BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1754 of 2008

BETWEEN:

WINSTON BUTCHER	**CLAIMANT**
AND	
MAVIS HUTSON (Power of Attorney for Nola Barrow)	**DEFENDANT**

Before Dr.The Hon. Madam Justice Sonia Richards, Judge of the High Court.

2011: September 13
November 14, 16, 18
2012: March 06
2015: October 08
December 07
2016: April 19
2017: May 23

Mr. Chester L. Sue, in association with Mr. Philip Gaskin, Attorneys-at-Law for the Claimant
Mrs. Sally Comissiong, Attorney-at-Law for the Defendant

DECISION

Introduction

[1] In this matter, the Claimant is seeking damages from the Defendant for the alleged breach of a construction contract.

Background

[2] The Claimant is a building contractor trading under the name Precision Contractors and Maintenance. The Defendant is the sister and agent of Nola Barrow, a resident of the United States of America.

[3] In January 2006, Ms. Barrow entered into a written agreement, with the Claimant, for the construction of a two storey dwelling house on her land at Lot 1, Palmers Land, St. John. A first plan was prepared by Roderick Roach, an architect, with a floor area of approximately 2,487 square feet. The parties negotiated a construction price of $346,000.00 based on this plan.

[4] At the request of Ms. Barrow, Mr. Roach prepared a second plan with an increased floor area. The Claimant and Ms. Barrow agreed to build the house in accordance with the second plan.

[5] The Defendant also agreed to oversee the construction work for her sister. She acted as her sister's agent under a durable general power of attorney executed by Ms. Barrow in her favour. During her oral submissions on 19 April 2016, counsel for the Defendant conceded that there was no issue properly before

the Court, either concerning the Defendant as a party to the proceedings, or as Ms. Barrow's agent.

[6] Both parties state that, initially, construction of the house progressed smoothly. In the words of the Claimant, "the relationship at the outset was extraordinarily smooth". But as the house neared completion, the relationship between the parties deteriorated to the point where the Defendant engaged someone else to complete the house. As a result, the Claimant filed his Writ in October 2008 claiming:

1. damages or the sum of $61,600.00 by way of damages;
2. interest;
3. costs; and
4. further or other relief as deemed appropriate.

The Claimant's Case

[7] The Claimant alleged that after the written agreement between himself and Nola Barrow, there was an oral agreement between himself and the Defendant, as Ms. Barrow's agent, for additional work to be done to the house. The price of the additional work was $37,600.00. Work on the house progressed, and the additional work was carried out.

[8] The Claimant says that the Defendant prevented him from completing the house when she locked him out of the house in March 2007. According to the

Claimant, the Defendant repudiated the contract, and refused to pay him either the $24,000.00 outstanding under the initial written agreement, or the $37,600.00 due under the oral agreement for the additional work.

The Defendant's Case

[9] The Defendant acknowledges the written agreement to build the house for $346,000.00. However, any money owed for additional work, if at all payable, was said to be only $7,829.00. She also complained that the Claimant did not proceed diligently with the construction, and as a result he was unable to complete the house within the agreed time frame of 6 months.

[10] The Defendant detailed a number of areas in the house that were not done or partially completed. She alleged that by his conduct the Claimant had repudiated the agreement when he abandoned the work, and she accepted his repudiation. She counterclaimed for the cost of labour and materials to complete the house.

The Written Agreement

[11] The written agreement between the Claimant and Ms. Barrow is dated 03 January 2006. It contains an estimated cost for construction of a total floor area of 2487 square feet, comprising a ground floor of 1243 square feet, and a first floor of 1244 square feet. A number of stages are listed in the agreement, with the cost of each stage as follows:

1.	setting out excavation, casting of foundation to ground floor inclusive of electrical, plumbing and telephone;	$70,000.00
2.	building block walls to ring beam for ground floor;	$27,000.00
3.	installing concrete on 1st floor with electrical, plumbing and telephone preparations;	$51,000.00
4.	building block walls to ringbeam of 1st floor with electrical and plumbing where necessary;	$27,000.00
5.	installing of roof with treated 2x6 pine rafters, treated 1x6 V-joint for close boarding and perma-clad sheeting;	$68,000.00
6.	plastering internal and external walls, trowel plastic finish on outer and inner walls;	$30,000.00
7.	installing all windows and doors as shown on plan;	$20,000.00
8.	installing cupboards in kitchen and bedrooms, painting and trowel where necessary;	$21,000.00
9.	installation of tiles throughout structure;	$ 8,000.00
10.	installation of bath and kitchen fixtures (fixtures to be selected and provided by owner). Completion of drainage inclusive of manholes, grease traps and well; and	$14,000.00
11.	completion of plumbing and electrical including plates and covers	$10,000.00

[12] The written agreement does not say whether payments for any stage of the work should be made before commencement or after completion of that stage.

However, the conduct and evidence of the parties indicated that payments were made to the Claimant in advance of each stage. If he had completed the construction, the Claimant would have received full payment, under the written agreement, prior to the commencement of the final stage of construction. In fact, it appears that the last two payments he received on 30 January 2007, were for stages 8 and 9.

