**2019 JMSC CIV. 160**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. C.L. 2002/P-016**

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| **BETWEEN** | **PENTIUM HOLDINGS LIMITED** | **CLAIMANT** |
| **AND** | **BRYAN MORRIS** | **1ST DEFENDANT** |
| **AND** | **ISLANDWIDE CONSTRUCTION LTD.** | **2ND DEFENDANT** |
| **AND** | **PLEXUS LIMITED** | **3RD DEFENDANT** |

**IN OPEN COURT**

**Alexander Williams and Topazia Brown, instructed by Usim, Williams & Company for the claimant**

**Charles E. Piper, QC, Wayne Piper and Petal Brown, instructed by Piper & Samuda for the 1st and 3rd defendants**

**Lawrence Haynes, instructed by Tracey A. Hamilton for the 2nd defendant**

**October 16 & 17, 2012; October 18, 2013; February 12 & 13 and April 7, 2014, May 14 & 30, and July 31, 2019**

**Claim for damages for breach of contract and/or negligence – Whether claim under both heads can properly be pursued – Contract for architectural services regarding office renovation project – Separate contract for construction services regarding office renovation project – Implied terms– Whether 1st defendant should be held personally liable for negligence – Scope of duty of care owed by architect to claimant – Whether 3rd defendant owed duty of care to claimant to carry out any of the duties particularized in the claimant's second further amended particulars of claim – Ancillary Claims.**

**ANDERSON, J.**

**The Background**

**[1]** The claim is a claim against the 1st and 3rd defendants for damages for breach of contract and/or negligence and as against the 2nd defendant, for damages for breach of contract only. Initially, the claimant's claim against the 2nd defendant was for damages for breach of contract and negligence, but subsequently, the claimant's lead counsel informed the court that his client was no longer pursuing his claim against the 2nd defendant, for damages for negligence.

**Introduction**

**[2]** The claimant is claiming against the 1st and 3rd defendants for damages for breach of contract and/or negligence, arising out of their engagement as 'an architect,' for the claimant, and against the 2nd defendant, arising out of its engagement as a contractor for the claimant. The 2nd defendant, allegedly in breach of contract, due to their negligence, failed to properly supervise or inspect the building works at the claimant's premises so as to ensure compliance with all necessary regulations and avoid encroachments, amongst other alleged negligent acts.

**[3]** In summary, the claimant's claim against the 1st and/or 3rd defendant is that they failed to submit plans to the proper authorities, for approval, prior to construction

and failed to inspect and/or properly supervise the building works at the premises, amongst other alleged negligent acts.

**The claimant's case**

**[4]** The claimant's case is that: The claimant is and was at all material times, the owner and occupier of premises with address at No. 1 Worthington Avenue, Kingston 5, in the parish of St. Andrew and which is registered at Volume 1197 Folio 614 of the Register Book of Titles.

**[5]** The 1st defendant is a registered architect and a contract was entered into, on or about August 8, 2000, between the claimant and the 1st and/or 3rd defendants for those defendants to act as architect for reward, in connection with the said premises. Said contract was made in writing and is evidenced by the 1st and/or 3rd defendant's letter to the claimant, dated August 8, 2000, which has been signed by the claimant.

**[6]** The 2nd defendant was engaged by the claimant as the contractor to conduct building work on the said premises and a contractual agreement was entered into, between them, pursuant to that purpose.

**[7]** According to the claimant, the 1st and 3rd defendants were negligent, in the following respects, in that, they/he:

1) '*Failed to submit plans to the proper authorities at or before the commencement of the building works.*

2) *Failed to ascertain and/or comply with the requirements of the necessary 'statues' (sic), regulations and development orders in the locality of the premises, at or before the commencement of the building works.*

3) *Failed to properly supervise the building works at the premises, particularly to avoid encroachments.*

4) *Failed to inspect the building works carried out by the 2nd defendant, properly or at all.'* (Italicized for emphasis)

**[8]** It is being alleged by the claimant against the 1st and 3rd defendants, that said negligence constitutes a breach of contract and that it was an implied term of the contract which was entered into between the claimant and the 1st and/or 3rd defendant, that, according to the claimant, those defendants were negligent, in that they failed to exercise; '*all due professional skill and care in the performance of his or its services thereunder*:'

**[9]** The acts of negligence alleged by the claimant against the 2nd defendant, are as follows:

a) *'Failed to ascertain and/or comply with the regulations of necessary statues (sic), regulations and development orders in the locality of the premises, at or before the commencement of the building works.*

b) *Failed to properly supervise the building works at the premises, particularly to avoid encroachments.*

c) *Failed to inspect the building works properly or at all.'* (Italicized for emphasis)

It is being alleged by the claimant as against the 2nd defendant, that said negligence constitutes a breach of contract.

**The case of the 1st and 3rd defendants**

**[10]** The 1st and 3rd defendants have filed a joint defence. In that regard, it is their joint contention, that it was the 3rd defendant that was hired to perform architectural services for the claimant.

**[11]** The proposed work to be done at the said premises was a modification to the claimant's offices, which are located at the said premises.

**[12]** The 1st defendant who is a registered architect and also, a shareholder and director of the 3rd defendant, met with the claimant to discuss the scope of work to be done and to reach an agreement as to the bases on which such work would be done. The letter which was delivered to the claimant and which is dated August 8, 2000, was a letter of the 3rd defendant.

**[13]** There was the payment of United States eight thousand nine hundred dollars (US$8,900.00) by the claimant's servant or agent - Lee Hartley, to the 1st defendant, on behalf of the 3rd defendant, on September 9, 2000, as an advance payment for architectural work in connection with the said proposed modification.

**[14]** The 3rd defendant agreed to do architectural work pertaining to the following:

a) Convert the existing office on the ground floor building of the said premises into rentable units; and

b) Add a first floor to accommodate 3-4 rentable units; and

c) Convert both floors of the annex, to house executive offices for the claimant; and

d) Ensure that the upgrading had adequate parking; and

e) Facilitate the connection of the said premises into the sewer main on Worthington Avenue aforesaid.

**[15]** The architectural work which the 3rd defendant agreed with the claimant, to specifically perform, was as follows:

a) Prepare a measured survey; and

b) Prepare and present a design layout of the proposed changes to the said building; and

c) Prepare a schematic design development drawing for the project; and

d) Prepare detailed working drawings for the said project including a revised electrical and plumbing layout.

**[16]** The 1st and 3rd defendants contend also, that on or about September 7, 2000, the claimant paid to the 2nd defendant, the sum of approximately United States twenty-seven thousand six hundred and forty-two dollars and eighty-six cents (U.S. $27,642.86) (the equivalent of Jamaican one million, one hundred and sixty-one thousand dollars (J$1,161,000.00), as a mobilization fee, for the commencement of the construction work pertaining to the modification of the claimant's said offices.

**[17]** The 1st and 3rd defendants have alleged that the claimant demanded of the 2nd defendant, that it commence the requisite work and upon construction work having commenced, the claimant demanded of the 3rd defendant, through the 1st defendant, that it ensures that the work was pursued in accordance with the design thereof, which demand was complied with, by those defendants.

**[18]** Prior to said engagement of the 3rd defendant's architectural services and while the defendants and the claimant were initially meeting with each other, collectively, and then discussing the nature of the project to be undertaken, it was represented to the 1st defendant, by the claimant's servants or agents, or by one or the other of them, that the user of the claimant's said premises for commercial purposes, had been approved by the Kingston and St. Andrew Corporation (K.S.A.C) (as it was then known), in February 1996, and that plans for a two-story office building at the said premises, had been approved by the K.S.A.C. on July 31, 1995.

**[19]** The defendants are relying on a letter dated February 28, 1996, from the K.S.A.C. to Jamaica Property Development Ltd. and a notification of building approval dated

August 4, 1995, which were delivered by the claimant, to the 1st defendant during those initial meetings.

**[20]** Nonetheless, it is the contention of the 1st and 3rd defendants that even though 'they' (the claimant) knew that detailed working drawings for the proposed modification of its said offices, had not yet been prepared and submitted to the K.S.A.C. and that modification of the buildings on the said premises could not properly have been commenced before building approval had been obtained from the K.S.A.C. and other relevant authorities, on September 7, 2000, the claimant paid to the 2nd defendant, the sum of twenty-seven thousand, six hundred and forty-two United States dollars and eighty-six cents (U.S.$27,642.86) (J$1,161,000.00)(equivalent), as mobilization fee for the commencement of the construction work for the modification of its said offices.

**[21]** What is clear, therefore, is that the defendant commenced working on the intended office modifications for the claimant – that undoubtedly being the work on the usage of the said premises, for commercial purposes, without having received specific approval from the K.S.A.C. for those intended office modifications, to be carried out.

**[22]** The 3rd defendant submitted to the K.S.A.C., application for building approval in respect of the proposed modification, on November 7, 2002, and was subsequently advised by the K.S.A.C., inter alia, that the proposed modifications, '*represents further intrusion of a non-conforming use*.' Further, a stop order was issued in connection with the construction work which was then being undertaken by the 2nd defendant, at the request of and on behalf of the claimant. Thereafter, the application for building approval was refused.

**[23]** By letter addressed to the office of the then Prime Minister, as Minister of Land and Environment, and dated May 4, 2001, the claimant appealed the decision of the K.S.A.C. refusing building approval, on the grounds, inter alia, that building approval had been obtained from the K.S.A.C. in 1995 and that permission had

previously been granted by the K.S.A.C., to use the said premises, for mixed purposes. That appeal was unsuccessful.

**[24]** According to the 1st and 3rd defendants, the claimant made representations to the 1st defendant and delivered to the 1st defendant, the letter dated February 28, 1996, and the notification of building approval, dated August 4, 1995, to induce the 1st and 3rd defendants to contract with the claimant.

**[25]** The said representations were false and were known by the claimant's servants or agents to be false, for that they knew, or ought reasonably to have known that:

a) By letter dated August 21, 1985, the claimant's predecessor in title – Mr. Donald Taylor applied to the K.S.A.C. for approval of a change of use of the said premises, from residential to commercial usage; and

b) By notice dated September 17, 1985 from the Town and Country Planning Authority to the said Donald Taylor, permission was refused for use of the said premises for commercial purposes on the ground that, '*the character, harmony and well-being of this predominantly residential neighbourhood, would be seriously affected by the intrusion of the proposed use'*; and

c) Having purchased the said premises with the ongoing business of Don's Rental and Tours Ltd. In a predominantly residential neighbourhood, in February 1998, the claimant and the claimant's servants/agents were put on enquiry as to the permitted usage to which the said premises could be put and ought properly to have known that use thereof, for commercial purposes, had not been approved.

**[26]** The 1st and 3rd defendants are contending that the claimant is estopped by its conduct from alleging or maintaining that they or either of them was/were negligent whether as alleged or at all. This is the 3rd defendant's primary defence. In the event that this court concludes that the claimant contracted with the 1st defendant, the defence of estoppel is then put forward by the 1st defendant, as his defence.

**[27]** Apart from those aspects, of the layers of defences to this claim, the 1st and 3rd defendants are also denying that any loss as alleged by the claimant was caused by the alleged or any act or omission on their part. If which is denied, the claimant, sustained any loss or damage, the same was caused or contributed to, by the claimant's conduct as alleged.

**[28]** During the modification of the said premises, the 2nd defendant, without the knowledge or approval of the 1st and 3rd defendant, constructed scaffolding on adjoining premises which were owned or occupied by the Worthington Gardens Citizens' Association – of which Association, Mr. Dennis Spencer was a member at the time and constructed a shed on the claimant's said premises, from the roof of which, water flowed onto the premises of the said Association, without obtaining Mr. Spencer's consent or approval, or the consent or approval of any member of the said Association.

**[29]** Mr. Spencer, on behalf of the said Association, commenced proceedings in the Resident Magistrate's Court for the Corporate Area, by Plaint No. 41 of 2001, against the claimant, seeking to recover damages for trespass and nuisance, caused by the encroachment of the said scaffolding and the flow of rainwater from the said shed.

**[30]** The claimant neglected or refused to defend the Resident Magistrate's Court action, and as a result, on January 29, 2001, a default judgment was entered in the said court, in favour of the said Association, in the sum of one hundred and ten thousand dollars ($110,000.00) with costs to the Association.

**[31]** At the request of the claimant, the 1st and 3rd defendants modified and resubmitted the development plans for the said premises so as to permit residential units to be built. Approval was granted for that modified plan to be the basis for new construction work to take place on the said premises. That approved plan permitted the construction of six studio apartments, one 1 bedroom apartment and one 2 bedroom apartment.

**[32]** While the 3rd defendant's contract with the claimant was still subsisting, the claimant, of their own volition and without reference to the 1st and 3rd defendants, retained the services of other architects, surveyors and engineers, to perform the same services which were the subject of the contract which the claimant then had with the 1st defendant. Those same services were then being performed by the 1st and 3rd defendant and their sub-contractors, under their contract with the claimant.

**[33]** Further, the 1st and 3rd defendant contend that there was no need for the alleged, or any demolition, if the claimant had accepted, adopted and pursued the development in accordance with the plan which had, by then, been prepared by the 1st and 3rd defendants and approved by the K.S.A.C.

**[34]** If therefore, the claimant suffered any loss and/or damage, as a consequence of the hiring of new architects, engineers, etc. and the demolition that they carried out, same was caused by the claimant's repudiation of their contract with the 3rd defendant and the claimant's failure to mitigate its alleged loss.

**[35]** The 1st and 3rd defendants, therefore, completely deny that the claimant is entitled to any relief as claimed for, by them.

