[2024] JMCC COMM. 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISON

CLAIM NO. 2018CD00657

BETWEEN	**ALEISHA KNOTT**	**CLAIMANT**
AND	**COPELAND MYRIE**	**DEFENDANT**

Mr. Jonathan D.K. Morgan instructed by Dunn Cox, Attorneys-at-law for the Claimant

Ms. Kimberly K. Myrie Essor and Mr. Gordon McFarlane instructed by Michael B.P. Erskine, Attorneys-at-law for the Defendant

Breach of Contract - Whether the Defendant is liable for failing to complete the modification of the unfinished building - Whether the Claimant breached the contract for failing to pay the Defendant in a timely manner - Whether the Defendant is in breach of the contract for leaving the work site - Whether the Defendant should be compensated for additional works.

IN OPEN COURT

Heard on 23rd, 24th, 25th, 26th, 30th, 31st October, 12th December, 2023, 24th January, and 13th February 2024

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

[1] This is a claim for breach of a contract entered into on July 12, 2017, between Aleisha Knott (hereafter Ms. Knott), the owner of property located at Lot 152 Ocean

Ridge in the parish of St. James, and Copeland Myrie (hereafter Mr. Myrie) where Mr. Myrie was contracted to modify and complete an unfinished building located at the said property. After a walkthrough of the property, the Defendant prepared and gave to the Claimant an "Estimate" detailing the work to be done on the property including material and labour costs in the sum of Seventeen Million, Eight Hundred and Twelve Thousand Dollars ($17,812,000.00). Thereafter on July 12, 2017, the parties executed an Agreement that stipulated that the Claimant agreed to the contract sum of the said Seventeen Million, Eight Hundred and Twelve Thousand Dollars ($17,812,000.00) to cover labour and material cost with a condition that all material required for the project will be the responsibility of the contractor to secure and purchase. It was also a term of the contract that in the event of termination of this contract by either party, payments or refunds will be calculated by quantifying the work completed plus any other cost variation incurred as a result of the termination.

[2] The Claimant now alleges that the Defendant failed to complete the work as itemized on the estimate. It is also alleged that the value of the work done on the property amounted to only Ten Million and Ninety-Six Thousand, Nine Hundred and Fifty-Five Dollars ($10,096,955.00) and that the Claimant was forced to use alternate methods to have the work completed on her property to make it habitable. She has claimed the sum of Eight Million, Two Hundred and Fifty-Three Thousand, Five Hundred and Thirty-Six Dollars ($8,253,536.00) representing the money paid to the Defendant for work not completed.

[3] The Defendant denies that the work done, and all the costs associated with same were itemized on the Estimate but stated that an initial estimate was presented to the Claimant Ms. Knott setting out all the work to be done, however, she requested a reduction. He also stated that she requested that upgrades be made to the property which were outside the estimate. He denies receiving the total sum alleged and has counterclaimed for the sum of Four Million, One Hundred and Eighty-Four Thousand, Nine Hundred and Eighteen Dollars and Seventy-Five

Cents ($4,184,918.75) being money owed for work completed on the property as well as payments made to his workers.

THE CLAIMANT'S CASE

Evidence of Aleisha Knott

[4] In her viva voce evidence, Ms. Knott stated that an initial "walk-through" of the property was done where she pointed out the work she wanted to be done to Mr. Myrie and at that time, he took note of the measurements. She stated that a few days after the initial "walk-through", a written estimate was prepared and sent to her agent, Dr. Shrinivasa Gunta detailing the work to be done on the property. Ms. Knott indicated that the total cost of the work to be done amounted to Seventeen Million, Eight Hundred and Twelve Thousand Dollars ($17,812,000.00) and it was agreed that the completion date for the work was fixed for four (4) months from the date of the contract. During cross-examination, Ms. Knott could not specify exactly where in the contract it was stated that the work would be completed in four (4) months but insisted that that was verbally agreed. She also admitted that there is nothing in the contract which specified a deadline for the work to be completed, neither was there a commencement date for the project.

[5] She averred that in keeping with the terms of the contract, several payments were made to Mr. Myrie via cheque and direct transfer which totalled Sixteen Million Five Hundred Thousand Dollars ($16,500,000.00). She further expressed that cash payments totalling Two Million, Two Hundred Thousand, Four Hundred and Ninety-One Dollars ($2,200,491.00) were made directly from Dr. Gunta to Mr. Myrie to purchase material and to pay the workmen. Ms Knott asserted that Mr. Myrie was also contracted to make, supply and install shelves in the library at an agreed cost of Three Hundred & Fifty Thousand Dollars ($350,000.00). The work to the library does not form a part of the Claim.

[6] Ms. Knott stated that Mr. Myrie caused significant delays in the work which resulted in extending the completion date of the project to over a year and this forced her to stay in hotels, rent various properties and enter into a lease agreement until the work was completed. She also asserted that in or around July of 2018, Mr. Myrie stopped working on the property, demanded more money to complete the work and threatened that he would do no further work unless he was paid more money. She stated that she refused to pay Mr. Myrie any additional money and he ceased working on the property. She also stated that the workmen refused to carry out work on the property and in a desperate bid to get the work completed, she began making cash payments directly to Dr. Gunta so he could pay the workmen and ensure that the work is completed.

[7] Ms. Knott gave evidence that after Mr Myrie ceased working on the property, she engaged the services of Mr. Rudal V McFarlane, Quantity Surveyor, to do an estimate of the work that was done by Mr. Myrie. She stated that the Quantity Surveyor's Report revealed that the work done on the property amounted to Ten Million and Ninety-Six Thousand, Nine Hundred and Fifty-Five Dollars ($10,096,955.00). She further stated that, though she had dialogue with the National Commercial Bank (NCB) for a loan to carry out the work on the premises, at no point was she ever in a separate contract with any representative from the NCB for the distribution of funds directly to Mr. Myrie. She asserted that the loan proceeds were paid to her and she transferred the money directly to Mr. Myrie or through her agent Dr. Gunta.

[8] Ms. Knott asserted that at no point was she presented with an amended estimate for work to be done and she did not agree to any amendments or modification of the contracted terms which were presented in the estimate. In cross examination, Ms. Knott admitted that she communicated with Mr. Myrie verbally by telephone conversation and WhatsApp messages, however, that would have been for specification of what the contract covered. She also admitted to communicating verbally with Mr. Myrie regarding the correct colour of the paint, style of kitchen

cupboard, style of the grills and the colour of the tiles however, such verbal communication was only in relation to design and specification of what the contract covered.

[9] Ms. Knott also denied that significant masonry work had to be done to correct the lower level of the property to ensure that the ground floor could be tiled property. Also, although she did not provide any evidence to show the status of the property before or after the work was done, she denied that Mr. Myrie had to demolish the walls on her instructions but stated that it was demolished after Mr. Myrie realised that he was at fault.

Evidence of Dr. Srinivasa Gunta

[10] Dr. Srinivasa Gunta stated that he knew Mr. Myrie to be a contractor and arranged a meeting with Ms. Knott to secure an estimate for the construction work to be done on the property. He further stated that sometime in July 2017, he arranged a walk-through of the entire property inside and outside where Ms. Knott pointed out the work she needed to be done and Mr. Myrie took measurements. Dr. Gunta asserted that a few days later, Mr. Myrie sent him two estimates of the work to be done, one was for the detail of masonry work and the other showed all the work to be done including the masonry work which totalled Seventeen Million, Eight Hundred and Twelve Thousand Dollars ($17,812,000.00). He asserted that the second estimate detailing all the work to be done was agreed on by Ms. Knott and he instructed Mr. Myrie to commence construction. During cross examination, Dr. Gunta denied receiving another estimate in the sum of Twenty-Five Million, Five Hundred and Seven Thousand, Three Hundred and Eighty Dollars ($25,507,380.00).

