25 OCT 2011

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1755 of 2005

BETWEEN:

ANDREW WATSON **PLAINTIFF**

AND

FRANKLYN IFILL **DEFENDANT**

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

2009: March 02, 05, 09, 12
June 03, 04, 05
December 11
2011: October 25

Mrs. Sally Comissiong for the Plaintiff.

Mr. Stephen Lashley and Ms. Michelle Knight for the Defendant.

DECISION

Background

[1] The Plaintiff resides and works in the United States of America. He is the owner of land in Barbados at Lot No. 86, Gibbons, Christ Church. The Plaintiff made arrangements to build a house on this land, and construction

commenced around June 2004. The Plaintiff stopped the construction around December 2004 because of serious defects in the footings and blockwork columns. On the advice of an engineer, the Plaintiff demolished the defective work.

[2] In this action the Plaintiff alleges that the Defendant was the person engaged by him to build the house. He further alleges that because of the Defendant's negligence in constructing the house, he suffered loss and damages. He claims the following against the Defendant.

1. liquidated damages in the sum of $64,219.83;
2. damages for breach of contract and/or negligence;
3. interest; and
4. costs.

[3] The Defendant denied the existence of a contractual relationship between himself and the Plaintiff. He further rejected any suggestion that he was liable to pay the Plaintiff damages for either breach of contract or negligence.

Was There An Oral Agreement Between The Parties?

[4] The first issue to be determined in this case is whether there was an oral agreement between the parties for the Defendant to execute construction work for the Plaintiff at Gibbons in Christ Church. The parties agreed that

they met each other in Miami, Florida, where they were introduced by a mutual friend, Alvina Bynoe. The Plaintiff is a businessman, who ships freight from Florida to Barbados. He has performed these services for Alvina Bynoe and for the Defendant.

(1) The Plaintiff's Case

[5] The Plaintiff said that the Defendant told him that he had lived in England for sometime, where he built large buildings, and that he built homes in Barbados. The Plaintiff understood from the Defendant that he was a contractor and an engineer. According to the Plaintiff, the Defendant showed him various houses he had built in Barbados, and persuaded the Plaintiff that he was the best man to build his house for him. The Plaintiff had house plans drawn and approved by the Town Planning Department. His evidence was that the Defendant entered into an oral agreement with him to build the house.

[6] The terms of the agreement, as understood by the Plaintiff, were that the Defendant would cast the foundation, build all external walls, and bring the house up to ring beam level for $52,000. The Defendant would be paid this sum for labour. The Plaintiff described labour as "whatever was associated to bringing the house to ring beam level, all external walls, decking for floor.". In addition to the labour costs, the Plaintiff was responsible for

paying all the other expenses. The agreement was for only one phase of construction, and no further phases were mentioned in the evidence.

[7] As the Plaintiff does not live in Barbados, he arranged for a friend, Mr. Rahmon Akoojee, to act as his agent. Mr. Akoojee paid the Defendant whatever costs the Defendant incurred, including the cost of building materials. Whenever the Defendant requested a payment from Mr. Akoojee, Mr. Akoojee informed the Plaintiff about the request, and the Plaintiff authorised Mr. Akoojee to pay the Defendant.

(2) <u>The Defendant's Case</u>

[8] The Defendant was adamant that he never agreed to build a house for the Plaintiff. He contended that he never built private homes because they tended to be inadequately financed and ran into problems. In his own words there were "too many hassles in a private home.". He preferred working with professionals on large projects. Therefore, he was not interested in building a house for the Defendant.

[9] The Defendant described his arrangement with the Plaintiff as follows:

> "After plenty of discussion over a period of time between [the Plaintiff] and myself in Barbados, it came down to being asked if I could get labour or men to do the construction for him. He asked me to get these men. I did get some men for him. I also told him that he should pay the men directly. I did not want to have to do that. I was leaving it completely up to him. However, after some discussion again about how difficult it would be for him to be in Miami and being able to pay the

> men, it was decided in order to assist him that I would do that; pay the men for him for their labour work on site. It entailed getting the information from the men on site, and calling Mr. Akoojee … tell him what the figure was, collect the cheque and cash it, and give cash to the men.".

[10] The Defendant said that all he agreed to do for the Plaintiff was to find men to do the construction for him, and to pay those men with funds provided by Mr. Akoojee. The Defendant confirmed that he did in fact source the workmen, collected the money from Mr. Akjoojee, and paid them on behalf of the Plaintiff. For him, his job was basically "just paying men", and not the job of a contractor. He maintained that he never entered into a contractual relationship with the Plaintiff, and that he never had any intention to enter into such a relationship.

(3) <u>The Defendant's Involvement In The Project</u>

[11] Despite the Defendant's version of his limited involvement in the Plaintiff's project, the Defendant's own evidence suggests that he played a more expanded role before and during the construction of the house. The Plaintiff alleged that, prior to the commencement of construction, the Defendant told him that they needed a surveyor to show the Defendant the linemarks. The Defendant did not deny this, or that Mr. Ward, a surveyor, pointed out the linemarks. The Defendant confirmed this when he said in his evidence: "I told [the Plaintiff] it was necessary to have the linemarks put in. In order to

know where the building should go you should know where the linemarks are.".

