**[2015] JMCC Comm. 24**

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

**COMMERCIAL DIVISION**

**CLAIM NO. 2014 CD00120**

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| **BETWEEN** | **CECIL REID** | **CLAIMANT** |
| **AND** | **GLOBAL DESIGN AND BUILDERS LIMITED** | **1ST DEFENDANT** |
| **AND** | **GREGORY DUNCAN** | **2ND DEFENDANT** |
| **AND** | **QUANTITY SURVEYING CONSULTANT LIMITED** | **3RD DEFENDANT** |

**Mr. Stuart Stimpson and Mr. Hassani Haughton instructed by Hart Muirhead Fatta for the Claimant**

**Mr. Zavia Mayne instructed by Zavia Mayne & Co for the Defendants**

**Contract – Construction contract – Whether there was a variation of contract – Whether variation caused or contributed to delay in performance –**

**Agency – Whether director of contracting company personally liable – whether quantity surveyor independent contractor**

**Damages – Breach of contract - Measure of damages where defects remedied by claimant**

**Heard: 22nd July, 18th August, 2nd September and November 27, 2015.**

**K. LAING J**

## The Claim

[1] On or about February 5, 2013, the Claimant and the Third Defendant entered into a construction and sale contract ("**the Prepayment Contract**") by which the Claimant purchased Strata Lot No. 4 Rose Garden, Lot 1 Hillside Drive, Belvedere, Kingston 19, St. Andrew ("**the Unit**"), from the First Defendant. The Claimant asserts that there were deficiencies with the Unit and claims against the First and/or Third Defendants for

damages for breach of contract, against the First and/ or Second Defendant for damages for breach of statutory duty as well as damages for breach of fiduciary duty and claims against all three Defendants for negligence.

**Background**

[2] It is common ground that the Unit was marketed to be part of an apartment complex which on completion would have a solar electrical supply and would be independent of the Jamaica Public Service Company's electrical power supply grid.

[3] A practical completion certificate was prepared by the Third Defendant confirming that the works in respect of the Unit were found to be completed in accordance with the provisions of the Prepayment Contract as at May 30, 2013 (the "**Practical Completion Certificate**"). The Practical Completion Certificate was also countersigned by the Second Defendant on behalf of the First Defendant on May 30, 2013.

[4] Ms. Jade Hollis, attorney-at-law acting for the First Defendant sent a letter by bearer dated June 21, 2013 to Messrs. Hart Muirhead Fatta, attorneys representing the Claimant. The Letter enclosed a letter of possession and indicated that the keys to the unit would be forwarded to the Attorneys shortly.

[5] The keys to the Unit were not handed over to the Claimant and in July 2014 the Claimant located the keys in the guardhouse of the complex in which the Unit is located and he took physical possession of the Unit.

**Was the Claimant entitled to take possession of the Unit?**

[6] The joint defence of the Defendants averred that after the Practical Completion Certificate was delivered to the Claimant, he requested certain rearrangement of the Unit as well as a number of upgrades to the Unit, such upgrades attracting an additional cost of $250,000.00 which the Claimant had failed to pay up to the date of the defence filed March 4, 2015.

[7] It was also averred in the Defence that the standard solar system which was installed in the Unit had to be removed in order to accommodate the air conditioning units installed by the Claimant.

[8] The Defendants' position as presented in their Defence is that all the material required for the completion of the Unit was always on site and the Defendants were prevented from addressing the concerns raised by the Claimant, when he stepped in and prevented further works.

[9] It is useful at this stage to examine the appropriate provisions of the Prepayment Contract.

