to the First Defendant's employees and to the media, it was submitted that they were in fact accurate and justified in that they had just filed a claim for outstanding monies due and owing from the First Claimant at the time the statements were made. Further, in any event, it was clear that the words did not impute any insidious conduct on the part of the First Claimant but rather simply an indication that there was an ensuing contractual dispute as between the parties.
- [239] The Second Defendant therefore submitted that the words could not be considered defamatory in all the circumstances and the claim must therefore by necessity fail.

Court's consideration and analysis

- [240] The first step in this Court's mind in assessing this claim is to make an assessment of the words as spoken or written.
- [241] Thus, it is essential that the Court look at the specific words complained of by the First Claimant.
- [242] In relation to what was said to the prospective buyer as stated in the Defence of the Second Defendant: ***"Mr. Johnson was constantly rushing ahead of the rest of the touring party and kept saying let's go let's go. The potential purchaser then inquired of the Second Defendant "Does he do everything***

this quick?" to which the Second Defendant responded "not writing cheques."

[243] In relation to the words complained of in the Memorandum to the First Defendant's employees and to the media I agree with the submissions on behalf of the Second Defendant that the specifics complained of are unclear.

[244] However what may be extrapolated from the documents is as follows – (the Memorandum to employees):

"As a result while we have been able to pay wages every week we will not be able to pay vacation pay this year in December unless our position improves before year end and Oil Nut Bay pays us some money."⁴²

In relation to the statement to the media:

"Yates explained that the company is owed by the developers of Oil Nut Bay and other projects which add up to over \$2 million worth of outstanding payments. The Managing Director noted the company plans court action to recover monies from the Oil Nut Bay project."

[245] In order for this Court to determine the bases of this claim it must determine three essential questions:

1. Were the words capable of being defamatory?
2. Where they in fact defamatory? and
3. Where they defamatory of the First Claimant?

[246] Defamation has been defined in Gatley on Libel and Slander⁴³ as being ***"committed when the Defendant publishes to a third person words or matter containing an untrue imputation against the reputation of the Claimant."***

[247] The Learned Authors went on to say that there was a particular formula that should be used to assess whether the words can be considered as defamatory.

⁴² The memorandum to employees

⁴³ 10th ed. paragraph 1.3

This was encapsulated as follows: (1) Would the imputation tend to "lower the Plaintiff in the estimation of right thinking members of a society generally", (2) would the imputation tend to cause others to shun or avoid the Claimant? And (3) would the words tend to expose the Claimant to hatred, ridicule or contempt?⁴⁴

[248] Thus, it is for this Court ***"in determining whether the words are capable of bearing any defamatory meaning...determine what was the permissible range of meanings that the alleged defamatory words could carry. When the court is satisfied that the words complained of are capable of a defamatory meaning, then the Court can consider whether in fact the words bore the alleged or any defamatory meanings."***⁴⁵

[249] It is therefore clear that I must look at the ordinary and natural usage of the words. That is, how would they be understood by ***"reasonable men of ordinary intelligence with the ordinary man's general knowledge and experience of worldly affairs."***⁴⁶

[250] It is permissible in doing this assessment to use the context in which the words were published as ***"context affects meaning"***.⁴⁷

[251] In so doing in the instant case I find that the words spoken of Mr. Johnson by Ms. Yates to the prospective purchaser could only have meant that Mr. Johnson was not a reliable efficient businessman and were in fact capable of being defamatory of him. In relation however to the alleged offending words in the memorandum and the media statement, given the context I find that the words were in fact not capable of being defamatory.

⁴⁴ Beulah Mills v Michael Perkins et al NEVHCV2009/0098 page 28

⁴⁵ per Williams J in Beulah Mills v Michael Perkins and others Op cit. at para. 75

⁴⁶ Gatlery on Libel and Slander 8th ed. Para. 93

⁴⁷ Per Williams J Beulah Mills Op Cit. paragraph 79

[252] In relation to whether the words are in fact defamatory, it is clear that the words must carry such an imputation that would expose the complainant to a lowering in the minds of right thinking individuals.