[11] Dr. Gunta stated that up to July 2018, Mr. Myrie was still working on the premises and was complaining that he needed more money to conclude the work. He further indicated that Ms. Knott started sending money directly to him to buy material as

well as to pay the labourers after consultation with Mr. Myrie and he made a note of all the uncompleted work. During cross examination, Dr. Gunta indicated that Ms. Knott made the selection for paint colour as she was particular about her colours and that there was a colour which had to be changed because Mr. Myrie did not use the right colour at the right place.

Expert evidence of Mr. Rudal McFarlane

[12] In his expert evidence, Mr. Rudal McFarlane opined that the actual value of the work carried out by Mr. Myrie amounted to Ten Million and Ninety-six Thousand, Nine Hundred and Fifty-Five Dollars ($10,096,955.00). Mr. McFarlane stated that in August, 2018, he was contracted by Ms. Knott to carry out an assessment of the work done by Mr. Myrie. He stated that he visited the site where the work was pointed out to him. He carried out measurements, conducted an assessment of the works performed thereon and arrived at the assessment. During cross-examination Mr. McFarlane admitted that he could not know all the work performed by Mr. Myrie unless all that work was pointed out to him. He also could not recall whether certain items such as rough casting of walls, window jambs, door jambs and ceiling were pointed out to him.

THE DEFENDANT'S CASE

Evidence of Copeland Myrie

[13] Two witnesses gave evidence on behalf of the Defendant. The first witness was the Defendant himself who stated that at the time he did the walk-through with Ms. Knott and Dr. Gunta, he informed Ms. Knott not to purchase the house because of the extent of work that needed to be completed, however, Ms. Knott informed him that she had already committed herself. He further stated that he informed her that she had to do the "dirty work" first and he did an estimate for masonry and carpentry work for the sum of Three Million, Two Hundred and Forty-Six Thousand

and Forty Dollars ($3,246,040.00). Mr. Myrie asserted that Ms. Knott asked for another estimate to complete the full project and he presented an estimate for the sum of Twenty-Eight Million Dollars ($28,000,000) and Ms. Knott informed him that the bank would not approve a loan for that amount of money.

[14] He further stated that Ms. Knott asked him to reduce the estimate which he brought down to Seventeen Million, Eight Hundred and Twelve Thousand Dollars ($17,812,000.00) and though Ms. Knott stated that it was still too high, she requested that a contract be prepared as she would go ahead with the estimate. During cross-examination, Mr. Myrie admitted that based on the estimate, the sum of Seventeen Million, Eight Hundred and Twelve Thousand Dollars ($17,812,000.00) should be paid in three instalments of Five Million, Eight Hundred Thousand Dollars ($5,800,000.00) and that the final instalment would not be due until receipt of a Certificate of Completion.

[15] Mr. Myrie stated that he commenced working on the property two days after the contract was signed and even though he had not yet received any money from Ms. Knott, he ordered and received material from Big M Hardware in the amount of Two Hundred and Eleven Thousand, Eight Hundred and One Dollars and Fifty-Nine Cents ($211,801.59) and commenced working on the property. Mr. Myrie further stated that the first two cheques issued by Ms. Knott dated July 12, 2017 bounced, however, these cheques were rectified by a wire transfer to the bank on July 17, 2017.

[16] Mr. Myrie indicated that once the work commenced, Ms. Knott constantly spoke with him about changes to be made to the design of what was originally agreed. He also indicated that there was evidence of inferior work which had to be corrected before the contract and extra work could commence and it was pointed out to Ms. Knott that this would cost more in labour and material and that it should be done and paid for separately. He also indicated that in late 2017 or early 2018, Ms. Knott requested a revised estimate to include the extra work as well as the

electrical and plumbing work as she wanted to approach the bank for more money to complete the property. He indicated that a final estimate for the sum of Twenty-Five Million, Five Hundred and Seven Thousand, Three Hundred and Eighty Dollars ($25,507,380.00) was prepared and given to Dr. Gunta and he even received a call from the bank manager to verify the estimate.

[17] Mr. Myrie indicated that Ms. Knott requested numerous changes to be done to the property including:

a. lowering the flooring in the downstairs living room which required recasting.
b. increasing the flooring upstairs because the floor was slanted and adding another step the length of the living room.
c. changed the window and door jambs as they were not properly completed by the previous builder.
d. removed and replaced all glass blocks and purchased and replaced new ones.
e. changed the tiling in the bathroom from halfway up the wall to the ceiling.
f. changed the paint on the outside of the wall to trowel-on.
g. changed the location where plugs, lights and switches were constructed.
h. built wooden scaffolding after removing the metal scaffolding.
i. demolish the shower wall in the Master bathroom, which was already built, install glass walls, included a Jacuzzi and 12 feet granite countertop and cupboards.

[18] Mr. Myrie stated that Ms. Knott refused to pay him for the extra work he completed, and he had even started to use his own funds to purchase goods as well as to pay the workmen. He further indicated that as a result of the Claimant's refusal to pay, he left the property and never returned. Mr. Myrie stated that he left the job having put himself in debt and lost earnings for his professional services, material and costs. He however, left his workmen to complete the job, remained amicable with Ms. Knott and Dr. Gunta and informed his workmen that Ms. Knott would pay them

directly. Mr. Myrie further stated that in August 2018 he sought legal advice regarding the non-payment of his professional services and the fact that he had expended a substantial sum. He stated that by letter dated August 18, 2018 his attorneys wrote to Ms. Knott setting out the work not done and asked that the outstanding sum be deducted from the sums owed to him and the balance be delivered to him.

[19] Mr. Myrie admits that he left the property without completing the job. He denies owing the Claimant any funds whatsoever as the work completed on the property is of greater value than what he had been paid for. He stated further that the Claimant was given quality work with approximately ninety percent (90%) completion when he left the premises and that there were only minor cosmetic finishes which was due to the constant changes and numerous requests made by the Claimant. Mr Myrie said he only received Sixteen Million, Four Hundred and Fifty-Five Thousand, Four Hundred and Forty-Three Dollars and Twenty-Five Cents ($16,455,443.25) and he counterclaims for the sum of Four Million, One Hundred and Eighty-Four Thousand, Nine Hundred and Eighteen Dollars and Seventy-Five Cents ($4,184,918.75) for work done for which he has not been paid.

Evidence of Bradley Walker

[20] Bradley Walker was the main mason who was contracted to do masonry work on the Claimant's property. His evidence is that he accompanied Mr. Myrie on the first site visit in June 2017 where a walk-through of a three-storey high "shell" was conducted. He said the property had walls and a roof however, it had no windows and doors. Mr. Walker stated that because of the extensive masonry work to be done on the property, he had to employ four other masons to assist him on the site as he was given seven (7) months to complete. During cross-examination, Mr. Walker contradicted himself when he said, "I don't know of that, I know of ten (10) months" for the completion". Mr. Walker asserted that during the course of his employment, Mr. Myrie approached him to do several estimates as there were

constant adjustments to where plugs and switches were to be placed and this required cutting out of the walls to make these adjustments.