**COMPLETION:**

> *"The Vendor shall complete the unit on or before March 30, 2013 and completion shall occur seven (7) days after the Vendor shall have sent notice to the Purchaser requiring payment of the balance Purchase Price together with any other monies payable hereunder in exchange for delivery of the Practical completion of the Unit prepared by the Architect or the Quantity Surveyor the project and upon delivery of vacant possession (hereinafter referred to as "Possession") of the Unit to the Purchaser in accordance hereto.*
>
> *At the time of Completion the Vendor shall tender to the Purchaser the following documents:*
>
> *a) the Certificate of Title of the Strata Lot;*
> *b) the Instrument of Transfer for the Strata Lot duly executed by the Vendor in the name of the Purchasers and/or their nominee and impressed with Stamp duty and Transfer Tax (or with payment thereof duly denoted);*
> *c) a cheque payable to the National Land Agency for the Vendor's share of any registration fees incident to the registration of the aforesaid discharge and transfer;*

*d) A certificate of Practical Completion.*

*The completion of the green areas for the development, where applicable, shall not be a precondition for the payment of any balance due and owing hereunder by the Purchaser."*

**POSSESSION:**

*"(i) The Purchaser shall be entitled to possession of the Unit on Completion as described in Clause 5 hereof on payment in full of the purchaser's share of costs and expenses as provided in Item 4 of the Second Schedule hereof and/or on delivery of undertaking for the Balance Purchase Money, for the sums stated in item 3(2) of the Second Schedule. At the date of Completion the vendor shall serve a notice in writing upon the Purchaser to take possession of the Unit after the expiration of seven (7) days from service of the said notice and to make all outstanding payments payable hereunder save and except the balance of Purchase Price as referred to in the Letter of Undertaking. In such event the Purchaser shall be deemed to have taken possession as hereinbefore specified, provided that such notice is accompanied by the said Certificate which, shall be conclusive and binding on the parties hereto and the Purchaser shall thereafter pay interest on the balance of the Purchase Money outstanding at the rate more particularly referred to in Item 5 of the Second Schedule. Notwithstanding that the purchaser may not have taken physical possession of the Unit.*

*(ii) The risk of the Unit shall be at the sole risk of the Purchaser from Possession as set out in Clause 6 (i) herein and the Vendor shall not be liable for any loss suffered thereafter in respect of the said Unit."*

[10] It is my finding that, following the letter of possession issued by the First Defendant's attorney on June 21, 2013 the Claimant was entitled to possession and

occupancy of the Unit. The receipt by him of the keys to the Unit was merely a minor albeit necessary step to facilitate the Claimant's possession and occupancy. Having not received the keys up to July 2014, approximately twelve (12) months after the letter of possession was issued, the Court finds that the Claimant acted quite reasonably and prudently in taking physical possession of the Unit. This conclusion is arrived at because based on the terms of the Prepayment Contract extracted above, the Claimant was entitled to possession following receipt of the letter of possession and it was incumbent on him to mitigate his loss and not wait indefinitely for the remedying of the defects and provision of the keys to him.

**The effect of the request for upgrades**

[11] Paragraph 11 of the Defence states that:

> *"That having produced and delivered the Certificate of Practical Completion to the Claimant, the Claimant through the Realtor requested an upgrade of his unit and for the Defendants to carry out certain arrangements to his unit. The Claimant through the Realtor and his Attorney communicated that he wanted an upgrade at an additional cost of $250,000.00".*

In paragraph 14 of the defence it is averred that to date (the Defence is dated and filed 4th March 2015) "*the Claimant has failed to pay the additional $250,000.00"*.

[12] The First Defendant issued an invoice to the Claimant dated February 4, 2013 in the sum of $250,000.00 for the cost of upgrades to the Unit, namely light fixtures, ceiling fans, mirrored closet doors in bedrooms and granite counter top. It was conceded by the Second Defendant that the $250,000.00 was paid as evidenced by the receipt dated February 5, 2013 issued on behalf of the First Defendant. It is therefore clear that the request for these upgrades were not made after the issuing of the Practical Completion Certificate and the Court does not find that these upgrades could have contributed to the delay in the Claimant receiving the Unit.

