[2015]JMSC Civ 68

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV 02889

BETWEEN	**NICOLA LAUDER**	**1ST CLAIMANT**
A N D	**LYDIA JONES**	**2ND CLAIMANT**
A N D	**EVERETT BRADY**	**DEFENDANT**

Mr. Barrington E. Frankson and Miss Jodian Hammitt instructed by Frankson & Richmond for the claimants

Mr. Ruel Woolcock instructed by Ruel Woolcock & Co. for the defendant

Heard: 23rd and 24th January; 13th March; 15th April 2014 and 17th April 2015

Contract – Building contract – Contract to erect and install roof – Roof not erected according to the specifications and drawings – Whether work done in workmanlike manner – Roof not fit for the purpose required – Building unfit for human habitation - Measure of damages.

Evan Brown J

Introduction and background

[1] Ms. Lydia Jones is the mother of Nicola Lauder. Ms. Jones was a businesswoman residing in the parish of Portland, Jamaica while Ms. Lauder was a Registered Nurse living in the United States of America. They jointly owned lot #14, Jamaica Beach in the parish of St. Mary. It was their desire to develop this land as an investment. The development would take the form of a 16 apartment building, together with a dwelling house. To this end, Griffiths Architectural Designs and Planning was given instructions to prepare a building plan. In due course the building plan was completed and submitted to the St. Mary Parish Council, the local planning authority, for approval. Approval was not withheld.

[2] With the requisite approval in hand, they met with the defendant in or about June, 2007. After some discussion the claimants and the defendant struck an oral agreement for the construction of the building. During the construction, there was a further oral agreement between the parties for the defendant to install the roof on the building. The roof approved by the local planning authority for the building was to be part slab and part timber. This apportionment of slab and timber, along with the quality of the work, became the bone of contention between the parties.

The Statements of Case

[3] The claimants commenced their claim against the defendant on the 4th June, 2009. They wish to recover damages for breach of contract and, or, for breach of the duty of care in respect of the installation and erection of a roof to the building, situated at premises known as lot #14 Jamaica Beach in the parish of St. Mary. The claimants also averred in the Claim Form "that the defendant failed and, or, refused to do the work in a workmanlike manner and was not of a merchantable quality."

[4] It was admitted in the statements of case that there was an oral agreement between the parties for the defendant to construct, in the first place, a multiple bedroom guest house. There was a further oral agreement for the defendant to erect and install the roof on the building at a cost of $2,100,000.00. The specifications and drawings for both the building and roof were contained in one document prepared by Richard Griffiths, Manager and Director of R. Griffiths Architectural Designs.

[5] The claimants contended that the agreement was to erect and install the roof in accordance with the specifications and drawings. The defendant enjoined that the specifications and drawings were defective and could not be used. This the claimants denied in their reply to the defence and counterclaim. In that reply, they further said they were learning of the alleged defectiveness for the first time in the defence.

[6] The claimants averred that it was either an expressed or implied term of their oral agreement that the defendant would use reasonable care and skill in carrying out the work. In the alternative, the claimants said the defendant owed them a duty of care to see that his work was done in a workmanlike or professional manner so that the building

upon which the roof was located would be fit for habitation. The defendant countered that he used all reasonable care and skill in carrying out the building of the roof. In response to the claim of a duty of care, the defendant said the roof was built in accordance with standard building practice and procedures. His further contention was that the roof was of good and sound quality.

[7] It was the claimants' averment that the defendant, in breach of their agreement and his duty of care, carried out the work that the following defects and faults arose and persisted:

(i) the defendant failed to install the roof in accordance with the specifications and drawings;
(ii) the arches to the front of the roof were not in alignment and were lean;
(iii) the boards to the roof were uneven and not properly joined leaving spaces between the boards;
(iv) sunlight appeared through the roof at several places.

The defendant denied these defects and required the claimants to prove each and every item of loss and damage together with the cause or causes. Objection was taken to the Bill of Quantities relied on by the claimants.

[8] It was admitted that the defendant completed the roof. At paragraph 10 of the Particulars of Claim the claimants said they would be obliged to employ another builder to complete the roof at a greatly increased cost. However, the item is particularised as to remove and erect a roof to the building. The cost to accomplish that was said to be $30,533,825.58. The defendant denied that the claimants suffered the alleged, or any loss or damage. He further denied that the same was due to any breach of contract as alleged or at all.

[9] The defendant counterclaimed for the sum of $230,664.00 for breach of contract. He alleged the purchase of materials from Quality Dealers Roofing on behalf of the claimants pursuant to their oral agreement in the sum of $170,664.00. Further, that there was an outstanding balance of $60,000.00 on the agreed cost of building the roof.

He averred that his request for payment was refused by the claimants on the basis that they had no money.

[10] The claimants' responsed is that they withheld the $60,000.00 after the discovery of the defects in the roof. Additionally, they averred, after they pointed out the defects to the defendant he made no claim or request for the payment of the $60,000.00. In answer to the allegation of purchase of building materials, the claimants said they purchased the building materials.

[11] The claimants further said that the defendant advised them that there was an excess of building materials sometime after the construction of the roof commenced. Fifty squares of this excess was sold to D.I.B. Hardware, owned by Mikey, a friend of the defendant. That was done on the assurance of the defendant that there would not be any shortage of material. This assurance was backed by the defendant assuming responsibility to make good any shortfall, the claimants averred.

Case for the claimants

Raising the roof

[12] The witness statements of the claimants were a virtual facsimile, the one of the other. Having regard to their respective places of residence, it was the second claimant who mainly interacted with the defendant and made purchases locally. They agreed to pay the defendant $2,100,000.00 to install the roof on the building. Their agreement required them to provide all the building materials and the defendant the labour.

[13] The lumber for the roof was purchased in the USA. Approximately two truckloads were shipped to the island. In addition, Ms. Jones purchased most of the roofing material from Quality Dealers Roofing. Although Quality Dealers Roofing offered to erect the roof, the defendant was given the contract on his assurances and representations.

[14] After construction of the roof commenced, the defendant advised the claimants that there was an excess of the material supplied. The defendant further told the claimants that his friend Mikey, the owner of D.I.G. Hardware, needed 65 squares of the

roofing material. They were persuaded to sell Mikey 50 squares of the roofing material on the defendant's assurance that the sale would not affect the completion of the roof. He further assured them that he would take the responsibility for any shortfall resulting from the sale of the 50 squares.

[15] During the construction of the roof Ms. Jones wasn't able to visit the site on a daily basis. The reason for that was the fact of residing outside the parish, she said. On the occasions she visited the site she didn't know that the roof was not being constructed according to the plan, or that there were problems with it. Under cross-examination, Ms. Jones said before her daughter came she noticed a section of the roof at the front of the building was not straight. She spoke to the defendant about it and he asserted that it was straight and the matter was left there.

[16] However, when she visited the site in the company of her daughter the problems were observed. Those observations were made in December, 2008. The claimants noticed that the arches to the front of the roof were misaligned and lean. There was a glitter on the roof as a result of the use of different nails from those purchased by Ms. Jones. The boards on the roof were uneven and improperly joined, leaving spaces between them. That resulted in sunlight penetrating the roof in several places. Furthermore, the blocks laid did not go up to the eaves of the roof.

[17] While being cross-examined, Ms. Lauder said she spoke to the defendant about the defects. His response was, "no problem, just point them out to Mikey and I will take care of it." Mikey was employed to the defendant. To her knowledge, he did not attempt to make corrections. Ms. Lauder denied that she did not permit the defendant onto the site after discovering the defects. It was also elicited from her that she discussed with the defendant the matter of part of the roof not being slab, over the telephone.

[18] The claimants subsequently discovered that the construction of the roof was so altered that it was completely different from the approved building plan. They insisted that the defendant never raised the issue of the specifications and drawings for the entire building being defective and therefore useless. They only became aware of this alleged defectiveness when they read the defence. Upon consulting Clifton G. Logan

Associates Ltd., the claimants were advised that the cost to construct a roof in keeping with the approved building plan would be $30,533,825.58. Cross-examination revealed that the information provided by Clifton G. Logan Associates Ltd. was consonant with Ms. Lauder's instructions.

