



[2018] JMSC Civ. 192

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009 HCV 02419

BETWEEN	ALDITH SIMMS	CLAIMANT
AND	HOWARD GORDON	DEFENDANT

IN OPEN COURT

Ms. Tamiko N. Smith instructed by Frater, Ennis & Gordon for the Claimant

Mr. Fabian Campbell, Ms. Karlene Afflick and Ms. Yanique Smythe instructed by Kingston Legal Aid Clinic for the Defendant

HEARD: June 20, 21 and 22, November 23, and December 19, 2018

Civil practice and procedure– Breach of building contract– Expressed and implied terms of contract– Whether work done in workmanlike manner– Measure of damages for breach of building contract

PALMER HAMILTON, J. (AG)

BACKGROUND

[1] The Claimant is a seventy (70) year old retired nursing assistant having her true place of abode at 138 Main Street, Ocho Rios in the parish of Saint Ann. She is also the proprietor of a plot of land situated at Pineapple Place, Ocho Rios in the parish of Saint Ann (hereinafter referred to as “the property”). On or about the 25th day of September 2006, she entered into a written building contract with the

Defendant for the completion of construction on her home in accordance with a building plan produced by the Defendant.

- [2] At the material time, the two-floor structure already consisted of two (2) bedrooms, two (2) bathrooms, a living room, a kitchen, a laundry room and a verandah. The contract price was agreed at Two Million Eight Hundred Thousand Dollars (\$2,800,000.00) inclusive of labour, material and the cost of the building plan. The parties further agreed that the cost for the Defendant to supervise the project would be an additional Two Hundred Thousand Dollars (\$200,000.00).
- [3] It was also an expressed term that the construction would be completed within three (3) months beginning October 26 and ending December 2006. Despite this slated completion time, the Defendant carried out works on the property that overextended beyond the slated three (3) month period to October 2008. However, in or about October 2008, the Defendant abandoned any further construction on the house and the construction is yet unfinished. That is the background against which the Claimant filed her Claim for damages for breach of contract and/or damages for negligently performing the contract against the Defendant. The Defendant has filed a Defence and has counterclaimed against the Claimant. He asserted that the project is incomplete because the Claimant failed or neglected *“to keep her end of the bargain”*.

The Claimant's Case

- [4] The Claimant averred that she was referred to the Defendant by her daughter who used to work for the Defendant and the Defendant held himself out to her as a building contractor. She stated that on or around the 25th day of September 2006, the Defendant sent her a contract and a drawing of what the finished house would look like. The Claimant disclosed that she accepted the drawing and relied on the Defendant's expertise regarding the plan.
- [5] The Claimant also stated that the sum of Two Million Eight Hundred Thousand Dollars (\$2,800,000.00) was expressly agreed to as the contract price and this

was inclusive of labour, material, the Defendant's management fee and the cost of the building plan. She indicated that at the time of the filing of the Claim she has given the Defendant the sum of Forty-Five Thousand Four Hundred and Fifty United States Dollars (USD\$45,450.00) as well as Three Hundred and Sixty-Five Thousand Jamaican Dollars (J\$365,000.00).

- [6] The Claimant maintained that the Defendant negligently and in breach of the contract failed to perform the works in accordance with the building contract despite having receiving full payment for completion of same. She further stated that the Defendant carried out defective work and/or used inferior material and as a consequence, the work is incomplete and rendering the residential building unfit for habitation.

The Defendant's Case

- [7] The Defendant in his evidence indicated that he is a Site Finishing Supervisor. He professed that he provided the Claimant with an estimated cost of Two Million Eight Hundred Dollars (\$2,800,000.00) for labour and materials. He stated that he further agreed with the Claimant that his cost to supervise the project would be an additional Two Hundred Thousand Dollars (\$200,000.00).
- [8] The Defendant averred that he inadvertently excluded the cost for electrical and ceiling materials and labour cost from the initial estimated cost. He indicated in his Defence that upon recognition of his error, he immediately informed the Claimant of the omission and she assured him that whatever extra sums that were spent by him to carry out these tasks, she would reimburse him when she returned to Jamaica.
- [9] The Defendant also proffered that the Claimant delayed in sending off the monies. In fact, he asserted that the Claimant took two (2) years to send the sum of Three Million Dollars (\$3,000,000.00) and this caused many of the workmen to get frustrated and walk off the job.