**The effect of the request for a rearrangement of some fixtures**

[13] The Claimant's evidence is that he had requested that the placement of the Jacuzzi be changed from its original position because it partially obstructed the entrance to the bathroom. He also requested that the face basin in the powder room be replaced with a smaller one in order to allow users to easily access the toilet. He agreed during cross examination that the removal of Jacuzzi would necessitate the removal of piping and other fixtures such as the shower.

[14] I accept the evidence of the Claimant that he did not request a rearrangement of the kitchen countertop but merely insisted that the granite which had been installed be removed and replaced with the correct type of granite.

[15] I do not find that the rearrangement requested by the Claimant ought to have significantly affected the First Defendant's ability to deliver the Unit (even if the evidence of the Second Defendant is accepted that the rearrangement was requested after the issuing of the letter of possession and after the Claimant had done a walkthrough of the Unit).

**The effect of the upgrades to the Solar System**

[16] The Claimant during cross examination stated that he could not say whether there was a functioning solar system installed for the Unit. He conceded that a solar system was installed at the back of the Unit in the shed and that there were solar panels on the roof of an upstairs apartment. In the Claimant's witness statement dated 13th February 2015 at paragraph 16, he states that;

> *"In around February 2014 solar panels and electrical were installed and seemed functioning. Shockingly by March 2014 I noticed that my electrical weren't functioning anymore."*

[17] The evidence of the Claimant is that he caused air conditioning appliances ("**AC's**") to be installed in the Unit, as he recalls, in September 2013. Notwithstanding the deficiencies which the Claimant alleges are evident in the Practical Completion Certificate, I do not accept that the Practical Completion Certificate would have been

issued without there being a functioning solar system installed in the Unit. I accept that the provision of such a system was an important element of the Prepayment Contract. The availability of an electricity supply would have been an important factor which would have assisted in determining whether the Unit was ready for occupancy and the absence of such a supply would have been patently obvious. I do not accept that the Practical Completion Certificate would have been issued with such a glaring omission and deficiency of the Unit.

[18] The Court accepts the evidence of the Second Defendant on a balance of probabilities that there was a functioning solar system installed in the Unit which was removed after a conversation he had with the Claimant relating to the capacity of that solar system. I accept his evidence that the standard system that was installed in the Unit was designed to accommodate a refrigerator, lights and a television. I accept that he was asked by the Claimant why the two AC's the Claimant installed could not work with the existing solar system. I accept that he advised the Claimant that the system was a 4000 watt system and the required wattage of the AC's that the Claimant had had installed surpassed the capacity of the existing system. Accordingly the Claimant needed a larger solar system and this larger system would need upgraded equipment such as storage batteries (since the air-conditioning would be usually used at night), an inverter and a voltage controller for example. It was therefore not simply an issue of replacing the batteries. I also accept that following this conversation between the Claimant and the Second Defendant it was agreed between them that the Unit would be provided with an upgraded solar system capable of accommodating the increased electricity demand of the AC's. This agreement would have had the effect of varying the Prepayment Contract. The First Defendant would be bound by this variation since there is no evidence or pleading on the statement of case that the Second Defendant did not have the authority to act on behalf of the First Defendant and to bind it in respect of this variation.

[19] It is not entirely clear from the evidence the exact date when this variation took place. The witness statement of the Second Defendant dated May 27, 2015 is unhelpful in this regard and unfortunately the evidence elicited during the trial did not assist.

Paragraph 16 of the Claimant's witness statement referred to above, indicates that the non-functioning of the electrical system begun in March 2014 and would therefore be unrelated to the installation of the AC's which on his evidence took place in September 2013. It is in my view reasonable to infer that the conversation about the capacity of the solar system arose shortly after the installation of the AC's in or about September 2013 when it was discovered that the capacity of the existing electricity supply was inadequate.