[12] The Defendant also told the Court that he and the Plaintiff looked at the house plans together, prior to and after their approval; and that the approved plans were given to him by the Plaintiff. The Defendant in turn passed these plans on to the workmen. The Defendant said that the workmen "would go through the drawings and build accordingly.". The Defendant was also present at the site on at least one occasion for a meeting between the Plaintiff and the draftsman.

[13] The Defendant did other things on the site. He ordered materials such as diesel, sand, stone and steel. He told Mr. Akoojee how many cement blocks and how much cement to order. Both the Defendant and Mr. Akoojee individually made arrangements for the delivery of materials to the site. The Defendant also had some of his personal equipment on the site. This equipment included drilling machines, a compressor, power saw, extension cords and a concrete mixer.

[14] The Defendant expected to be paid by the Plaintiff for the use of this equipment. In fact, paragraph 9 of the Defence contains a Counterclaim where the Defendant deposed as follows:-

> "... the Defendant has suffered loss and damage having allowed the Plaintiff to use the Defendant's equipment, namely

> one (1) Cement Mixer, one (1) generator, and one (1) hammer drill among other tools. The Defendant also expended money on behalf of the Plaintiff in arranging for the installation of water at the Plaintiff's building site and in crediting building materials on the Plaintiff's [behalf].".

[15] The Court accepts that, prior to the commencement of construction, the Defendant did the following:

1. looked over the house plan with the Plaintiff, before and after it was approved, and received a copy of the approved plan which he passed on to the workmen;
2. was present at a site meeting between the Plaintiff and the draftsman;
3. asked to be shown, and was shown the linemarks for the building site by a surveyor;
4. arranged for the installation of water at the building site;
5. assisted Mr. Evans, (described by the Defendant as the lead workman), with the four points or corners of the building.

[16] During the course of construction, the Defendant also:-

1. ordered various building materials that were critical to the construction of the house;
2. collaborated with Mr. Akoojee to order building materials for the site;
3. determined the amount of sand and stone required, prior to placing an order;

4. told Mr. Akoojee how much steel to order, the quantity of cement and the size and quantity of the cement blocks to order.

5. used his own money at times to pay wages until refunded either by the Plaintiff or by Mr. Akoojee;

6. used his own money or credit facilities to obtain building materials for construction until he was reimbursed;

7. used his personal equipment on the site;

8. looked at the house plans with one of the workmen, a Mr. Evans, "just to find out if he understood exactly what had to be done on the plans";

9. entertained questions from Mr. Evans about the size of the steel mats and the size of the steel to be used for the construction. The Defendant said that on the rare occasions when Evans consulted him about such matters they either looked at the plans together or the Defendant referred Evans to the plans.

[17] Given the details at paragraphs [15] and [16] above, it is obvious that the Defendant did much more, in relation to the construction, than to source workmen and pay them for their labour. According to the Defendant, he "got involved in things that I did not want to get involved in, including coming to town on Fridays, going to the bank and paying men.".

[18] The Defendant steadfastly denied being involved in the construction of the house. The reason given by the Defendant for assisting the Plaintiff was that:

> "I was basically helping out a friend, and that is why I went to such lengths. He helped me in some ways and I helped him. He would purchase small parts for my vehicle and send them for me. ... There were instances when I offered to pay him and he would not accept money.".

However, it is clear that the Defendant involved himself in several aspects of the project prior to and after the commencement of construction. But it does not follow that this involvement amounted to the Defendant performing the duties of a contractor under an oral agreement with the Plaintiff.

[19] In the absence of a written contract, the existence of a contractual relationship between the parties must be evidenced by their conduct; by the things said and done by them. The Court has to place a reasonable construction upon that conduct, and draw reasonable inferences from the conduct of the parties. (See ***Northern Ontario Power Co. v. Canadian Northern Power ([1944] 2 DLR 20).***

(4) <u>The Plaintiff's Agent</u>

[20] The parties agreed that Rahman Akoojee was the person who paid the Defendant on behalf of the Plaintiff. According to Mr. Akoojee's evidence, when the Defendant first contacted him by telephone he described himself as

the Plaintiff's contractor. Akoojee paid the Defendant either in cash or by cheque for either wages or materials purchased by the Defendant. The Defendant produced receipts to Akoojee for materials and equipment used at the building site. However, he did not produce receipts to support his requests for money to pay wages.

[21] Mr. Akoojee told the Court that whenever the Defendant came to him to collect money, "he would tell me to come and see what a wonderful job he was doing." But Akoojee never visited the site before the Plaintiff put a halt to the construction. Akoojee insisted that the Defendant told him that he was the Plaintiff's contractor. It was also his evidence that the Defendant never requested contractor's fees, only fees for wages.