[19] While the claimants admited an outstanding balance of $60,000.00 to the defendant, they sought to explain it. A decision was taken to withhold this sum until the defendant remedied the defects in the roof. In January, 2009, the defendant told the claimants that they should give him two weeks to make good the defects. That, they said, he either failed or refused to do. Neither did the defendant make any claim for the outstanding sum.

[20] Ms. Lauder was further questioned in cross-examination. She agreed that the approved plan called for a mixed roof, that is, one made of slab and timber. It was not correct to say the slab portion was to be relatively small. She understood that most of the roof should be slab to accommodate air conditioning units and to facilitate future upward expansion. While she was present when the roof was being measured, she was not on site during its construction.

[21] Ms. Lauder said she purchased two container loads of timber which she shipped to Jamaica. That she did on the defendant's instructions. He told her the amount and the size. He never specified that all the timber was to be used for the construction of the roof. Accordingly, she answered in the negative when it was suggested to her that he told her the timber was for the construction of the roof.

[22] Ms. Lauder accepted that the material chosen for some parts of the roof was decra tiles. These were purchased from Quality Dealers Roofing by her and her mother. The amount of roofing tiles purchased was on the instructions of the defendant. However, the defendant confessed to having made a mistake in the measurement. The excess tiles were sold to a hardware store in Portland on the instructions of the defendant.

[23] Ms. Lauder was not able to say if cement and steel were also purchased during the construction of the roof as she had no conversation with either the defendant or her

mother. When Ms. Jones was cross-examined, she could not recall whether she had purchased those items at that time. Ms. Jones declared she knew nothing about construction. According to her, she went with Mr. Brady. If he said jump, she jumped.

[24] Questioned about the defendant purchasing roofing tiles out of his pocket, Ms. Jones said he told her he had done so. However, she could not remember if he gave her any receipts. Ms. Jones went on to say that before the defendant purchased the tiles, he had persuaded her to sell some she had bought to his friend. When she raised concerns about being "short-changed," he struck his chest and said if it came to that he would be responsible.

[25] Questioned further about the sale of tiles, Ms. Jones wouldn't say the tiles were exchanged for timber. She sat down with Mikey and worked out the dollar amount. The defendant instructed her that the best thing to do was to allow the money to remain with Mikey as he, the defendant, would need more materials and would take whatever he needed for the money. She took the lesser part of the price in cash and left the remainder on account. However, she did not know what the defendant took for it.

Replacing the roof

[26] Clifton G. Logan, Quantity Surveyor testified and his report was admitted into evidence. Pursuant to being retained by the claimants, he visited the property and inspected the roof on the 27th May, 2009. His inspection revealed that the roof had been built completely different from the design shown on the roof plans. The contractor eliminated the suspended concrete roof slabs and concrete beams. Expanding on this under cross-examination, what he saw was timber throughout with a very small section of slab. About 65-75% of the roof on the drawing was slab, and the rest built up. What was there at inspection was about 95% built up and the rest was slab.

[27] Mr. Logan considered this a big problem. A big problem because the concrete slabs were to accommodate mechanical and electrical services such as air conditioning units, solar water heating panels and water tanks. Taxed on this by counsel for the defendant, Mr. Logan said the slab area he saw could possibly accommodate one air conditioning unit. There were, however, fifteen apartments and slab would be needed

for the different areas, not just the air conditioning units but the other mechanical and electrical services.

[28] Cross-examined further, Mr. Logan admitted that these services were not on the plan. He asserted that his reference to these services was not based entirely on what the claimants told him. The use of the slab roof is a general design concept. He advanced that it was not compulsory that these services to be put on the slab roof. Their location there is based on the constraint of land space. While he did not measure the land, he concluded from the site plan that there was a constraint of space so these services would have to be located on the roof.

[29] In his report Mr. Logan said the roof in place was not as designed and would not be able to accommodate the services the claimants wanted to be on the roof. He concluded that the logical way to remedy the situation was to remove the existing roof and build one as was designed. Put to the test in cross-examination, Mr. Logan agreed that what was constructed could vary from the approved plan. That may be because the area of undeveloped land could have changed as against what was built. He couldn't say for sure whether there was in fact sufficient space on the land to site the services there.

[30] Mr. Logan's answer was in the negative when it was put to him that his conclusion that it was necessary to remove the entire roof was based largely on the absence of the slab. He never consulted with an architect or other professional before coming to this conclusion. He insisted there was no need to consult with any other professional in the industry. Why? There was no need to consult because all the beams to accommodate the slab had been eliminated, as also the slabs, leaving just sheet timber roof with the exception of a small area.

[31] Mr. Logan maintained that it was not plausible for a portion of the existing roof to remain while the needed slab was put in. He went on to explain this. He said because the defendant had removed the slab, even the timber section was not as was designed. So, to get the entire roof, timber and slab, as designed, the entire roof would have to be removed.

[32] Finally, Mr. Logan was asked about the impact the changes to the building could have had on the construction of the roof. He responded that internal changes would not have anything to do with the roof. That was so because the roof was attached to the external section of the building.

Changes to the building

[33] Under cross-examination, Ms. Lauder conceded that changes had to be made to the building during its construction. She first agreed that the building was too large for the land. In the next breath Ms. Lauder said she wasn't told the building was too large for the land, only that a truck could not drive all the way around it. It was the defendant who told her this. He also told her he would contact Mr. Whittley at the St. Mary Parish Council regarding the matter.

[34] Mr. Whittley was contacted. When she enquired of the defendant how it was not possible for a truck to go around the building, he gave the assurance received from Mr. Whittley. Mr. Whittley said it would not be a problem. All they had to do was eliminate some of the apartments. The defendant in fact said he would eliminate some of the apartments. Ms. Lauder confirmed this with Mr. Whittley then gave the defendant the go ahead to do so. Questioned by counsel for the defendant, Ms. Lauder said she was unaware that some of the rooms constructed were bigger than what was approved by the Parish Council.

[35] Questioned by counsel for the defence on this point, Ms. Jones agreed that as the building was going up the defendant told her it was too large for the land and changes had to be made. She, however, did not go back to Mr. Griffiths for any changes to be made to the drawings. However, she was aware that the building should conform to the approved building plan. She could not read the plan. Although she knew the building was to contain sixteen apartments, she knew nothing about the plan. Mr. Brady was her eyes.

[36] Ms. Jones denied the changes were made on the ground with her approval without going back to the Parish Council. Neither did she request that changes be made to some of the rooms during the construction. The defendant told her she didn't need to

have her place and a truck couldn't drive around it. She asked him what she should do. He said she should do nothing as he was in touch with the inspector from the Parish Council, Mr. Orelle Whittley, who said they didn't have to do anything.

[37] Mr. Richard Griffiths, managing director of R. Griffiths Architectural Designs, the successor to the company employed by the claimants, testified to the drawings. Having received instruction from the claimants, he conducted a measured survey of the property before preparing the building plan. The measured survey involved collecting all relevant information pertaining to the property, as well as ascertaining the boundaries of the property. That having been done, he then went through a process described as negotiation. It was here that he made a determination of what was acceptable for the land as it related to its location and the surrounding area. The design was then prepared and presented to the claimants.

[38] He had designed what he called a regular roof. When the draft was presented to the claimants, they told him they wanted each room air conditioned. They discussed with him the possibility of placing the units on the wall in each room. He told them that it would be more aesthetically appealing to place the units on the roof. The claimants agreed. Consequently, he amended the building plan to reflect a slab roof while maintaining the roof areas on the facade. After seeing the roof constructed by the defendant, Mr. Griffiths concluded that it was different from his drawings and specifications.

[39] Mr. Griffiths was cross-examined about the measured survey. He said he saw only two pegs on the property, one at each of the left and right front corners. He said in substance his ability to conduct a measured survey was significantly compromised by the presence of only two pegs on the land. However, he would have asked for further documents from the certified land surveyor to clarify the boundaries. He assumed that he had done so in this case but could not put his hands on those documents as they would have been handed back to the claimants. That assumption was based on his observation of the development on the land which conforms to his drawing.