**[36]** The 3rd defendant has counterclaimed against the claimant and in that regard, is contending that the claimant has neglected or refused to settle their indebtedness to them, for outstanding sums due to them, under the contract.

**[37]** As such, the 3rd defendant claims against the claimant, the sum of United States three thousand one hundred and fifty-seven dollars (US$3,157.00), being the sum which was due, as set out in the statement of accounts, dated August 21, 2002.

**[38]** The third defendant also claims interest at the rate of 12% per annum from 21st August 2002, to date of judgment.

**[39]** The 3rd defendant also seeks costs and '*such further or other relief as may be just*.' (Italicized for emphasis)

**The case of the 2nd defendant**

**[40]** In or about early August 2000, an officer of the 2nd defendant met at the office of the claimant, along with 1st defendant, representing the 3rd defendant and other persons, representing the claimant. That meeting was convened to discuss the proposed modifications to the claimant's office building, located at 1 Worthington Avenue, Kingston 5.

**[41]** At that meeting, it was proposed that the 2nd defendant undertake the construction work required in connection with the said modifications and as such, the 2nd defendant was requested to and did procure a cost estimate for the then proposed project, from L. Smith and Associates - Quantity Surveyors.

**[42]** The 2nd defendant was informed by the 1st defendant, that the 3rd defendant was the firm of architects that had been engaged by the claimant to undertake the architectural work which was required to effect the modifications to the claimant's office building.

**[43]** The 2nd defendant, through L. Smith and Associates, Quantity Surveyors, submitted to the 3rd defendant, under cover of a letter dated August 16, 2000, the said cost estimate, which stated that the cost to construct the project was Jamaican six million and fifty thousand dollars (J$6,050,000.00).

**[44]** Therefore, on August 23, 2000, the 2nd defendant received from the claimant the keys to the premises and was instructed to commence construction work thereon forthwith. The 3rd defendant was advised of this and requested by the 2nd defendant to prepare a 'mobilization certificate,' in the amount of one million two hundred thousand Jamaican dollars (J$1,200,000.00) for the claimant's attention.

**[45]** On September 7, 2000, the 2nd defendant received the sum of one million two hundred and forty-five thousand Jamaican dollars (J$1,245,000.00) from the claimant and thereafter, work commenced in accordance with the 3rd defendant's architectural drawings and that work was supervised by the managing director of the claimant and by the 1st defendant, who inspected the construction work at different intervals and approved interim payments from the claimant to the 2nd defendant, based on that.

**[46]** There were regular site meetings comprising, the claimant's managing director, the claimant's attorney-at-law, the engineer, the first defendant and a representative of the 2nd defendant, among others.

**[47]** The 2nd defendant is contending that its duties and functions in respect of the modifications that were to have been made to the claimant's office buildings, were merely executory and at all material times, the 2nd defendant implemented the directions and instructions given to them by the claimant and the 1st and 3rd defendants. The 2nd defendant contends that they relied wholly on the expertise, knowledge and experience of the 1st and 3rd defendants who were at all material times, inspectors and supervisors of the construction work in conjunction with the claimant's managing director.

**[48]** Overall, the 2nd defendant received five (5) interim payments from the claimant and the last of those five (5) interim payments were received from the claimant, on December 29, 2000. Shortly thereafter, a servant and/or agent of the 2nd defendant received, on the claimant's said premises, a document which was purportedly a 'Stop Order,' from a person purporting to be an officer of the K.S.A.C. That document was handed to the claimant's managing director, who was advised by the said K.S.A.C. officer, to cease work on the said premises.

**[49]** The 2nd defendant contends that, in total, it received the sum of four million, five hundred and forty-five thousand one hundred and thirty-three Jamaican dollars

and sixty-eight cents (J$4,545,133.68) from the claimant on account of the contract price for the project.

**[50]** The 1st defendant was informed of the 'Stop Order' and when asked whether work should cease, the 2nd defendant was instructed to hurriedly install some windows in the office buildings, so that the claimant's goods which were being imported, could be securely stored on their arrival.

**[51]** According to the 2nd defendant, thereafter, the 2nd defendant was instructed to cease work on the premises and work has, since then, never been recommenced by the 2nd defendant and as such, 'its contract with the claimant was never completed.' (Paragraph 18 of the 2nd defendant's defence and counterclaim).

**[52]** At that time, the 2nd defendant was advised by the 1st defendant and the claimant, that the said premises was not an approved site for commercial use.

**[53]** The 2nd defendant has counterclaimed for the balance of the contract price, in the sum of one million five hundred and four thousand, eight hundred and sixty-six Jamaican dollars and forty cents (J$1,504,866.40) as damages for breach of contract, on the basis that the claimant knew, or ought to have known that the said premises was not zoned for commercial use and, as such, should not have instructed the 2nd defendant to commence the stated construction work, until the regulations of all necessary statutes and development orders, had been complied with.

**[54]** The 2nd defendant, therefore, claims damages for breach of contract, in the sum of one million five hundred and four thousand, eight hundred and sixty-six Jamaican dollars and forty cents. (J$1,504,866.40).

**[55]** The 2nd defendant has denied the assertion made in paragraph 7 of the claimant's second further amended particulars of claim as to the 2nd defendant having been negligent in having failed to properly supervise the building works at the premises, to avoid encroachments and in addition, the 2nd defendant has made no admission

as to the claimant's alleged loss/damage, in the sum of two hundred and eighteen thousand Jamaican dollars ($218,000.00) being the Judgment debt and costs in relation to Plaints 4 and 6 of 2001, in the Resident Magistrate's Court, for the Corporate Area.

**[56]** The 2nd defendant has denied the assertion which was made in paragraph 8 of the claimant's second further amended particulars of claim. In paragraph 8 of same, it has been alleged, inter alia, that the 2nd defendant, through its servants and/or agents were negligent, in that they failed to properly supervise the building works at the premises, particularly to avoid encroachments.

**[57]** It is especially of note though, that the 2nd defendant has filed no reply in response to the assertion made in the defence of the 3rd defendant that it was the 2nd defendant which had, without the knowledge or approval of the 1st or 3rd defendants, constructed scaffolding on adjoining premises which was owned or occupied by the Worthington Gardens Citizens' Association and constructed a shed on the claimants said premises, from the roof of which, water flowed onto the premises of the said Association. It was as a result of that encroachment and the nuisance created, that a default judgment was entered against the claimant, in favour of the said Association, for the sum of one hundred and ten thousand Jamaican dollars ($110,000.00), with costs to the said Association.

**[58]** Initially, it appears that the issues which have arisen for this court's determination, are as follows:

i) Whether the 1st and/or 3rd defendants can properly be held liable to the claimant, for damages for negligence, in a context wherein the alleged negligence pertains to work allegedly carried out, or not carried out, by the defendants, in the course of a contractual relationship between them, or one of them and the claimant.

ii) Whether the claimant had contracted with all of the defendants, or rather, with only the 2nd and 3rd defendants as regards the work done, or not done by either of the defendants, which constitutes the basis for this claim.

iii) Whether either or both the 1st and/or 3rd defendants, owed a duty of care to the claimant to submit plans to the proper authorities, at or before the commencement of the building works and if so, whether either of those defendants, breached that duty of care.

iv) Whether either or both the 1st and/or 3rd defendants, owed a duty of care to the claimant, to ascertain and /or comply with the regulations of necessary statutes, regulations and development orders, in the locality of the premises, at or before the commencement of the building works and if so, whether any or both of those defendants, breached that duty of care.

v) Whether the 2nd defendant owed a contractual duty of care to the claimant to properly supervise the building works at the premises, particularly to avoid encroachment, and also to properly, or at all, inspect the building works and if so, whether the 2nd defendant breached that duty of care.

vi) Whether the 2nd defendant owed a contractual duty of care to the claimant, to ascertain and /or comply with the regulations of necessary statutes, regulations, development orders, in the locality of the premises, at or before the commencement of the building works and if so, whether the 2nd defendant breached that duty of care.

vii) Whether the 1st and/or the 3rd defendant, impliedly owed a contractual duty of care to the claimant, to ascertain and /or comply with the requirements of the necessary statutes, regulations and development orders in the locality of the premises, at or before the commencement of the building works.

viii) Whether the 1st and/or the 3rd defendant, impliedly owed a contractual duty of care to the claimant, to properly supervise the building works at the premises, particularly to avoid encroachments and /or to properly inspect, or inspect at all, the building works carried out by the 2nd defendant and if so, in any of those respects, whether the 1st and/or 3rd defendant, breached that duty of care.

ix) If any such negligence or breach of contract occurred, as alleged against the 1st and/or the 3rd defendant occurred, what award of damages should be made, arising from such?

x) If any such breach of contract occurred, as alleged against the 2nd defendant, what award of damages should be made, arising from such?

xi) Whether the claimant had, at all material times, known, or ought reasonably to have known, that the premises which was to have been used for the purpose of the renovation project, was not approved by the Kinston and St. Andrew Municipal Corporation (KSAC) for commercial use, such that the renovation project could not lawfully have been carried out, on that premises.

xii) If the claimant knew, or ought reasonably to have known that the premises which was to have been and which was in fact, used for the purpose of the renovation project, was not approved for commercial use, is the claimant estopped from alleging or maintaining, that the 3rd and/or 1st defendant(s) was/were negligent, or in breach of contract, as alleged?

xiii) What is the legal effect of 'estoppel' and what constitutes, 'estoppel'?

xiv) Does estoppel properly arise, in the context of this claim, as a valid defence, for either or both the 1st and/or the 3rd defendants and if so, what is the effect of that defence, on this claim?

xv) Can the plea of estoppel, raised by the 1st and 3rd defendants in their joint defence, be equated with a plea of contributory negligence, in response to the claim for damages for negligence and if so, what effect, if any, will that plea have on that aspect of the claimant's claim?

**Specific aspects of the analysis of the claim for damages for breach of contract against all of the defendants**

**[59]** It is significantly noteworthy that, in the claimant's second further amended particulars of claim, it is only in relation to the 1st and/or 3rd defendants, that it has specifically been alleged that *'It was an implied term of the contract that the 1st and/or 3rd defendant would exercise all due professional skill and care in the performance of his or its services thereunder.*' (paragraph 4) (Italicized for emphasis)

**[60]** Further on, in those further amended particulars of claim, the claimant has set out, in respect of the 1st and/or 3rd defendants and the 2nd defendant respectively, the alleged negligent conduct of those defendants.

**[61]** From the manner in which they have set out the claimant's statement of case in respect of the respective defendants, what follows, is that the claimant has not alleged any implied duty of care owed by the 2nd defendant, to the claimant. Accordingly, unless the duty of care allegedly breached by the 2nd defendant, was a duty expressly set out under the contract which was entered into, between the claimant and the 2nd defendant, then it would not, at all, be open to this court, to allow the claimant to recover any damages for breach of contract, arising from any breach of that duty, as may have been proven.

**[62]** That must be so, because no implied breach of that duty, would have specifically been alleged, in relation to the 2nd defendant. That defendant, just as every other defendant, would have been and also to the same extent as every other defendant, entitled to have known the case which it had to meet, or in other words, to know the parameters of the case which it was expected to be required to respond to. Any alleged breach of contract, on the part of the 2nd defendant, which would have arisen as a consequence of a breach of contract of an implied term, needed to have been specifically averred/alleged, so as to have enabled the 2nd defendant to have thereby, properly been enabled to respond to same. In that regard, see **Rules 8.9(1) and 8.9(A) of the C.P.R**.

**General point as regards the several issues**

**[63]** Depending on what are this court's conclusions on some of these issues, other issues may not properly arise for any further consideration. Additionally, several of these issues are significantly inter-related and therefore, need not and will not be, treated with, separately. They will though, be treated with, to the extent necessary, within the orbit of this court's assessment of the claim brought by the claimant, against each of the defendants and the respective ancillary claims being pursued

by the 2nd and 3rd defendants, against the claimant. That assessment will follow, immediately hereafter.

**The claimant's claim against the 1st defendant for damages for breach of contract**

**[64]** The content of the letter of August 8, 2000, is of significant importance, for the purpose of this court's determination as to whether or not any contractual agreement was entered into, between the claimant and the 1st defendant. The claimant's case is that they contracted with either the 1st or 3rd defendant, or with both of those parties and that said contract was made in writing and is evidenced by the, '*1st and/or 3rd defendant's'* letter to the claimant dated 8th August, 2000, which has been signed by the claimant.' (Highlighted in italics, for emphasis) (Part of paragraph 3 of the claimant's second further amended particulars of claim).

**[65]** Said letter was a document which was entered into evidence at trial, as one of several documents which constituted an agreed bundle of documents and which were, therefore, admitted as evidence, by agreement between the parties.

**[66]** The copy of the said letter which was among the agreed bundle of documents which was filed, has a space at the end of it, for the client to sign, under the words' Agreed and accepted by' and above the words, *'Authorized signature by or on behalf of client*.' (Italicized for emphasis)The absence of the claimant's signature there though, is in reality, of no significance, for present purposes.

**[67]** What is of significance is that in that document, it is specifically stated that the '*client/employer is Pentium Holdings Ltd*.' It is also stated, in the second paragraph of that letter, that: '*This is an agreement between Plexus Limited and Pentium Holdings Limited.*'

**[68]** It follows inexorably therefore, that although the 1st defendant has signed that document, above his name and the word, '*Architect*,' (Italicized for emphasis) he could only have signed same, for and behalf of the 3rd defendant, since the said letter clearly states that it is an agreement between Pentium Holdings Ltd' and

Plexus Ltd. It is not an agreement/contract between Pentium Holdings Ltd and Bryan Morris.