[21] Mr. Walker stated that when he commenced the work in June 2017, he noticed several issues with the house. Firstly, the hallowed wall sections in the concrete walls had to be cut and repaired using washed river sand as it was originally done with dirty sand to flash the walls. He stated further that it was brought to his attention that the outside property wall which appeared to be perfect and intact was shelling out and hollowed inside and this also had to be repaired. Mr. Walker further indicated that repairs had to be done to the window and door jambs because they were slant, that the downstairs living room had to be lowered and recast and the upstairs bedroom had to be elevated by an additional 7 to 8 inches to allow for proper tiling. Mr. Walker further indicated that Ms. Knott instructed them to remove the old glass blocks and replace them with new ones, to remove the shower walls and replace them with glass walls and to upgrade the fence from a two-block height to four block height and this required additional material.

SUBMISSIONS ON BEHALF OF THE CLAIMANT

[22] Mr. Jonathan Morgan on behalf of the Claimant submitted that building contracts are categorised based on payment arrangements made between the parties and fall within certain categories. Counsel relied on Halsbury's Laws of England, 5th Edition, Volume 6 (2023) paragraph 309 for the interpretation of certain terms in a building contract. Counsel submitted that the parties intended that payments would be made periodically at various stages of the construction work and relied on the text in **Stair Memorial Encyclopaedia on Building Contract (Reissue) [Edinburgh: Butterworths, 1999)** to support his position. He drew the Court's attention to the fact that the Claimant made periodic payments throughout the period July 2017 to August 2018, however, when it became apparent that the

Defendant almost received the complete contractual amount and the work was not near completion, she opted to make payments to her agent to manage costs.

[23] Mr. Morgan argued that the Defendant has not denied that he failed or refused to do the work and submitted that the Defendant's breaches of the Agreement, involve the non-completion of the contractual steps. Counsel submitted that a similar sequence of events took place in **Aldith Simms v Howard Gordon** [2018] JMSC Civ 192 where the Defendant overextended beyond the slated period to October 2008, before he abandoned any further construction on the house with it left unfinished. The Court did not find that there was any lawful justification for the Defendant's inability to fulfil the terms of the contract which would enable him to abandon the construction.

[24] Counsel submitted that specific rules apply to any extra-works performed by a contractor on the terms of a building contract. He stated that the law provides that compensation may be sought for extra work only if it was a variation contemplated within the terms of the Agreement or the property-owner expressly agreed to pay for the same. To further bolster his position regarding "extra work" Mr. Morgan relied on **Equilibrio Solutions (Jamaica) Ltd v Peter Jervis & Associates Ltd** [2021] JMCC Comm. 26 where Laing J, commencing at paragraphs 124, provided an analysis of whether an obligation arose to compensate the contractor for "extra work". Counsel submitted that the Defendant needed to establish some definitive agreement on the part of the Claimant, to pay an additional sum for any alleged "extra work" performed at the property and stated that the Defendant failed to discharge this burden on the evidence before the Court. He also submitted that the Defendant is not entitled in law to receive any additional payments from the Claimant for alleged "extras" performed at the property.

[25] Counsel submitted that the law is clear and that based on the decision of the Court in the case **H Dakin & Co Ltd v Lee** [1914-1915] All ER 1302, a building contractor is only entitled to the contract price less the amount that ought to be deducted for

works not completed or not done to specification. He further submitted that the law provides that compensation may be varied only if it was within the contemplation of the Agreement or with the property owner's agreement.

[26] Mr. Morgan contended that the evidence shows that the Defendant failed to perform the agreed contractual works to the specification required by the Agreement or any at all. Counsel submitted that the Defendant's work fell far below the specification required by the Agreement in terms of quality and value as evidenced by the expert witness.

[27] Finally, counsel advanced that the Claimant is entitled to damages as the evidence presented reveals that periodic payments were made to the Defendant's account for which work was not completed which is supported by the Quantity Surveyor report. Counsel submitted that the sum of Eight Million, Two Hundred and Fifty-Three Thousand and Forty-Five Dollars ($8,253,045.00) is due and payable which represents the difference between the sums paid to the Defendant and the value of the works performed.

SUBMISSIONS ON BEHALF OF THE DEFENDANT

[28] Counsel for the Defendant, Mrs. Kimberley Myrie Essor commenced her submissions by stating that it is essential to determine who breached the contract. She further stated that the relevant obligations of each party as expressly stated or required by the said terms of the Agreement, must first be ascertained.

[29] Counsel relied on Lord Hoffman's principle in **John Thompson & Janet Thompson v Goblin Hill Hotels Limited** [2011] UKPC 8 where the Privy Council rejected the reasoning of the Court of Appeal and emphasized the fact that in certain cases, commercial absurdities must be supported by evidence and not assumptions and submitted that in interpreting the terms of a written contract, the

Court must first determine the natural and ordinary meaning that the words convey to the reasonable man, who had all the background knowledge reasonably accessible to the parties at the time they contracted with one another.

[30] Counsel further submitted that only where the words used create ambiguity and/or flout commercial sense, will the court give effect to the meaning that the parties must have agreed to, given the background knowledge which each party ought reasonably to have had. She advanced that the Court should examine the interpretation of the word "estimate" and stated that the definition in the Oxford dictionary is (a) an approximate judgment, especially of cost, value, size, etc. or (b) a price specified as that likely to be charged for work to be undertaken. Counsel also referred to the meaning using Dictionary.com which defines the word "estimate" as a noun as "an approximate judgment or calculation, as of the value, amount, time, size or weight of something. "She asked the Court to find that the "Estimate" was a rough approximation of the work to be done and not the actual cost.

[31] She further submitted that the Claimant breached the Agreement when she admitted in evidence that she paid the Defendant Sixteen Million, Five Hundred Thousand Dollars ($16,500,000.00) although the costs of the agreed "Estimate" was Seventeen Million, Eight Hundred and Twelve Thousand Dollars ($17,812,000.00). Counsel relied on **Alilas v Januzaj** [2015] 1 ALL ER (COMM) 1047 to support her position that it is the Claimant's action which forced the Defendant to terminate the Agreement. She pointed out that the property was ninety percent completed at the time of termination and so the Claimant is liable to the Defendant for failing to make timely and sufficient payments under the Agreement which resulted in the Defendant sustaining significant losses and damages.

[32] Counsel averred that the Defendant was, at all material times, willing to perform his obligations under the contract and that whilst awaiting payment from the

Claimant, the Defendant incurred debt through the purchasing or procuring of items on credit, using his credit card and paying his workers using his personal funds.

[33] As it relates to the principle underlying the award of damages for breach of contract, Counsel relied on paragraph 16 of **YP Seaton & Others v Sagicor Bank Jamaica Limited** [2022] UKPC 48 where Lord Hodge, in delivering the judgment of the Privy Council, noted that:

> 16. "*It is trite law that the fundamental principle underlying the award of damages for breach of contract, which is a substitute for performance, is that the plaintiff or claimant is to be placed in the same position it would have been in, so far as can be achieved by a money award, as if the contract had been performed:* ***Robinson v Harman*** *(1848) 1 Ex 850, 855 per Parke B. More recent applications of that principle can be found in* ***Golden Strait Corporation v Nippon Yusen Kubishika Kaisha*** *[2007] UKHL 12; [2007] 2 AC 353, paras 9 per Lord Bingham of Cornhill, 29 per Lord Scott of Foscote, and 57 per Lord Carswell;* ***Bunge SA v Nidera BV*** *[2015] UKSC 43; [2015] 2 Lloyd's Rep 469, [2015] Bus LR 987, para 76 per Lord* ***Toulson; and One Step (Support) Ltd v Morris-Garner*** *[2018] UKSC 20; [2019] AC 649, paras 31-35 per Lord Reed. (In this judgment the Board refers to "the plaintiff" in the context of Jamaican law and "the claimant" in the context of English law."*

[34] Counsel also relied on the principle in **Hadley v Baxendale** (1854) 9 Ex. 341 to support her position that damages for breach of contract should be such as may fairly and reasonably be considered either arising naturally or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it.