[40] He agreed with counsel for the defence that a surveyor's report does not give the precise boundaries of the land, in relation to the drawing in the report. Even with a surveyor's report, he could not identify where the pegs at the back of the property should have been. He just referred to the dimensions. That is, having got the measurements for the front, he triangulated all the other measurements so that they corresponded with those on the surveyor's report.

[41] Mr. Griffiths disagreed that it would have been more prudent to require a surveyor to re-establish the pegs at the back of the premises for the purpose of his drawing. He elaborated, if when he did his calculations the boundaries were off by 6" or 1', he wouldn't go on to suggest to the claimants to get a topological drawing. The reason for that was buildings have a specific set back from the boundaries. Since this was a two storey building, the set back would have been approximately 10' from the boundary.

[42] Having so satisfied himself, he proceeded with the drawing as the measurements were no way off and the building would be set back 10'. He agreed, however, that his drawings could deviate from the actual registered boundaries of the land. That was so because the boundaries themselves were imprecise. On his visits to the site during construction he observed that changes were being made to his drawings. He noted two changes. First, he noticed that parts of the building were being re-sized. Secondly, he saw that sheeted roofing was being affixed upstairs although he could remember drawing concrete roofing.

[43] He went inside and noticed smaller rooms and open spaces. He could not recall if the walls were drywall or concrete. From the changes he saw he concluded the contractor was proceeding with the blessing of the claimants. Why? He came to that conclusion as the changes he saw represented a sea change from what he drew. However, in his professional understanding, the re-sizing of the building would not have to result in changes to the design of the roof.

Case for the defence

Drawing pains

[44] The defendant proclaimed himself as a building contractor. He further said that he had been working as a sub-contractor for about fifteen years. Having entered into the agreement with the claimants, he received from them the specifications and drawings prepared by Mr. Griffiths. As he commenced the preliminary work and investigations with a surveyor, he discovered that the drawing was for a bigger lot than the claimants'.

[45] He advised the claimants of this, specifically that the drawing required a lot 23' bigger. He suggested to them to remove the gift shop and coffee area from the plan to correct the problem. He went on to say that the claimants told him about Mr. Whittley. It was the claimants who set up a meeting with Mr. Whittley to work out the difference. Presumably at this meeting, Mr. Whittley confirmed the defendant's suggestion as the best way out.

Raising the roof

[46] The construction progressed to the point of erecting the roof. The roof, the defendant said, was to be built using decra tiles. The work on the roof was expected to last one year. That target was exceeded because of difficulties in getting the material on time. At all times during the construction of the roof Mr. Whittley visited the site and inspected the work. Mr. Whittley did not complain about either poor workmanship or poor work quality. The defendant asserted that the building was built in accordance with standard building procedures and practices. The claimants also expressed their satisfaction.

[47] The defendant charged that the claimants deviated from the building plan and made several changes. However, he could not remember all the changes. This much he remembered, the claimant's bedroom was changed midstream from 16' to "22' bigger than the plan." The result of that was an increase in the original roof estimate and the roof was split in two. The claimants also changed the arches in the original plan. Columns were also put in, while the original building plan had none.

[48] With only the fascia board needing to be planed to complete the roof, the defendant went to the claimants to demand the outstanding balance of $60,000.00 for the work done. There was also a sum due on the last pay bill and for tiles the defendant had purchased. The claimants refused to pay. At first they said they had no money. Two weeks later the claimants changed their song and complained of a problem with the roof.

[49] According to the defendant, the claimants had purchased more tiles than necessary from Quality Dealers. It was Quality Dealers that had supplied the estimate which included the living quarters. With the consent of the claimants, 52 squares of tiles were exchanged for lumber at DIB Block Factory. This lumber was vital for the building of the roof, which the claimants could not find. He explained at the time of exchanging the tiles that if they ran short on tiles, he would purchase the necessary amount and they would reimburse him.

Pointing out the defects

[50] By mutual arrangement, the defendant and the claimants met at the site to show him what areas of the roof they had a problem with. The claimants showed him two or three areas of uneven fascia board through which the light reflected. His explanation to them was that there was a ¼ inch difference between the local and imported fascia boards and that the reflection was because there was no ceiling. He asserted in his witness statement that the reflection through the roof is not a defect but unfinished work.

[51] He also told the claimants that as soon as they provided board for the scaffold the work could be completed. The claimants never kept their word to provide the board. Instead, the claimants sent him a message through the watchman that he and his workman were not needed on the property anymore. Since he and his workmen were barred from the property he noticed other men working on the project.

[52] At the outset of cross-examination, the defendant agreed that the roof was constructed in a different manner from that which was approved. He agreed that he never sought any approval from the Parish Council for the changes. However, he disagreed that he proceeded to construct the roof without any approval. Before the

construction he did not know Mr. Whittley. Therefore, he was not the one who introduced Mr. Whittley to the claimants. Neither did he tell them who to contact at the Parish Council.

[53] It was suggested to the defendant that he changed the construction of the roof without the appropriate approval. His response was that he did not make any changes. He elaborated that he had an idea that the claimants knew what they wanted, he didn't just go ahead. Further, Mr. Whittley would come and check on the changes from time-to-time. However, Mr. Whittley did not provide any drawings concerning the changes to roof.

Changing from slab to timber

[54] According to the defendant, the idea to change from slab to timber was the claimants'. This was how that came about. The claimants said they would use dry walls for the partition downstairs. When the first floor was slabbed, the weight of the slab on the second floor would have been too heavy so they decided to change from slab to timber.

[55] So, because the combined weight of the slab on both floors would have been too heavy for the dry wall partition on the first floor, the decision was taken to depart from the approved plan and use timber. The defendant said he did not tell them that they couldn't make the changes without approval from the Parish Council. Elaborating, he said they told him what changes to make and he made them.

Drawing the attention of the architect

[56] The defendant said that he had previously constructed buildings from drawings. He said if there was a problem between the drawing and the building, the draftsman or architect would be contacted. In this case, he did not contact Mr. Griffiths. However, he asked both claimants to contact Mr. Griffiths. Their response was that they were not working with Mr. Griffiths anymore. He never contacted Mr. Griffiths because he had no number for him. Pressed, he said he did not request a contact number for him.

[57] He confessed to it being desirable to contact the architect in this situation. That notwithstanding, he did not ascertain from the claimants if there was another architect he could contact. In any event, the claimants told him they were working with Mr. Whittley. They got in touch with Mr. Whittley and Mr. Whittley came to the site.

Light reflecting through the roof

[58] Questioned about the areas in the roof through which the claimants complained light was reflecting, the defendant said he saw the light reflecting through the roof. Expanding his answer, he said these were decra tiles which were glued, so sun would reflect but it did not leak. The tiles were held in place by nails above and below. In respect of the uneven boards, the defendant said he saw the boards before the commencement of the work. He recognized the difference but decided that they should work together. First he said the roof was not sealed then he said it was.

[59] The defendant was directed to his evidence in chief where he said the light reflecting through the roof was not a defect but unfinished work. He said the work was finished. He went on to say that he returned to the building and inspected it. In that inspection he noted that the painter and other workers had walked on the roof and that was what caused the light to reflect through the roof.

[60] The claimants' counsel then suggested to him that in December 2008 when Ms. Lauder visited the premises the boards on the roof were uneven and not properly joined. To that his answer was yes. Following on, it was suggested to him that as a result light came through. He responded, those boards are on the fascia, that was why they are called fascia board, so they couldn't be responsible for sunlight coming through the roof.

[61] It was also suggested to the defendant that the blocks did not go all the way up to the roof. He said they did. The carpenter was responsible to put on the belt beam. The claimant would pay for it by the foot. There was no ply board so the roof was put on over it. The belt beam could go on at a later date in that area that is, the front and a part of the back.

[62] The defendant agreed that Ms. Lauder brought her observations concerning the roof to his attention. He said the areas she pointed out were checked. It was also explained to her what would be needed to complete those areas, such as scaffolding board, ply board and 1x3 lath. He agreed with the suggestion that when Ms. Lauder pointed out the defects to him his response was, that's no problem, anything you see tell Mike.

[63] The defendant said he told Ms. Lauder he would take care of it. That was in relation to the uneven boards. He never took care of it because he didn't get the material from her. In January 2009 he asked Ms. Lauder for two weeks to remedy the defects. Later in cross-examination, he said he was not aware that the entire roof had to be replaced.