**[69]** Since the court is relying on the said letter as evidencing the contractual agreement between the parties, this court has readily concluded that the contractual agreement which is pertinent for the purposes of this claim, was not as between the claimant and the 1st defendant, but rather, was as between the claimant and the 3rd defendant.

**[70]** Further confirmation of this court's conclusion in that respect, has arisen from the claimant's evidence, which was solely presented to this court- in terms of the oral evidence given, by Mr. Lee Hartley, who was the Managing Director of the claimant when he left his employment with them, in July of 2001.

**[71]** It was stated in evidence by Mr. Hartley that,

'*The 1st defendant and representatives of the 2nd defendant met with us a number of times prior to August 2000 to discuss the impending project and to agree on a contract price. The1st defendant, via his company Plexus Limited (The 3rd defendant), set out in a letter dated 8th August, 2000 the terms and conditions agreed on. ... On the 28th August 2000, the 2nd defendant started preparatory work on the site and on 2nd September, 2000, the contractors were paid a mobilization fee of U.S. $29,000.00. The 1st defendant also received, on behalf of the 3rd defendant a start-up amount of U.S. $8,900.00*.'

**[72]** To my mind, once that sum of U.S $8,900.00 was paid to the 3rd defendant, via the 1st defendant, a contract existed as between the claimant and the 3rd defendant, since at that stage, there existed an offer made by the 3rd defendant to the claimant, for services to be rendered, acceptance of that offer, by the claimant and consideration for the agreement between those parties. None of that existed as between the claimant and the 1st defendant. At all material times, the 1st defendant

was patently active, only as an intermediary, between the 3rd defendant – which is a limited liability company and the claimant.

**[73]** For those reasons, the claimant's claim against the 1st defendant, for damages for breach of contract, must and does fail.

**The claimant's claim against the 1st defendant for damages for negligence**

**[74]** This court must therefore next go on to consider whether the claimant's claim against the 1st defendant for damages for negligence, has been proven or not.

**[75]** What then, are the elements to be proven by any and every claimant, with respect to a claim for damages for negligence? Those elements are as follows:

i) A legal duty on the part of A towards B to exercise care in such conduct of A, as fall within the scope of the duty; and

ii) Breach of that duty; and

iii) Consequential damage to B.

The burden of proof rests on the claimant's shoulders, to establish, on a balance of probabilities, each of those three elements and as such, any failure to prove any one of those three elements must result in the claimant's claim for damages for negligence being dismissed. See Winfield & Jolowicz on Tort**,** 14th ed. (1994), at p.78 and Charlesworth & Percy on negligence**,** 8th ed. (1990), at paragraphs 1-25 and 1-27.

**[76]** Additionally, the claimant has to prove that the duty of care which was owed by the defendant to the claimant and which was allegedly breached by that defendant,

was as particularized in the claimant's statement of case, in the 'Particulars of Negligence.'

**[77]** The next questions to be answered, therefore, pertain to whether the 1st defendant had a duty of care as to any or all of the following, which in the claimant's, 'particulars of negligence,' it has been alleged that the 1st defendant failed to do.

**[78]** Those questions are as follows:

a. Did the 1st defendant owe to the claimant, a duty of care to submit plans to the proper authorities, at or before the commencement of the building works?

b. Did the 1st defendant owe to the claimant, a duty of care to ascertain and/or comply with the requirements of the necessary statutes, regulations and development orders in the locality of the premises, at or before the commencement of the building works?

c. Did the 1st defendant owe to the claimant, a duty of care to properly supervise the building works at the premises, particularly to avoid encroachments?

d. Did the 1st defendant owe to the claimant, a duty of care to inspect the building works and further, to properly inspect same?

**[79]** In answering each of those questions, it must always be recalled that the claimant was, throughout the course of the architectural design for the renovation project and also, while construction work pertaining to that project, was ongoing, liaising with the 1st defendant, along with the managing director of the 2nd defendant – Mr. Nicholas Chin – who has not been personally sued, by the claimant.

**[80]** Of course too, it must always be recalled that a limited company is a separate legal entity from its shareholders – who are its owners and that a company must carry out its works, through an individual or individuals and that ordinarily, while carrying

out that work, those individuals may, as a matter of law, in certain circumstances, be considered as employees or agents of that company, whose work as such, if performed negligently, will result in that company which permitted and enabled that individual, or those individuals, who perform that work, on its behalf, to be held by a court of law, as being vicariously liable, as a consequence of that negligence. See **Launchbury v Morgans** – [1971] 2 QB 245, at 253, per Ld. Denning, M.R. (although the decision of the Court of Appeal was reversed by the House of Lords (1973) AC 127, on other grounds).

**[81]** Whilst that is so though, this does not automatically preclude the individual or individuals who carried out that work, from being held by a court of law to be personally liable to the claimant, for damages for negligence, arising from the negligent performance of that work. That can be so, even though the work, which was allegedly performed negligently, was to have been performed by a limited company, pursuant to that company's contractual obligations to the claimant and even if the company cannot properly be held liable for damages for breach of contract, or for damages for negligence.

**[82]** In the context of this claim, the 1st defendant may be held personally liable to the claimant, for damages for negligence, if it is concluded by this court, that the 1st defendant personally committed the negligence as alleged against him. See: **Standard Chartered Bank v Pakistan National Shipping Corporation and others (No. 2)** – [2000] 1 Lloyd's Rep 218, at paras. 16 and 17, per Aldous, L.J.

**[83]** In the context of this claim also, the 1st defendant may be held personally liable to the claimant, for damages for negligence, if whilst carrying out his obligations for the company which he is the owner and/or a director of, he is considered as having acted jointly with the 3rd defendant – that being the said company, to commit the alleged negligent act or acts, as has/have been particularly specified, in the claimant's statement of case. See **MCA Records Inc. and another and Charly Records Ltd. and others** – [2001] EWCA Civ 1441, at paras 47-50, per Chadwick, L.J.

**[84]** In either of those scenarios though, the 1st defendant cannot be held personally liable, unless he, as an individual, owed a duty of a care to the claimant, in respect of one or the other of the things which he allegedly failed to do, which allegedly constitutes the negligence on his part, which caused loss to this claimant and he breached that duty, thereby having caused foreseeable consequential loss to the claimant. It is important to reiterate also, that the 1st defendant can be held personally liable, either singularly or jointly, along with the 3rd defendant - which is the company that he owns. See: **Rainham Chemical Works Limited (In Liquidation) and others and Belvedere Fish Guano Company Limited** – [1921] 2 AC 465, esp. at p.476, per Ld Buckmaster; and **Hedley Byrne and Co. Ltd. and Heller and Partners Ltd**. [1964] AC 465; and **Performing Right Society v Ciryl Theatrical Syndicate** – [1924] 1 K.B. 2, esp. at pp.14 and 15, per Atkin, L.J. and **Williams and another and Natural Life Health Foods Ltd. and Mistlin (H.L.)** [1998] 1 WLR 830, esp. at pp 833 and 834, per Ld Steyn and **Fairline Shipping Company v Adamson** [1975] QB 180 esp. at pp. 190 and 191, per Kerr, J.

**Whether the 1st defendant owed to the claimant any duty of care**

**[85]** I am not of the view that the 1st defendant personally owed any duty of care to the claimant. I disagree with the learned senior counsel's written submissions in that regard, which were filed on the claimant's behalf.

**[86]** In order for the 1st defendant to have owed the claimant, a duty of care in the performance of his services as an architect, with respect to the renovation project, the 1st defendant would have had to have placed himself in a, 'special relationship' with the claimant, that being one in which he undertook personal responsibility for that which the claimant had contractually engaged the 3rd defendant, to perform on its behalf.

**[87]** There is no doubt that the 1st defendant was, at all material times, personally involved in the carrying out of the work which the 3rd defendant was contractually hired to perform, on the claimant's behalf. That though, is not enough, to cause

him to be personally saddled with a duty of care, or to create a 'special relationship,' as regards that work, as between himself and the claimant. If it were otherwise, then the well-established legal principle of a company being a separate legal entity from its owners and/or directors and employees would largely be rendered nugatory.

**[88]** If though, the 1st defendant had held out himself to the claimant as being personally responsible for the carrying out of the architectural work which the 3rd defendant was engaged/hired to perform, on behalf of the claimant and had done so, in a context wherein, it was, when considered from an objective viewpoint, clearly understandable as between the 1st defendant and the claimant, that he (the 1st defendant), was personally carrying out those services, for and of his own accord, this as distinct from his having so done, for and on behalf of the third defendant, then the legal situation of the 1st defendant would be different.

**[89]** It is the objective viewpoint of this court, in that regard, that matters. It is not the subjective viewpoint of the parties, in that regard, which matters.

**[90]** Having considered the whole of the evidence presented to this court by all of the parties, in respect of this claim, I am not of the view that the 1st defendant can properly be held, based on the particular circumstances of this particular claim, liable to the claimant for damages for the negligence as alleged against him, either jointly with the 3rd defendant or, independently of the 3rd defendant.

**[91]** The evidence presented to this court, has fallen woefully short of establishing that any such special relationship between the claimant and the 1st defendant, in respect of the performance of architectural services with respect to the renovation project, may properly be deemed by this court, as having existed, when that aspect of this claim, is considered from an objective viewpoint. In the circumstances, the claimant's claim for damages for negligence, must and does fail.

**Whether the claimant's claim against the 3rd defendant can properly be pursued as alternative claims for damages for breach of contract or damages for negligence.**

**[92]** There exists in law, authorities, which are relied upon by jurists and attorneys alike, in suitable cases, as precedents which should be followed by courts of law, in respect of legal issues which have been addressed by those authorities.

**[93]** In so far as this claim is concerned, the 3rd defendant is through its counsel, relying heavily on the following cases and reference treatise, as precedent in support of their submission that since the claimant and the 3rd defendant were in a contractual relationship which necessitated the provision to the claimant by the 3rd defendant, of specified architectural services with respect to the renovation project, this therefore means that the claimant must, if there was any failure on the part of the 3rd defendant, to perform those specified architectural services in a reasonably competent manner, pursue their remedy for same, based solely on the law of contract and not, on the law of tort.

**[94]** In that regard, see: **Tai Hing cotton Mill Ltd. v Hiu Chong Hing Bank Ltd. and other** (P.C.) – [1986] 1 A.C. 80, esp. at p.107, per Ld. Scarman, who stated as follows:

> *'There is no advantage to the law's development in searching for a liability in tort where the parties are in a contractual relationship. Though it is possible to conduct an analysis of the rights and duties inherent in some contractual relationships including that of banker and customer either as a matter of contract or as a matter of tort it is correct in principle and necessary for the avoidance of confusion, to adhere to the contractual analysis. Parties' mutual obligations in tort cannot be any greater than those to be found expressly or by necessary implication in their contract.'*

**[95]** In Halsbury's Laws of England, Vol. 4 at para. 1330, the learned authors have stated:

> *'The relationship between architect and the employer is contractual and there is no residual liability that can exist in tort. Moreover, the test of whether the architect is in breach of his duty to his employer is whether he acted negligently or not. The test is one of fact and depends upon the consideration of whether other persons exercising the same profession, and being men of experience and skill therein, would or would not have acted in the same way as the architect in question. It is evidence of ignorance and lack of skill that the architect has acted contrary to the established practices that are universally recognized by members of the profession.'*

See also: **Bagot v Stevens Scanlon and Co. Ltd**. – [1966] 1 Q.B. 197, esp. at p. 203 G to p. 204 E and p. 205 E to p. 206 E, per Diplock, L.J.

**[96]** In the case of **Henderson v Merrett Syndicates Ltd.** and others (H.L.) [1995] 2 AC 145, the case: **Tai Hing Cotton Mill Ltd**. (op. cit.) and **Bagot** (op. cit.), were carefully considered and addressed by the House of Lords, in that court's well – reasoned judgment, in that case. See what was stated in that regard, at pp. 186 and 187, per Ld Goff. of Chieveley.

**[97]** At page 187, Ld. Goff referred to the case: **Esso Petroleum Co. Ltd. v Mardon** [1976] Q. B 801. In the **Esso** case (op. cit), the Court of Appeal of England and Wales was addressing a situation in which statements had been made by employees of Esso, in the course of pre-contractual negotiations with Ms. Mardon, the prospective tenant of a petrol station. The statements related to the potential throughput, which proved to be much lower than had been predicted. The Court of Appeal held that Mr. Mardon was entitled to recover damages from Esso, on the basis of either breach of warranty or (on this point, affirming the decision of the judge below), negligent misrepresentation. The Court of Appeal rejected the

argument, that Esso's liability could only be contractual. That Court held that in addition to its liability in contract, Esso was also liable in negligence.

**[98]** In rejecting an argument made in that case, that Esso's liability could only be contractual, Ld. Denning, M.R. dismissed **Groom v Crocker** – [1939] 1 K.B. 194; and **Bagot v Stevens Scanlon and Co. Ltd.** (op. cit), as inconsistent with other decisions of high authority, viz. **Lister v Romford Ice and Cold Storage Co. Ltd.** [1957] A.C. 555, at 587, per Ld. Radcliffe; and **Nocton v Lord Ashburton** – [1914] A.C. 932, at 956, per Viscount Haldane, L.C. The other members of the Court of Appeal, Ormond and Shaw L.JJ. agreed that Mr. Mardon was entitled to recover damages either for breach of warranty or for negligent misrepresentation, though neither expressed any view about the status of **Groom v Crocker** (op. cit). It was, however, implicit in their decision that, as Lord Denning, M.R. held, concurrent remedies were available to Mr. Mardon, in contract and tort.