(5) The Site Meeting

[22] In December of 2004, the Plaintiff visited the building site. The foundation was about to be poured and he became concerned about what he saw. He invited the Defendant to a meeting at the site which the Defendant attended, along with 4 or 5 other persons. Mr. Norville and Mr. Belgrave attended the meeting, and gave evidence at the trial on behalf of the Plaintiff.

[23] Mr. Norville is an engineer by profession, and he was accepted as an expert witness by consent. He examined the structure on the site and determined

that it was structurally unsound. Mr. Norville also considered the Defendant to be the contractor for the building. His evidence was that:-

> "The details given at the time for the foundation by the contractor was adequate. Details means how the foundation was supposed to be constructed. [The Defendant] was the contractor. I was shown the actual concrete foundation by [the Defendant]. I was satisfied with the details [the Defendant] gave me for the foundation ... I spoke to [the Defendant] in terms that there needed to be corrective action to the structure, and that the details of the corrective action would be produced at a later date. [The Defendant] said that he could correct the structure. I was told by [the Plaintiff] that [the Defendant] was the contractor. [The Defendant] also stated to me that he was the contractor."

[24] Mr. Belgrave was the other individual present at the site meeting who gave evidence on behalf of the Plaintiff. He is a property valuer at the Land Tax Department, and also responsible for the district where the Plaintiff was building. He too was concerned about the structural integrity of the work in progress. He confirmed that the Defendant was present at this site meeting, and that he also spoke to the Defendant.

[25] Mr. Belgrave said that he formed the impression that the Defendant was a builder from the discussions they had. He believed that the Defendant told him that he was responsible for the work at the site. Mr. Belgrave described his interaction with the Defendant as follows:-

> "I asked [the Defendant] what was his expertise in this area of construction He said he was a trained engineer, and that he used to work for the telephone

> company or one of those people. Most of the discussion was on where did the people who where controlling the site go wrong. I got the impression from [the Defendant] that he was the contractor responsible for the building of this house …
>
> Mr. Norville and myself pointed out the defects to [the Defendant]. I got the impression that when we pointed out the defects [the Defendant] became aware of them. My question to [the Defendant] was: are you a builder? How could you build the columns as they are? [The Defendant] started getting agitated. The atmosphere was warm. [The Defendant] gave me the impression that he had been building for a while and that he knows what he is doing. It was more the engineer Mr. Norville who was pointing out the defects to [the Defendant]. He seemed surprised that we thought there were defects."

[26] The Defendant agreed that a site meeting occurred. But his evidence was that he never told anyone there that he was the contractor responsible for the site. His reasons for attending the meeting were because he was asked to go, and because he got the workmen for the Plaintiff. However, the Defendant acknowledged the defects shown to him by Mr. Norville. He said: "The engineer showed me and explained to me what he considered to be the defects. What he showed me I acknowledged.".

[27] Mr. Norville gave his evidence in a frank, forthright and professional manner. The Court accepts this evidence, and has deduced from that evidence that the Defendant was familiar with and knowledgeable about detailed aspects of the construction at the site. He adequately answered

questions posed by Mr. Norville. The Defendant also accepted the responsibility to take corrective action for the defects pointed out to him; defects that were not minor defects. This acceptance of responsibility was coupled with a willingness he expressed to correct the defects.

[28] What the Court finds passing strange is that at the site meeting, when faced with accusations of bad workmanship, the Defendant was so reticent that he did not disavow responsibility for the defects. He made no effort either to disassociate himself from responsibility for the project, or to call the names of those persons whom he considered to be responsible. Even after the meeting, there is no evidence of any effort on his part to put the Plaintiff in contact with the individuals who worked on the site.

[29] Incredibly, the Defendant asked the Court to believe that he never got the impression at the site meeting that it was being suggested that he was responsible for the problems. He said that the first time he realised that a finger was pointing at him was when he received correspondence from the Plaintiff's attorney-at-law.

(6) <u>The Plaintiff's Credibility</u>

[30] The Court has pointed out areas of the Defendant's evidence about the site meeting that placed doubt on his credibility. The Court also had doubts about other aspects of the evidence. The Defendant's evidence is that on

several occasions he urged the Plaintiff to get someone to supervise the construction. However, he frequently interacted with the Plaintiff's agent Mr. Akoojee, but there is no evidence that he complained to Akoojee about the Plaintiff's failure to appoint a supervisor. As a builder, the Plaintiff should have been aware of the risks associated with unsupervised construction. But he never testified that he warned either the Plaintiff or Akoojee that he would not be responsible if things went wrong on the construction site. Nor is there evidence that the Defendant urged Akoojee to speak to or persuade the Plaintiff to engage a supervisor. In addition, no evidence was presented to the Court about complaints by the Plaintiff to Akoojee arising from difficulties at the building site due to the absence of a supervisor. To the contrary, the Defendant invited Akoojee to come and see what a good job he was doing.