[13] The written agreement also contained a number of conditions that are relevant to this case. The first condition was that the estimate for building the house was based on a plan dated 10 October 2005. This plan was the first plan prepared by the architect. Another condition was that any changes to this plan "shall be subject to additional costs". The agreement also gave the estimated time for completion of the house as 6 months, which depended on "the availability of funds/materials in a timely manner".

[14] The written contract is not a complex document. And neither party has challenged the content of the document, or claimed any ambiguities or inconsistencies therein. Therefore, there is no need for the Court to discuss the principles of contract interpretation in the context of the written agreement.

The Oral Agreement

[15] After signing off on the written contract, Ms. Barrow requested another plan from her architect. The Claimant proceeded to build the house in accordance with the second plan. There was no new or amended written agreement to replace the initial written agreement. The Court finds that Ms. Barrow and the Claimant entered into an oral agreement to use the second plan to construct the house. The Defendant also knew that a second plan was used.

[16] Mr. Roach confirmed that he provided a new plan at the request of Ms. Barrow. His unchallenged evidence was that the width of the house increased from 26 feet to 30 feet; and the length went from 52 feet to 54 feet. An internal stairway was included on the second plan. Mr. Roach informed the Court that the new floor area was 2,824 square feet, whereas the original floor area was 2,488 square feet.

[17] The oral agreement did not replace the written agreement. It was supplemental to that agreement. The Court is persuaded to this view, given the fact that actual construction and drawdowns closely adhered to the stages itemised in the written agreement. However, the parties deviated from the written agreement in some respects.

[18] In addition to agreeing to expand the building and include an internal staircase, the first stage payment was increased by $2,000.00 to cover the cleaning of the site. Payments for the second and third stage were combined

into a single payment, and an additional $725.00 included. There is no evidence to explain this additional payment.

[19] The fourth stage of $27,000.00 was paid on 18 September 2006. Thereafter, the Claimant did not receive the full $68,000.00 allocated for the fifth stage at one time. Instead he received $30,000.00 on 23 October 2006, and a further $60,300.00 on 06 November 2006. By stages 5 and 6 the Claimant had received only $90,300.00 of the $98,000.00 agreed for these two stages. Again, there is no explanation from the parties for the shortfall of $7,700.00 by the Defendant.

[20] Payments for stages 7, 8 and 9 were received on 01 December 2006 and 30 January 2007. Stages 8 and 9 were paid on the second date mentioned by two separate cheques. Therefore, through a series of oral agreements, amendments were made to the written agreement. There is no evidence that either of the parties objected to these adjustments.

Who Breached the Contract?

[21] Each party blames the other for breaching the construction contract. The fact that someone other than the Claimant completed the house, leads to a reasonable inference that one of the parties breached the contract.

(1) The Concept of Repudiation

[22] The Claimant alleges that the Defendant repudiated the contract when she changed the locks to the house. He was unable to complete construction because he had no access to the work site. The Defendant counters that it was the Claimant who repudiated the agreement when he abandoned the work and failed to complete the construction of the house.

[23] The learned authors of "Keating On Building Contracts", opine that:

> "The word "repudiation"...is the most convenient term to describe circumstances where "one party so acts or so expresses himself to show that he does not mean to accept the obligations of a contract any further". Such a repudiation, if accepted by the innocent party, releases both parties from further performance". (8th ed. 2001 at para.6-68; see also **Hayman v. Darwins [1942] AC.356 at 378 and 398, and Photo Productions v. Securior [1980] A.C. 827 at 849)**.

[24] One of the circumstances in which the innocent party may elect to end the contract is

> "....where the event resulting from the breach of contract has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contact, i.e. where there is a fundamental breach". (Keating, supra para. [23], and **Photo Productions** per Lord Diplock at 849).

[25] A contractor who abandons work before it is substantially completed, without any lawful excuse, commits an act of repudiation. (See **Mersey Steel & Iron Co. Ltd. V. Naylor (1884) 9 App. Cas. 434; Marshall v. Mackintosh (1898)**

78 L.T. 750; and Hoenig v. Isaacs [1952] 2 All E.R. 176). And an employer repudiates a contract where he wrongfully, and without lawful excuse, makes completion impossible. (**Southern Foundries v. Shirlaw [1940] A.C. 701 at 717 and 741**). The employer also repudiates if he fails to give possession of the work site at all, or without lawful excuse ejects the contractor from the site before completion. (**Felton v. Wharrie (1906) 2 Hudson's BC (4th Ed.) 398).**

[26] Was there a repudiation of the contract by one of the parties in this case? And, if so, did the other party accept that repudiation? These are findings of fact for the Court. **(See Campbell-Bennett Ltd v. Geo L. McNicol Co et al [1952] 3 DLR 247)**. In order to make its determinations, the Court must undertake a careful analysis of the evidence. The Court has to bear in mind that the allegations of repudiation by both sides were made in the context of specific events. And in finding facts, and drawing reasonable inferences therefrom, the Court is challenged by the lack of clarity in the evidence with respect to the time frames within which critical events occurred.