**What were the defects which were present in July 2014?**

[20] A Report on the estimated construction cost for remedial works on the Unit prepared by Ms. Veronica Royal and dated August 2014 ("**the Report**") was admitted into evidence. Ms. Royal is a chartered quantity surveyor /constructions cost consultant. Pursuant to the orders made on the Case Management Conference the Claimant was permitted to call Ms. Royal as an expert witness and it was ordered that her report be filed. Rule 32.7 of the Civil Procedure Rules ("**CPR**") provides that expert evidence is to be given in a written report unless the Court directs otherwise. The Defendants did not avail themselves of the provisions of part 32.8 of the CPR which entitled them to put written questions to an expert appointed by another party. What the Defendants sought to do was to lead evidence through the Second Defendant to seek to convince the Court that certain element of the Report were inaccurate and could not be relied upon. By way of example his evidence was that the jacuzzi, the faucet the toilet tank and accessories were all in the Unit. Mr. Duncan said that there was a laundry tub completely installed as well as a properly installed water meter as well as plumbing in place. He insisted that the paint was not stripping and that three quarters of the bathroom wall was tiled.

[21] I accept the Report as accurate. The Report is dated August 2014 but states that an inspection of the property was done on July 5, 2014 by Ms. Royal with separate in sections by Alternative Energy Plus a solar power company and Mr. Calvert Small a plumber. I appreciate that there is therefore a risk that there could have been a tampering with the Unit by the Claimant or his agents before these inspections. However having regard to the evidence of the Claimant as to the defects which were present after he did the inspection of the premises, and the updated list of defects which

he sent to the Realtor for the Second Defendant's attention in or about June 2013, I find that the defects found by Ms Royal in August 2014 were defects which were present in June 2013. I also find that the defects identified in the Report where wholly the fault of the First Defendant and were not caused by, contributed to or exacerbated by the Claimant and/or his agents.

[22] I find that the First Defendant had access to the Unit up to July 2014 and that the Claimant and or his agents did not in any way prevent or impede the First Defendant and/or its servants and/or agents from effecting the repairs to the Unit or remedying the defects which the Court finds were present from June 2013.

**Did the Second defendant Breach the Contract?**

[23] By not ensuring that the Unit was in accordance with the specifications to which the Claimant and the First Defendant agreed in the Prepayment Contract within a reasonable period after the issuing of the letter of possession dated June 21, 2013, the First Defendant breached the Prepayment Contract. By not providing an upgraded solar system as agreed between the parties within a reasonable time after the end of September 2013 the First Defendant committed a further breach of the Prepayment Contract as varied.

**Is the Second Defendant personally liable?**

[24] I have not been directed to any evidence which proves on a balance of probabilities that the Second Defendant was at any material time acting is in personal capacity or other than as the duly authorised representative of the First Defendant. The First Defendant is the party that contracted with the Claimant and is the party which bears the obligations under the Prepayment Contract and the party which is liable for any breaches of these obligations. Accordingly I find that the Claimant has not proved its case against the Second Defendant and I find for the Second Defendant on the claim.

**Is the Third Defendant Liable?**

[25] Counsel for the Defendants in submissions referred to **Emden's Construction Law Chapter 9 paragraph 9.20** which provides as follows:

> *"It is often the case that a contract requires that an architect or engineer certifies the practical completion. Such certification does not amount to a certification that the works have been properly completed unless that contract expressly or by implication so provides:* ***Ata Ul Haq v City Council of Nairobi [1962] 28 BLR 76 at 96 [PC]****. Indeed, in most forms of contract there follows a period after certification during which the contractor is required to remedy any defects in the works. Once a final certification is produced, which might be a final statement of the balance due to the contractor and/or a certificate of making good defects in the works, the precise effect of that certificate depends on the terms of the contract in question. There is no general rule that such a certificate is conclusive or inconclusive of the question of whether the works are of a sufficient quality".*

[26] I find that the Unit was "substantially completed" when the Practical Completion Certificate was issued by the Third Defendant. There were defects but these could have been remedied within a reasonably short time thereafter. I find that in the circumstances the Third Defendant did not breach its duty of care to the Claimant by issuing the Practical Completion Certificate when it did and accordingly was not negligent. Based on this finding the issue as to whether the First and or Second Defendants could be liable for any negligence of the Third Defendant falls away and does not require the Court's further consideration.