DISCUSSION

[35] Based on the facts of the case the submissions advanced, two main issues arise to be resolved. They are firstly whether the Claimant or the Defendant is in breach of the contract dated July 12, 2017, and secondly, whether the Defendant performed extra work and whether his Counterclaim can succeed.

Whether the Claimant or the Defendant is in breach of the contract dated July 12, 2017?

[36] There is no dispute concerning the fact that the parties executed a document titled "Agreement" which provided for the modification and completion of the Claimant's unfurnished residential building by the Defendant. There is also no dispute that the parties agreed to the written terms of the Agreement or that the Claimant commenced making payments to the Defendant who embarked on the modification. It is also not in dispute that the Agreement provided for the payment by the Claimant to the Defendant of the sum of Seventeen Million, Eight Hundred and Twelve Thousand Dollars ($17,812,000.00) which cost was to cover both labour and material. This figure was based on an "Estimate" prepared by the Defendant which set out all the items that were to be dealt with under the contract.

[37] It is Ms. Knott's allegation that the sum of Seventeen Million, Eight Hundred and Twelve Thousand Dollars ($17,812,000.00) is the total agreed by Mr. Myrie to carry out the renovation and that this sum included the "dirty work". Mr. Myrie on the other hand stated that that was not the case since other invoices were presented to Ms. Knott which she refused to pay.

[38] Counsel for the Defendant argued that the word "Estimate", when given its natural and ordinary meaning and applied to the Agreement, is a rough approximation of

the value of the work to be performed on the property. She submitted that the Defendant calculated and presented this information using his expertise, within his profession, as a contractor for approximately twenty-five (25) years during which he has constructed several houses, guest houses, villas, apartments, commercial buildings and done countless residential and commercial renovations. She contended that the estimates were drafted at a time when only two "walk-throughs" of the property were conducted and that Mr. Myrie was not in a position to determine the exact value of the works to be performed on the property. She further contended that in the nature of the work, estimates prior to the start of the modification and/or construction of a property are estimates which may be varied throughout the life of the respective contract.

[39] I do not find favour with the submissions of counsel for the Defendant in this regard. This "Estimate" was provided after the Defendant has conducted three "walk-throughs" and after a process of negotiation. The parties thereafter executed the Agreement which made reference to the "Estimate" and to the agreed sum. It is clear that the parties agreed to be bound by the terms of the Agreement which included the "Estimate" which amounted to the sum of Seventeen Million, Eight Hundred and Twelve Thousand Dollars ($17,812,000.00).

[40] There appears to be no issue as to whether the contract was breached. The issue is which party is responsible for breaching the contract. It is the Claimant's contention that the Defendant breached the Agreement by not completing the work according to the terms of the contract and walking off the job before completion. It is the Defendant's contention that the Claimant breached the Agreement by failing to make timely payments and by not paying the sums required under the Agreement. With respect to the Claimant's contention, the Court therefore has to examine the terms of the contract and assess whether the Defendant did what was required under the contract.

[41] The "Estimate" consisted of seventeen headings. It is the Claimant's contention that the Defendant defaulted in respect of several of these headings. In support of her contention, she relies on the Bill of Quantities of Quantity Surveyor Mr. Rudal V McFarlane. According to Mr. McFarlane's report, the work carried out by the Defendant only amounted to the sum of Ten Million and Ninety-Six Thousand, Nine Hundred and Fifty-Five Dollars ($10,096,955.00). The Claimant claims that she paid on account of the Defendant the total sum of Eighteen Million, Three Hundred and Fifty Thousand, Four Hundred and Ninety-One Dollars ($18,350,491.00) and so she is entitled to a refund of the sum of Eight Million, Two Hundred and Fifty-Three Thousand, Five Hundred and Thirty-Six Dollars ($8,253,536.00).

[42] The question of credibility is a live one. Counsel for the Defendant submitted that the Claimant's evidence is not credible. One of the issues in contention is the time within which the contract should have been completed. Mrs. Myrie-Essor highlighted that the Defendant indicated to the Claimant orally that the estimated completion period of the work under the Agreement was to be approximately ten (10) months and that this has been corroborated in the evidence of the mason, Mr. Bradley Walker who stated that he was given seven (7) months to complete the work. Counsel asserted that based on the evidence, the Claimant was not being truthful when she indicated that a time limit was specified in the Agreement and that the time period specified was four (4) months which would have been unreasonable and almost impossible based on the amount of "dirty work" to be completed. When it was suggested to the Claimant that a completion date of four (4) months was never mentioned in the Agreement, she did not agree but instead insisted that it was in the Agreement but could not point out where. On my review of the Agreement, no where is a time for completion mentioned. I did find the Claimant's evidence to be inconsistent in this regard. This was particular evident based on her insistence on the four months as being provided for when this was in fact not so.

[43] I did find other instances in which the Claimant's evidence was inconsistent. There was some inconsistency in what she claimed was done to the glass blocks. I also found certain aspects of her evidence to be incredible. The Claimant came across as being very particular in terms of what she required but yet the Agreement was bare bones in that it did not have relevant specifications in relation to items and material to be used. I formed the impression that she had certain things in mind that were not always communicated to Mr. Myrie.

[44] I preferred the evidence of Mr Myrie in relation to the fact that she made changes to the paint colour which required additional labour and painting materials to be used. I also found that in relation to the titling of the bathroom, she did not initially specify that she wanted the entire walls to be tiled. It seemed it was a position she assumed would have taken place without expressly stating this. She was very reluctant to admit making any mistakes even when the evidence suggested it. I found the manner in which she gave her evidence to be largely exaggerated. When her evidence is compared to that of Mr. Myrie, I found him more credible. He was quick to make admissions even when it did not advance his case. In fact, it is because of the admissions that he made why it was clear to the Court that there was some default on his part in terms of his obligations under the contract.

[45] He admitted in his evidence that he left without completing everything in the contract and he itemized those items as being "the closets, the staircase rails made from wood (lumber returned to the Claimant), powder room- the face basin, fitting, toilet, tiling (only did drop ceiling), master bathroom- cupboards, fixtures, basin (only did toilet partition), tiling- did not tile bathroom walls as changes were made". When it was suggested that the work contained in the Seventeen-Million-Dollar odd estimate was not completed within the ten months agreed, he agreed that it was not but sought to explain that this was because he was not in charge of the electrical and the plumbing.

[46] The Defendant was confronted with each item that the Claimant avers that he had not completed commencing with item three. The Defendant in his Defence had suggested that there was an oral agreement to amend the estimate of costs for the works. He also mentioned converting this oral agreement into writing however this was never signed by the Claimant. The Claimant had been very precise initially about not wanting to enter into the Agreement without having it in writing. She denied entering into this oral agreement with the Defendant.

[47] Counsel for the Defendant pointed out that the Claimant and the Defendant agreed during the "walk-through" of the property the works that were to be carried out to modify, construct and complete the property to the Claimant's specifications. She further pointed out that the exact specifications of the Claimant were never reduced to writing and that additional work had to be completed which was not previously covered under the final "Estimate" which included repairs for inferior work performed by some other contractor or developer to the property prior to the Agreement.