(2) Issues of Credibility

[27] The parties have offered different versions about what transpired between them. In two important instances, the credibility of the Claimant was successfully challenged. First, having alleged that the Defendant always had

access to the house, this was disproved to the satisfaction of the Court. The evidence of Martin King supports the Defendant's assertion that the Claimant changed the locks to the house, and denied her accesses thereto.

[28] The Claimant maintained that the Defendant always had access to the house. If this was true, there would have been no need for the Defendant to request access from the Claimant in order to take Mr. King into the house. It was because of the Claimant's failure to provide the Defendant with a new set of keys, that she was forced to wait outside the house with Mr. King for approximately four hours. Mr. King confirmed that the Defendant was unable to access the house because the Claimant refused to come to the site to let them in.

[29] The second compromise of the Claimant's credibility occurred when he alleged that he left a number of his tools at the house, and that these tools were never returned to him. The Claimant identified major tools such as power saws, routers, an electrical plane and hard saw. He wished the Court to believe that these tools were left behind. He stated that:

> "These were the workman's tools. I told her I had tools in the building. She had nothing more to say to me. What could I do?"

[30] But, surprisingly, there is no specific claim for these tools, and no evidence as to their value. Also, none of the correspondence sent to the Defendant

mentions any tools. Therefore, the Court does not believe that the Claimant left any tools behind. Rather, the Court accepts that he removed himself, his workmen, his tools and the building materials from the site.

(3) Abandonment of Construction by the Claimant

[31] The Defendant's evidence is that, when Mr. King returned to install the burglar bars in the house, she made certain observations. While downstairs, she realised that "cement and paint and tiles that were there to do the house were missing". And upstairs, "...boxes, about twenty something that came down from the United States I had stacked in one corner, ...were scattered all over the living room and dining room".

[32] The Defendant investigated further and realised that:

> ".....[the Claimant's] workclothes and clothes belonging to two workmen who used to work there [were not] there; and all [the Claimant's] tools that he usually kept there were not there. That is how I came to the conclusion that [the Claimant] was no longer interested in the work he left behind. I did not see any of his tools left behind".

[33] The Court is of the view that it was not possible for the Claimant to remove building materials and tools unless he had access to the house. And he would not have known that he was locked out, unless he went to the house and attempted to enter. Therefore, the Defendant must have made her observations and changed the locks prior to Mr. King's return. It is unlikely

that the Defendant made her observations about the missing materials and tools, on the very day that Mr. King came back.

[34] The Defendant's Witness Statement is also informative. She alleges that after the well was dug:

> "...Two weeks passed and I did not see the [Claimant] on site and he never contacted me. He never told me why he did not come back on the site. When I went to the site I realised the building materials that were in the building were missing i.e. tiling cement, trowel plastic, tiles.....After some time I realized that the [Claimant] had not returned to the job or contact[ed] me. I presumed that he was no longer interested in returning to complete the job. I put a new lock to the back door I had left for him to access the building. He left the job on his own leaving the job uncompleted". (Paras. 12 and 14).

[35] It is the Defendant's evidence that after the Claimant did not assist her entry to the house with Mr. King, she "never saw him at the house after that", and that she "did not try to contact him". She told the Court that she continued to visit the house but "after that I did not see him, and neither he [nor] any men were on the job for about three weeks".

[36] The Defendant's son confirmed that after his refusal to advance more money to the Claimant:

> "...I did not see any workmen on the site after the altercation. I observed scaffolding on the outside of the building was gone... There were no work tools.....just empty trowel plastic buckets around."

[37] The Defendant further explained that:

> "After that I went to the site two to three times a week just to see if I saw him or anybody come back to work. I saw nobody. He did not contact me, I did not contact him. I assumed that he had left the job and was not interested in the work anymore....After he did not come back, and I assumed he left the job, I contacted my sister and spoke with her... I got Mr. Holmes and he came and checked out the work. Mr. Holmes gave me a cost to finish the work that [the Claimant] had left. I had to pay Mr. Holmes for the work [the Claimant] had got paid for, and work [the Claimant] didn't finish".

From this evidence the Court drew a reasonable inference that the Claimant had access to the house during the time that the Defendant was seeking to ascertain whether he was going to complete the construction. The Court also finds that the Defendant changed the locks to the house after the Claimant withdrew.

[38] Did the Claimant's withdrawal from the building site constitute a repudiatory breach of the contract? The Defendant pleaded as follows in her Defence filed on 31 December 2008:

> "In breach of [the] agreement the [Claimant] left the building uncompleted and failed to carry out the said work with reasonable skill or care in that:
>
> (a) All bathrooms upstairs were left untiled.
>
> (b) The front patio was not tiled and not painted.

(c) The countertop in kitchen was not laminated.

(d) The pedestals of the interior staircase were not installed.

(e) The pedestals on the upstairs patio were small in diameter and inappropriate.

(f) The outside staircase was not tiled and was not trowel plastered.

(g) The plumbing in the entire building was not completed and/or was not properly done, that is, the installation of the jacuzzi, the waste pipes were not connected to the manholes.

(h) The grease traps were not built.

(i) The septic well was not cased.