Defective specifications and drawings

[64] The defendant disagreed with the suggestion that at no time did he tell the claimants that the specifications and drawing were defective. Neither was it true that the first time the claimants became aware that the plan was defective was when they read it in his defence.

[65] He was thereafter referred to paragraph three of his defence. At paragraph three he averred, "the specification and drawing that the claimants refer to was one for the entire guest house and the said specification and drawing was completely defective and could not be used." The defendant responded that he did not say it was completely defective and could not be used. The drawing was wider than the lot and could not fit, having regard to the distance it had to be from the boundary. Mr. Whittley came and decided what could be left out while giving the building the same look.

Outstanding balance

[66] When the defendant was questioned about the outstanding balance, he admitted that as at January 2009 he had been paid $2,400,000.00. That left a balance of $60,000.00. He said he never asked for the balance. The reason he never asked for the balance wasn't because he knew he had messed up the roof and was suppose to pay for it. The reason he did not ask was because he did not complete the uneven board for

which the claimant should have provided the scaffolding. He said the value of the unfinished work did not amount to $60,000.00. Notwithstanding, he wanted the outstanding balance.

Construction supervisor Speid speaks

[67] Mr. Cliver Speid, the construction supervisor was called on behalf of the defendant. He supported the defendant's evidence that the gift and coffee shops had to be removed to reduce the size of the building by 23' to maintain the distance from the boundary. He gave that distance as approximately 13'. That, he said, was done in the presence of, and with the agreement of the claimants. Thereafter, Mr. Whittley confirmed the changes.

[68] On the question of the roof, he said the board work of the roof was put in. The roof had three sections. Two sections were completed. The third section was uncompleted because the claimants did not have the material. That state of affairs remained for four or five months. The result of the incomplete work was the framework being left uncovered and exposed. He echoed the defendant in saying that there was a 1/4" difference in width between the imported and the local fascia boards.

[69] Under cross-examination Mr. Speid said that he inspected the roof. To his knowledge there was no problem with the roof. He was asked if the roof was completely different from the one in the drawing. His answer was in the negative. In the next breath he said he was not sure if the roof was completely different from the design shown on the roof plan. According to Mr. Speid, the defendant told him the claimants said that they wanted woodwork on the roof.

[70] Continuing under cross-examination, Mr. Speid said the concrete slabs were eliminated but the concrete beams were not. Elaborating, he said the concrete beams must be there to tie the building together, even if there were no concrete slabs on the roof. The original design had the concrete beams. If the building was shrunk to eliminate the coffee area and gift shop, the concrete beams would not be in the same position as the beams on the ground. He agreed, however, that the beams in the coffee area and the gift shop would have been eliminated.

Wuthering or withering Whittley

[71] Also called on behalf of the defendant was Mr. Orelle Whittley. His witness statement was dated the 24th February, 2014 and filed 25th February, 2014. An objection to his mid-stream appearance was withdrawn ahead of a reserved ruling. Between 2006 and 2008 Mr. Whittley was the Acting Deputy Superintendent of Roads and Works (DSR&W) at the St. Mary Parish Council. His responsibilities included the inspection of construction works being carried out in the parish, pursuant to building approvals grated by the council. At the time of giving his evidence he was a Building Officer with the St. James Parish Council, a subordinate position to (DSR&W).

[72] In his witness statement Mr Whittley said in or about late 2007 Mr. Brady contacted him. That contact was about the prospect of effecting changes to an approved building design. As a result he visited lot # 14 Jamaica Beach. Mr. Brady told him that the building as designed was too wide for the lot. Mr. Whittley too measurements which confirmed what the defendant said. Mr. Brady suggested to him that a removal of several of the apartments would contract the building by over 20'. In that way the lot would be able to accommodate the building.

[73] Sometime thereafter Mr. Whittley returned to the site. This time he met with the defendant and the claimants. The proposed changes to the design were discussed. He informed the parties of the necessity to submit additional drawings to the Parish Council for approval, since the changes were major. He was asked to assist and agreed to do so. While he could not remember the actual changes, he recalled that the lot owners agreed that the roof would be constructed from timber.

[74] Mr. Whittley subsequently met with Ms. Jones and discussed his fees for redoing the drawings. He received a deposit of $125,000.00. He prepared the drawings with the aid of computer software. Having completed the drawings he made repeated unsuccessful efforts to contact the claimants. Consequently, the drawings were never submitted to the Parish Council. Since he was not able to contact the claimants, the drawings were never printed. With the passage of time the file with the drawings became corrupted resulting in its' irretrievability.

[75] In late 2008 Mr. Whittley received an invitation from the defendant to visit the construction site. He did so. On this visit Mr. Whittley inspected both the building and the roof. His inspection revealed what he described as very minor imperfections to the timber roof. Mr. Whittley opined that these imperfections could be easily remedied.

[76] When Mr. Whittley was cross-examined, he agreed that the building on the ground differed from the design. That difference being the designed building was larger than the lot. As a result, a new design was done by him. He agreed that the new design should have been approved by the Parish Council. There was no such approval as the new design was never submitted.

[77] It was the practice of the local planning authority to send an inspector to look at buildings under construction. As an acting DSR&W, it was part of Mr. Whittley's responsibilities to inspect buildings under construction. In this case, Mr. Whittley said he was not the building inspector. Neither did he know the identity of that person. However, there was only one person whose core function was the inspection of buildings under construction. That person was Aniffe Morrison, Building Officer.

[78] Mr. Whittley explained that there was no real difference between a Building Officer and a Building Inspector. In any event, other persons could inspect buildings such as a works overseer. He thought there were three works overseers at the St. Mary Parish Council at that time, all of whom were under his supervision. He could assign buildings to them to inspect. Four persons were entitled to inspect buildings including Mr. Whittley.

[79] Mr. Whittley said he had overall responsibility for all building matters. That made him competent to decide to inspect a particular building. Further, it was within his purview to decide whether the inspection of a building would fall to him or one of his subordinates. However, he neither assigned himself nor a subordinate to inspect the claimants' building. He said although he was not assigned to do so, he went to inspect the claimants' building.

[80] At the time Mr. Whittley went to the claimants' property there was no building on the land. According to him, it was just lined out. He could not remember if he was armed

with a copy of the drawing at that time. This visit was at the invitation of the defendant. The invitation was extended while Mr. Whittley was at his office. However, Mr. Whittley could not remember if when he went to the property if that was the first time he was meeting the defendant. Although he could not recall the means of communication, he recalled that that it was the defendant who told him to meet with him there.

[81] Also beyond Mr. Whittley's recall was which of the parties had contacted him and indicated that changes were wanted. It was after he was contacted that he visited the site. He visited the site a minimum of three times. On either the first or second occasion he saw Ms. Lydia Jones there. It was however on his second visit that he spoke with the owners.

[82] Mr. Whittley agreed with counsel for the claimants that without the approval of the amended drawing the building should not have been erected. Indeed, he had a duty to impose a stop order on the building. To Mr. Whittley's knowledge, no such approval had been given up to the time of trial. Neither had a stop order been issued.

[83] Mr. Whittley went on to tell learned counsel for the claimants that he never told Mr. Brady that he could not go ahead without the approved amended plan. However, Mr. Whittley said he did not expect that construction of the building would have proceeded almost to the point of completion without the modified plans being approved. Modifying plans approved by the parish council was not part of his responsibilities as acting DSR&W, Mr. Whittley said.

[84] Mr. Whittley told the court that the agreement for the drawings was $250,000.00. Having received a half as a deposit, the other half was payable upon completion and delivery. He did not think he should have returned the deposit although the claimants received nothing from him. He did not think so as he could not contact the claimant. At any rate, at the completion of the drawing he was no longer in St. Mary.

Submissions on behalf of the claimants

[85] Learned counsel for the claimants reduced the issues for determination to ten. First, was the roof erected by the defendant in accordance with the specifications and

architectural drawing prepared by the claimants' architect, Mr. Richard Griffiths? Secondly, were the specifications in the said drawings defective and if so, was the defect or defects communicated to the claimants, and/or the architect? Thirdly, did the defendant advise the claimants and/or the architect as to the nature of any problem he had with constructing the building pursuant to the specifications outlined in the drawing?