[31] The Defendant agrees that he sourced the men for the project. He was familiar with some of them, because they had worked with him before. According to the Defendant, Evans was chosen as a multitasker at the site, and for his ability to read plans. Again the Court finds it curious that, having sourced the workmen, there is no evidence that either the Plaintiff or Akoojee were introduced to these men. Even if the Court accepts that the Plaintiff did not wish to deal directly with the workmen, there is no evidence

that either the Plaintiff or Akoojee were in a position to contact these men directly if they so desired. The workmen never called Akoojee or the Plaintiff about challenges at the construction site. They did not call about the ordering of materials or equipment, or about the payment of wages, or for directions or consultations, because this was the responsibility of the Defendant.

[32] There is one other part of the evidence in this case that the Court will refer to in its assessment of the Defendant's credibility. The Plaintiff said that in an effort to impress him as a man of means, the Defendant took him to the airport, showed him two small aircraft, and said that he owned these aircraft. Alvina Bynoe, who testified on behalf of the Defendant, said that he told her that he was in partnership with someone else in the ownership of an aircraft. When asked about this event, the Defendant did not deny that it occurred. He said that the Plaintiff asked him who the planes belonged to, and he told him that they "belonged to people in the flying club.". The Court noted that the Defendant made no claim to ownership of or legal interest in the aircraft, despite having told the Plaintiff and Bynoe otherwise.

(7) **The Findings Of Fact**

[33] Not only has the Court accepted Mr. Norville's evidence, but also the evidence of Mr. Belgrave, which reinforced that of Mr. Norville. The Court

is not persuaded that these gentlemen were too close to the Plaintiff to be objective in their analysis. The Defendant held himself out to these gentlemen to be the builder responsible for the construction at Gibbons. Mr. Akoojee also understood this to be the position, based on what the Defendant told him, and his invitation to come and see what a good job he was doing. The Court finds that the Defendant was the person responsible for the building site.

[34] The Defendant as the contractor, controlled the labour force and directed the proceedings at the construction site. The Defendant knew the number of men who worked at the site, and what these men were paid individually. He claimed that Evans hired the men and told him what to pay them. However, he was not able to say where Evans could be found, and no-one from the site gave any evidence.

[35] In addition to the foregoing, the Court is reminded of its earlier finding, at paragraphs [15] to [17], that the Defendant did much more than source workmen for the Plaintiff. Therefore, the Court is persuaded that the Plaintiff has proved, on a balance of probabilities, than an oral agreement existed between himself and the Defendant for certain construction work to be executed by the Defendant at Gibbons. The conduct of the Defendant

supports the existence of an oral agreement. He said that he was the contractor, and he behaved like a contractor.

Oral Contracts For House Construction In Barbados

[36] In this case there is no written contract. The Plaintiff is relying on the existence of an enforceable oral contract between the parties. Colonel Branford, the Defendant's expert witness, observed that oral contracts for the building of houses are not unusual in Barbados. He noted that:

> "In these oral contracts there would be an offer and an acceptance, a clearly defined scope of works, the type of contract entered, the cost of the project, its duration and a start up time. Sometimes you get oral family or friendly contracts that usually go bad, because you usually do not have a clearly defined scope of works. These contracts can be highly contentious but they are enforceable. Money has passed and work was done, but it is a question of the quality of the work. The difficulty is what was agreed. I have seen one or two oral contracts for building houses in stages. ... Building in stages is usually found in written contracts.
>
> It is not unusual for people in Barbados to build in stages and stop. That is determined by finances. It is the norm to agree with the builder for the payment of each stage.".

[37] Colonel Branford's area of expertise is construction and not law. Therefore he cannot speak authoritatively about contract law and the enforceability of contracts. However, the Court accepts that oral contracts for the construction of houses do occur in Barbados, and that building in stages is also known in local construction.

The Terms Of The Oral Contract

[38] The oral agreement in this case was not for the construction of the entire house, but for one phase or stage of construction. The Plaintiff testified that the Defendant agreed to cast the foundation and bring the house up to ring beam level. This included the decking for the floor and the external walls. The agreement did not include the internal walls. Therefore, foundation to ringbeam was one phase or stage. Interestingly, the Defendant revealed in his evidence that the Plaintiff wanted a ballpark figure for getting the walls up to ringbeam. So that there must have been some discussion between the parties about a phased approach to the construction.

[39] The Plaintiff alleged an agreed price of $52,000 to be paid to the Defendant for labour only. The Plaintiff was responsible also for paying the suppliers directly for all the other expenses such as materials and equipment. This was confirmed by the Defendant during cross-examination when he said that "the arrangement was that [the Plaintiff] would pay the costs of materials". Therefore, the Defendant admitted the existence of an arrangement with the Plaintiff, an arrangement that went beyond the mere sourcing of workmen. He admitted to one of the terms of the agreement as alleged by the Plaintiff.