(j) The electrical installations in the entire building were not completed.

(k) The trowel plaster of 3 bedrooms and 2 bathrooms downstairs and patio was not done.

(l) The patio floor was not floated and was not tiled.

(m) The cupboard doors in the kitchen, cupboard doors of 2 face basins, one cupboard of wardrobe and one interior door were not installed.

The [Claimant] therefore repudiated the said agreement which repudiation the Defendant accepted". (Para.8).

[39] When the Claimant withdrew, the house was ninety percent complete. He had expended his own resources in order to expand the building. By the Court's calculation he was owed another $7,700.00 when he embarked on stage 6. (See para. [19] supra). The Claimant had requested additional money from the Defendant and her son. Further advances were refused, but he proceeded to dig the well. This well was a part of stage 10, but there was no advance payment to cover this stage.

[40] The unfinished work listed by the Defendant fell into stages 6, 8, 9, 10, and 11. Stage 6 required a trowel plastic finish on the outer and inner walls. The complaint was that this finish was not applied to the outside staircase, the downstairs bedrooms and bathrooms, and one patio. The Court infers here that the vast majority of the inner and outer walls to this two storey building had been plastered.

[41] Stage 8 referred to cupboard installation. All that remained to be done here was the installation of cupboard doors in the kitchen, one wardrobe door, one interior door, and the cupboard doors under two face basins. There was no allegation that the doors were not built or painted. The Court concludes that the only unfinished part of the cupboard construction was the laminating of the countertop, and the placement of a few doors.

[42] Stage 9 called for the installation of tiles throughout the house. This appears to have been the most significant aspect of the unfinished work detailed in the Defence. The upstairs bathrooms, two patios, and the outside staircase were not tiled. However, judging from the Defendant's pleading, the majority of the tiling was completed. The amount allocated to stage 9 was $8,000.00. However, the Court reminds itself that the Claimant was owed $7,000.00 when he reached this stage.

[43] The Defendant's concerns about stages 10 and 11 are that aspects of the plumbing and electrical installations were not completed. It must be emphasized again that the well was dug, although no money was advanced by the Defendant for these two stages. Therefore, the Court is unable to entertain any claims for work not done under stages 10 and 11.

[44] The other areas itemised by the Defendant as incomplete relate to pedestals that were not installed, or to the unsuitability of pedestals used. There is no specific mention of pedestals in any of the stages listed in the agreement. The Claimant considered the pedestals to be extra work for which he did not charge the Defendant. (Infra at paras. [97] and [98]).

[45] The Defendant's Witness Statement addresses defects in the plumbing and a failure to make certain bathroom installations. (Para.13). It bears repeating that these were stages 10 and 11 issues that were not financed by the

Defendant. The other areas of concern in the Witness Statement are a repetition of the Defence.

(4) Monies Due to Claimant

[46] An objective assessment of the unfinished work, as alleged in the Defence, confirms that a significant portion of the work paid for by the Defendant was completed by the Claimant. The Claimant had also spent his own money on the construction. His withdrawal from the project occurred after he had requested instalments that were not forthcoming.

[47] The last two payments the Claimant received were from the Defendant's son Ricardo Skeete, and not from the Defendant herself. The Defendant had given her son this responsibility while she was overseas. Mr. Skeete's evidence is that the Claimant demanded more money after receiving these payments.

[48] Skeete refused further advances because, as far as he was concerned, "...the work that should be done according to the monies paid before was not finished". According to Skeete, when he told the Claimant why he was not making any further payments, the Claimant was far from pleased. Skeete does not recall seeing the Claimant again after this.

[49] The interaction between Skeete and the Claimant was after 30 January 2007, the date on the last two cheques. The Defendant alleged, at paragraph 7 of her Witness Statement, that she paid the Claimant an additional $28,000.00 in

2007. Given that it was customary to pay the Claimant by a banker's cheque, the Court saw no documentary evidence that the Defendant made any payments after 30 January 2007. Perhaps the $28,000.00 refers to the money paid to the Claimant by her son.

[50] The Defendant also alleged that the Claimant asked her for money to install the jacuzzi and for digging the well. Her witness statement says that:

> "I told him to complete the bathrooms and other works remaining and he will get paid. When I returned to the site the well was dug. This was sometime in May/June 2007". (Para.12).

But these aspects of the contract were a part of stage 10, for which the Claimant was not paid in advance, as required by the written agreement between the parties.

[51] Assuming that the Defendant made such statements, it is possible that she made them prior to April 2007. The Court reached this conclusion based on the fact that Mr. Holmes, the individual who completed the house, said both in his Witness Statement and oral evidence that he looked at the house in April 2007, in order to give an estimate for completing the same. It is unlikely that Mr. Holmes was invited to quote for completing the house before the Claimant abandoned construction. And the Claimant points to March 2007 as the time when the Defendant "took possession of the dwelling house". (See para.6 of Statement of Claim).

[52] It is also likely that any requests by the Defendant and her son, for certain aspects of the construction to be completed before more money was paid, were made between 30 January 2007 and 18 April 2007. The latter date is the date of Mr. Sue's first letter to the Defendant.