[10] He stated that he spent the sum of Six Hundred and Fifty-Six Thousand Five Hundred and Seventy-Five Dollars and Forty-Seven Cents (\$656,575.47) out of his own personal monies on the construction and he has countersued for this sum.

The undisputed facts

[11] Much of the facts in this case are not in dispute. The parties agreed that they entered into a contract in or around September 2006 and the contract was to complete the Claimant's residential building on the property. The parties also agree that the Claimant paid the Defendant the total sum of Three Million Dollars (\$3,000,000.00) and that the slated completion time was three (3) months. It was also agreed that the Defendant carried out construction between the period of October 2006 and October 2008 and that the Defendant left the construction incomplete.

ISSUES

[12] The issues to be determined by the court are as follows: -

1. Did the Defendant breach the contract?
2. If the Defendant breached the contract, what is the quantum of damages that the Claimant is entitled to, if any?
3. Is the Defendant entitled to judgment on his counterclaim?

[13] Written submissions were provided by both Learned Counsel and they greatly assisted in the composition of this judgment.

LAW & ANALYSIS

Did the Defendant breach the contract?

Submissions of the Claimant

[14] Learned Counsel for the Claimant, Miss Tamiko Smith submitted that the Defendant fully knew and appreciated that his duty under the contract was to complete the construction of the Claimant's property. Miss Smith proffered that this was solicited from the Defendant under cross-examination. Under cross-examination, the Defendant admitted that he failed to fully perform the contract despite having been paid in full.

[15] The Claimant also averred that the Defendant negligently performed the contract and urged the Court to take into consideration two factors; firstly, that the Defendant had little-to-no experience as a building contractor at the time he entered into the contract with the Claimant and that this affected the quality of work the Defendant performed. Secondly, the report from the Claimant's expert witness Mr. Clifton G. Logan, Quantity Surveyor and Construction Cost Consultant should also be taken into account. The report was tendered into evidence and Mr. Logan's assessment disclosed that *"The standard of workmanship overall is very very poor and just about nothing is finished to an acceptable standard"*.

[16] Learned Counsel for the Claimant also asserted that the Defendant accepted in his Defence and Counterclaim that implied within the contract was the duty to ensure that the construction was carried out *"in a good and workmanlike manner"*, using *"material of good quality"*, *"reasonably fit for the intended purposes"* and *"fit for human habitation"*. The Claimant declared that the Defendant failed on all counts and in support of this the Claimant tendered in evidence photographs showing that not only that the construction was incomplete, but that the construction performed by the Defendant was not up to an acceptable standard or quality.

[17] The Claimant cited the case of **Nicola Lauder & Lydia Jones v Everett Brady [2015] JMSC Civ. 68** in support of the submission that the Defendant failed to complete the construction in accordance with the expressed and implied terms of the contract.

Submissions of the Defendant

[18] The Defendant in his Defence stated that the construction took inordinately long as the Claimant did not send the monies as agreed and took two (2) years to send the sum of Three Million Dollars (\$3,000,000.00). He indicated that it was agreed that the Claimant would have sent the monies to buy material and pay the labourers on a continuous basis when needed. However, the Claimant kept delaying with the sending of the monies. This caused many of the workmen to get frustrated and walk off the job which forced him to find new workers.

[19] The Defendant further averred that it was explained to the Claimant initially that the costs given to her were merely an estimate, as such, when the work actually commenced it became clear that the construction would cost more than what was initially estimated.

[20] Learned Counsel for the Defendant submitted that time was of the essence of the contract and a condition precedent to the contract. The Claimant cannot succeed because she was not able to perform her part of the contract within the time fixed for performance. Learned Counsel cited page 164 of **Halsbury's Laws of England**, 3rd Edition, Volume 8 in support of this submission.

[21] The Defendant indicated that he complied with his duty of care and carried out all his functions in supervising the work to ensure that the construction was done to the Claimant's satisfaction. He stated that he ensured that the work was done properly, effectively, in a timely manner and to the best of his abilities despite the lack of financial support from the Claimant.