[40] The Court finds that the contract is a labour only contract, with all materials and equipment to be paid for by the Plaintiff. Payments for labour were

made directly to the Defendant. Colonel Branford also confirmed the existence of the labour only contract in local construction. He said that in this type of contract:

> "Labour is usually 65 per cent of the overall costs. The contractor would be responsible for supplying all the labour to the site, whereas the owner would supply all the materials. In that arrangement the contractor is responsible for seeing that things are done properly.".

[41] With respect to the price for labour, the Defendant claimed that what he gave the Plaintiff was a

> "ballpark figure so that he could source some funds, and it was like just pulling a figure out of the air at that time: "it could be so and so" … An estimate involves more detail to reach a more precise figure. It was a guesstimate rather than an estimate."

There is no evidence that the Defendant ever suggested to the Plaintiff or his agent that he should either engage a quantity surveyor or otherwise obtain a realistic estimate of the costs involved. There is no evidence that the Defendant, having the knowledge of a professional builder, and claiming to be the friend of the Plaintiff, warned either the Plaintiff or Akoojee about the dangers of embarking on a building project with only a "guesstimate" of the projected costs. The Court also noted that the Defendant referred to the ballpark figure of $52,000 in paragraph 3 of his Defence. And the Court is of the view that the Defendant's actions negated any guesstimate, but were

more consistent with an agreement for a set price of $52,000 for labour to execute a phase of the work.

(1) Consideration

[42] Counsel for the Defendant argued forcefully that there was no consideration to support the existence of an enforceable contract because the Defendant did not receive a contractor's fee. Clause 9 of the Defence states that the Defendant received no payment for his assistance to the Plaintiff. In **Chitty On Contracts** it is observed that:

> "Typically, in the context of construction contracts, the consideration provided by the employer is the promise to pay the contract price, and the consideration provided by the contractor is the promise to carry out the works." (30th ed., Vol. II, at parag. 37-045).

[43] In the context of this case, the Plaintiff would have provided consideration by his promise to pay the contract price of $52,000. Concomitantly, the Defendant would have provided consideration by his promise to carry out a phase or stage of the construction. The Plaintiff understood the contract price to be $52,000 for the labour provided by the Defendant. As the Defendant proceeded to execute the construction work at Gibbons, the Plaintiff's agent paid various sums of money to the Defendant. A portion of this money went towards the payment of wages to the workmen, but,

however described, these payments were advanced for the labour costs incurred by the Defendant.

[44] The Plaintiff in his evidence made no mention of a separate fee for the Defendant as distinct from the labour costs or wages payments. And neither was it put to him in cross-examination that the quoted labour costs were solely for wages, and could not have included a profit for the Defendant. In addition, the Defendant's expert witness, Colonel Branford, gave no evidence as to how a contractor's fee is arrived at in a labour only contract. Branford only mentioned that in this type of contract, labour is approximately 65 percent of the overall cost of construction.

[45] In the absence of this evidence, it is not for the Court to speculate whether an essential term is missing from the contract. However the Court will make the following observations. First, if indeed a contractor's fee, as distinct from a labour quote, is an essential term in a labour only contract, the Defendant has not shown that he did not derive a financial benefit from the payments that he received for wages. The quantity surveyor, Mr. Barrow, gave evidence as an expert witness for the Plaintiff. He assessed the Plaintiff's labour costs at $31,495. This is nearly two thousand dollars less than the $33,420 that the Plaintiff said he paid to the Defendant for labour.

This raises the question as to whether the Plaintiff did derive a financial benefit from the project.

[46] No oral or documentary evidence was offered by the Defendant to identify the workmen who were on site. Similarly, there was no evidence to show what each workman was paid. Whereas receipts were produced to Akoojee to support claims by the Defendant to be reimbursed for monies he spent on materials and equipment, there is an absence of documentation to support the various requests made for wages.

[47] The absence of oral or documentary evidence, about the workmen and their wages is fatal to the Defendant's claim that he did not receive a contractor's fee for his efforts at Gibbons. This lack of evidence means that the Defendant was unable to demonstrate that he did not receive a financial benefit from the wages paid to him by Akoojee. The Defendant said that he had these records, but that he did not know where to find them. He placed these records in a box and put them away.

[48] The Court is of the view that the production of the relevant documentation would have assisted the Defendant in proving that he received no monies for his efforts on behalf of the Plaintiff. That documentation could also have shown whether the Defendant paid out, as wages, all the money he received for labour costs.

[49] The second observation is that a court is not concerned with the adequacy of consideration. (See **Boulton v Madden (1873) LR 9 Q.B. 55).** Inadequacy of consideration by itself is not a ground for setting aside a contract. (See **Lilley v. Hewitt** 147 E.R. 543). There must be evidence of fraud or an unconscionable bargain, and the Defendant has not so alleged. A court will not consider a hard bargain. (See **Middleton v Browne** (1878) 47 LJ Ch 411).