[86] Fourthly, did the claimants agree to the roof being constructed in the manner that it was completed by the defendant? Fifthly, what is the nature and extent of the defect in the construction of the roof to the claimants' building by the defendant? The sixth issue is, did the defendant breach his duty to build the roof in a workmanlike or professional manner so that the building upon which the roof was located would be fit for habitation? The seventh issue is, was the roof built in accordance with building practice and procedures and was it of good and sound quality?

[87] Eighth, was it an agreed term of the oral contract that the defendant was to provide material, construct the roof and be reimbursed thereafter by the claimants for the monies he expended in constructing the roof? Ninth, whether the claimants are entitled to damages in the sum of $30,533,825.58 being the estimated cost to repair the roof? Lastly, whether the defendant is entitled to set off damages in the sum of interest and costs?

[88] The claimants' counsel submitted that where a dwelling house is being constructed, there is an implied warranty that the builder would reasonably supply good and proper materials and that the house would be reasonably fit for human habitation on completion. ***Hancock v B.W. Brazier (Anerley) Ltd.*** [1962] 2 All E.R.901, 903 (***Hancock v Brazier***) was relied on for that submission. Furthermore, the construction must be done in a good and workmanlike manner: ***Jennings v Tavener*** [1955] 2 All E.R. 769. The defendant failed to do the work in a workmanlike manner, resulting in the house not being fit for human habitation, counsel submitted.

[89] Turning his attention to the defendant's allegation that the specification and drawing was completely defective and could not be relied on, counsel submitted that the defendant had a duty to the claimants. That duty was to warn the claimants of the

danger of relying on the drawing in the circumstances. Further, the defendant should have advised the claimants that he was unable to construct the roof from the drawing.

[90] It was further submitted that the defendant had a duty also to communicate with the architect. It was argued that a prudent contractor should always take care to consider the implications of a design, even if he has no design responsibility whatsoever. Furthermore, there is an implied term in a contract requiring a contractor to inform his employer's architect of any defects in the design of which he's aware.

[91] The submission continued, under English or common law the duty of a contractor extends to ensuring that once the work is completed, the house was fit for the purpose for which it was built. Lord Denning's dictum in ***Greaves v Baynham Meikle*** [1975] 3 All E.R. 99, 102 (***Greaves v Meikle***) was cited in support. Lord Denning is there quoted as follows:

> *"Now, as between building owners and contractors, it is plain that the owners made known to the contractors the purpose for which the building was required, so as to show that they relied on the contractor's skill and judgment. It was therefore the duty of the contractors to see that the finished work was reasonably fit for the purpose for which they knew it was required. It was not merely an obligation to use reasonable care; the contractors were obliged to ensure that the finished work was reasonably fit for the purpose."*

The duty is therefore absolute, it was opined.

[92] Following from there, it was said that the contractor's contractual duty extends to querying the design. In his failure to raise his doubts or concerns with the architect, the defendant acted with less care than was expected of the ordinary competent builder. That situation was compounded by the fact of the claimants being lay persons and inexperienced in construction. The defendant is therefore in breach of contract. He also breached his duty to see that he executed his work in accordance with the specifications and drawings and in workmanlike or professional manner.

Submissions on behalf of the defendant

Building contracts

[93] Counsel for the defendant reduced the issues for the court's determination to three. First, was it a term of the contract that the roof would be constructed primarily of timber and decra tiles? Secondly, was the roof defective? And if so, were the defects of such a nature and extent as to necessitate the entire removal and reconstruction of the roof? Thirdly, is the defendant liable to the claimants for installing a roof which did not accord with approved building drawings?

[94] According to counsel for the defendant, the nature of building construction is such that it is rare that what is actually constructed will be exactly as designed. He continued, the decisions of the courts in cases of dispute are based upon the context of the terms of the contract. If the contract is in writing and provides an expressed term for variations in writing, only any extra work would not be allowed unless the variation was in writing. ***McKinnon v Pabet Brewing Co. Ltd [1900], 8 B.C.R 265*** was relied on for that submission.

[95] In this submission, there have been instances in which the courts have departed from a slavish adherence to the writing. ***Molloy v Liebe*** [1910] 102 L.T.R. 616 was cited as an example. In that case the United Kingdom Privy Council ruled that an arbitrator was justified in inferring an implied promise by the employer to pay for works as extras even though the instructions were verbal and the contract required same to be in writing.

[96] Learned counsel stressed the following passage from the judgment of the court, delivered by Lord Macnaghten, at page 617:

> *"As Molloy insisted on the works being done, in spite of what the contractor told him, the umpire naturally inferred (and it was for him to draw the inference) that the employer implied promised that the works would be paid for either as included in the contract price or, if were wrong in his view, by extra payment to be assessed by the architect. It is difficult to see how the umpire could have drawn any other inference from the facts as found by him, without attributing dishonesty to Molloy."*

Further, where the alterations and extras were so many as to be outside the contract, no written orders for them were required: ***Meyer v Gilmer*** 18 N.Z.L.R. 129.

[97] Learned counsel for the defendant submitted that a contractor has no duty of care to the employer to build in compliance with building drawings and specifications where the employer or his agent authorizes changes. For that proposition he cited ***Dominion Paving & Construction Co. v Toronto City*** (1907) 9 O.W.R. 38. In that case a building contract authorized the architect to make changes to the plans and specifications. He verbally ordered work not resulting from any changes in the plans and specifications at all. The court held that the contractors could nonetheless recover from the building owners for the cost of the extra work.

Defects

[98] It is the claimant who bears the burden of proving the defects, counsel for the defendant submitted. That burden can only be discharged by calling expert evidence to identify the nature and extent of the defects. For that position counsel cited the Bahamian Supreme Court case of ***Clearlie Todman-Brown v Melvin Rymer*** Claim No. BVIHCV2009/0195 unreported delivered 11th May, 2011. Stress was placed on the following passage from the judgment of Hariprashad-Charles J:

> *"Mr. Carrington submitted that the evidence of Mr. Conway does not address whether the defendant's works are defective vis-a-vis the drawings. He further submitted that Mr. Conway's evidence is that he conducted no structural testing and calculations would have to be made to establish the stability of the actual building. Accordingly, no structural defects have been established to date ... Mr. Carrington further submitted that any works which were completed but were defective vis-a-vis the approved plan merely suffered from temporary disconformity which would have been corrected upon the completion of the construction ... I agree entirely with [the] submissions. In light of the approval of the structure as built by the Building Authority, the absence of any actual structural testing, and the ability to remedy any existing concerns during the completion of the project, a finding of defective works at this stage would be premature."*

[99] Under this head, counsel for the defendant submitted that the evidence shows that the defendant is owed the sums claimed. He relied on the dictum of Denning LJ, as he then was, in ***Hoenig v Isaacs*** [1952] 2 All ER 176:

> *"The first question is whether on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract but that does not mean that entire performance was a condition precedent to payment. When a contract provides for a specific sum to be paid on completion of a specific work the Courts lean against a construction of the contract which would deprive the contract of any payment at all simply because there are some defects or omissions."*

Issues for determination

[100] In my opinion, some of the issues identified by both sides may be conveniently conflated, or otherwise dealt with together. The first issue is, taking the claimant's number six and the defendant's number four, did the parties agree that the roof would be constructed in the manner that it was completed? That is, was it part of their agreement that the roof would be constructed primarily of timber and decra tiles? Secondly, was the roof erected in accordance with the specifications and architectural drawings prepared by Mr. Griffiths? Thirdly, were the specifications and drawings defective and, if so, was that communicated to the claimants?

[101] Fourthly, merging the claimants' number five with the defendant's number two, was the roof defective? If the answer to that is in the affirmative, were those defects of such a nature and extent to necessitate the entire removal and reconstruction of the roof? Following on from there, the fifth issue is, did the defendant breach his duty to build the roof in a workmanlike or professional manner so that the building upon which the roof was located would be fit for habitation? In other words, was the roof built in accordance with standard building practice and procedure?