[48] The evidence is that the Defendant was a contractor of some twenty-five years' experience who had constructed many residential and commercial buildings. Having done "walk-throughs" and an examination of the property, it would have been incumbent on him before entering into any contract to ensure that he took the state of the building into account. It would not have been unreasonable for the Claimant to expect that his "Estimate" took into account any remedial work to be done to bring the building up to a habitable state. I am of the opinion that having done the "walkthrough" and taken measurements, an expert contractor would have recognised the issues that existed on the property and would have taken them into account in arriving at an "Estimate".

[49] In the normal course of things, although there may be some concession made for any unforeseen work and for increase in material and labour costs, this should have been specifically brought to the attention of the Claimant. Mrs. Myrie-Essor

stated that the Claimant instructed the Defendant to make several changes as to the specifications under the Agreement and submitted that Mr. Myrie should not be put to bear any additional costs incurred as a result of the change of heart of the Claimant after construction materials were purchased and work commenced. It is the Defendant's evidence that the Claimant sent WhatsApp message to make changes such as, where plugs and switches should be placed, how the bathroom should be tiled, removing concrete walls and replacing glass walls. Although the Claimant denied sending these messages, I found the Defendant to be more credible in this regard and accept that she did in fact send these WhatsApp messages. It is evident that these changes would alter the material and labour costs particularly if construction had already taken place. There is some merit in the Defendant's submissions in this regard and it may be that where the Claimant made changes or additions, she should bear the additional costs associated therewith.

[50] Counsel also submitted that changes also occurred in the manner in which payments were to be made under the Agreement. It was agreed that payments were to be made in three (3) tranches of Five Million, Eight Hundred Thousand Dollars ($5,800,000.00) however, from the initial payment, the Claimant deviated from the payment schedule in the contract and made payments in increments of One Million Eight Hundred Thousand Dollars ($1,800,000.00). It is the Defendant's evidence that the payment arrangement was changed to something more friendly. This deviation, Counsel submitted, is not only reflected in the Claimant's bank statements and direct transfers but also admitted by her during cross examination. It is clear to me that there was some deviation in the mode of payment from what was agreed, however, what is important is the total figure that was paid and how it compares to the total amount of work that was completed.

[51] The Claimant contended that the Defendant used inferior material and that the works performed were not up to the standard expected. The question of the quality of the works is to be distinguished from the question of performance accordance

to specification. The Claimant has not led any evidence from any expert in relation to the quality of the work done by the Defendant. She is a lay person and there is no evidence that she has any skill or expertise to be able to give that evidence. In order to prove this, she would have had to lead evidence from an expert who can speak to the quality of the work done and the materials used. This is also true in relation to her averment that the Defendant failed to provide workmanship of a high standard with respect to the construction and installation of the doors and kitchen cupboards as well as with respect to the alleged installation of defective doors and kitchen cupboards.

[52] The Claimant relied heavily on the evidence contained in the report of Mr Rudal McFarlane but he is also not an expert in quality but rather in quantity. Quality would have to be determined by someone other than a quantity surveyor. No such person has given evidence in this case. The Claimant relies on the evidence of Mr McFarlane to prove that the Defendant did not carry out the works set out in the "Estimate". My assessment of Mr McFarlane's report is that it was flawed in some respects as he only took into account what was said to him by the Claimant. He was also discredited in some instances. However, based on the Defendant's posture admitting not having completed most of the items he is accused of defaulting on, it lends some credence to the report prepared by Mr McFarlane.

[53] I have set out below the Claimant's evidence in relation to each relevant item on the Estimate and the Defendant's evidence in response:

ITEM 3

The Claimant's evidence is that the kitchen cupboards were completed, however, it was infested with termites. The kitchen pantry was not completed. The wall tiles in the kitchen were not completed. The granite was not completed; neither was the mixer nor the sink.

The Defendant's evidence is that he did not complete the pantry nor the wall tiles in the kitchen but that he supervised the installation of the granite countertop. He agreed that he did not complete the mixer in the kitchen as he said that was the plumber's work.

ITEM 4

The Claimant's evidence is that some doors and door frames were completed. She could not recall mouldings, however, stated that some mouldings and some locks were completed.

The Defendant's evidence was that of the nineteen doors he was required to supply only one was not supplied and that was the glass door.

ITEM 5

The Claimant agreed that the glass block area was completed.

ITEM 6

The Claimant's evidence is that not all floor tiles were completed; some bathroom wall tiles were completed however not all of them.

The Defendant's response was that the bathroom floor was only partially tiled. He agreed that he did not complete the bathroom wall tiles up to the ceiling but said it was supervised by him and he provided the money to be paid to the tiler.

ITEM 7

The Claimant stated that the Decorative tiles were not completed, and she is not sure what is horizontal basin.

ITEM 8

The Claimant stated that some outside masonry work was completed, however she could not recall whether the round columns were completed.

ITEM 9

The Claimant stated that some ceiling mouldings were completed.

The Defendant's evidence is that he did everything that was pointed out.

ITEM 10

That Claimant's evidence is that no closets, not speaking of the doors, nor closets were completed by Mr. Myrie

The Defendant agreed that he did not provide the closet and linen cupboards to completion.

ITEM 11

The Claimant stated that there was no gate. She indicated that gate would be the entry to the property, side gate, main gate, securing the property and there were no metal security fences. She stated that some walls on the outside was completed but no doors, some columns but no pavements.

The Defendant agreed that he did not provide a gate.

ITEM 12

The Claimant's evidence is that all the masonry work set out in the first quotation was not completed.

The Defendant agreed that the inside masonry work was not completed.

ITEM 13

The Claimant stated that the staircase rails were completed and that Mr. Myrie provided a few pieces of wood for the staircase, but we weren't able to use them as they were damaged with termites, so we had to discard them.

The Defendant agreed that he did not provide any of the woodwork for this item, apart from some lumber and some mahogany he gave them.

ITEM 14

The Claimant stated that nothing was done in the powder room, however, she could not recall the drop ceiling. She also stated that no works were completed in the powder room, absolutely no wall tiles, toilet, face basin and fittings, not only in the powder room but in the entire house.

The Defendant agreed that he did not provide the tiles but said he supervised the laying of the tiles and applying them but agreed they were purchased by Dr. Gunta. He agreed also that the toilet, face basin and fittings were not purchased and installed.

ITEM 15

The Claimant stated that nothing in the bathrooms, cupboards, nothing, was completed.

ITEM 16

The Claimant's evidence is that the mantle below the round window was completed.

The Defendant agreed that in relation to the master bathroom no fixtures, wall tiles or cupboards were provided or installed. He agreed that when he left the property the shower in the master bathroom was incomplete and that no ceramic wall tiles were provided or installed. He said however that he supervised the laying and that he gave Dr Gunta the sum to be paid for that.

ITEM 17

As it related to the painting, the Claimant indicated that what he did was not what was agreed upon, so she had to then get another painter. He only painted partially.

Mr Myrie agreed that he would finish the property within the time frame discussed. She also indicated that Mr. Myrie was supposed to paint the entire home, inside walls, entire painting on the property, trowel-on to be completed along with facial board along with painting of the retaining wall. Mr Myrie did about 20 percent of the trowel-on, 10 percent painting on the inside. The facial board was completely a different colour than we agreed upon so that had to be re-painted by me.

In relation to the trowel-on the Defendant said he did 97 percent of it.

[54] It is to be noted that in the Particulars of Claim, the items complained of as not being completed did not include Items 1, 2, 5, 7, 8, and 15. I will therefore address only the items complained of in the Claim Form. The items that remained to be completed included the kitchen which included the cupboards, pantry, wall tiles, granite, mixer, sink, C/W fittings and extractor.