[50] The law, as stated by Duncan Wallace in **Hudson's Building And Engineering Contracts**, is that:

> "In normal commercial contracts, however, if the consideration is obviously so inadequate as to be derisory, the burden of establishing the contract is correspondingly the greater. Nevertheless there is no principle of law which will relieve a party from a foolish or disastrous bargain once its terms are clearly established." (11th ed., 1995, Vol. 1 at parag. 1- 070).

[51] Another observation is that with respect to the essential terms of a construction contract:

> "Typically ..., matters such as the scope of work, the time for completion and the price will need to be finalised in order to make the contract workable, but there is no pre-scriptive definition of what will be an essential term in every case. It is for the parties to decide what is essential or important to their reaching agreement; where the parties have indeed failed to agree a term which is essential to the working of the agreement, the court cannot fill the gap. ... In each case it will be necessary to look at what was said and done by the parties and determine what the parties intended would be essential for an agreement, as emphasised by Goff J. in ***British***

> ***Steel Corp. v. Cleveland Bridge ([1984] 1 All E.R. 504, 511 g-j)***.". (See **Chitty On Contracts** 30th ed., Vol. II at parag. 37 – 049).

[52] Colonel Branford in his expert evidence mentioned that in local oral construction contracts for houses one finds "an offer and acceptance, a clearly defined scope of works, the type of contract entered, the cost of the project, its duration and a start up time." (See paragraph [36] of this judgment). The Court has established the necessary offer and acceptance, based primarily on the assertions of the Plaintiff that were confirmed by the statements and the conduct of the Defendant.

[53] The scope of work cannot be disputed. It is the construction of the house from foundation to ring beam level, inclusive of the outer walls. Again the Defendant confirmed in paragraph 3 of his Defence that the internal walls were omitted because the Plaintiff was uncertain about the placement of the internal walls. The Plaintiff also provided an approved plan to guide the Defendant. As to the cost of the project, the Defendant agreed that a figure of $52,000 was given by him as "a ballpark" figure for the labour to get the house to ring beam level in accordance with the scope of work. The Plaintiff's evidence is that this was the price quoted by the Defendant for the labour work.

[54] The Court finds that there was consideration for the agreement, and that the contract price was $52,000. The Defendant did not demonstrate that the payment of a contractor's fee was an essential term that was omitted from this contract. The Defendant also failed to establish that he derived no financial benefit from the monies he received for the payment of wages. The absence of a contractor's fee does not negate the fact that there was consideration, or that the parties agreed a price.

(2) Time For Completion

[55] Counsel for the Defendant argued that the contract terms were imprecise because there was no agreement about the date of completion. Colonel Branford echoed **Chitty On Contracts** when he said that a time for completion is an essential term in a construction contract. But ***Chitty*** (30th ed., Vol. II, paragraph 37-030) further posits that:

> "In the absence of an enforceable express stipulation as to time, the court will normally imply a term into a contract that completion is to be within a reasonable time.". (See ***Hick v. Raymond & Reid [1893] A.C. 22, 32).***

[56] The learned authors of ***Keating On Construction Contracts*** (8th ed. 2006) make a similar statement about the absence of an express term regarding the time for completion of a contract. They state that:

> "If no time is specified for completion of the contract a reasonable time for completion will normally be implied. What is a reasonable time is a question of fact to be considered in

> relation to circumstances which existed at the time when the contractual services were performed but excluding circumstances which were under the control of the party performing those services.". (paragraph 9-001; see also ***Charnock v. Liverpool Corp. [1968] 1WLR 1498, CA***; ***Shawton Engineering Ltd. v. DGP International Ltd. [2006] B.L.R. 1 CA;*** and ***BSC v. Cleveland Bridge and Engineering [1987] 24 BLR 94).***

[57] ***Razack J.*** was of the same mind in ***Westmoorings Limited v. National Insurance Property Development Company Limited (H.C.A. No. 2303 of 1993).*** In deciding whether the absence of a formal contract in writing precluded the existence of an enforceable agreement between the parties, ***Razack J.*** followed ***Farrell v. Green ((1974) 232 EG 587),*** and opined that:

> "It appears to this court on a careful perusal of [the] documents, that the parties had arrived at a consensus on the essential aspects of the bargain. The parties had not however fixed a date for the completion of the contract but a court in such circumstances will always read into an agreement and imply a term that the completion will take place within a reasonable time."

The ***Westmoorings*** case is also highlighted by **Ramlogan & Persadie** in ***Commonwealth Caribbean Business Law*** ((2004), Cavendish Publishing at p. 113-114).

[58] Had a dispute arisen between the parties about the date of completion of the agreed phase of the work, a court would have been able to determine a reasonable time for completion. The absence of such a term in the agreement does not make the agreement either vague or uncertain. The terms of the

oral contract between these parties may be basic, but they are precise and certain, and the oral contract contains all the essential terms.