[102] The sixth issue for my determination is, amalgamating the claimants' number nine and the defendant's number three, are the claimants entitled to damages in the sum of $30,533,825.58? Put another way is the defendant liable to the claimants for installing a roof which accords with the approved drawings? Lastly, whether the defendant is entitled to judgment on his counterclaim? Is the defendant entitled to set off damages in the sum of interest and costs?

Law and analysis

[103] This claim arose from a building contract. Simply put, and adapting the language of ***Keating on Building Contracts*** 5th edition page 1, a building contract is one in which one person (the contractor) agrees for valuable consideration to carry out building works for another (the employer or building owner). The building contract is a species of the general law of contract. Therefore, general contract law principles apply. Where, as here, there is no express contract, it is usual to imply certain terms.

[104] According to ***Treitel, The Law of Contract*** 12th ed. para. 6-028 (***Treitel***) implied terms may be divided into three main categories. These are, terms implied in fact, terms implied in law and terms implied by custom. The terms of a contract are subdivided into conditions and warranties. Since the cases to be considered below deal with warranties, for context, a definition of warranties is offered. A warranty is a term "the breach of which gives rise to a claim for damages but not a right to ... treat the contract as repudiated." (***Treitel*** op. cit. para. 18-039) Consequently, the injured party is required to prove both the breach and his loss.

[105] The situation under a design and build contract is a convenient place to start. Traditionally, the contractor is presented with a design prepared by the architect. The contractor then builds according to the design. The modern trend is for the contractor to both design and build. Under such a design and build contract, there is usually an implied term that the building will be suitable for its purpose for which the contractor knows it is required: ***Greaves v Meikle***, *supra*. The learned authors of ***Keating on Building Contracts***, supra, pages 7-8 expressed the view that such a contract affords the building owner greater protection than under a traditional contract. The greater protection arises in this way. In the normal run of things it is a defence for the architect to show that reasonable skill and care was used in the preparation of the design.

[106] In ***Greaves v Meikle*** the building owners wanted a new factory, warehouse and offices constructed. The warehouse was required as a store in which barrels of oil could be kept until they were needed and dispatched, and in which they could be moved safely from one point to another. This was a packaged deal in which the building owners

hired the claimant contractors to do everything. That is, the contractors were not only to provide labour and materials but also to hire architects and engineers. The claimant employed the defendants, structural engineers, to provide the design.

[107] The floor was built according to the defendants' design. The defendants were aware that stacker trucks would be employed to move drums of oil in the warehouse. Soon after it was put into use, cracks appeared in the floor. The issue was what was the cause of these cracks? Was it shrinkage of the concrete or design defects making the floor insufficiently strong to withstand the vibrations produced by the stacker trucks? The trial judge found that it was the latter.

[108] In declaring the law, Lord Denning MR, as he then was, said that the law implies a term into the contract that the builder will do his work in a good and workmanlike manner; that he will supply good and proper materials; and that it will be reasonably fit for human habitation. In respect of the employment of a professional man, "the law does not usually imply a warranty that he will achieve the desired results, but only that he will use reasonable skill and care" per Lord Denning at page 102. However, a dentist who undertakes to make a set of dentures impliedly warrants that they will fit the patient's gum.

[109] As to which of these two warranties applied to an architect or an engineer employed to design a house or bridge, Lord Denning did not think he had to decide that as a matter of law. That was so as in the case before him there was a common intention that the engineer should design a warehouse which would be fit for its required purpose. In those circumstances, there was an implied warranty of fact that the warehouse would be fit for its purpose once it was completed according to the design. It was in those circumstances that Lord Denning spoke of an absolute warranty of fitness.

[110] In the absence of that absolute warranty, the duty of the of the contractor is to exercise reasonable care and skill. For the extent of the duty McNair J in ***Bolam v Friern Hospital Management Committee*** [1957] 2 All ER 118, 121, approved by the Privy Council in ***Chin Keow v Government of Malaysia*** [1967] 1 WLR 813 was quoted. McNair J said,

> *"where you get a situation which involves the use of some special skill or competence, then the test whether there has been negligence or not is not the test of the man on the top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that skill ... It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."*

However, there may be special circumstances requiring the professional man to take special steps to discharge this duty. It is the judge who sets the standard of what a competent professional man would do.

[111] Following on the warranties discussed above, the contractor is required to do the work with all proper skill and care or in a good and workmanlike manner: ***Young & Marten Ltd. v McManus Childs Ltd.*** [1969] 1 AC 454, 465 (***Young & Marten***). ***Keating on Building Contracts*** at page 52 suggests that this is a continuing duty for the life of the construction, and not only at completion. The degree of skill required is to be gathered from all the circumstances of the contract: ***Young & Marten***, *supra* at pages 469-470. The latter case also established that this duty includes the use of materials with obvious defects, notwithstanding the fact of those materials emanating from a source of the employer's choosing.

[112] In ***Jennings v Tavener***, *supra*, the complaint was that the defendant contractor had failed and/or neglected to build a bungalow with reasonable skill and care, with good and suitable materials or in a proper, efficient and workmanlike manner. This claim arose out of the sale of a house in the course of construction to the plaintiff's husband. The husband died soon after taking possession. Before his death he complained of cracks appearing in the structure.

[113] Post-mortem, his widow consulted an architect who concluded that the cracks were due to the withdrawal of moisture from the site by the roots of some poplar trees. The poplar trees were in a cemetery about 30 or 40 feet away to the back of the bungalow. The cemetery proprietors cut down the poplar trees and destroyed their roots at the instance of the plaintiff's solicitors. After that, there was no further damage to the bungalow. The plaintiff's widow alleged that the bungalow was unfit for habitation.

[114] Jones J was concerned with the nature and extent of the warranty in the case of the sale of a house under construction. His review of the authorities showed that in the case of a completed house "there is no room for the implication of any terms as to the doing of any further work upon it," per Sir Wilfred Greene in ***Perry v Sharon Development Co. Ltd.*** [1937] 4 All ER 390,392. In those circumstances caveat emptor would apply. That is, the buyer could inspect the finished house, whether by himself or the appropriate professional.

[115] The following passage from the judgement of Sir Wilfred Greene M.R. in ***Perry v Sharon Development Co. Ltd.*** *supra,* was cited with approval:

> *"It is, of course, well settled that a vendor of a completed house, in respect of which there is no work going on and no work to be done, does not, in the absence of some express bargain, undertake any obligation with regard to the condition of the house. It is further well settled that, quite apart from obligation in contract, there is no obligation in tort lying upon him in respect of want of proper care in the construction or in the condition of the house which he is selling."*

[116] Where the contract concerns either a house to be built or under construction, the attitude of the court is quite different. This is amply demonstrated in the following quotation from the judgment of Swift J in ***Miller v Cannon Hill Estates, Ltd.*** [1931] 2 K.B. 113,121:

> *"The position is quite different when you contract with a builder or with the owners of a building estate in the course of development that they shall build a house for you or that you shall buy a house which is then in the course of construction by them. There the whole object, as both parties know, is that there shall be erected a house in which the intended purchaser shall come to live. It is the very nature and essence of the transaction between the parties that he will have a house put up there which is fit for him to come to as a dwelling-house. It is plain that in those circumstances there is an implication of law that the house shall be reasonably fit for the purpose for which it is required, that is for human dwelling."*

[117] ***Hancock v Brazier****, supra*, confirmed the threefold implication where the subject of the contract is a house which is either to be built or is under construction. That is, the

builder will do his work in a good and workmanlike manner; he will supply good and proper materials; and that it will be reasonably fit for human habitation. As that case demonstrates, while the contractor may have been compliant with one implication, he may be in breach of another.

[118] In particular, the implication is strict. That is, the buyer will have the full effect of it even where the builder was not at fault. In ***Hancock v Brazier*** the defendant was held to be in breach of the warranty to supply good and proper materials. That arose in circumstances where the builders had no reason to suspect materials used as hardcore in a foundation contained sodium sulphate. Sodium sulphate was the agent that caused cracks to appear in the flooring some years after the claimant took up possession. Nevertheless, since it was their contractual responsibility to secure good and proper materials for the hardcore, they were held to be in breach.