[55] When Mr. Myrie's responses are examined, save for item 9, he has admitted defaulting on all those items and therefore not completing the items in accordance with what was required in the "Estimate". Even in respect of item 9, his response is not clear. He merely said that he did everything that was pointed out. The Claimant's evidence in respect of this item is clearer in that she suggested that only some of the work on this was done. This is supported by the evidence of her expert and so I prefer the Claimant's position in respect of item 9.

[56] On the Defendant's own account, the failure to address the items mentioned would render him in breach of the contract. I therefore accept that the Defendant failed to complete all the works agreed to be completed under the contract. In addition to that, it is agreed that the Defendant left the work site when the Claimant refused to provide further sums to pay him.

[57] It is the Defendant's contention that the Claimant breached the contract by virtue of her failure to perform her obligations under the contract in failing to make timely

and or sufficient payments under the Agreement. However, the evidence is that the Claimant had in fact paid the Defendant sums amounting to some Sixteen Million, Five Hundred Thousand Dollars ($16,500,000.00) up to the time the Defendant left the work site. This would have been a substantial portion of the agreed sum but yet on both accounts there were still substantial works remaining to be completed. Based on the Agreement the final payment was to be made upon completion.

[58] Counsel for the Claimant drew my attention to the text Stair Memorial Encyclopaedia on Building Contracts (Reissue) [Edinburgh: Butterworths, 1999], where at paragraph 63, Construction Contracts are described in this way:

> [63] *An entire contract is one in which entire performance by one party is a precondition to the liability of the other party. It has been suggested that most building contracts are entire contracts, in the sense that the contractor is not entitled to any payment under the contract if he stops work before it is completed…*
> *First, it is of course open to the parties to contract in terms such that the contractor is entitled to payment under the contract even if he does not complete the works. This is perhaps likely where the contract is a measurement or cost reimbursable one, but in principle even a lump sum may not be an entire one. In particular, the contract may provide for interim payments, although if the interim payments are to be paid on completion of specified stages of the works, whether or not the means of sectional completion, then each stage can amount to a 'mini entire contract'*.

[59] The parties herein agreed that the final tranche of payment was not due until the works were finally performed. The final payment of Five Million, Nine Hundred Thousand Dollars ($5,900,000.00) would not have been due until completion. So therefore, the failure of the Claimant to pay the entire sum would not render her in breach. However, the evidence is that up to that point the Claimant has paid the Defendant a substantial sum and he would not have been entitled to the full amount as there were many areas not yet completed. The Defendant has not established on a balance of probabilities any lawful justification for having abandoned the work

site. Therefore, his abandonment of the work site before completion would also render him in breach of the contract.

[60] The Claimant's reliance on the authority of **Aldith Simms v Howard Gordon** [2018] JMSC Civ 192 is well placed. In that case, Palmer-Hamilton J concluded that where there was no lawful justification for the Defendant's/ builder's inability to fulfil the terms of the contract and to abandon the works and so his abandonment was classified as a breach of the contract.

[61] I also find that both on the evidence of the Claimant and on the Defendant's acceptance of failure to complete several items under the contract, he is the one in breach. I accept on a balance of probabilities that the Defendant failed to complete the works as set out in Items 3, 4, 6, 9, 10, 11, 12, 13, 14, 16 and 17 of the "Estimate".

[62] The next question that would arise is the extent of the Defendant's liability. This would require some quantification. By virtue of Schedule 3 of the Agreement the parties had agreed that in the event of termination of the contract by a party, payments or refunds will be calculated by quantifying the work completed plus any other cost variation incurred as a result of the termination.

[63] The only expert relied on is Mr. Rudal McFarlane. It is a useful reminder to consider the principles treating with expert witnesses. A witness called as an expert is entitled to express his opinion in respect of his findings on the matters which are put to him, and the court ought to have regard to this evidence and to the opinions expressed by him when coming to its own conclusions about the aspect of the case to which it relates. I bear in mind that, having given the expert evidence careful consideration, I can accept or reject all of his evidence or a part of it depending on my assessment of him and his report, taking into account maters such as cross-examination and how the evidence relates to other evidence on the same issue.

[64] One of the drawbacks about this expert report is that it took only the Claimant's side into account. Mr. McFarlane gave evidence that a site visit involves both the client and contractor pointing out the works. He said only Ms. Knott was present and she pointed out to him specific works performed by the contractor and that this was a consequence of the Defendant having failed to attend the site visit. The absence of the Defendant and his input makes the report less than independent however, it is the only report that is available and so the Court will give it due weight.

[65] During Mr. McFarlane's evidence it became evident that there were some flaws in his report in addition to the fact that it was a one-sided report. There were some discrepancies that were evident as well. The one that stands out the most is the one that has to do with the mason work set out at Item 12. Similar concerns are raised in relation to the painting/trowel-on referred to, at Item 17.

[66] His report on the mason work referred to the estimated cost as being a total of Two Million, Nine Hundred and Fifty-One Thousand Dollars ($2,951,000.00) and his estimate of what was spent amounted to Five Hundred and Forty-Four Thousand, One Hundred and Eighty Dollars ($544,180.00). On an examination of how he arrived at this figure, it is clear that he did not factor in any cost for items such as rough cast and dressing of walls, jambs, column beams, arch, ledge, steps and several other areas. This prompted the question to him as to how these areas could be painted if they were not first 'rough casted'.

[67] When confronted with this he said rough casting was not picked up in his report and that is why he had zero for this. He answered that he was going to say he had a note measured separately but there is nowhere in this report where he was able to point out those items. It is evident from his response that he did not include any of the rough casting done although it was evident that rough casting was done. His explanation was that it was not pointed out to him. This is a significant portion of

the items listed under Item 12 and so his entire estimate in relation to that item would be flawed and could not be accepted by the Court.

[68] A similar position obtains in relation to trowel-on and painting. The issue was raised as to whether in the "Estimate", painting was intended to include trowel-on. Although he arrived at a figure in relation to trowel-on, he was unable to say what percentage of trowel-on was complete. He was not even able to give a rough estimate. I found his assessment of the trowel-on and paint to be unreliable and so I would not be prepared to accept it as an accurate reflection of what was done. I found the witness to be inconsistent in this regard and his evidence does not match up to what is in the report. In respect of Items 12 and 17, I am unable to accept his estimate of what was spent. The only other evidence on that issue would come from the Defendant himself. Although he is not a quantity surveyor, I accept his evidence that having worked in the construction industry, he has some knowledge about the cost of construction work and can give evidence of it.

[69] In respect of the other relevant items, this has to be compared to the evidence of the Defendant. The Defendant has sought to provide explanations for his failure to complete the various items, however, a lot of the additional work he indicated that he had to undertake was not first discussed with the Claimant at the time of encountering them so the appropriate adjustments could have been made to the contract with her consent. He however compiled them in a revised estimate for which he never secured the Claimant's agreement to pay. It would have been incumbent on him to indicate to the Claimant that the adjustments being made were not covered by the "Estimate" prior to making the adjustments and securing her agreement to any additional figures. He failed to do this. In fact, it seems he conducted his affairs in a manner that was less than business-like.

[70] He even says the amount stated in the initial letter to the Claimant was less than what is owed and that after he was sued, he went back and did all relevant calculations to add up to the figure for which he countersued. This does not

generate confidence in his calculations. He has not provided a direct response to the report of the quantity surveyor to enable the Court to compare his response with Mr McFarlane's report and arrive at a preferred position. He has however provided his own indication of the sums he paid which will be considered as part of the Counterclaim. The Counterclaim will be considered in the context of additions made to the original Agreement whereas the Claimant's case is being considered largely in the context of the original agreement.