- [22]** He stated that sections of the building were habitable and the Claimant moved into that area. It was tiled and painted fully. The Defendant indicated that what remained to be finished were the plumbing, bathroom fixtures and kitchen cupboards on the ground floor. The upstairs section of the house was completed, save and except for the kitchen area which was forty-five percent (45%) complete. He further indicated that the kitchen sink, fixtures and faucets were purchased but had not yet been installed at the time the Claimant was given possession. The Defendant also insisted that the quality of the work that had been done was good quality.
- [23]** The gravamen of the Claimant's case is that the Defendant breached the contract by failing to complete the contract in accordance with the expressed and implied terms of the contract.
- [24]** I will firstly examine the issue in regards to the time for completion. Both parties agree that the completion time would be three (3) months from the date of the agreement thereby ending in December 2006.
- [25]** It is not in dispute that the Defendant defaulted on the fixed completion date. It is trite law that delay on the part of the contractor in complying with a time provision in a building contract where time is not of the essence of the contract, does not amount to a breach of the contract, unless it is such to show that he will not, or cannot, carry out the contract.
- [26]** Notwithstanding that the Defendant failed to complete the contract by the fixed completion date, this failure did not in itself amount to a breach of the contract. I will have to look into the circumstances to ascertain whether the Defendant had sufficient reason to abandon the contract. I analysed the Defence of the Defendant with respect to the reason the fixed date of completion was not achieved and I find that the Defence is not sustainable in that regard. Firstly, I accept the evidence of the Claimant that the Defendant received approximately Two Million Four Hundred and Ninety-One Thousand Nine Hundred and Fifty-

Two Dollars (\$2,491,952.00) by February 2007. That is approximately eighty-three percent (83%) of the contract price. As at the time of the filing of the Claim, he received payment in full. The terms of the contract provided for payments to be made as requested and the Defendant failed to establish that the Claimant was non-compliant with his requests for payments.

[27] Secondly, I agree with the submission of Learned Counsel for the Claimant and I find from the evidence presented that the delay was attributed to the Defendant's inexperience and mishandling of funds. The Defendant's evidence is that he never provided the Claimant with invoices or receipts to justify his request for more money or to show that the contract price was insufficient. Of utmost importance, the Defendant on cross-examination admitted that he failed to fully perform the contract notwithstanding having received payment in full. I do not find that the Claimant barred completion of the contract in that regard.

[28] In addition to the Defendant's self-confessed failure to complete the contract, I find that the work that the Defendant did was not done in a "workmanlike" manner. The expert report and viva voce evidence of Mr. Clifton G. Logan revealed same. The evidence disclosed that the building was not constructed in accordance with the plans submitted and described the standard of workmanship as being very poor.

[29] The author of **Law and Practice of Building Contracts**, 2nd Edition, at page 38 stated: -

"It seems that where the employer makes known to the contractor the particular purpose for which the work is to be done and the work is of a kind which the contractor holds himself out as performing, and the circumstances showed that the employer relied on the contractor's skill and judgment in the matter, there is an implied warranty that the work as completed will be fit for human purpose..."

[30] Our common law principle places a duty on building contractors to build dwellings fit for habitation. This principle is reflective of Section 1(1) of the English statute **The Defective Premises Act** 1972 that provides that all persons taking on work for or in connection with the provision of a dwelling in the course of a business

which consists of or includes providing or arranging for the provision of dwellings owe a duty to see that the work is done in a workmanlike or professional manner, with proper materials, and so that as regards that work, the dwelling when completed will be fit for habitation. It is immaterial whether that person does the work himself or employs an agent.

[31] The uncontested Quality Surveyor's Report prepared by Mr. Logan also indicated that "*nothing is finished to an acceptable standard*". The Report stated: -

"There is no proper plumbing or bathroom fixtures, no kitchen cupboard or kitchen sink, no electricity, in fact most likely the electrical inspection cannot be passed because of the bad location of the electrical panel.

The entry doors are undersize (sic) and the hardwares (sic) are falling apart. The masonry work is incomplete and looks terrible.

Floor tile is incorrect and is just about 25% complete.

Windows are installed but water is seeping through the edges because no caulking is done.

There is an external staircase that needs to be demolished because it is built not according to plan and it is collecting water from the roof and channelling it into the house.

In our estimation the said building will take approximately Two Million Five Hundred Thousand Dollars (JA\$2,500,000.00) to effect repairs and satisfactory (sic) complete it to a standard that is humanly habitable."