[253] It is clear that these words were said to a prospective purchaser in what the First Claimant's witness Mr. Johnson called the "*world's worst economic times*". There could be no other meaning as to be ascribed to these words than that Mr. Johnson was a "*poor or late payer*".⁴⁸

[254] In this Court's mind therefore not only were the words spoken to the prospective purchaser capable of being defamatory but were in fact defamatory of no one else other than Mr. Johnson which therefore answers the third and final question.

[255] In relation to the words spoken to the First Defendant's workers and the media, not only do I find that they were incapable of being defamatory but they were in fact also not defamatory and as such there is no need to answer the third question in that regard.

[256] However, despite my finding that the words spoken to the prospective purchaser were defamatory this Court must determine whether it is in fact the First Claimant who is the legal entity the company and not Mr. Johnson himself who can maintain this claim.

[257] This Court is satisfied that it is now settled law that a company can maintain an action for defamation uttered in relation to business dealings.⁴⁹ However this claim, in this Court's mind is **not** of defamation of the company but rather (even in a Sole shareholder scenario) of a member or Director of that company which presents a wholly different scenario.

⁴⁸ Paragraph 19.9 Claimant's Closing Submissions lodged 19 June 2014

⁴⁹ **D & L Caterers v D'Aiyou** [1945] KB 364; **Express Data Systems Ltd. v Vincent Alexander** SVG 119/1998

[258] In **Gatley on Libel and Slander** it is stated quite clearly that "**a corporation or company cannot maintain an action of libel or slander for any words which reflect not upon itself but solely upon its individual officers or members defamed...**"⁵⁰. It is in those cases that "**the action should be brought in the names of the individual officers or members defamed...**"⁵¹

[259] The Court has not been given any assistance by the First Claimant to indicate that they rely on a contrary principle of law that takes them outside the provisions of this statement. Thus, having found that the words were specifically in relation to the action of Mr. Johnson, he being the only subject of the conversation, this Court finds that the First Claimant has no locus standi to bring this claim.

[260] In relation to the claims in which they have the locus standi to bring, being the words in which the company was specifically mentioned, I have already found that those words were not defamatory they having failed to fall within the criteria as stated. I therefore dismiss this claim for defamation in its entirety.

Conclusion

[261] It is quite clear that despite these parties attempting to make provision for the conduct of this construction that the relationship fell apart and did so quite rapidly with somewhat disastrous results.

[262] The First Defendant's hopes of being the contractor of choice were dashed and realized too late that they had entered into a bargain that was obviously detrimental to their financial health.

[263] It was indeed all quite unfortunate.

⁵⁰ See para.959

⁵¹ See para. 959

[264] In the final analysis I therefore make the following orders based on the prayers as claimed by both parties:

On the Claim by First Claimant:

1. The sum of \$191,227.08 for the cost of remedying defects is denied and the Court awards the sum of \$100,000.00.
2. The sum of \$105,000.00 for transportation costs is denied.
3. The sum of \$80,134.00 for the repairs to the Koi Pond and pool are denied such costs to be included in the sum awarded at paragraph No. 1 herein above.
4. The sum of \$122,169.69 as contract credits is denied, the Court having found that the parties had in fact executed a fixed price contract.
5. The sum of \$257,267.44 for sums paid for materials and supplies is denied and the court awards the sum of \$252,967.44.
6. Damages for breach of contract is denied.
7. Damages for defamation is denied.
8. Costs to the First Claimant for partial success on the claim are to be prescribed costs.

On the Claim by the Second Claimant:

1. The sum of \$267,260.00 for loss of rental income is denied.
2. Damages are denied.
3. Costs to the Defendants on this portion of the claim are to be prescribed costs.

On the Counterclaim:

1. The sum of \$1,130,197.04 for works done under the Agreement is denied and the First Defendant is awarded the sum of \$190,461.37 in relation to the extras or variations carried out, together with the balance of all sums due under the Agreement of the original contract price inclusive of all retention sums less the payments made on behalf of the First Defendant in the sum of \$252,967.44 as awarded.
2. Costs to the First Defendant for partial success on the counterclaim to be prescribed costs.
3. The claim for interest is denied.



Nicola Byer
High Court Judge