**[99]** The Court of Appeal's decision in the **Esso Case** (op. cit.), was followed by the England and Wales Court of Appeal, in **Batty v Metropolitan Property Realisations** Ltd. [1978] Q.B. 554, in which, concurrent remedies in contract and tort were again allowed. According to Ld. Goff, 'the requisite analysis is however to be found in the judgment of Oliver J. in **Midland Bank Trust Co. Ltd. v Hett, Stubbs and Kemp** [1979] Ch. 384, in which he held that a solicitor could be liable to his client for negligence either in contract or in tort, with the effect that in the case before him it was open to him, as a judge of first instance, to depart from the decision of the Court of Appeal in **Groom v Crocker** – [1939] 1 K.B. 194. For that purpose, he carried out a most careful examination of the relevant authorities, both before and after **Groom v Crocker** (op. cit), and concluded that he was free to depart from the decision in that case, which he elected to do.' (p.188).

**[100]** It is of importance to note at this juncture, that in the Privy Council's judgment in the case: **Tai Hing Cotton Mill Ltd. v Liu Chong Hing Bank Ltd**. [1986] A.C. 80, p. 107, Ld Scarman, in delivering the judgment of the court in that case, stated:

> *'Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship … their Lordships believe it to be correct in principle and necessary for the avoidance of confusion in the law to adhere to the contractual analysis: on principle because it is a relationship in which the parties have, subject to a few exceptions, the right to determine their obligations to each other, and for the avoidance of confusion because different consequences do follow according to whether liability arises from contract or tort, e.g. in the limitation of action.'* (Italicized for emphasis)

**[101]** Immediately after setting out that last quotation, in his judgment, Ld. Goff stated:

> *'It is, however, right to stress, as did Sir Thomas Bingham M.R. in the present case, that the issue in the Tai Hing case was whether a tortious duty of care could be established which was more extensive than that which was provided for under the relevant contract.'* (Italicized for emphasis)

Of course, that could not be so established.

**[102]** Ld. Scarman addressed that matter, in this way:

> *'Their Lordships do not, therefore, embark on an investigation as to whether in the relationship of banker and customer it is possible to identify tort as well as contract as a source of the obligations owed by the one to the other. Their Lordships do not, however, accept that the parties, mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract. If therefore, as their Lordships have concluded, no duty wider than that recognized in MacMillan [1918] A.C. 777 and Greenwood [1933]*

*A.C. 51 can be implied into the banking contract in the absence of express terms to that effect, the banks cannot rely on the law of tort to provide them with greater protection than that for which they have contracted.'* (Italicized for emphasis)

**[103]** Of course, it must be noted for present purposes, that the **Tai Hing case** (op. cit), pertained to the obligations owed by a customer to its banker.

**[104]** The **Tai Hing case** (op. cit) was, of course, ultimately adjudicated on, by the Privy Council. On the other hand, the judgment earlier referred to, in the case: **Henderson and others** (op. cit), is a House of Lords' judgment. For the purposes of legal precedent in Jamaica, it is my understanding that on the same point of law which was addressed in both of those cases, the Privy Council case precedent, is binding. See **Jamaica Carpet Mills Ltd. v First Valley Bank** – [1986] 45 WIR 278. That is so, even though the Privy Council's judgment in the **Tai Hing case** (op. cit.), did not emanate from Jamaica.

**[105]** No difficulty exists for present purposes though, in doing that, since the legal conclusions of the Privy Council as set out in the **Tai Hing case** (op. cit), were not at all, disapproved of, by the House of Lords, in their later-in-time judgment, in the **Henderson and others case** (op. cit)

**[106]** I, therefore, consider the legal position to be clear, in a case such as the present, which is that in circumstances wherein the contract which was entered into, between the parties, makes no reference to any specific duty of care, that would mean that the duty of care owed by the 3rd defendant to the claimant, would be the same, in terms of its scope, as would be understood and applied as per both the law of tort and the law of contract.

**[107]** The law as regards negligence will be the same, in Jamaica, whether it is considered in the context of the law of tort and the law of contract, save and except in two respects, neither of which will be of any relevance for the purposes of this

claim. One of those respects, is that under the law of tort, the cause of action founded upon the tort of negligence, does not arise until actual loss has been incurred, by the intending claimant, whereas, for the purposes of the law of contract, the cause of action arises, once the breach of contract has occurred. The limitation period in Jamaica though, unlike England, for bringing a claim in both contract and tort, is the same, which is six years. The second respect is that the duty of care owed in a contract is wider than in tort. For a reference to that, see **Robinson v P E Jones (Contractors) Ltd.** [2012] Q B 44, at para 94, per Burnton L.J.

**[108]** I am of the view therefore, that the claimant's claim against the 3rd defendant could have been pursued on the tort of negligence and for breach of contract. Case law from Jamaica's Court of Appeal supports this position of mine. See **National Commercial Bank of Jamaica Limited and Surrey Hotel Management Limited** [2018] JMSC Civ. 28. In any event though, the judgment of that court, in that case, constitutes binding precedent for this court.

**Whether the claimant can resile from the concession made by their counsel as regards the claim for damages for negligence**

**[109]** As things transpired in the court, in respect of this matter, however, during the course of presenting his client's oral closing submissions, with respect to this claim, lead counsel for the claimant - Mr. Williams, had informed the court that his client would no longer be pursuing their claim against the 3rd defendant, for damages for negligence.

**[110]** At a much later stage, I had received written submission from the claimant's and the 1st and 3rd defendants' counsel, which were provided upon my specific request, made to counsel, for same to be provided to the court, particularly by counsel for the claimant and the 3rd defendant, with the 2nd defendant having had the option to provide same to the court if they wished. The 2nd defendant's counsel exercised that option.

**[111]** Those written submissions addressed, amongst other things, whether the claimant could properly resile from that concession made by the claimant's counsel, as regards the claimant's claim against the 3rd defendant for damages for negligence and also addressed, from the claimant's standpoint, the issue as to whether, even if the claimant could properly be permitted to resile from that concession, whether or not the claimant wished to, in fact, do so.

**[112]** Having carefully considered all written submissions and oral submissions in this case, I can now state, for the purposes of these reasons, that it is the 1st and 3rd counsel's legal position, that: The claimant cannot resile from that concession. No authorities though were cited by the 1st and 3rd defendant's counsel, in support of that contention and additionally, no reasons were proffered as to why that contention was made. In the circumstances, it must now be stated in these reasons, that the mere statement of that contention was, albeit not entirely unhelpful, at the same time, not particularly helpful, as legal submissions in support of same, were expected by the court.

**[113]** The 2nd defendant's counsel, having been invited to do so, at his discretion, chose to make submissions to this court, as regards whether the claimant should, or should not and/or whether the claimant properly can, or cannot, resile from the earlier concession made on their behalf, by their counsel, in relation to their claim against the 3rd defendant that of course, having been their concession that their claim against the 3rd defendant, is being pursued solely for damages for breach of contract.

**[114]** To put it as simply as possible, it was that counsel's contention that to allow for the claimant's counsel to resile from that earlier concession, would be '*to offend against the principle of certainty and conclusiveness*.' (Italicized for emphasis) It is also the position of the 2nd defendant's counsel, that the claimant's claim for damages for negligence, cannot be successful.

**[115]** In that regard, it is though, the claimant's present position, as expressed through their counsel, in his further written submissions, that is open to this court to grant relief in favour of the claimant, on the tort of negligence, notwithstanding the concession which was earlier expressed by himself, that being Mr. Alexander Williams, who was throughout the trial of this claim, the claimant's lead counsel.

**[116]** In support of that submission the claimant's counsel is relying on **section 48(g) of the Judicature (Supreme Court) Act,** which provides that:

> *'The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided.'*

**[117]** I am of the view that the claimant ought not to be prevented from maintaining its claim against the 3rd defendant for damages for negligence, even though the claimant's counsel had informed the court, during his presentation to this court, of the oral closing submission on the claimant's belief, that his client will no longer be pursuing same.

**[118]** In the overall circumstances, it cannot, in my view, constitute an abuse of process for the claimant to maintain its claim against the 3rd defendant, for damages for negligence. To my mind, in the particular context of this particular claim, the claimant's claim for damages for negligence and for damages for breach of contract, as against the 3rd defendant, can properly be pursued to point of judgment of this court, in respect of both of those heads of claim. The 3rd defendant had, in their original written closing submission and also, in their further written closing

submissions, addressed this court as to both of those heads of claim. In the interest of justice, it is by no means either unfair to the 3rd defendant, or an abuse of process to allow the claimant's claim against the 3rd defendant, for damages for negligence, to remain extant. In these reasons, therefore, I will next address the negligence head of claim, which has been brought by the claimant, against the 3rd defendant.

**The claim for damages for negligence brought against the 3rd defendant**

**[119]** Having earlier in these reasons, set out the elements of negligence and the particulars of negligence, it is not necessary for me to repeat same. I will therefore now analyse that claim.

**[120]** The first questions to be posed and answered, for the purpose of that analysis, are whether, firstly, the 3rd defendant owed a duty of care to the claimant, to properly supervise the building works at the premises, particularly to avoid encroachments and/or to properly inspect the building works properly and secondly, whether the 3rd defendant owed a duty to the claimant, to submit plans to the proper authorities at or before the commencement of the building works and/or to ascertain and/or comply with the requirements of the statutes, regulations and development orders in the locality of the premises at or before the commencement of the building works.

**[121]** It follows that if either of those duties were owed by the 3rd defendant to the claimant, then, based on the evidence which was presented at trial, that duty was certainly not complied with, by the 3rd defendant and there is no doubt also, that as a consequence, the claimant suffered loss and damage.

**[122]** That is why, during the trial of this claim, it was the focus of the evidence led on behalf of the claimant and the 3rd defendant, as to whether or not the 3rd defendant owed to the claimant any of the duties which the 3rd defendant allegedly failed to perform either at all, or at the very least, in a reasonably competent manner, as

particularized in the claimant's 'Particulars of Negligence,' as set out in paragraph 7 of the claimant's second further amended particulars of claim.

**[123]** There is no doubt that the 3rd defendant owed to the claimant a duty of care, generally, as alleged by the claimant, to exercise, '*all due professional skill and care in the performance of his or its services*.' (Italicized for emphasis) (Paragraph 7 of the second further amended particulars of claim). The claimant though, as he was legally required to do, specified in what respect, the 3rd defendant allegedly failed to comply with that broad, generally specified, duty of care. That was the function of the claimant's particulars of negligence, which are set out in paragraph 7 of the second further amended particulars of claim.

**[124]** The claimant is bound to prove one or the other of those particulars as alleged, otherwise, their claim for damages for negligence must fail.

**[125]** To my mind, the claimant has failed to so prove and that failure arose, because the claimant failed, in the first instance, to establish that the 3rd defendant owed to it, any such duty of care which it specifically alleged in its particulars of claim as being that which that the 3rd defendant had failed to do. See **Esso Petroleum Co. Ltd. v Southport Corporation**. [1956] A.C. 218.

**[126]** The claimant did not place before this court, for its consideration, any evidence whatsoever, as to what is to be considered as the duties owed by architects to clients in circumstances wherein, as in the present matter, a party hires an architect to prepare drawings, or in other words, architectural plans related to the design of a particular construction project which is expected to be undertaken by that party, at a later stage.

**[127]** The claimant and the 3rd defendant were contractually engaged in a relationship as client and architect. The written contract set out the specific terms of that contractual relationship. Beyond that specified contractual duty, as set out in the written contract, the 1st defendant has stated that, at the claimant's insistence, he

also took on the duty of ensuring that the construction work on the renovation project was being done in accordance with the design. Based on all of the evidence presented at trial, this court has been unable to reach the conclusion as having been proven on a balance of probabilities, that the 3rd defendant had any duties such as the claimant is contending that the 3rd defendant, failed to carry out.

**[128]** That though, is not the end of the matter, because even if not specifically adumbrated in the contract, it could very well have been that as a matter of law, there exists other duties which, for the purposes of the law of tort, would be deemed to have existed, at the relevant time, as being duties owed by the 3rd defendant, to the claimant.

**[129]** Such a duty will not be considered as having existed at the relevant time, as a matter of law, merely because a party to a claim which is before a court of law, for adjudication, wishes that duty to be treated with, by that court, as having existed at the relevant time. An objective standard must always be applied by courts, for the purpose of determining whether or not a duty of care existed and if so, determining further, what was the scope of that duty.

**[130]** Applying that objective standard to the matter at hand and after having carefully considered all of the evidence which was led at trial, by the respective parties, I am of the considered view, that the claimant has failed to prove its claim against the 3rd defendant for damages for negligence. That is so, for the reasons which I have earlier specified.

**The claimant's claim against the 3rd defendant for damages for breach of contract**

**[131]** It is a central and significant feature, of the claimant's claim against the 3rd defendant, that there exists a term which is to be implied into the contract between the claimant and the 3rd defendant. That term is a very broad one, at first, but has several facets to it, which are particularized in the claimant's second further

amended particulars of claim, under the rubric: '*Particulars of Negligence*.' (Italicized for emphasis)

**[132]** As such, it is the claimant's case that it is an implied term of their contract with the 3rd defendant, that the 3rd defendant would exercise all due professional skill and care in the performance of its services thereunder and that negligently and in breach of contract, the 3rd defendant failed to exercise all due professional skill and care in the performance of its service. In particularizing that negligence, the claimant has further, specifically alleged that the 3rd defendant, '*failed to submit plans to the proper authorities, at or before the commencement of the building works*'; and '*failed to ascertain and/or comply with the requirements of the necessary statutes, regulations and development orders in the locality of the premises, at or before the commencement of the building works*.' (Italicized for emphasis)

**[133]** Of course, therefore, what first must be considered by this court, before any determination can properly be made as to whether the 3rd defendant may have breached such alleged implied term, is whether or not any such term as specifically particularized, can be implied into the contract between the pertinent parties. This is not a question which can either, easily be answered or one which ought readily to be answered, in the affirmative.