[53] The reality is that at this stage of construction, the Claimant had completed the expansion of the house in accordance with the second plan. Therefore, under the terms of the written agreement, he was owed money for undertaking that expansion. Additionally, it appears that he was owed a further $7,700.00, outstanding from stages 5 and 6. (See para.[19], supra).

[54] Unfortunately, there is no evidence indicating that the parties agreed when this money was to be paid. The payment schedule in the written contract was never adjusted either to incorporate the additional expenditure for expanding the building, or to provide a formula for calculating that expenditure. There is no evidence that the Claimant made it clear to the Defendant that the non-payment of the additional money would jeopardise further construction.

[55] The Claimant sought legal advice. The first letter from counsel to the Defendant is dated 18 April 2007. Mr. Sue's correspondence says in part:

> "My instructions are that you agreed to pay my client the sum of $346,000.00 for the construction of a house for your principal, Nola Barrow. My client complains that you owe the sum of $24,000.00 for the said construction and $7,829.00 for additional work and expenses which you

> requested but you have refused to pay the total sum of $31,846.25.
>
> Kindly be advised that the total sum of $31,846.25 is to be paid to my client or my chambers within seven days of the date hereof. Should you fail to do so legal proceedings will be instituted against you without further notice".

[56] This correspondence does not directly accuse the Defendant of a breach or repudiation of the contract. But implicit in the demand for unpaid sums of money, is an assertion that the Defendant is in breach of the contract. The request is for a sum representing the unpaid instalments for stages 10 and 11, and a sum for additional work and expenses.

[57] Mr. Sue's first letter does not call on the Defendant to pay the sums claimed before work on the house continued. There was no indication of a willingness on the part of the Claimant to continue construction as soon as funds were received from the Defendant. Also absent from the corres-pondence is any reference to a repudiation of the contract, either by locking out the Claimant, or by engaging another individual to complete the construction. In fact, there is no statement that the Claimant accepts a repudiation of the contract by the Defendant on any grounds whatsoever.

[58] What is certain from Mr. Sue's April letter is that the Claimant was threatening to institute legal proceedings against the Defendant if he was not paid the sums requested. A similar letter was issued by another lawyer in July

2007, also requesting the same sums, and again threatening legal action if the monies remained unpaid. The significance of the second letter is that it was sent to the Defendant after she changed the locks, and around the time that Mr. Holmes assumed responsibility for completing the house. Therefore, any possibility of the Claimant returning to complete construction was extinguished by the Defendant.

[59] Mr. Sue sent another letter to the Defendant in August 2007. It was in this letter that Mr. Sue drew to the Defendant's attention that the price of the additional work was erroneously calculated at $10.00 per square foot. The true price was $100.00 per square foot, and therefore the cost of the additional work was $37,600.00. When combined with the sums allocated to the last two stages of construction, the amount claimed in total is $61,600.00. This is the same figure pleaded in the Statement of Claim.

[60] After a careful and at times tedious assessment of the evidence, the Court has concluded that the Defendant, by her refusal to advance money for the completion of the house, was in breach of the contract. Money was owed to the Claimant, and he had undertaken aspects of the final stages of construction without an advance. The house was almost completed, a fact confirmed by the evidence of the Defendant, her son and Mr. Holmes. For example, Mr. Holmes' evidence of unfinished work confirms the areas

referred to by the Defendant. Where Mr. Holmes differs is that his evidence speaks in detail to construction defects that he observed.

[61] In these circumstances, the Court finds that it was not unreasonable for the Claimant to cease construction. The Defendant's failure to pay monies due and owing, particularly after written requests from lawyers, demonstrated her repudiation of the contract, and her unequivocal refusal to perform her part of the contract. (See para.[25] supra, and **Anderson v. Anchor Hotel Ltd [1973] 2WWR 582**). Without an injection of funds by the Defendant, the Claimant was unable to continue performing his part of the contract. The Defendant was in breach of a term of the contract that was fundamental to its continuation.

(5) Acceptance of Repudiation

[62] Jill Poole writes that:

> "Should a repudiatory breach occur, the non-breaching party may treat the contract as repudiated, but is not obliged to do so. Thus, in the event of a repudiatory breach of contract, the non-breaching party has the option (or 'election') to treat both parties' future obligations to perform as terminated or to choose instead to affirm the contract: see **Decro-Wall International SA v. Practioners In Marketing Ltd [1971] 1 WLR 361**". (Textbook on Contract Law, 13th ed, 2016, at p.293).

[63] It is not enough that the Defendant repudiated the contract. In this case the Claimant must also establish that he accepted that repudiation. Poole continues that:

> "A difficult question of fact may be to ascertain whether the non-breaching party has elected to accept the repudiation and treat the contract as at an end. A clear and unequivocal communication to that effect will resolve the matter, and an 'unequivocal overt act which is inconsistent with the subsistence of the contract' should be equally effective: **State Trading Corporation of India v. M. Golodetz Ltd [1989] 2 Lloyd's Rep. 277".** (Supra para.[62] at p. 294; see also **Force India Formula One Team Ltd v. Malaysia Racing Team Sdn Bhd [2013] EWCA Civ 780**).