Intention To Create Legal Relations

[59] Counsel for the Defendant also submitted that, even if the elements of a construction contract were present, there was no intention between the parties to create a legal relationship. Salmon LJ held in ***Jones v. Padavatton ([1969] 2 All E.R. 616 at 621),*** that an objective test is to be applied when a Court is deciding whether parties intended an arrangement to be legally binding. In that case, the Court of Appeal held that an arrangement between a mother and a daughter was a family arrangement that depended on good faith to keep the promises made by the parties. There was no intention for the arrangement to be rigid and binding. The Court of Appeal held further that the arrangement was too vague and uncertain to be enforceable as a contract.

[60] Salmon LJ stated the legal principles as follows:

> "Did the parties intend the arrangement to be legally binding? This question has to be solved by applying what is sometimes (although perhaps unfortunately) called an objective test. The court has to consider what the parties said and wrote in light of all the surrounding circumstances, and then decide whether the true inference is that the ordinary man and woman, speaking or writing thus in such circumstances, could have intended to create a legally binding agreement. … as a rule

> when arrangements are made between close relations, for example between husband and wife, parent and child, or uncle and nephew, in relation to an allowance, there is a presumption against an intention of creating any legal relationship. This is not a presumption of law, but of fact. It derives from experience of life and human nature which shows that in such circumstances men and women usually do not intend to create legal rights and obligations, but intend to rely solely on family ties of mutual trust and affection."

[61] The Barbados High Court dealt with similar issues in the case of ***Smith v. Mottley ((1993) 48 WIR 20)***, where there was an arrangement between an uncle and his niece for the uncle to build a house for the niece. The evidence revealed that:

> "No contract, however, was recorded in writing. No sufficient thought appears to have been given as to the type of house to be built, as to the price of the house, as to the period over which the house was to be built and as to the defendant's remuneration for his services. By this rather loose arrangement it seems as if the uncle was trying to help his niece, who lived in England, build a house in Barbados for herself and her family and at the same time make some money for himself in supervising the building and assisting in doing some of the carpentry work on the house." (p. 22 g-h)

[62] Based on this evidence, **Waterman J**. had no difficulty in determining that:

> "... the true inference is that at the time when the arrangement was made to build the house neither the plaintiff nor the defendant intended to enter into a legally binding contract. I am satisfied that it was simply an informal family arrangement between an uncle and a niece whereby the uncle was helping his niece and her family build a house in Barbados. Furthermore, all the evidence shows that the terms of the arrangement for the building of the house were vague and uncertain. There is no written contract. There is, in particular,

> no agreement as to the defendant's remuneration for his work and services.
>
> In the circumstances therefore the agreement between the parties is unenforceable because of the vagueness and uncertainty of the terms of the agreement.". (p. 23h – 24a)

[63] The facts of the present case may be distinguished from the evidence on which ***Jones v. Padavatton*** and ***Smith v. Mottley*** were decided. There is no family relationship between the Plaintiff and the Defendant that would support the existence of a family arrangement between the parties. Theirs was not a close friendship developed over several years of interaction. They were introduced to each other as adults and as businessmen. Their initial relationship was business oriented, with the Plaintiff providing shipping services for the Defendant. The Defendant described the Plaintiff as his friend, but the Plaintiff resiled from any notion of friendship between them. The Court finds that these gentlemen were more business acquaintances than bosom friends.

[64] Another consideration is that in a commercial contract, he who asserts that there was no intention to create legal relations has the burden of so proving. And it is a heavy burden to discharge. (See ***Edwards v. Skyways Ltd. [1964] 1 W.L.R. 349, 355; Mamidoil-Jetoil Greek Petroleum Co. SA v. Okta Crude Oil Refinery Ad [2003] 1 Lloyd's Report 1 at 159).*** The Court, having applied an objective test, finds as a fact that the Defendant, by his

words and his conduct, undertook the contractual responsibility of construction at the Gibbons site. The Defendant has not discharged the heavy burden of proving that the parties did not intend to create a legal relationship.

The Extent Of The Defects

[65] Defective work was carried out at the Gibbons site. The Defendant has not challenged the defects identified by Mr. Norville to the Court and in his reports. In fact, the Defendant acknowledged the defects when they were shown to him by Mr. Norville. Mr. Norville identified the following defects:-

> "The existing blockwork columns did not meet the British or American codes with respect to the height. For a blockwork column of this nature the maximum height to the minimum dimension should not exceed 20 feet. Several of the columns exceeded 20 feet, and some were relatively short ... some of the columns were out of vertical alignment, i.e. not straight, and they were not tied. All the columns were free standing at this stage ...
>
> On some of the foundations there was exposed reinforcement. Several of the column foundations were not to the standard size. The stated dimensions of the column foundations was said to be 4 square feet by [the Defendant]. The majority of them were not 4 square feet. One column had no significant foundation at all. There was a lower level then a ridge, and this column was on the ridge of the lower level; it was sitting on the rock with just a small amount of concrete under the block. Another column was constructed into two

> sections, and the upper section did not line up with the lower section … .
>
> There was significant steel exposure in several of the foundations. If reinforcement is left exposed for too long it would become rusty, and the effective diameter of the reinforcement would be reduced. The reinforcement in the blocks was inadequate. The minimum reinforcement for a 12 inch column as built would have been four 16 milimeter steel bars. There were only two 12 milimeter steel bars in all of the columns.".