[71] In respect of this claim, the Claimant has proven on a balance of probabilities that the Defendant breached the original Agreement. She has shown through Mr. McFarlane the sums that were in fact expended in accordance with what was agreed. She is therefore entitled to recover sums consistent with the shortfall from the items not completed according to the contract.

[72] According to Mr. McFarlane, in his summary, only the sum of Ten Million and Ninety-Six Thousand, Nine Hundred and Fifty-Five Dollars ($10,096,955.00) was expended in accordance with the contract. That would leave a shortfall of some Seven Million, Seven Hundred and Eighteen Thousand and Forty-Five Dollars ($7,718,045.00). I have not accepted his evidence in relation to the inside masonry work or in respect of painting. I instead formed the view that in light of the fact that the inside walls were painted that the Defendant did in fact do the inside masonry work and so was entitled to the full amount there. I also formed the view that in relation to the painting, having done trowel-on, he no doubt expended more than was within the contemplation of the Agreement, so I am prepared to come to the position that the Defendant at the very least expended the sum stipulated in the Estimate. Any additional amounts claimed with be treated with in the Counterclaim.

[73] In calculating the value of the works done by the Defendant, I took into account the sum of Ten Million and Ninety-Six Thousand, Nine Hundred and Fifty-Five Dollars ($10,096,955.00) reflected on Mr. McFarlane's report along with the value of the work for the mason work and painting as set out in the Estimate. On my calculation,

in the context of what is claimed, the value of the work done by the Defendant in the context of what is claimed is as follows:

Item 1:	*$840,000.00*
Item 2:	*$2,076,025.00*
Item 3:	*$668,450.00*
Item 4:	*$1,257,000.00*
Item 5:	*$20,000.00*
Item 6:	*$2,443,800.00*
Item 7:	*$623,000.00*
Item 8:	*$250,000.00*
Item 9:	*$148,000.00*
Item 10:	
Item 11:	*$1,364,260.00*
Item 12:	*$2,951,000.00*
Item 13:	*$573,000.00*
Item 14:	*$16,000.00*
Item 15:	*$35,000.00*
Item 16:	
Item 17:	*$1,270,000.00*
Total:	*$14, 535,535.00*

[74] The total value of the work performed by the Defendant amounts to the sum of Fourteen Million, Five Hundred and Thirty-Five Thousand Five Hundred and Thirty-Five Thousand Dollars ($14,535,535.00). This is what the Defendant is entitled to be paid for. The schedule of payments tendered into evidence reflects that a total sum of Sixteen Million, Five Hundred Thousand Dollars ($16,500,000.00) was paid to the Defendant. The Claimant is also alleging that Dr. Gunta made some payments to the Defendant in addition which amounted to some Two Million, Two Hundred Thousand, Four Hundred and Ninety-One Dollars ($2,200,491.00). Dr Gunta's evidence in this regard was not successfully challenged. The total sum

paid would therefore amount to Eighteen Million, Seven Hundred Thousand, Four Hundred and Ninety-One Dollars ($18,700,491.00). The sum owing to the Claimant would be Four Million, One Hundred and Sixty-Four Thousand, Nine Hundred and Fifty-Six Dollars ($4,164,956.00). Judgment is for the Claimant in the Claim in the sum of Four Million, One Hundred and Sixty-Four Thousand, Nine Hundred and Fifty-Six Dollars ($4,164,956.00) with interest at a rate of 6% per annum from today to the date of payment.

Whether the Defendant performed extra work and whether his Counterclaim can succeed?

[75] According to the Defendant, it was the Claimant who breached the contract with him in that she failed to make the required payments. According to him, she also substantially changed what she had requested under the original contract which resulted in him having to spend additional sums. He claims that this additional sum amounts to some Four Million, One Hundred and Eighty-Four Thousand, Nine Hundred and Eighteen Dollars and Seventy-Five Cents ($4,184,918.75) being money owed to him for work completed by him.

[76] When the evidence of the Defendant is compared to that of the Claimant, he came across as being less prone to exaggeration and so generated more confidence. He was quick to accept what he had done wrong and that he had not completed several of the areas he had agreed to undertake and so basically admitting that he had breached the contract. However, when his Counterclaim is carefully examined it appears to have some merit. It has merit in the sense that his account that the Claimant made significant changes is supported by the evidence. It is important at this juncture to examine how extra work in the context of a building contract is treated with.

[77] In **Stair Memorial** at paragraph 74 the following is provided for:

> "74. *The contractor may seek an additional payment for work which he considers was in addition to or a variation of the work which he was obliged to carry out under the contract. It is essential to distinguish between:*
>
> 1. *Work which the contractor is obliged to carry out as part of the contract;*
> 2. *A variation which has been ordered in terms of the contract where the contract provides expressly for the appropriate adjustment to the contract sum (a variation)*
> 3. *Altered additional work which has no basis in the contract.*
>
> *The contractor has no right to claim any additional payment for work under head (1), as it is part of the work stipulated for in return for the contract price. He has a right to claim payment for work under head (2), to the extent that the contract so provides, provided that the variation was properly instructed in terms of the contract and any requirements of the contract as to certification or otherwise have been fulfilled. Work under head (3) raised two separate issues. First, if the work varies or changes the work required under the contract, prima facie the contractor has not provided what he obliged to provide and is in breach. Unless he can show that the employer or his authorised agent agreed to the change, he may have to accept a reduction in price under the Ramsay & Son v Brand principles, and indeed the employer may have a claim against him for breach of contract. Secondly, if the work I truly 'extra', (that is additional to the contractual works), he is entitled to payment for it only if he can establish that the employer agreed to pay or the work, or perhaps on the basis of unjust enrichment. The mere fact that the employer has permitted contractor to vary the work does not necessarily imply that he is obliged to pay any additional costs incurred or keep any savings made as a result. If he has agreed to pay for an extra, but the amount has not been agreed, payment is quantum meruit."*

[78] The term "quantum meruit" was explained in the case of **Equilibrio Solutions (Jamaica) Ltd. V Peter Jervis & Associates Ltd**. where the Claimant sought compensation on the basis of the "quantum meruit" doctrine. Laing J (as he then was) made it clear that any extra work requires that the ingredients of a new contract are met which would involve an offer, acceptance, consideration and an intention to create legal relations. Laing J analysed whether an obligation arose to compensate the contractor for "extra work" and found that a quantum meruit payment would not be applicable as there was no agreement before the services were rendered.

[79] I find the **Equilibrio** case to be distinguishable from the instant one as the arrangements in that contract seemed to have been more precise than in the instant one. In the instant contract it is agreed that not all specifications were made prior to commencement. It is clear that the Agreement did not include everything that would be done with much specificity. The way in which the Claimant and the Defendant operated was rather informal.

[80] On an examination of the Claimant's evidence vis a vis that of the Defendant, it is essential that I arrive at some findings of facts regarding the issue of additional works. The works the Defendant undertook can be set out in different categories based on the evidence that was led. Firstly, there are works which the Defendant claimed he did as remedial works. I am of the view that remedial works should have been obvious from the "walk-throughs" that he did and so he should have taken them into account in providing the "Estimate" and so those works should already be covered in the "Estimate", and he would not be entitled to any compensation for those works. This would come under work which the contractor is obliged to carry out as part of the contract, and he would have no right to claim any additional payment for this.