[64] Keating notes that "...a mere failure to perform may be sufficient notice that the innocent party has elected to treat the contract as at an end". (Supra para.[23], at para.6-79). In **Vitol S.A. v. Norelf Ltd [1996] A.C. 800**, Lord Steyn opined that:

> "An act of acceptance of a repudiation requires no particular form: a communication does not have to be couched in the language of acceptance. It is sufficient that the communication or conduct clearly and unequivocally conveys to the repudiating party that that aggrieved party is treating the contract as at an end...It is sufficient that the fact of the election comes to the repudiating party's attention, *e.g.* notification by an unauthorised broker or other intermediary may be sufficient...". (Pages 810-811).

[65] The Court considers that the Claimant's acts of withdrawing himself and his tools and materials, requesting payment and threatening legal action through his lawyers, are unequivocal evidence of his acceptance of the Defendant's repudiation of the contract. Nothing in the legal letters can be interpreted as either a waiver of the breach, or as an affirmation of the contract. All the Claimant wanted was to be paid what he believed was due to him. He expressed no desire to continue their contractual relationship. (See paras. [56] and [57] supra).

[66] The Court has taken into consideration the fact that the Claimant relied on the Defendants change of the locks as the evidence of her repudiation of the contract. He also sought to convince the Court that he discovered the lock out after he returned to the house to continue construction. This suggests that he accepted her breach of the contract resulting from her non payment of monies owed. More importantly, it suggests that he elected to affirm the contract.

[67] The Claimant's evidence of returning to the house to continue his performance of the contract lacks credibility. The Court does not accept that his desire was to continue working without an essential injection of capital by the Defendant. His actions say the opposite, and the Court found as a fact that he withdrew from the project with good reason. The Claimant had already

accepted the Defendant's repudiation of the contract before she changed the locks to the house.

[68] In a recent case, Lewison L.J. opined that:

> "First, the task of the court is to look at the position as at the date of purported termination of the contract even in a case of actual rather than anticipatory breach. Second, in looking at the position at that date, the court must take into account any steps taken by the guilty party to remedy accrued breaches of contract. Third, the court must also take account of likely future events, judged by reference to objective facts as at the date of purported termination". (See **Ampurius Nu Homes Holdings Ltd v. Telford Homes (Creekside) Ltd [2013] 4 All ER 377** at para.[44]).

[69] While it was challenging for this Court to identify the exact date of the purported termination of the contract under consideration, the Court has carefully evaluated the relevant events leading up to the breach of the contract, in order to estimate when the Defendant's breach occurred. The Court also determined the position between the parties and the state of construction at the time of the breach. (Supra at paras.[46] and [53]).

[70] The Claimant's withdrawal from the construction site, and the content of the letters sent to the Defendant from his lawyers, all point to his acceptance of the Defendant's repudiation. It would have been obvious to the Defendant why the Claimant withdrew from the construction site. He was prevented from obtaining a part of the financial benefit that the parties intended him to obtain

from the performance of the contract. Having received the first letter from Mr. Sue, the Defendant was made aware of the amount of his claim, and the basis for his claim. However, according to her evidence, she made no effort to contact the Claimant either by telephone, by letter or in person.

[71] Had the Defendant sought legal counsel early, a reference to the written agreement would have confirmed that indeed money was owed for building expansion. Instead, the Defendant preferred to remain in an unreasonable state of ignorance. No steps were taken by the Defendant to remedy her breach of the contract. She precluded any opportunity for a negotiated settlement between the parties, that could have resulted in the completion of the house by the Claimant.

(6) Delay

[72] The Court also finds that the Defendant's conduct cannot be excused by the issue of delay that she raised in her Defence. Paragraph 7 of the Defence states that:

> "In breach of [the] agreement the [Claimant] failed and/or neglected to proceed diligently with the construction of the said dwelling house...as a result of which the Defendant was obligated to make repeated demands to the [Claimant] to complete same which said work would have been completed in a period of about 6 months from the date of [the] agreement or on or about 3rd January 2007".

[73] Indeed, the written contract gave an estimated time of completion of six months, "depending on the availability of funds/materials in a timely manner". The lack of finance from the Defendant caused the Claimant to cease work. And nowhere in her oral evidence did the Defendant refer to any concerns about the delay in construction, prior to the Claimant's disengagement from the work.

[74] The Defendant first estimated the time that the Claimant was away from the construction as approximately two weeks. (See para. [34] supra). Then a three week absence was mentioned:

> "I visited the site often again. At that stage the building was not finished, but a good way complete. I never saw him at the house after that. I did not try to contact him. After that I did not see him, and neither he [nor] any men were on the job for about 3 weeks".

[75] In "Chitty On Contracts", E.G. McKendrick writes that:

> "Time is of the essence: (1) Where the parties have expressly stipulated in their contract that the time fixed for performance must be exactly complied with, or that time is to be "of the essence". (2) Where the circumstances of the contract or the nature of the subject-matter indicate that the fixed date must be exactly complied with...". (13th ed., Vol.1, at para. 21-013).