**[134]** Whilst I have no doubt whatsoever therefore, that it was in fact, an implied term of the contract which was entered into, between the claimant and the 3rd defendant, that the 3rd defendant, would exercise all due professional skill and care in the performance of its services thereunder, it is quite something else to conclude that from that, there also existed, an implied term as specifically particularized and quoted in paragraph 132 of these written reasons for judgment.

**[135]** In the case: **Attorney General of Belize and others v Belize Telecom Ltd. and another** [2009] 1 WLR 1988, the Privy Council definitively set out the circumstances in which a court, which is subject to the common law as regards

implied terms in contract law, can properly imply a term into a contract. I will not quote from same, in these written reasons, for the sake of brevity. Suffice it to state that I have adopted and applied to the case at hand, same as set out in paragraphs 16 to 27 of that court's judgment, in that case, as per Ld. Hoffman, who announced/delivered, same.

**[136]** In applying the law as set out in that case, to the circumstances of the case at hand, it must always be recognized that this court is not to imply a term into a contract, in order to make the contract appear fairer, or more reasonable. The court must be astute, in seeking to determine what the parties to the contract had intended, based on the actual wording that was agreed to by the parties, as set out in the parties' written contract.

**[137]** As was stated by Ld. Pearson, in **Trollope and Colls Ltd. v North West Metropolitan Regional Hospital Board** [1973] 1 WLR 601, at 609 –

> *'… the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however, desirable, the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings. The clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that time to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves.'*

**[138]** I think that it is worthwhile also, to quote from paragraphs 26 and 27 of the Board's judgment in the **Attorney General of Belize v Belize Telecom case** (op. cit). That quotation is now set out:

> *26. 'In **BP Refinery (Westernport) Pty Ltd v Shire of Hastings** (1977) 180 CLR 266, 282-283, Lord Simon of Glaisdale, giving the advice of the majority of the Board, said that it was "not necessary to review exhaustively the authorities on the implication of a term in a contract" but that the following conditions ("which may overlap") must be satisfied:*
>
> 1. *it must be reasonable and equitable;*
> 2. *it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;*
> 3. *it must be so obvious that 'it' goes without saying;*
> 4. *it must be capable of clear expression;*
> 5. *it must not contradict any express term of the contract."*
>
> *27. The Board considers that this list is best regarded, not as a series of independent tests which must each be surmounted, but rather as a collective of different ways in which judges have tried to express the central idea that the proposed implied term must spell out what the contract actually means, or in which they have explained why they did not think that it did so. The Board has already discussed the significance of "necessary to give business efficacy" and "goes without saying". As for the other formulations, the fact that the proposed implied term would be inequitable or unreasonable, or contradict what the parties have expressly said, or is incapable of clear expression, are all good reasons for saying that a reasonable man would not*

*have understood that to be what the instrument meant.'* (Italicized for emphasis)

**[139]** In the matter at hand, the written contract between the claimant and the 3rd defendant, pertained to the provision by the 3rd defendant to the claimant, of architectural services, pertaining to the proposed renovation of the premises which constitutes the subject – matter of this claim.

**[140]** That contract has set out, under, the headings: '*BRIEF,' 'SCOPE OF WORK' and 'GENERAL TERMS*,' the following:

***BRIEF***

1. *Convert existing ground floor office into rentable units.*
2. *Add a first floor to accommodate 3# - 4# rentable units.*
3. *Convert both floor of annex to house executive office for Pentium.*
4. *Ensure that the upgrading has adequate parking.*
5. *Consideration must be given, connecting into sewer main on Worthington Avenue.*

***SCOPE OF WORK***

1. *Prepare a measured survey.*
2. *Prepare and present design layout of proposed changes.*
3. *Prepare schematic design development drawing.*
4. *Prepare a detailed working drawing for the proposed changes including revised electrical and plumbing layout.*

***GENERAL TERMS***

1. *Upon completion of any stage, an invoice will be submitted which is due and payable within ten (10) days of the billing date and client's receipt of invoice. The Architect reserves the right to cease work on the project until all arrears have been paid. In addition, no drawings will be issued until overdue fees are paid.*

2. *The client will sign an agreement and return it to the Architect's office with the retainer cheque, which instructs the Architect to commence work on the project. Please note that the General Consumption Tax must be added to the fee sum.*

3. *The originals of all drawings by the architect release cannot be used by no other than the client. The client may, however, give written consent for this to be done but will attract an additional fee charge.*

4. *In the event, the scope of work is modified, or variations to drawings are ordered by the client after approval is given for schematic designs, the client will be charged for the additional. Note all originals remain the property of the Architect.*

5. *The Architect accepts no liability for any part of work not designed by them or work, undertaken without their approval or instruction.*

6. *All instructions or variation orders must be issued through the Architects.'* (Italicized for emphasis)

**[141]** There are other provisions set out in the contract, under the headings: '*Fee Proposal, Payment Schedule, Reimbursable and Abortive Work*.' (Italicized for emphasis) For present purposes, none of the provisions under any of those headings, needs to be given any further consideration. Aspects thereof though, will be given further consideration, further on, in these reasons.

**[142]** From the terms as set out above, which are the only relevant terms for present purposes, it cannot, to my mind, be implied, as a matter of either, 'necessity' or 'business efficacy,' from the terms which have been used by the claimant and the 3rd defendant, in their contract, that the parties intended it to be deemed as part and parcel of that contract. The words as used in the entire contract, are clear and free from ambiguity. That though, is understood as not being the end of the matter.

**[143]** As stated by Ld. Hoffman in the **Attorney General of Belize and Belize Telecom case** (op. cit), at paras. 17 and 18:

> *17. The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs. The most usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.*
>
> *'18. In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.'* (Italicized for emphasis)

**[144]** What then, was the evidence as regards the contract which was entered into, between the claimant and the 3rd defendant? Was there any background information regarding that contract, which the parties knew about, but which was not expressed in those parties' written contract and which can assist in enabling

this court to better understand the terms of those parties' written contract? These questions can only properly be answered, following upon a careful review of the evidence given.

**[145]** It must also be recognized and applied throughout, that the burden of proof, as regards the alleged implied terms as specified in the claimant's 'Particulars of Negligence', rests solely on the shoulders of the claimant. This court has applied that. The standard of proof required to be met by the claimant, in that respect, is proof on a balance of probabilities. This court has applied that.

**[146]** The evidence-in-chief which was given to the trial court, was presented by Mr. Lee Hartley and was, to the extent as is relevant for present purposes, as set out in his witness statement and quoted, immediately hereafter:

*'I currently live at 9810 S.W. 215 Terrace, Miami, Florida, U.S.A. I am a businessman engaged in the manufacture of household chemicals.*

*In February 1998 I started working with Pentium Holdings Limited, the claimant, as the Managing Director of the company's registered office at 1 Worthington Avenue, Kingston 5. I left Pentium Holdings Limited in July 2001.*

*The principals of Pentium Holdings Limited, who reside overseas, desired to improve the earnings of the company by expanding the Office building at 1 Worthington Avenue. It was decided to add another storey to the existing single-storey main building and establish units for office rentals to other companies.*

*Mr. Bryan Morris, the 1st Defendant, who was known to us as an architect and a project manager, was asked to assist us with the project. He agreed to our request and he recommended that Islandwide Construction Limited was also known to us for work that they were doing for an affiliated company - Harmony Gates Limited.*

*The 1st defendant and representatives of the 2nd defendant met with us a number of times prior to August 2000 to discuss the impending project and to agree on a contract price.*

*The 1st defendant via his company Plexus Limited (the 3rd defendant), set out in a letter dated 8th August 2000 the terms and conditions agreed on. I refer to that letter.*

*On 23rd August 2000, the keys for the building to be modified were given to Mr. Mark Chin, a representative of the 2nd defendant. The 1st defendant advised us that the contractors (the 2nd defendant) and himself requested mobilization funds to start the project.*

*On the 28th August 2000 the 2nd defendant started preparatory work on the site and on 2nd September 2000 the contractors were paid a mobilization fee of United States twenty-nine thousand dollars (US$29,000.00). The 1st defendant also received, on behalf of the 3rd defendant a start-up amount of United States eight thousand nine hundred dollars ($8,900.00).*

*Work continued on the site until on or about 24th October 2000 when the Kingston and St. Andrew Corporation served a 'stop-order' notice on the site for building without a building permit.*

*I was quite surprised about the 'stop order' because I thought the 1st defendant the project manager had done all the necessary preparation to commence the project which I presumed would have included the submission and approval of plans. At no time during our several meetings prior to the date, of the serving of the 'stop order' were we informed about any outstanding application for a building permit. We always implored the 1st defendant and the 2nd defendant to do the work within the limits of the construction budget and within the estimated time for completion, that is, by the end of December 2000.*

*After the serving of the stop order I noticed that the work continued and did not cease immediately, so I went on-site and cautioned the 1st defendant not to breach the stop-order. I went back to my office but the work did not stop that day. It continued the following day and I repeated my caution to the 1st defendant on two other occasions, The work eventually ceased …*

*After receiving the K.S.A.C.'s 'stop-order' we learned that there was a K.S.A.C. building approval for mixed-use on record somewhere. I visited the K.S.A.C. and a previous owner of the property, Jamaica Property Development Limited, and I obtained a copy of K.S.A.C.'s letter dated 28th February 1996. This letter confirmed that the Original building was already approved for mixed-use …*

*At no time was it ever discussed that we had to wait before plans were approved. The way we operated with regards to any matters concerning the construction is that I would discuss all matters with the 1st defendant because he was the project manager. He was the one we dealt with, who got answers from the contractors regarding our queries, and he verified all payments connected with the construction.*

*All bills of quantities which I paid would come from the contractor to the 1st defendant. I wouldn't pay unless the 1st defendant approves it, by his signature.*

*He also billed us for his services as Project Manager which was built into his fees.*

*I was in attendance at all meetings connected with the project.*

*Prior to the dispute with the neighbours, there was never any discussion about the application for building permit. It was not raised because it was expected that the 1st defendant would have done this. It was made clear to him from the outset that he was to have everything ready for construction to start. In all meetings relating to the ongoing construction, it was never raised by anyone that there were outstanding approvals. We never knew plans had to be submitted by us. We thought anything to do with the construction was part of the mandate of the 1st*

*defendant and the contractor and that is the reason why we focused on the budget and completion dates.*

*At no time did the 1st defendant, the 2nd defendant or their agents indicated that any of the target dates were set dependent on outstanding approvals to be obtained from the authorities. I saw them working with plans while the construction continued. Sometimes they attended meetings with a number of plans and whether those drawings which they referred to and highlighted at the meetings were approved plans. It never crossed my mind.*

*The claimant in those meetings were represented by myself at all times and sometimes Ms. Judith Haughton, the legal representative and Mr. Evans Gardner, agent of the principals, who was not always present.'*

**[147]** During cross-examination and examination-in-chief of that witness for the claimant Mr. Lee Hartley and the witness for the 3rd defendant - Mr. Bryan Morris, some time was spent by each of them, in responding to questions as to who was the project manager for the pertinent project and in addition, Mr. Morris was questioned and proffered an answer, as to what are the duties of a project manager.

**[148]** To my mind though, that evidence as to what are the duties of a project manager and as to who was the project manager of the pertinent project provided no useful assistance to me, in resolving the dispute as to whether or not the claimant's claim is proven.

**[149]** This court cannot and ought not to re-write the contract for the parties. That is not the role of a court, in this jurisdiction. What this court will and must do instead, in a case such as this, is consider whether a term should be implied into the contract which was in writing and agreed on, between the parties, as being a term which must be implied as a matter of either necessity, or business efficacy, so that the wording of the written contract can have the effect which it needs to have, or which

business efficacy requires it to have, in order for that written contract to serve the purpose(s) which both parties had, at the time when they contracted with each other, intended it to.

**[150]** As such, whilst I have no doubt that, after the stop-order had been put into effect by the K.S.A.C., the then manager of Plexus Ltd. – Mr. Hartley, would have been surprised to learn that approvals which were required, to have allowed for the pertinent project to have been commenced, had not yet been obtained, or even applied for, that does not mean that the 3rd defendant or the 1st defendant had ever been under any contractual obligation to ensure that such approvals were obtained, before construction work on that project, began.

**[151]** The 1st defendant never had any such contractual obligation, since, as was specified earlier, in the examination-in-chief evidence of Mr. Hartley, the contractual agreements which were entered into, as regards the pertinent project, were entered into, as between the claimant and the 3rd and 2nd defendants in two separate contractual agreements. There was never any contract, between the claimant and the 1st defendant.

**[152]** As regards the 3rd defendant, and their contractual relationship with the claimant, whilst there can hardly be any doubt that both as a matter of necessity and business efficacy, approval for the pertinent project was required to be obtained, if the construction work, pertaining to that project, was ever to be commenced, that does not, in and of itself mean that as regards those parties' contract, a term is to be implied that the 3rd defendant, in particular, was to carry out the necessary processes in order to enable the necessary approval from K.S.A.C. for the pertinent project to be carried out to completion, to be obtained.