[81] It may be that not every defect could be ascertained prior to commencement of the work or determined by virtue of a walk through so it would be incumbent on the

Defendant upon recognizing the need for them to have brought this to the attention of the Claimant and secured her agreement to proceed with undertaking them. It would have been important for the Defendant to assess any additional work before commencing the work and giving the Claimant an estimate to what this would cost before embarking on those corrective steps with the assumption that the Claimant will pay. He should not just assume that, because it is necessary, she must agree to pay this cost. On the evidence, I have found that he failed to bring the need for some of the extra works to her attention and secured her consent before embarking on these additional works. The additional works would amount to a different contract so to speak.

[82] The third category of works would be those which the Claimant asked for or required to be done which were not originally specified. For those works, it is clear that she is required to pay the Defendant any additional sums that he spent. The Claimant reluctantly admitted to making changes to certain aspects of the agreement. She also agreed that not all specifications were made prior to commencement. Although she admitted making changes, there was no new contract entered into. When the Claimant was asked whether the exact specifications of what she engaged the Defendant to do were put in writing she answered that they were not. It is clear to me that not everything was provided for in this "Estimate". In light of her agreement that not all specifications were made prior to commencement and the informal way in which the Claimant and the Defendant operated, it is not surprising that there was no formal contract entered into after the first one. The evidence which I accept is that the Claimant instructed the Defendant to carry out certain changes and so the Defendant should not be made to bear any additional costs incurred as a result of those changes. Although there was no formal arrangement for these changes made by the Claimant, if the Defendant cannot be compensated for following her instructions and making the changes, the Claimant would be unjustly enriched by the expenditure made by the Defendant. I am of the view that where the Defendant is seeking compensation

for works that are truly extra, he should be afforded the costs associated with what he spent.

[83] I accept the Defendant's evidence regarding his work involved in lowering the flooring in the downstairs living room and recasting in order to prepare the area to be tiled. I also accept that he had to cut out the excess concrete using compressor in that section. She denied that significant work was done on the lower level to increase the amount of concrete in order for the tiling to take place. Although I found the Defendant's evidence on this issue to be more credible, I accept this is something he should have contemplated at the time of the original inspection and so he is not entitled to any further compensation for this.

[84] The Claimant having not agreed to the Defendant's estimate, it would be a matter of the Court's findings on any of items referred to in the estimate based on the evidence given. I accept that the Defendant has some expertise in the assessment of works having worked in the building industry for in excess of twenty-five (25) years. There are twenty-seven (27) items referred to in this revised estimate. Of the twenty-seven (27) items there is only evidence in respect of a few of these items that I can act on.

[85] The Claimant admitted that she made changes to the items such as the glass blocks, but she was reluctant to admit making changes to other aspects although it was obvious to me that she must have made some of those changes.

[86] One such clear instance is with respect to paint and trowel-on. In the original agreement there was no differentiation between paint and trowel-on. Counsel for the Defendant submitted that the evidence on the Claimant's case regarding painting cannot be accepted as all three witnesses, the Claimant, Dr Gunta and Mr. McFarlane gave different evidence on the extent of the paint applied to the premises. I agree that there was some discrepancy in the three witnesses. It was

suggested to the Claimant that she changed her decision as to the colour of the interior of the property six times during the contract and she said that was not true and that she had her colour chart selected and highlighted for Mr. Myrie and no changes were completed after. It was suggested that even in her WhatsApp messages she indicated that she wanted to change the colour of a wall because she didn't like the colour. She insisted she did not. When she is confronted with what is in the WhatsApp messages, she insisted it was not her verbiage.

[87] It was also suggested to her that under the original estimate the outside of the property was supposed to be painted as per item 17 of the estimate. When it was suggested that trowel-on was not included in the "Estimate", she denied this. However, I find that the failure in the "Estimate" to mention trowel-on is consistent with the Defendant's suggestion that it was after the commencement of the agreement that she requested the use of trowel-on. Throughout her evidence, she was quick to deny suggestions even when the facts suggesting the contrary were clear. I reject her evidence that the "Estimate" included the cost for trowel-on. I accept that she made changes to the paint colour and that the original agreement did not include trowel-on but that the Defendant had to expend additional sums to do trowel-on as required by the Claimant.

[88] She did admit that the Defendant advised her that the column in the living room area was built slant and that the Defendant had to rectify this. When asked if she agreed that this required additional labour and cost, she was quick to say no as it was a very simple post that need to be shifted a little.

[89] In cross-examination she denied that the Defendant had to remove all glass block and purchase new ones although in her evidence in chief she agreed to additional works being done with glass blocks. In light of her apparent uncertainty compared with the Defendant's affirmative statements on this issue, I found the evidence of the Defendant regarding the issue of the glass blocks to be more credible.

[90] She did not agree that she changed from the bathroom being tiled halfway up to full wall. She said it was common sense that tiling would be to the entire bathroom because of moisture. I am of the view that this is something she pointed out afterwards and that there was no agreement to tile the full wall in the bathrooms. It was suggested that supplying and installing a jacuzzi was not included in the original estimate, but she said she could not recall. When it was suggested that she made the choice to install a jacuzzi after the commencement of the contract she said she cannot agree. This is despite the fact that there is no mention in the "Estimate" of any jacuzzi. The Defendant would have been entitled to be compensated for his but in his revised estimate he did not provide any evidence of additional sum expended for this.

[91] It was suggested to her that at the start of the contract she wanted a two block high fence but that after the fence was put up, she changed to four and five-block fencing at the front and six and seven block fencing at the side. She said this was absolutely not true and that Mr. Myrie was provided with pictures of the fence she wanted before the project started. I accept Mr. Myrie's evidence on this point and find that he did do extra work on the blocks for the fence.

[92] There is also evidence from Dr. Gunta about the Claimant making a request for a mantle to be made. There was provision for a mantle in the original estimate but I accept the Defendant's evidence on this point that the initial agreement for the mantle was based on the design initially shown to him but the Claimant requested a more detailed pattern which was more expensive and cost Sixty-Thousand Dollars ($60,000.00) instead of the original Thirty-Five Thousand Dollars ($35,000.00).

[93] I also accept the Defendant's evidence that the Claimant made changes to the style of the doors and the quality and even sent him images via WhatsApp and that the initial cost changed from One Million Two Hundred and Fifty-seven

Thousand Dollars ($1,257,000.00) to One Million Six Hundred Thousand Dollars ($1,600,000.00).

[94] Although I found the Defendant generally more credible, the evidence in support of his averments is lacking. For example, although he made mention of a document setting out the shortfall it was never tendered into evidence. The Court is left to cypher what his claim amounts to by utilizing just the evidence of the Defendant and the "Estimate" he provided belatedly to the Claimant. The Defendant failed to mention several items in his evidence such as the cost to do the additional tiling to the bathroom. Having examined the evidence as a whole, I find that on a balance of probabilities the Defendant has established that he did additional work in certain areas and has provided evidence of the value of those works and those are the areas I am prepared to compensate him for. These areas are set out as follows:

- Additional cost for paint and trowel-on: $530,000.00
- Additional cost for doors, lock and frames: $348,000.00
- Additional cost for glass blocks: $85,000.00
- Additional cost for outside masonry work and columns: $86,000.00
- Additional cost for mantle: $25,000.00
- Total additional cost: $1,074,000.00
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[95] On the Counterclaim judgment is for the Defendant in the sum of One Million and Seventy-Four Thousand Dollars ($1,074,000.00) with interest at a rate of 6% per annum from today's date to date of payment.

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Stephane Jackson Haisley
Puisne Judge