[76] **Shawton Engineering Ltd v. DGP International Ltd (t/a Design Group Partnership) (No.3) [2005] EWCA Civ.1359**, was a case involving a

contract for the design and manufacture of a number of packages for a handling plant for nuclear waste. The contractor was behind schedule in completing the work. May L.J. held that:

> "[The Claimant] could only in law legitimately determine the contracts for delay if either
>
> (a) they gave reasonable notice making time of the essence; or
>
> (b) [the Defendant's] failure to complete within a reasonable time was a fundamental breach such that the gravity of the breach had the effect of depriving [the Claimant] of substantially the whole benefit which it was the intention of the parties that they should obtain from the contracts.
>
> Where time is not of the essence and where the party said to be in breach by delay is nevertheless making an effort to perform the contract, it is intrinsically difficult for the other party to establish a fundamental breach in this sense". (Para.[32]).

[77] There is no evidence that either the Defendant or her principal considered that time was of the essence in this agreement. In fact, the Defendant waited several months for the remaining work to be completed by Mr. Holmes. Nothing in the evidence suggests that the completion or occupation of the house became critical to the owner. And no notice was ever given to the Claimant making time of the essence. In addition, the requests for additional work, and the withholding of instalment and other payments, would have

increased the construction time. The Claimant did not take an unreasonable time to build the house, prior to his departure.

The Claimant's Entitlement

[78] Consequent upon the Claimant's acceptance of the Defendant's repudiation of the building contract, both parties were discharged from further performance of the contract. However, the Claimant is entitled to his accrued rights under the contract. (See Keating supra para.[23] at para.6-79A). The first consideration is what, if anything, is due to the Claimant for additional work. The second consideration is whether he is entitled to the unpaid instalments.

(1) The Additional Work

[79] Given the expanded size of the house, it cannot be disputed that the Claimant undertook additional work. It was Mr. Roach's expert evidence that the increase in the floor area "would mean an additional building cost".

[80] The Claimant's evidence is that:

> "It was understood that there would be an additional cost for the increased size of the house. I don't remember if I told the Defendant or Nola Barrow that there was a new size so the price is X or Y. Before we started construction I told her that my rate was $139.00 per square foot, but for the extended building I would only charge $100.00 per square foot. I don't recall where we were, either at my house or at her place. I discussed it with her and subsequently put it in writing in 2007. Maybe it was

> after our relationship deteriorated because trust wasn't there any longer".

[81] The Defendant denied that, during construction, she knew that she was expected to pay an increased price to the Claimant. In her Witness Statement filed on 12 September 2011, she averred that:

> "15. When the foundation was excavated and construction began I did not know about the extra works except by letter dated 24th February 2007 (or 24th September 2007) the [Claimant] informed me that the extra construction work cost $7,829.00. A copy of that letter is attached and marked "**MH4**".
>
> 16. Prior to that I had received [a] letter from Mr. Chester Sue dated 18th April 2007 attached and marked "**MH5**" and subsequently from Mr. Michael Lashley attorney-at-law dated 11th July 2007 marked "**MH6**".

[82] The Defendant expanded on her Witness Statement during her evidence in chief. The Court was informed that:

> "After I gave him the second plan there was no discussion about an increase in price. We had no discussion at any time about an increase in the price of construction. When I was having discussions with him no other person was present. The first time I knew he was asking for more money was when I got a letter from Mr. Sue. He was not still working on the site when I got the letter. I can't recall how long after I got the letter. When the job was nearly completed by the other person is when I got the letter".

[83] It is of interest that the owner of the property did not provide a Witness Statement. Neither was she subpoenaed by the Defendant to give evidence as to the circumstances surrounding the change to a second plan with an increased floor area. Even if the Defendant contends that as agent she had no knowledge or appreciation of the difference between the first and second plan, it was Nola Barrow who signed the agreement and then gave the architect instructions for a second plan.

[84] As Nola Barrow's agent, the Defendant is bound by the agreement that Barrow signed. And that agreement stated clearly that any change to the first plan would be subject to an additional cost. (See para.[13] supra). There is no allegation or evidence that there was a specific waiver of this contractual term, by the Claimant, in relation to the additional area on the second plan.

[85] Another relevant consideration is that at paragraph 5 of her Defence, filed on 31 December 2008, the Defendant admitted to an oral agreement with the Claimant "to carry out extra construction work on the said dwelling house". She admitted that a sum of $7,829.00 was due for the additional work, with $3,528.00 referable to the expansion of the building. Therefore, the Court finds that the Defendant conceded that an additional sum is also due to the Claimant for building expansion.

[86] What must be determined by this Court is the extent of the expansion on the second plan, and the price to be paid by the Defendant for that expansion. Having compared the pre-construction plan with the plan used to build the house, the Court confirmed a revised floor plan with additional floor area. The evidence of the architect is that the dimensions of the building expanded by an additional floor area of 336 square feet. (See para. [16] supra).

[87] In his oral evidence the Claimant referred to an additional floor area of 376 square feet, some 40 square feet more than the additional area referred to by the architect. In the absence of an explanation for the additional 40 square feet, the Court accepts the evidence of the expert witness in this regard. The Defendant owes the Claimant for an additional 336 square feet.