**What is the measure of damages to be awarded?**

[27] The evidence of the Second Defendant is that fourteen (14) Months was a reasonable time to remedy the defects. Ms. Royal in her report indicated that with adequate financing and subject to the availability of the required material and labour resources the defects could be remedied in four weeks. I accept Ms. Royal's estimate

as accurate, while reminding myself that I am not bound to accept her evidence on this or on any other point simply because she is an expert.

[28] Since a functioning electricity supply would have been a necessary element in making the Unit habitable, and since I have found that the agreement between the Claimant and the First Defendant to vary the solar supply system was concluded sometime in September, 2013, applying a backstop date of 30 September 2013, the First Defendant ought to have been in a position to provide a move-in-ready Unit by the end of October 2013. Because the First Defendant failed to do so, the Claimant was constrained to seek alternative accommodation and is entitled to be compensated for this as an element of his claim for damages for breach of contract although it has not been specifically pleaded as special damages. The Claimant has given evidence of that expenditure at $90,000.00 per month

[29] Having sought to mitigate his loss by taking physical control of the Unit in July 2014, the Claimant ought to have completed the remedial works in four weeks by on or about the end of August, 2014. The Court will consider the end of August 2014 to be the end of the period for which damages will be awarded (although it may have actually taken the Claimant a longer time to remedy the defects and to make the Unit habitable). I accept the evidence of the Claimant that $90,000.00 was spent for suitable alternative accommodation, a sum which I find to be reasonable. I will accordingly award the Claimant compensation for twelve (12) months at $90,000.00 per month which amounts to $1,080,000.00. The Claimant complains of having to pay a mortgage without having the use of the Unit but I find that to also compensate the Claimant for the mortgage payments he made and for alternative accommodation would be duplicative.

[30] Counsel for the Defendants relying on cases such as **Tito v Waddell 1977** (No. 2) CH 106 and **Radford v De Froberville** [1977] 1 WLR 1262 submitted that if the Court finds that the Claimant suffered loss, his compensation should be limited to the amount of money he spent in remedying the defects since the defects have been remedied. Counsel argued that the amount spent is known, that is, the actual “cost of the cure” and is accordingly a better measure of damages than the estimate provided by Ms. Royal in the Report. Counsel further submitted that since the Claimant did not

provide evidence of the amount actually expended by him, then he ought to receive a nominal sum only.

[31] Counsel for the Claimant submitted that the true measure of the loss suffered by the Claimant is accurately reflected in the amount assessed by Ms. Royal as being needed to bring the Unit to its contractually agreed state. He argued that using the amount actually expended by the Claimant as the appropriate value could work to the detriment of the Claimant because he would be penalised for any sacrifices he made for example in the quality of material he used.

[32] The Court accepted Ms. Royal as an expert in her field. I find that her estimate of the then current construction cost to remedy the defects was accurate and reflected the "*cost of the cure*" to the Claimant. In view of her expertise, that amount determined by her as being $2,492,332.59 is an accurate reflection of the loss suffered by the Claimant. I am not of the view that the Court is bound to accept the amount actually expended by the Claimant. By way of example, if the Claimant did not in fact bother to utilise a solar system that would not diminish the loss he suffered. He contracted for a solar system and he did not get one. He is entitled to the value of it whether he purchases a replacement or not. I therefore award the Claimant the sum of $2,492,332.59 as being representative of the difference between what he contracted for and what he actually obtained from the First Defendant.

[33] The Court for the reasons above, makes the following orders:

1. Judgment in favour of the Claimant against the 1st Defendant in the sum of $3,572,332.59.
2. Costs of the claim in favour of the Claimant against the 1st Defendant.
3. Judgment in favour of the 2nd and 3rd Defendants against the Claimant.
4. Costs of the claim in favour of the 2nd and 3rd Defendants against the Claimant.