[119] ***Hancock v Brazier*** seems only to have been giving effect to the law laid down in ***The Moorcock*** (1888) 13 P.D. 157. In that case the wharfingers were held liable for damage done to the vessel while moored at their jetty, upon the strength of an implication in the contract. The liability did not arise from a warranty that the jetty was safe and suitable for the vessel. Rather, since the vessel was damaged in the ordinary use of the jetty, the implication was that the wharfingers would have taken reasonable care to ascertain that the conditions were not inimical to the vessel in those circumstances.

[120] What, then, is the position, as in the instant case, when a builder is contracted to both build the guest house with living quarters and erect and install the roof? The entire object of the contract is that there shall be erected a house in which both the owners and paying guests shall come to live; in the case of the owners permanently, and in the case of the paying guests, temporarily. In both cases the building is to be used for habitation. In that event, the very nature and essence of the transaction between the defendant and the claimants is that the defendant, having erected the building, will install a roof which will make the building fit for the claimants and their guests to inhabit. In those circumstances, the law will imply a term that the house shall be fit for the purpose for which it is required.

[121] Since the erection and installation of the roof formed a separate agreement, is there any implication in respect of it? The roof, like the house itself, must be fit for the purpose required. What then is the purpose of the roof? The most basic function of the roof of a house is to provide protection from the elements. In that event, the parties must have intended that the completed roof would provide this atmospheric protection. Can it then be said that a completed roof which allows the penetration of sunlight in several places offered this protection? Or that a completed roof with space between the eaves and the walls of the house afforded this protection?

[122] Taking the questions in chronological order, the defendant accepted the fact of this penetration of sunlight through the roof. For that occurrence the defendant gave three explanations. First, in his witness statement he attributed the penetration of sunlight to the ¼ inch difference in width between the local and imported fascia boards and the absence of a ceiling. Secondly, under cross-examination the presence of the sunlight was linked to the use of decra tiles, which were glued. Finally, the cause of the penetration of sunlight was the fact of workers walking on the roof.

[123] In so far as the penetration of the sunlight can be shown to have been caused by the uneven fascia boards, this sounds in the vein of workmanship and the quality of the material used. The defendant made the conscious decision to use the boards even though he recognised the difference. The use of the uneven boards clearly resulted in a defect in the roof which was patent. Patent, since the defendant was aware of the difference in the boards but went ahead anyway. In that event, the defendant was in breach of his warranty to supply good and proper materials: ***Hancock v Brazier***, *supra*. Further, the use of fascia boards which was bound to result in a defect in the roof shows that the defendant failed to use proper skill and care in the construction of the roof. (See ***Young & Marten***, *supra*)

[124] I now turn my attention to the space between the roof and the walls. This too was acknowledged by the defendant. This area is called the belt beam. His explanation for its absence came to this. It was the carpenter's responsibility to put it on and the claimants would pay the carpenter to do so. However, there was no ply board to

accomplish that task. In any event, the belt beam could go after the erection and installation of the roof.

[125] However sound this explanation might otherwise have been, it does not avail the defendant. It is clear that the defendant considered his task to erect and install the roof at an end, save for the fascia boards to be planed, when he demanded the outstanding $60,000.00 balance on the contract. So, the defendant was prepared to deliver the building to the claimants without the belt beam in place.

[126] With those defects, the evidence is compelling that the roof the defendant erected was not fit for the basic purpose it was required. But that is not all. Both the house and the roof were the subject of a traditional construction contract. That is, the defendant was presented with an approved design and specifications to which both should be constructed. In the end neither was built according to the design and specifications. In the respect of the building, I accept that a departure from the design and specifications became necessary for the reason given. That is, the lot could not practically accommodate the building as designed.

[127] However, the claimants' complaint concerns only the roof. I do not accept that the modifications to which the building was subjected extended to the roof. First, the claimants knew that the slabbed section of the roof was needed to locate air conditioning units, and other electrical services, for the several rooms of the guesthouse. Although at the time the claimants instructed the architect the location of these services was for aesthetics, by the time the roof came to be erected and installed, the efficacy of that decision ought to have been plain to the defendant, an experienced contractor.

[128] There was already a crush of land space resulting in the building being re-sized. This constraint of space should have telegraphed to this seasoned contractor that the slab roof was needed to site these services. In addition to the constraint of space, the location of the services on the roof was a general design concept with which the defendant was expected to be familiar by virtue of his length of years in the sector.

[129] So, for two reasons it is highly unlikely that the claimants would have consented to the sea change in the design of the roof. In the first place, they had already elected not to place the air conditioning units on the walls in the rooms because it would not have been aesthetically well-pleasing. Secondly, with the space constraint on the ground, something known from the foundation was about to be laid, the units could not go on the ground either. Therefore, as a matter of options, the claimants had no choice but to keep the design of the roof.

[130] The second reason for rejecting that the modifications extended to the roof is the lack of necessity. I accept the evidence that the re-sizing of the building was an exercise independent of the erection and installation of the roof. That was the evidence of both the Quantity Surveyor and the Architect. The reason given by Mr. Logan is that the roof attaches to the external section of the roof, is logically persuasive.

[131] On the other hand, I do not accept the reason offered by the defendant for the departure from the design of the roof. According to the defendant, because the claimants decided to use drywalls for the partitions downstairs, the combined weight of slab on the first and second floors would have been too much; hence, the decision to use timber. Quite simply, I do not believe him. But that is not the only reason for rejecting his evidence.

[132] The obvious consequence of such a decision on the part of the claimants would be to place them in the same invidious position they escaped at the design phase of the project. By that I mean they would be faced with the choice of either locating the air conditioning units on the wall or on the disappearing space outside on the ground. At this juncture the claimants would have been in need of the defendant's professional guidance.

[133] It is clear that the claimants relied on the defendant for his professional guidance. Ms. Jones, the claimant with whom the defendant had significant interaction, said he was her eyes and if he said jump, she jumped. And hardly anything else could have been expected from this simple layperson. Ms. Jones was clearly relying on the defendant's skill and judgment in the construction of the guesthouse.

[134] In those circumstances the defendant had a duty to warn the claimants of the danger of using drywalls on the first floor. It appears there was a total lack of foresight concerning the consequence of using dryways on the first floor. The design and specification required a predominantly slab roof. Therefore, the impact of its weight on the rest of the building ought to have been uppermost in the mind of the defendant.

[135] Although the defendant advanced the consequence of the claimants' election to use drywalls as the reason for his departure from the design, there is no evidence that he discussed this with them, as he was duty bound to. What is more, the defendant gave no evidence that changes to the roof were part of the discussions to make adjustments to the building. Mr. Whittley sought unsuccessfully to fill that breach.

[136] I say unsuccessfully because I find myself wholly unable to accept Mr. Whittley as a credible witness generally and, particularly, on this point. Having said the proposed changes to the design were discussed with the claimants, he could conveniently recall only the change to the roof. However, the evidence of the defendant as to how the change to roof came about strips Mr. Whittely's evidence of its veneer of truth. According to the defendant the change was made during the construction of the building. On the other hand, when Mr. Whittley went to the property and met with the claimants there was no building on the land.

[137] It is convenient at this point to make a brief mention of the submission of learned counsel for the defendant on the question of defects to the roof. Mr. Woolcock submitted that the claimants should have called expert evidence to establish the nature and extent of the defects, relying on ***Clearlie Todman-Brown v Melvin Rymer***, *supra*. The first point of distinction is this, that case arose from a failure of the builder to complete the project within the budget and time agreed. In the case before me the overarching concern is the defendant's failure to erect and install a roof in accordance with the design and specifications.

[138] Secondly, neither the passage quoted by counsel nor the case lays down the proposition counsel attributes to it. Specifically, at paragraph 27, the learned trial judge rejected the evidence of the structural engineer for two reasons. One, the defendant

was sued in his capacity as contractor and not as architect so criticisms of his design were irrelevant. The judge's second point was evidence of alleged defects was premature as the building was incomplete. In essence, the case was not about defects at all.