**[153]** Either party could have applied for that approval to commence construction. Unfortunately, as things occurred in respect of the subject–matter of this claim, no one applied for same. As a consequence, the construction on the project was

halted by the K.S.A.C., by means of the stop-order which was issued by that local government entity.

**[154]** I am not of the view that the 3rd defendant had an implied duty of care, under the contract which is entered into, with the claimant, to apply for any permission to lawfully allow for construction to be commenced on the pertinent project, or to put it as precisely as the claimant has alleged in its particulars of claim, which is that the 3rd defendant ought to have exercised all due professional skill and care in the performance of its services under the contract and was negligent in that regard, in that they, '*failed to submit plans to the proper authorities at or before the commencement of the building works*' and '*failed to ascertain and/or comply with the requirements of the necessary statutes, regulations and development orders in the locality of the premises, at or before the commencement of the building works*.' (Italicized for emphasis)

**The claimant's claim against the 2nd defendant for damages for breach of contract.**

**[155]** The claimant's counsel has elected to forego his client's claim against the 2nd defendant, for damages for negligence. Accordingly, the claim against the 2nd defendant now lies in respect of only, alleged breach of contract.

**[156]** I had earlier set out the particulars of negligence alleged against the 2nd defendant, which concomitantly constitute the alleged particulars of breach of the contract which had been entered into, as between the claimant and the 2nd defendant and therefore, will not now repeat same.

**[157]** At this stage of these reasons though, it must be pointed out that, the claimant has not, at all, alleged, in respect of the 2nd defendant, that there existed any implied term that the 2nd defendant '*would exercise all due professional skin and care in the performance of its services thereunder*.' (Italicized for emphasis) That alleged implied term of the alleged contract between the claimant and the 1st and/or the 3rd defendants, was expressly set out as part of the claimant's statement of case.

**[158]** Having not alleged that any such implied term existed, it is not now open to the claimant to pursue its claim, on the basis that any such implied term existed and was breached, by the 2nd defendant.

**[159]** In that context therefore, this court must pay careful regard to the precise wording of the contractual agreement which was entered into, between the claimant and the 2nd defendant, in order to determine whether that contract, as worded, required the 2nd defendant to do any and/or all of the things which the claimant has alleged in the particulars of negligence as specified, in the claimant's second further amended particulars of claim.

**[160]** Even if therefore, the 2nd defendant failed to do any of that which has been alleged against them, that is not the end of the claim against that defendant, such that it is to be treated with by this court, as having been duly proven, as constituting a breach of contract.

**[161]** In order to determine whether any such failure on that defendant's part to do any or all of those things as alleged, constitutes a breach of contract, this court will next have to go on to consider whether the terms of the contract between the parties, required the 2nd defendant to do any or all of those things.

**[162]** In considering the former of those two things, or in other words, whether the claimant has firstly, proven on a preponderance of probabilities, that the 2nd defendant failed to do any or all of the things alleged by the claimant against them, I must next go on to consider, what was the 2nd defendant's defence to this claim.

**[163]** The 2nd defendant's defence to the claim is essentially that under the contract which it had entered into, with the claimant, *'… its duties and functions were merely executory and at all material times, the 2nd defendant implemented the directions and instructions given to it by the claimant and the 1st and 3rd defendants*.' (para. 11 of 2nd defendant's defence and counterclaim) (Italicized for emphasis). Further, the 2nd defendant has contended that *'… it relied wholly on the expertise,*

*knowledge and experience of the 1st and 3rd defendant who were at all material times inspectors and supervisors of the construction work in conjunction with the claimant's managing director.*' (para 12 of second defendant's defence and counterclaim). (Italicized for emphasis)

**[164]** To my mind, this is, in reality, not in and of itself, a valid defence to this claim, if this court were to conclude that in carrying out the aspects of work which it was required to carry out, the 2nd defendant did so, negligently, as specifically alleged by the claimant.

**[165]** To my mind, that must be so because, if one acts negligently as a consequence of following the negligent instructions or directives of another, it cannot be an answer to a claim for damages for breach of contract, based upon the alleged negligence of one of the parties, in carrying out their contractual duties, that the party who actually carried out those negligent instructions, only did so, at the behest of the party who gave those negligent instructions to that party, which that party, carried out.

**[166]** This is not a situation in which the 2nd defendant is contending that at the material time, it was acting as the servant or agent of either or both of the other defendants. If they had put that allegation forward, as part of their statement or case, then it could have been tested. Having not done that though, it certainly cannot be enough to suggest that at all material times, they were merely acting upon the directions and instructions and at the behest of others.

**[167]** The 2nd defendant was hired to carry out the construction work which was to be done, pursuant to a design that was prepared by the third defendant. If they carried out that work negligently, it is no defence for them to state that they did so because the 3rd defendant was negligent. The 2nd and 3rd defendants are separate and independent legal entities and thus, they each entered into separate and independent contractual relations, with the claimant, albeit that said contractual relations required them to work along with others, who had no control over how

they carried out their work and vice versa. The evidence was disclosed that the 2nd defendant was at all material times, an independent contractor and not, an employee or agent of any other party.

**[168]** As such though, it must follow, that even if this court were to have been of the considered view that the 3rd defendant acted negligently, it does not follow from that, that the 2nd defendant also acted negligently in having done the construction work which it did. The claim against each of the defendants, must be and has been considered separately.

**[169]** Following from that, there must now be addressed, the 2nd defendant's failure to respond to the assertion, made, as part of the 1st and 3rd defendants' statement of case, that it was the 2nd defendant who had, without the knowledge or approval of the 1st or 3rd defendant, constructed scaffolding on the adjoining premises, which was owned or occupied by the Worthington Gardens Citizens' Association and furthermore, constructed a shed on the claimant's premises, from the roof of which, water flowed onto the premises of the said Association. As a result of that encroachment and the nuisance created, a default judgment was entered against the claimant, in favour of the said Association, for the sum of one hundred and ten thousand dollars ($110,000.00), with costs to the said Association.

**[170]** The 2nd defendant's failure to respond to that assertion which was made by the other defendant against them, means that they are to be taken by this court as having accepted the validity of that assertion.

**[171]** If the second defendant did not wish for this court to have accepted that assertion as valid, then they needed to have put forward, as part of their statement of case, by means of either, a reply to that assertion, or a further amendment of their defence, a contrary assertion, so that this court would then have been in a position, to weigh the respective parties' cases, with respect to that particular assertion. Alternatively, after the 1st and 3rd defendants had filed their defence, with that assertion as part thereof, the 2nd defendant could and should have sought the

permission of this court, to file an amended defence and counterclaim, in order to thereby respond to that assertion. I am not aware of the 2nd defendant ever having made such an application to this court and I am certain that neither did the 2nd defendant file an amended defence, nor did they file any reply.

**[172]** Having concluded that the said uncontested assertion which was made by the 1st and 3rd defendant in their statement of case, against the 2nd defendant, is considered by this court as having been proven, it must be carefully noted at this juncture that it does not follow inexorably, that the claimant's claim against the 2nd defendant is proven. It is to be recalled that, at this time the claimant's claim against the 2nd defendant, if for damages for breach of contract, only.

**[173]** That may, at first glance, appear to be so, because, the said uncontested assertion, inevitably leads to the conclusion that, just as the claimant has asserted, in paragraph 8 of its amended particulars of claim, the 2nd defendant, '*failed to properly supervise the building works at the premises, particularly to avoid encroachments.'*

**[174]** The fact that said assertion has been duly proven though, does not mean that this court does not have to consider the other particulars of alleged negligence asserted by the claimant, against the 2nd defendant. This court will, therefore, now go on to address same, in these reasons.

**[175]** I am not of the view that the evidence establishes that the 2nd defendant failed to inspect the building works properly, or at all. That was also, one of the particulars of negligence, which was alleged by the claimant, against the second defendant.

**[176]** I am though, of the view, that the 2nd defendant, '*failed to ascertain and/or comply with the regulations and development orders in the locality of the premises, at or before the commencement of the building works*,' (Italicized for emphasis) which is what the claimant has also alleged against them.

**[177]** At all material times, the managing director of the 2nd defendant was Mr. Mark Chin. He was the only person who testified at trial, on behalf of the 2nd defendant.

**[178]** While he was being cross-examined by counsel for the 1st and 3rd defendant, the following were some questions posed to and answers given by him, to those questions, set out sequentially:

*Q: 'Is this the first time that your company was involved in doing construction work?'*

*A: 'No.'*

*Q: 'Did you know at the time of doing this work that approval from the K.S.A.C. and/or the Town Planning Department, were required for the work being undertaken.'*

*A: 'Yes.'*

*Q: 'Did you know at the time, whether approvals had been granted?'*

A: '*No.'*

*Q: 'Had you ever, prior to this, commenced doing construction work on a development which required approval, before ascertaining if approval had been granted.'*

*A: 'Yes.'*

*Q: 'Under what circumstances would you do so?'*

*A: 'Based on contract, given possession of property and given instructions to commence the works, we would proceed.'* (Italicized for emphasis)

**[179]** It is therefore clear to me that, in respect of the construction work which the 2nd defendant was hired/engaged by the claimant to carry out, on the claimant's behalf,

that the 2nd defendant did in fact, fail, '*to ascertain and/or comply with the regulations of necessary statutes, regulations and development orders in the locality of the premises, at or before the commencement of the building works*.' (Italicized for emphasis)

**[180]** The next questions to be answered by this court though, are each as follows:

I. Did the terms of the contract, between the claimant and the 2nd defendant, require that the 2nd defendant, properly supervise the building works at the premises, particularly to avoid encroachments?

II. Did the terms of the contract, between the claimant and the 2nd defendant, require that the 2nd defendant comply with the regulations of necessary statutes, regulations and development orders in the locality of the premises, at or before the commencement of the building works?

**[181]** Whilst it was not disputed at trial, that there was a contract for work related to the renovation project's construction work, in place at the material time, as between the claimant and the 2nd defendant, surprisingly, the precise terms of that contract were never disclosed to this court, during any part of the examination-in-chief evidence that was presented at trial, on behalf of the 2nd defendant, by Mr. Mark Chin, who was, at the time when he certified his witness statement, on January 19, 2007, the then managing director of the 2nd defendant.

**[182]** That examination-in-chief evidence of Mr. Chin, consisted solely of Mr. Chin's witness statement, the contents of which, were not added to, in any way, by means of oral evidence, from Mr. Chin. It was, for the first time, during Mr. Chin's evidence, when he was being cross-examined by the 1st and 3rd defendants' counsel, that specific reference was made by Mr. Chin, to what were the terms of the relevant contract. Mr. Chin made that reference in response to questioning from counsel, who was then cross-examining him.

**[183]** The sequence and wording of that questioning and the answers given in response to same, were as follows:

Q: *'Is there a written contract between Pentium Holding and Islandwide Construction Ltd?'*

*A:* *'Yes.'*

*Q:* *'Was the contract to which you referred, disclosed to the parties in this case?'*

*A:* *'Yes, I think so.'*

With the permission of the court and at the request of the 1st and 3rd defendants' counsel, the witness is shown the documents at pages 7 and 10 respectively, of the agreed bundle of documents.

Q: *'Are those two documents the documents that comprise the contract to which you refer?'*

*A:* *'No.'*

Counsel for 1st and 3rd defendants: '*Look though Index to Bundle of Agreed Documents and see if you can find the contract to which you refer*.'

Witness is, with court's permission, allowed to look though the Index to Bundle of Agreed Documents.

Witness: Page 7 is a summary of the contract. That's the written contract that I was referring to earlier.

Q: *'When you say it is a summary of the contract, is it correct for me to say that there is a contract in writing setting out the terms and conditions upon which the summary at page 7 is based?'*

*A:* *'Yes.'*

*Witness is asked to look again, through the Index to the Agreed Bundle of Documents.*

*A: 'Page 129 of the bundle of documents is the written contract that I referred to, earlier. Page 130 document is the same summary that at page 7.'*

**[184]** This court has carefully reviewed all of the documents which are pertinent to this claim. Having done so, I have seen the 'contract', which the 2nd defendant's managing director at the time when he testified during the trial, was making reference to, during his evidence.

**[185]** What is actually set out though, commencing at page 129 of the bundle of documents and continuing through to page 136 of said bundle, is as has been stated at page 129*: 'ESTIMATE FOR RENOVATION OF OFFICE ANNEX AT DON'S RENTAL AND TOURS LTD. FOR, ISLANDWIDE CONSTRUCTION LTD*.'

**[186]** That, 'cost estimate' was prepared by L. Smith and Associates, quantity surveyors, in December of 2000. That is also stated on page 129 of the bundle of documents.

**[187]** That 'cost estimate' is as stated, a cost estimate. It can also, to my mind, properly be described as a contract. A 'contract' is an agreement giving rise to obligations which are enforced or recognized by law. That proposition remains generally true, although it is subject to a number of important qualifications. The first such qualification is that the law is often concerned with the actual fact, of agreement: a person is bound 'whatever his real intention may be,' if, 'a reasonable man would believe that he was assenting to the terms proposed by the other party and that other party upon that belief enters into a contract with him.' See: **Smith v Hughes** [1981] L.R. 6 Q.B. 597, at 607. This objective principle is based on the needs of commercial convenience. See Treitel: The Law of Contract, 14th ed. Edwin Peel (2015).

**[188]** To my mind, therefore, the contractual agreement between the claimant and the 2nd defendant was for the renovation work to be done, to carry to completion, all of

the specific aspects thereof, at the respective costs set out, at pages 131 to 135 of the bundle of documents and as summarized at page 130 of said bundle.