[66] Mr. Norville initially recommended the remedial work to be done at the site. But, in his expert opinion, the extent and significance of the work and the materials required would have been more costly than demolishing and starting again. Therefore, his final recommendation was the demolition of approximately half of the existing structure which included the columns. The Plaintiff took this advice, and demolished the defective part of the structure at a cost of $6,350.

[67] Mr. Norville admitted during his cross-examination, that he did no cost estimates for the remedial work. Defence counsel submitted that this was a "grave omission" on Mr. Norville's part, and that there was no evidence to support Norville's final recommendation. Norville's reason for omitting cost estimates was that "since the remedial work was so complex and given the significant material required, it would be more costly than to demolish and start again."

[68] The Court is of the view that, as an expert in his field, Mr. Norville was competent to make the judgment call that demolition would be less costly than remedial work. In any event, it was only the part of the structure with the columns that required demolition. Therefore, construction had not progressed to a stage that would have caused the Court to question his ability to make the assessment without cost estimates.

[69] Counsel for the Defendant challenged the evidence of both Mr. Norville and Mr. Belgrave on the basis that these men were familiar with the Plaintiff. He argued that given the "nexus" between the Plaintiff and these gentlemen, the Court should have had an independent analysis of their findings. Mr. Grenville Barrow, one of the Plaintiff's expert witnesses, said that he did not know the Plaintiff before he was engaged by him to remeasure all the ongoing work at the Gibbons site, and to cost it for the labour inputs only.

[70] Mr. Barrow examined and identified defects in the construction that he saw. He concluded that:

> "The work I saw was not of good quality because of the defects … . For the type of work expressed from a professional opinion I would say that the work was undersupervised.".

This evidence served to reinforce that of Messrs Norville and Belgrave.

The Issue Of Liability

[71] In a construction contract, the law implies certain terms with respect to the standard of workmanship, and the fitness of the works. As the contractor at Gibbons, the Defendant was expected to carry out the works "using all proper skill and care". (See **Chitty On Contracts, 30th ed., Vol. II, parag. 37-076.**

[72] The Engineer in his report of June 2005 mentioned columns that showed "extremely poor workmanship"; inadequate construction of footings; and problems with the columns. He concluded that:

> "The quality of workmanship on the project to date leaves much to be desired and is an indication of inadequate supervision of workmen without the skills to perform the intended tasks. In either case the result is a structure that is substandard in design and construction." (page 3)

Therefore, the Defendant was in breach of an implied term in the contract, as he did not use all proper skill and care during construction. His efforts were described by the Engineer as "bad substandard workmanship.".

[73] The Defendant was also required to ensure that his work was reasonably fit for its particular purpose. The Defendant knew that he was building a stage of a dwelling house. He held himself out as being capable of carrying out the construction. He told other persons, including the Engineer, that he was responsible for the building. And the Plaintiff undoubtedly relied on the

Defendant's skill and judgment as a builder. (See **Greaves v Baynham Meikle [1975] 1 W.L.R 1095, 1098G,** per **Lord Denning M.R.)** The Defendant did not satisfy the Plaintiff's expectations in this regard. In the words of Mr. Norville, "What I saw could not have been used for the intended purpose.".

The Measure of Damages

[74] The Defendant was in breach of the implied contractual terms that required him to use all proper skill and care, and to ensure that the building was fit for the purpose. As a result of his undersupervision and substandard workmanship, the Defendant was forced to demolish a part of the existing structure in order to rebuild. In so doing he incurred loss and additional expenses.

[75] In these circumstances, the measure of damages is the cost of replacement or reinstatement. (See **Harbutt's "Plasticine" Ltd. v. Wayne Tank And Pump Co. Ltd.** [1970] 1 Q.B. 447; **East Ham Corp. v. Bernard Sunley & Sons Ltd.** [1966] A.C. 406). The Plaintiff incurred losses as follows:-

	$
Materials & Equipment	
Blocks	2,192.65
Steel	4,097.50
Cement	4,426.10

Sand and Stone		3,960.00
Nails		170.14
Lumber and plywood sheets		5,284.44
Rental of jackhammer		1,009.00
Rental of mixer and labour		3,160.00
		24,299.83
Labour (amount paid by Plaintiff)		33,420.00
Cost of demolition		6,350.00
	TOTAL	64,069.83

[76] Damages for breach of contract are awarded to the Plaintiff in the sum of $64,069.83. This figure will bear interest at the rate of 8 percent from the date of the filing of the Writ to 25 October, 2011; and 6 percent from 26 October, 2011 until payment in full.

Costs

[77] Costs are also awarded to the Plaintiff to be agreed or taxed.

S. A. Richards

Sonia Richards
Judge of the High Court