[139] In this case, the defects complained of were all patent. In so far as it concerned the roof, the Architect who designed and viewed it after erection and installation testified that it did not conform to his drawings. The Quantity Surveyor was of a similar view. The defendant himself agreed that the roof was constructed in a different manner from that which was approved. In any event, as I understand the case for the defendant he did not deny the defects in his evidence. That evidence was in itself a departure from his statement of case. What he sought to do was explain them. So, the question of who bears the burden of proof is an idle academic discussion.

[140] I therefore accept that the roof was not constructed according to design and specifications approved by the St. Mary Parish Council. Did the parties agree that the roof would be constructed in the manner it was completed? Having concluded that the modifications to the roof were not a part of the discussions to modify the building, I turn my attention to the question of acquiescence. In other words, how did the roof progress to the point of completion without Ms. Jones, the locally-based claimant, becoming aware that something was amiss?

[141] The evidence of Mr. Griffiths was that he amended the building plan to reflect a slab roof while maintaining the roof areas on the facade. I understand that to mean decra tiles were to be placed on the front sections of the roof while the inner portions were to be slabbed. That construction would involve the use of timber, decra tiles and, from the cross-examination of the claimants, cement and steel.

[142] The argument of the defence seems to be, the claimants bought only, or predominantly, timber and decra tiles for the roof. They bought none or only a small amount of cement and steel during the construction of the roof. Further, Ms. Lauder was told, which she denied, that the two container loads of timber were all for the construction of the roof. Therefore, the claimants knew or ought to have known that

what was being constructed was a roof made mostly of timber and decra tiles, with very little slab.

[143] I accept that the claimants bought such of these materials as they were instructed by the defendant. There was no contest that timber and decra tiles were bought. Defence counsel's inquiry concerned the purchase of cement and steel during the construction of the roof. Neither of the claimants could recall if any cement and steel were bought at that time. Ms. Jones' further response that she knew nothing about construction and was being led by the defendant is a sufficient answer. If none was bought it was because she was not instructed to buy any and, whatever may have been bought was what she was instructed to purchase.

[144] Apart from relying on the defendant's skill and judgment, it must be borne in mind that Ms. Jones was not a daily visitor to the construction site, residing out of the parish as she was. Therefore, she was not a constant observer of the roof under construction. Even if she was, I rather doubt that the difference in slab and tiled timber section of the roof would have been readily apparent to her. I accept her evidence that on her visits she did not know that the roof was not being constructed according to the plan. That she didn't know is evidenced by the fact of the departure not being raised before Ms. Lauder's inspection of the roof. I got the distinct impression that Ms. Lauder stood opposite to Ms. Jones in sophistication.

[145] I therefore conclude that there was no acquiescence on the part of the claimants. Having come to that conclusion, I hold that the claimants neither explicitly nor implicitly agreed that the roof should have been constructed in the manner in which it was completed. Since there was no agreement to construct the roof in the manner it was completed and it was not done according to the design and specifications, were the design and specifications defective? And if they were, was that communicated to the claimants?

[146] The person who did the drawings was called by the claimants. He was asked a number of questions in cross-examination. However, not even once was he taxed on the efficacy of his drawings. The contention of the defence averred in the statement of

case was never suggested to him. What is more, when the defendant's attention was drawn to that section of his defence he resiled from that averment. He then went on speak of the lot not being able to accommodate the building as drawn. No evidence came from him to support the averment of defective specification and drawing.

[147] In that event, the finding is compelling that the specification and drawing were not defective. That is, not defective in relation to the roof. Although I have accepted that the building had to be re-sized, I cannot by that finding say that the drawing for the building was defective. Since the specification and drawing were not defective, there was nothing to communicate to the claimants. What the defendant sought to say was that the changes made to the roof were all the claimants' doing. That is a position I have already rejected.

[148] Equally compelling is the finding that the roof was defective. The fascia boards were uneven. There was no belt beam and light sunlight penetrated the roof. Above all of that, the contract was for the defendant to complete the roof in compliance with the architect's design and specifications. The defendant is self confessed in his failure to perform his obligations under the contract. The result of that failure was to deliver to the claimant defective work.

[149] In addition to that, the work that the defendant did was not done in a workmanlike manner. The ultimate consequence of the defendant's less than professional workmanship is to render the building on which the roof sits unfit for human habitation. In my opinion, the defendant failed to use reasonable skill and care in the erection and installation of the roof.

Defendant's Counterclaim

[150] The defendant's counterclaim for $230,664.00 was 'proved' only to the extent of the claimants' admission. That is, the $60,000.00 outstanding balance on the contract price to erect and install the roof. The remainder represents the sum the defendant alleged he expended for tiles. Although the defendant said in his witness statement that he had an invoice to support his purchase of tiles, no invoice was ever placed before me.

[151] Although the balance on the contract was not disputed, is the defendant entitled to this sum? It has long been settled law that a party who has only partially performed his contractual obligations is disentitled to recover any money for the work done: ***Cutter v Powell*** [1775-1802] All ER Rep. 159. ***Cutter v Powell*** was considered in ***Sumpter v Hedges*** [1898] 1Q.B. 673. In the latter case the plaintiff builder contracted to build two houses and a stable on the defendant's land for a lump sum. The plaintiff abandoned the work, after receiving part of the price, which the defendant completed.

[152] It was held on appeal that the plaintiff could not recover in respect of the work done as upon a *quantum meruit*, there being no evidence of a fresh contract to pay for the same. In the words of A.L. Smith L.J., at page 674:

> *"The law is that, where there is a contract to do work for a lump sum, until the work is completed the price of it cannot be recovered."*

In the instant case, the defendant contracted to erect and install the roof for a lump sum. He was paid the greater part of the contracted sum. In respect of his performance, it would be kind to describe it as partial. The defendant performed his obligation under the contract in such a manner that the claimants will have to contract afresh for the same task. The counterclaim must therefore fail.

The Measure of Damages

[153] According to the learned authors of ***Treitel*** op. cit. Para. 20-039 the defendant is *prima facie* liable to compensate the claimants "on a "cost of cure" basis: i.e. he must pay for the cost of putting the defects right or of completing the work." This prima facie rule may be displaced in cases where the cost of reinstatement is disproportionate to the advantage gained by the injured party. In the latter case the measure of damages will be "the value of the building had it been built as required by the contract less its value as it stands."(See ***McGregor on Damages*** 18***th*** ed. para. 26-013)

[154] However, where the party in breach has utterly missed the contract mark the victim's loss is the cost of achieving that contractual objective. This was recognized by Lord Jauncey in ***Ruxley Electronics v Forsyth*** [1996] A.C. 344,358:

> *"Where the contract breaker has entirely failed to achieve the contractual objective it may not be difficult to conclude that the loss is the necessary cost of achieving that objective. Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing."*

[155] To say that the contractual objective has not been achieved is another way of saying there has been a fundamental breach. In that event, the general principle applies. That is to say, the injured party should be put into as good a position as he would have been if the contract had been performed, that is, if there had been no breach: ***Applegate v Moss*** [1971] 1 Q.B. 406, 414. That was a case in which the defendant failed to build in accordance with the design and specifications. The defects which arose as a result of that failure were so serious that the house could not have been repaired at a reasonable cost. It had to be torn down. In those circumstances the court awarded the value of the house at the time the breach was discovered.

[156] The character of the breach in the case before me, as in ***Applegate v Moss***, *supra*, cannot be described as anything less than fundamental. The evidence of the Quantity Surveyor, which stands uncontradicted, is that all the beams to accommodate the slab had been removed. Most of the roof, about 95% was sheet timber. Even this timber section did not comply with the design. So, to get the roof as designed everything has to be removed.

[157] From the Quantity Surveyor's perspective it is neither practical nor possible to make adjustments to the roof to make it compliant with the design and specifications. In short it is not repairable. It is perhaps unsurprising that no estimate of repairs was placed before me. I am therefore not in a position to assess the cost of cure in relation to cost of rebuilding the roof. Be that as it may, it appears to me that the instant case is indistinguishable from ***Applegate v Moss***. Accordingly, the measure of damages applicable is the same as applied in that case.

[158] I give judgment for the claimant on the claim and counterclaim. On the claim I award damages of $30,533,825.58 with interest of 10% under the Law Reform

(Miscellaneous Provisions) Act. Cost to the claimant on both the claim and counterclaim, to be agreed or taxed.