**[189]** There is no more detail whatsoever though, provided in that, 'contract.' Accordingly, that contract has not specifically provided that the 2nd defendant was required to have exercised all due professional skill and care in the performance of his or its service thereunder.

**[190]** The claimant has not, in their second further amended particulars of claim, unlike as they did, with respect to their claim against the 1st and 3rd defendants, specified that it was an implied term of their contract with the 2nd defendant, that said defendant would exercise all due professional skill and care, in the performance of the 2nd defendant's services thereunder.

**[191]** As such, since there exists no express terms of the contract between the claimant and the 2nd defendant, requiring the 2nd defendant to perform their services under the contract with all due professional skill and care, this means that the 2nd defendant has not breached any express term of the contract, even if this court were to now conclude that they performed their contractual duties, which were owed to the claimant at the material time, negligently, or in other words, in breach of all due professional skill and care.

**[192]** As such, the claimant, in order to be successful, against the 2nd defendant, in their claim for damages for breach of contract, must of necessity, rely on an alleged breach by the 2nd defendant, of a term which the claimant would have had to have been contending, was an implied term of the contractual agreement between those two parties.

**[193]** The claimant though, having not alleged that any such implied term of the contract, between themselves and the 2nd defendant, exists, is not legally in a position now, to succeed in proof of its claim against the 2nd defendant, for damages for breach of contract, arising from any breach of any such implied term.

**[194]** The claimant's statement of case should have alleged that such an implied term existed if they wished to rely on same, at trial. The 2nd defendant needed to have been properly made aware, prior to the commencement of trial, of the nature of the claim which it had to meet.

**[195]** **Rule 8.9(1)** read along with **rule 8.9 A of the Civil Procedure Rules**, to my mind, so require. **Rule 8.9(1)** specifies that: '*The claimant must include in the claim form or in the particulars of claim a statement of all the facts on which the claimant relies.*' **Rule 8.9A** specifies that: '*The claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission*.' (Italicized for emphasis)

**The claimant's claim against the 2nd defendant for damages for negligence**

**[196]** The fact that the 2nd defendant did not respond to the 1st and 3rd defendants' allegation against them, that they failed to ascertain and/or comply with the regulations of necessary statutes, regulations and development orders in the locality of the premises, at or before the commencement of the building works and that as a result, this court has concluded that the 2nd defendant has failed to do those things, as has been alleged, does not mean that the claimant's claim, as filed, for damages for negligence, has been proven.

**[197]** Upon having been invited to do so, by this court and having made further written submissions which were filed by the claimant on June 17, 2019, the claimant's counsel had, on behalf of his client – the claimant, chosen to specify that his client is no longer pursuing the claim against the 2nd defendant, for damages for negligence and will instead, only be pursuing the claim against the 2nd defendant, for damages for breach of contract.

**[198]** Interestingly enough though, the claimant had previously, through their same counsel, at an earlier stage, that having been when oral closing submissions were

then being presented to the trial court, by the parties' counsel, also then informed the court that in respect of the 3rd defendant, the claimant would no longer be pursuing the claim against that defendant, for damages for negligence.

**[199]** In their further written submissions, however, after the claimant's counsel had been ordered to do so, the claimant's counsel had, as ordered, informed this court as to whether or not the claimant, was still pursuing its claim against the 3rd defendant for damages for negligence. The claimant's counsel then informed the court that the claimant is still pursuing its claim against the 3rd defendant for damages for negligence and for breach of contract.

**[200]** I have, earlier in these reasons, accepted that the claimant is entitled to pursue its claim against the 3rd defendant for both causes of action – breach of contract and negligence, notwithstanding having earlier, through their counsel, then informed this court, that they would no longer be pursuing their claim for damages for negligence.

**[201]** I am of the considered view that it was meet and just to have so permitted the claimant, albeit not for the reason as proffered by the claimant's counsel, in their further written submissions. That reason is that the **Judicature (Supreme Court) Act**, allows for all remedies to be granted, either absolutely, or on such reasonable terms and conditions as it seems just, all such remedies as any of the parties thereto, appear to be entitled in respect of any legal or equitable claim brought forward by them in such cause or matter, so that, as far as possible, all matters in controversy between the parties, may be completely determined and multiplicity of proceedings, avoided. See **S. 48g** of that Act, in that regard. That section of that Act is mirrored by the provisions in **rule 8.7 (1)(a) of the C.P.R.**

**[202]** That section of that Act and that rule of court though, do not mean that and even if the claimant's cause of action is not proven, but another cause of action which the claimant could have and perhaps, ought to have pursued, could properly have been found to have been proven, the claimant must therefore obtain the remedies

which could and would likely have been obtained, had other potential cause of action, actually been pursued by that claimant, in respect of that claim.

**[203]** Remedies and causes of action, are not to be equated. One cannot obtain a remedy in a civil claim, unless one's cause of action against a specified defendant, has first been duly proven. It is only once a party's claim was been duly proven, that this court then has a wide discretion as to the remedies to be awarded and may even award remedies/reliefs, which were not specifically sought by the claimant, in that claim.

**[204]** If it were otherwise, then a party's statement of case would be of little, if any value or usefulness, to an opposing party, since it would then mean that this court could grant whatever reliefs this court may deem fit, based on whatever cause of action this court may deem fit. That though, thankfully, is not as far as I understand it, permitted. For that reason, therefore, I disagree with the claimant's counsel's submissions, on this particular point.

**[205]** Having nonetheless, taken the view that the claimant would be allowed to pursue their claim against the 3rd defendant, for damages for negligence, I will now take the opportunity to set out why it is that I permitted that, in respect of the 3rd defendant, as that reason will be of direct relevance, as thereafter, I will treat further with the claimant's claim for damages for negligence, as against the 2nd defendant.

**The reason why the court has permitted the claimant to pursue its claim against the 3rd defendant for damages for negligence**

**[206]** This court had brought to the attention of the parties' counsel, various cases in which unlike in the **Tai Hing Cotton Mill case** (op. cit), courts had permitted claims to be pursued for damages for negligence and damages for breach of contract, arising from alleged negligence in the performance of a contractual duty. Some of those cases were, earlier on in these reasons, referred to.

**[207]** After having brought those cases to the attention of the parties' respective counsel, those counsel were requested to set out their respective positions, as to whether or not the claimant should be permitted to pursue their claim against the 3rd defendant for damages for negligence. The claimant's counsel was then invited, to inform this court, in their further written submissions, as to whether, in respect of the 2nd defendant, the claimant, would still be pursuant their claim for both damages for breach of contract and for damages for negligence.

**[208]** Having ordered all pertinent parties to address this court on whether the claim against the 3rd defendant for damages for breach of contract and for damages for negligence, could properly still be pursued and for the claimant to inform the court as to whether the claim in those respects, as filed, was still being pursued, as filed, the parties complied with that order.

**[209]** In the circumstances, I do not see it as being either unfair or unjust to the 3rd defendant, for the claimant to have seen allowed to pursue their claim against the 3rd defendant, based upon the causes of action of breach of contract and negligence.

**[210]** The evidence was placed before the court, as were the respective allegations and causes of action. The parties made submissions as to all of same and even made submissions as to whether the claim based on both of those causes of action, could still, properly be pursued.

**[211]** After all of that, the claimant belatedly, through their counsel and with full knowledge of all pertinent legalities, decided not to pursue their claim against the 2nd defendant, for damages for negligence. In that context, can the claimant's claim against the 2nd defendant for damages for negligence, properly still be considered by this court, notwithstanding that the claimant's counsel had, at that stage, informed this court that his client is no longer pursuing same? That is the next question to be answered by this court, in these reasons.

**Whether the claimant's claim for damages for negligence, can properly still be addressed by this court.**

**[212]** I am of the considered view that based upon the particular context of this particular issue, having arisen in this particular case, it would not be meet and/or just, if this court were to consider the claimant's claim against the 2nd defendant, for damages for negligence, any further.

**[213]** It is apparent that the claimant does not wish to pursue that claim any further, against the 2nd defendant. On the other hand, the claimant had, through their counsel, deliberately and with full knowledge of the relevant case law, chosen to maintain the claimant's claim against the 3rd defendant, for damages for negligence, notwithstanding having earlier, during oral closing submission, informed this court then, that it no longer wished to do so.

**[214]** It is not for this court to pursue parties' claims for them. That is the role of the parties and of any counsel which those parties may have. Even in circumstances wherein a party does not have any counsel at all, the role of this court would be to assist that party in putting forward that party's statement of case in a manner such that it can properly be addressed by the court, in terms of being adjudicated upon.

**[215]** If this court were to permit the claimant's claim against the 2nd defendant, for damages for negligence, to be pursued any further, that would be tantamount to this court, taking over the role of the claimant and his experienced counsel, altogether. This court will not do that, as to do so, in the existing context, would be manifestly unjust.

**This court's conclusions as to the claimant's claim against the defendants**

**[216]** For all the reasons earlier provided, the claimant's claim against the defendants has failed altogether and in respect of each defendant, the costs of the claim against them, will be awarded in favour of the defendants.

**[217]** There now though, still remains to be addressed, the counterclaims respectively instituted against the claimant, by the 2nd and 3rd defendants. Those counterclaims will hereafter be referred to as either 'the 2nd defendant's ancillary claim,' or the '3rd defendant's ancillary claim.' That is the terminology which ought now to be used with reference to claims which formerly were described as counterclaims. The provisions of **Part 18 of the C.P.R.** make that clear.

**The 3rd defendant's ancillary claim against the claimant**

**[218]** The 3rd defendant's ancillary claim, is predicated upon their contention that the claimant did not settle with them, the claimant's alleged indebtedness to them, for the outstanding sum owed under their contract with the claimant. It has been alleged that said outstanding sum is set out in the 3rd defendant's statement of account which is dated August 21, 2002 and is the sum of three thousand one hundred and fifty-seven United States dollars (US$3,157.00).

**[219]** In the 3rd defendant's statement of account, which is dated August 21st, 2002, it is recorded that the sum then outstanding on account, in U.S. dollars, was: two thousand seven hundred and forty-eight United States dollars and fifty cents (US$2,748.50) and that additionally, there was a sum which was then outstanding, in Jamaican dollars, that being seventeen thousand seven hundred and seventy-eight Jamaican dollars and forty-six cents (J$17,778.46).

**[220]** Even, if the 3rd defendant's ancillary claim is duly proven, therefore, what will be recoverable is the U.S. dollar sum, converted to Jamaica dollars, using the appropriate exchange conversion rate. Added to that sum, will be the sum of seventeen thousand seven hundred and seventy-eight Jamaican dollars and forty-six cents (J$17,778.46).

**[221]** The contract between the claimant and the 3rd defendant was expressly referred to, in the witness statement of the claimant's only witness – Mr. Lee Hartley. That reference formed part of that witness' evidence-in-chief. He stated as regards

same, as follows: *'The 1st defendant and representatives of the 2nd defendant met with us a number of times prior to August 2000 to discuss the impending project and to agree on a contract price. The 1st defendant, via his company Plexus Limited (the 3rd defendant), set out in a letter dated 8th August 2000 the terms and conditions agreed on. I refer to that letter.*'

**[222]** That letter is one document, among the several agreed documents, which were entered into evidence, at trial.

**[223]** As part of his witness statement and his examination-in-chief evidence, the only witness for the 3rd defendant – Mr. Bryan Morris (the 1st defendant), testified as follows:

*'By letter dated April 4, 2001, the Town and Country Planning Authority refused permission to proceed with the renovations on three grounds. The first two grounds related floor area ratio and inadequate setbacks from the boundary which are both items which could be addressed by redesign. The third ground of refusal was that the proposals represented a further intrusion of a non-conforming use. Having regard to the letters which I had previously been given by the claimant's at out meeting in August, 2000, this refusal came as a surprise and decided to investigate. I researched the previous application for building approvals and change of use relating to 1 Worthington Avenue and discovered that:*

*(a) By letter dated August 21, 1985 the claimant's predecessor in title Mr. Donald Taylor applied to the K.S.A.C. for approval for a change of use of 1 Worthington Avenue from residential to commercial usage;*

*(b) By notice dated the 17th December, 1985 from the Town and Country Planning Authority to Mr. Taylor, permission was refused to use the property for commercial purposes on the ground that 'the character, harmony and well-being of this predominantly residential neighbourhood would be seriously affected by the intrusion of the proposed use'; and*

*(c) The claimant purchased the property, with the ongoing business of Don's Rental and Tours Limited in February, 1998.*

*The original plan which was approved in 1995 was of an office building at # 1 Worthington Avenue. It was an approval of an annex to the Office Complex. The annex was built and I was to extend it and renovate the building.*

*After I discovered the fact of the refusal of the change of use and the information set out above, I informed Mrs. Judith Haughton-Smith. I started to address the conditions for refusal relating to setbacks and parking and Ms. Haughton-Smith and appealed the refusal, in so far as it related to change of use. The appeal lasted for several months with yielding any results. I had re-submitted the adjustments relating to setbacks and parking but without a change of use approval, we could not go forward.*

*The appeal relating to change of use was refused and when this occurred I proposed to Ms. Haughton-Smith that the owners should resort to conforming use, namely apartments for residences. Ms. Haughton-Smith instructed me to proceed and approval was obtained in 2002. In the meantime, the owners retained another Architect, Mr. Leighton Hamilton, who also submitted plans for residential development of 1 Worthington Avenue. By letter dated June 13, 2002, Andrea Lee on behalf of the Pentium Holdings Limited requested the City Engineer of the K.S.A.C. to withdraw the Plan. I had submitted for approval and replace it with Mr. Hamilton's plan which was being submitted on the 13th June, 2002. The date of issuance of my plan as approved was July 3, 2002. The building was later demolished by the owners and a new building containing residential units was later constructed.*

*Plexus Limited's contract with Pentium Holding Limited was performed but Pentium Holdings Limited has neglected or refused to pay to Plexus Limited the balance of United States one thousand three hundred and eighty dollars (US$1380.00) which is due for work done on the project. A statement of account*

*showing the outstanding balance was delivered to Pentium Holdings Limited.'* (Italicized for emphasis)

**[224]** It will be recognized from that testimony of Mr. Morris, that the sum which he had initially set out in his witness statement, as being the sum owed by the claimant, is not the same as the sum claimed in the 3rd defendant's second further amended particulars of claim. The sum claimed in the latter-mentioned document, is three thousand one hundred and eighty United States dollars (US$3180.00) whereas the sum claimed in the former-mentioned document and in evidence, orally given on the 3rd defendant's behalf, at trial, was one thousand three hundred and eighty United States dollars (US$1380.00) Was that discrepancy resolved at trial, by Mr. Morris? It was, by means of a supplemental witness statement, which was also accepted as being part and parcel of Mr. Morris' evidence-in-chief.