[88] Determining a fair price for the extra square footage is not without its challenges. The written agreement is silent on this issue. Whereas the Defendant was prepared to pay $3,528.00 for the expansion of the building, the Claimant alleged that this figure was a mistake. He erroneously asked for $10.00 per square foot for the additional area, whereas the correct quotation was $100.00 per square foot. Instead of $3,528.00, his true price was $35,280.00.

[89] The written agreement quoted a price of $346,000.00 for 2487 square feet. This is approximately $139.00 per square foot. Therefore, a claim for

$100.00 per square foot, for the additional work, does not appear to be unreasonable. Mr. Roach is also a valuations expert, but he was unable to recall what the average contractor's building rate was in 2006, when the contract was executed.

[90] The Court finds that the value of the additional work was $33,600.00 for 336 extra square feet. The Court accepts the Claimant's evidence in this regard, given that the original price was approximately $139.00 per square foot. The Court also accepts that any calculation of the additional area at $10.00 per square foot was a genuine error by the Claimant. The Court also noted that the Defendant provided no evidence as to what should be considered a reasonable charge for this extra work.

[91] The expansion of the building was not the only additional work provided by the Claimant. The Defendant also admitted that she requested and received additional lights. During her cross examination she told the Court:

> "If I asked him to do additional work I would expect to pay him but I did not ask him to do additional work.....The only extra work I recall asking him to do was to install four lights for me. I can't recall asking him to extend the building or to provide staircases with pedestals. That would be on the plan and I do not know about plans".

[92] The Claimant informed the Court in his evidence in chief that:

> "I had electrical drawings for the house. The extra lights were not in the electrical drawings, and

> would have had an impact on the completion date. I don't recall how many extra lights [there were]. When the extra lights were requested the conduit was not yet run.....New wires and conduit had to be run, and walls cut and replastered".

[93] No electrical drawings were produced to the Court. Nevertheless, the Defendant's evidence is that she requested four additional lights. And she expected to pay for the work associated with the additional lights. She never challenged the Claimant's evidence given in cross examination that "It takes a Hilti, it takes labour to do these things".

[94] More importantly, the Defendant did not challenge the Claimant's price of $725.00 for the installation of the extra lights. There was no allegation that this charge was either excessive or inappropriate. Therefore, the Claimant will be awarded $725.00 for the extra lighting.

[95] The Claimant alleged that part of the extra work was the provision of stairs and staircases with pedestals throughout the building. Both plans indicate external staircases on two sides of the building. The second plan provided for an internal staircase not seen on the first plan.

[96] The Claimant testified that he did additional work to the external stairs:

> "...when the owner of the home came to the island and said she didn't like how the stairs was built. These stairs are on the original plan. Ms. Barrow asked me to take it down and I reconstructed a new one. The original stairs was built on what the plan said".

[97] The Claimant also said on two occasions that there was additional work that he did not charge for. First, during his evidence in chief he stated that:

> "I put in an internal stairs not on the plan to connect the two floors. I did not charge for that".

And second, during his cross examination the Claimant further stated that:

> "I put in an internal stairway between the kitchens on both floors at no cost. The other work I did not charge for was putting in pedestals, reconstructing stairs, and putting in a pantry upstairs".

[98] The Claimant admitted that he did this work gratuitously. Therefore, nothing is due to him either for the internal stairs, or for reconstructing stairs, or for putting in pedestals. He is, however, entitled to the sum of $34,325.00 for all the other additional work.

(2) The Unpaid Instalments

[99] Part of the claim is for a sum of $24,000.00, which represents the last two instalments under the agreement. Except for the well, there is no evidence that any of the work under these heads of agreement was completed. Also, the Claimant provided no valuation for the work done for the well. However, the evidence does suggest the sum of $7,700.00 is due for work completed under the written agreement. (See para. [19], supra). The Court will award the sum of $7,700.00 to the Claimant. But there is an insufficient evidential

basis on which to award a sum representing all or part of the last two contract instalments.

The Counterclaim

[100] The Defendant alleged that the Claimant removed tiles, tile cement and buckets of trowel plaster from the construction site. (Para.11 of Defence). She incurred construction and labour costs in order to complete the house. (Para.12 of Defence). Her Witness Statement gives the cost of materials as $2,565.00, and labour costs of $11,000.00. (Para. 14).

[101] The Defendant's expenditure to complete the house totalled $13,565.00. This is $10,435.00 less than the $24,000.00 which she did not pay the Claimant to complete the house. Realistically, therefore, there is no proof that the Claimant incurred a loss by engaging someone else to complete the house.

Disposal

[102] Judgment is entered for the Claimant in the sum of $42,025.00, with costs to the Claimant to be agreed or assessed.

[103] The Defendant shall pay interest to the Claimant at the rate of four (4) percent per annum from 31 October 2008 to 23 May 2017 and at six (6) percent per annum from 24 May 2017 until payment in full.

[104] The Counterclaim is dismissed.

Sonia L. Richards
Judge of the High Court