**[225]** In his supplemental witness statement, at paragraph 7, Mr. Morris referred to the sum one thousand three hundred and eighty United States dollars (US$1380.00) as was specified in his earlier witness statement, as having been stated erroneously. According to him, the statement of account dated August 21, 2002 from Plexus Limited to Pentium Holdings Limited, shows that the balance that was outstanding at that date was United States two thousand seven hundred and forty-eight dollars and fifty cents (US$2,748.50) and Jamaican seventeen thousand seven hundred and seventy-eight dollars and forty-five cents (J$17,778.45) which remains outstanding.

**[226]** Also, Mr. Morris, in that supplemental witness statement of his, at paragraph 3, that: '*the second, third and fourth sentences in paragraph 11 of my said witness statement dated 23rd January, 2007 should properly read:-*

*'I started to address the conditions for refusal relating to setbacks and parking and Ms. Haughton-Smith appealed the refusal in so far as it related to change of use. The appeal lasted for several months without yielding any results. I had re-*

*submitted the adjustments relating to setbacks and parking but without a change of use approval, we could not go forward*.' (Italicized for emphasis)

**[227]** Also, in that supplemental witness statement, Mr. Morris stated that the claimant did not consult with him or anyone on behalf of Plexus Ltd., before deciding to employ additional architects, surveyors and engineers and having other plans submitted for approval. According to Mr. Morris' account of pertinent events, Pentium Holdings Ltd., decided to retain those and other professionals to perform the very tasks that were being performed by Plexus Ltd. and subcontractors retained in furtherance of the contract between the claimant and Plexus Ltd.

**[228]** Furthermore, Mr. Morris also alleged in his supplemental witness statement and thus, as part of his evidence-in-chief, the plan that was eventually approved at the instance of Plexus Ltd. took into consideration the structure of the building at 1 Worthington Avenue, as was completed prior to the grant of approval. As such, he alleged also, that there had been no need for the claimant to have demolished any part of the building, if his plan had been followed. The need to demolish the structure, or any part of it, could only have arisen if Hamilton and Associates had either failed or declined to take the completed structure into consideration, or if the instructions they received from the claimant for the preparation of their plan and for the development generally, were at variance with the instructions I received from the claimant.

**[229]** Mr. Morris has also alleged that under the plan which was approved at the instance of Plexus Ltd, pertained to the intended construction of eight units, comprising studio apartments, one single bedroom apartment and one two bedroom apartment.

**[230]** I accept the evidence given to the trial court, on behalf of the 3rd defendant, that said sum of two thousand seven hundred and forty-eight United States dollars and fifty cents (U.S.$2,748.50) and seventeen thousand seven hundred and seventy-

eight Jamaican dollars and forty-five cents (J$17,778.45) for work done by the 3rd defendant, on the renovation project, remains unpaid, even as of now.

**[231]** What then, are the terms of the contract between the claimant and the 3rd defendant which are relevant to said outstanding balance? That is what is next addressed.

**[232]** The pertinent terms of the contract between the claimant and the 3rd defendant are as follows, under the respective headings: 'ABORTIVE WORK' and 'GENERAL TERMS'. Solely for the sake of same, using the roman numerals: (i) to (ii), each of those terms, are set out below:

*(i)* '*This is work done by the Architect, upon the Client's instruction. If the Client elects not to continue with the project for whatsoever reason, the Architect will be fully remunerated for all work completed to the date of the client's decision to about the project. If for whatever reason the client decides to terminate the services of the Architect must be remunerated for work done to date of termination.*

*(ii)* *'Upon completion of any stage, an invoice will be submitted which is due and payable within ten (10) days of the billing date and client's receipt of invoice. The Architect reserves the right to cease work on the project until all arrears have been paid. In addition, no drawings will be issued until overdue fees are paid.'* (Italicized for emphasis)

**[233]** At first glance therefore, it does appear from the evidence given on behalf of the 3rd defendant that the sum set out in the invoice dated August 8th, 2000, which is an invoice that was transmitted to the claimant a very long time ago, is certainly now, due and payable.

**[234]** What then, has been placed before this court, as the claimant's defence to the 3rd defendant's ancillary claim? It is not that said sum has been paid, or is expected to be paid and it is not that the work which the invoice pertains to, was not done,

at all. It is instead that the claimant had, at all material times, relied on the knowledge, expertise and guidance of the 1st and 3rd defendants and the claimant considers that the 1st and/or 3rd defendants are/is in fundamental breach of their or his obligations, thereby disentitling him or them from claiming any outstanding sum, as the 3rd defendant has claimed for.

**[235]** According to the claimant, their defence to the ancillary claim was, to put it simply, a reiteration of their specified basis for their claim. As such, they rely on the alleged implied term that the 1st and/or 3rd defendant would submit the plans to the proper authorities, at or before the commencement of the building works, to properly supervise the building works and comply with the requirements of the necessary statutes, regulations and development orders.

**[236]** For the reasons already given, I have rejected the contention that any such term can be implied into the contract between the claimant and the 3rd defendant.

**[237]** The claimant's defence to the ancillary claim also states that: *'…claimant says it did not authorize the 1st and/or 3rd defendant to commence construction prior to the obtaining of all necessary approvals, or for construction to proceed in breach of my regulation and/or statutes*.' (Italicized for emphasis)

**[238]** That aspect of the defence, to the ancillary claim, is of no weight whatsoever, since it was not the 3rd defendant which had carried out any construction work on the renovation project. The construction work on that project, was done by the 2nd defendant and in any event, the evidence disclosed that, at all material times, the claimant would have been fully aware of all aspects of the construction work which was being carried out, through their then managing director – Mr. Lee Hartley, who had testified at trial, as the only witness, on the claimant's behalf.

**[239]** In the circumstances, this court has concluded that the 3rd defendant's ancillary claim, has been duly proven, on a balance of probabilities. The 3rd defendant will, therefore, be awarded judgment against the claimant in the sum of two thousand

seven hundred and forty-eight United States dollars and fifty cents (U.S.$2,748.50), which if it is to be converted into Jamaican dollars, is to be so converted using the exchange rate for the United States to Jamaican dollars, which is applicable as at the actual date of payment of same and in addition, Jamaican seventeen thousand seven hundred and seventy-eight dollars and forty-five cents (J$17,778.45).

**[240]** Evidence given on behalf of the 3rd defendant, by the 1st defendant, in his capacity as the sole witness for the 3rd defendant, as regards the issue of interest, on the united states dollar sum claimed for, was as follows: '*Plexus Limited operates a U.S.$ savings account at the National Commercial Bank Jamaica Limited, Knutsford Boulevard branch. Between August 2002 it earned interest at the rate of 6.5% per annum. Between September, 2006 and November, 2007 the account earned interest at the rate of 5.25% per annum and it has since been earning interest at the rate of 4.85% per annum.'*

**[241]** On average, therefore, the 3rd defendant's U.S. dollar account, has earned, over a period of time, according to the evidence on this point, which I accept as truthful, an interest rate of approximately 5.53%. By law, therefore, this is a percentage which is higher than the interest which is presently awarded on special damages, in accordance, with the **Law Reform (Miscellaneous Provisions) Act**, **section 3**. That statutory provision, provides that: '*In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of judgment.*' (Italicized for emphasis) The interest which is presently awarded in this court, on special damages, is 3%.

**[242]** The evidence given on the 3rd defendant's behalf, suggests that the interest rate on U.S. dollars held at a commercial bank in Jamaica, was, up until November, 2007, on average, 5.53%. This court cannot and will not speculate as to what the

interest rate on U.S. dollars held at a commercial bank in Jamaica, has been, since as of December 2007. Accordingly, the 3rd defendant will be awarded interest on the Jamaican dollar sum claimed for, wholly at the typical interest rate of 3% and on the U.S. dollar sum claimed for, interest at the rate of 5.53% from the date of the claimant's filing of a defence to the ancillary claim, that being February 16, 2006 until November 30, 2007 and from December 1, 2007 until the date of judgment that being July 31, 2019, at the rate of 3%. It is to be noted that the claimant did not file an acknowledgment of service of ancillary claim and therefore, I have used as the applicable date, the date when the claimant filed its defence to the 3rd defendant's ancillary claim. That date is February 16, 2006.

**[243]** Lastly, the 2nd defendant's ancillary claim against the claimant will next be addressed.

**The 2nd defendant's ancillary claim against the claimant**

**[244]** In support of their ancillary claim against the claimant, the 2nd defendant has repeated its defence and has specifically, also stated as follows: '*The 2nd defendant will say at the trial herein that the 2nd defendant is entitled to recover the balance of the contract price from the claimant in the sum of one million five hundred and four thousand eight hundred and sixty-six dollars and forty cents ($1,504,866.40) as the claimant knew or ought to have known that the premises were not zoned for commercial use and, as such, should not have instructed the 2nd defendant to commence the stated construction work until the regulations of all necessary statutes and development, orders had been complied with*.' (Italicized for emphasis) It is that specific assertion which constitutes the fulcrum of the 2nd defendant's ancillary claim.

**[245]** Arising from that ancillary claim, the 2nd defendant is claiming damages for breach of contract, in the sum of one million five hundred and four thousand eight hundred and sixty-six dollars and forty cents ($1,504,866.40), interest and costs. The claimant has filed a defence to that ancillary claim. In that defence, the claimant

has denied that it instructed the 2nd defendant to commence construction prior to compliance with all regulations and statutes and has also denied that it ought to have known that the premises were not zoned for commercial use.

**[246]** In the matter at hand, the 2nd defendant was prevented from carrying out the construction work which it had agreed with the claimant, to carry out, on behalf of the claimant. There was a, 'stop order' in place, from the K.S.A.C. which prevented the 2nd defendant from carrying out that previously agreed upon, work, to renovate the structure(s) on the premises, for use as commercial offices.

**[247]** In the circumstances, it was not the claimant which had, brought the contractual agreement to an end. It was the force of law and circumstances which, as at that stage when those circumstances occurred, were not effected with the concurrence or prior expectation of either the claimant or the 2nd defendant, caused the relevant contractual agreement, to have been brought to an end.

**[248]** It was the K.S.A.C. which had, in utilizing its statutory powers, issued a, 'stop order,' which prevented either the claimant or the 2nd defendant from continuing to carry out the construction work in renovating the property, so that same could thereafter, have been used as an office complex.

**[249]** Thereafter, it was the claimant which had, unilaterally, chosen to hire the services of another architect - Mr. Hamilton, of Hamilton and Associates, to design the renovation project, so as to accommodate residential units. By then, approval had been granted by the K.S.A.C. for those residential units – two or three bedroom units, to be on that premises. Thereafter, a section of the building which had been constructed, was torn down and residential units constructed in place thereof.

**[250]** In the circumstances, I have concluded that the claimant did not breach the contract with the 2nd defendant. That contract was one which was unlawful from its onset. The contractual agreement between the claimant and the 2nd defendant could not have been carried out any further, because to do so, would have been a

violation of, a lawfully issued, 'stop order' from the K.S.A.C. Judgment on that ancillary claim therefore, will be granted in favour of the claimant.

**[251]** The judgment orders are therefore, as follows:

i. Judgment on the claimant's claim against the defendants is granted in favour of the defendants and the costs of those claims, are awarded to the defendants, with such costs to be taxed, if not sooner agreed.

ii. Judgment on the 2nd defendant's counterclaim/ancillary claim against the claimant, is granted in favour of the claimant and the costs of that ancillary claim are awarded to the claimant, with such costs to be taxed, if not sooner agreed.

iii. Judgment on the 3rd defendant's counterclaim/ancillary claim against the claimant, is granted in favour of the 3rd defendant and the costs of that claim are awarded to the 3rd defendant, with such costs to be taxed, if not sooner agreed.

iv. The 3rd defendant is awarded the sum of U.S. $2,748.50 and J$17,778.45 with interest on that United States dollar sum, at the rate of 5.53%, from as of February 16, 2006 to November 30, 2007 and at the rate of 3% per annum, with effect from December 1, 2007 to date of judgment and on that Jamaican dollar sum, at the rate of 3%, with effect from February 16, 2006, to date of judgment.

v. The counsel for the 1st and 3rd defendants shall file and serve this order.

**……**
**Hon. K. Anderson, J.**