[32] The consequence of the Defendant's poor workmanship is to render the building unfit for human habitation and as such, unfit for the purpose for which it is required. In my view, the Defendant failed to use reasonable skill and care in the construction of the building. This, in my judgment, deprived the Claimant substantially of the whole benefit of the contract.

[33] In my view, I do not find any lawful justification that would support the Defendant's inability to fulfil the terms of the contract and would enable him to abandon same. Therefore, his abandonment in the circumstances would clearly be classified as a breach of contract.

If the Defendant breached the contract, what is the quantum of damages that the Claimant is entitled to, if any?

Submissions of the Claimant

[34] Learned Counsel for the Claimant submitted that where there has been a breach of a building contract so that the building constructed is not in conformity with the terms of the contract, including but not limited to it being defective in its construction or unfit for the purpose for which it was commissioned, the normal measure of damages is the cost to achieve the contractual objective. Learned Counsel cited the cases of **East Ham Corporation v Bernard Sunley and Sons Ltd** [1966] A.C. 406, **Nicola Lauder & Lydia Jones v Everett Brady** (supra) and **Stevenson Samuels and Larene Samuels v Lorraine Cato** (unreported), Supreme Court, Jamaica, Claim No. HCV 488/2009 judgment delivered the 9th day of August 2011 in support of this submission.

[35] Learned Counsel also averred that given the nature and extent of the defective work done by the Defendant the only way to make the building in conformity with the contract would be to demolish certain portions and to rebuild them in addition to completing what the Defendant failed to do. Ms. Smith disclosed that the building as it now stands is incomplete.

[36] It was also submitted that the Claimant ought to be awarded the current cost to complete the contract. In support of this submission the case of **East Ham Corporation v Bernard Sunley and Sons Ltd** (supra) was cited. Learned Counsel indicated the assessment of Two Million Five Hundred Thousand Dollars (\$2,500,000.00) from Mr. Logan's Quality Surveyor's Report as the cost to cure the damage and complete the construction does not reflect current costs. Ms. Smith submitted that an award in the region of Four Million Five Hundred and Fifty-Eight Thousand Eight Hundred and Twenty-Three Dollars and Fifty-Three Cents (\$4,558,823.53) would be an appropriate sum to cure the damage and complete the construction.

[37] The Claimant averred that another measure of damage that ought to be considered is the measure of damages for delay. Learned Counsel submitted that the Defendant stopped his construction approximately Twenty-One (21) months after the agreed completed time and that the Claimant was able to move into a portion of the downstairs of her house after a further Nine (9) months.

[38] Further, Learned Counsel submitted that the Claimant will not be able to enjoy her home until the defective work is repaired and the construction completed. Consequently, the delay experienced by the Claimant has been prolonged and is continuing. As such, an award of damages under this head would be appropriate. In support of this position, Learned Counsel cited the principle at page 821 of **McGregor On Damages**, 13th Edition as follows: -

"If the builder fails to complete the building by the time required by the contract the normal measure of damages should be the value of the use of the building during the period of delay, the value generally being taken as the rental value."

[39] Learned Counsel for the Claimant also opined that the case at Bar is an appropriate case in which the Court can and should consider making an award for damages for loss of amenities and inconvenience. The following cases were cited in support of this submission: -

(1) **Ruxley Electronics & Construction Ltd v Forsyth** [1995] ABC.L.R. 06/29; and

(2) **Stevenson Samuels and Larene Samuels v Lorraine Cato** (supra).

[40] In comparing the abovementioned cases, Learned Counsel submitted that an award in the region of Five Hundred Thousand Dollars (\$500,000.00) is appropriate.

[41] In regards to Special Damages, the Claimant is seeking to recover the cost of Ten Thousand Dollars (\$10,000.00) being the cost of obtaining the Quantity Surveyor's Report.

[42] The Defendant did not make any submissions on damages.

[43] Having concluded earlier that the Defendant breached the contract, I must determine the measure of damages to be awarded. The normal measure of damages is explained in the case of **Enid Thomas v Christopher Thoms** [2015] JMSC Civ 209. The Honourable Mr. Justice Evan Brown at paragraph 66 stated:

*“Where a builder fails to build or builds only in part, the normal measure of damages is the cost to the owner of completing the building in a reasonable manner, minus the contract price: **McGregor on Damages** 18th ed. para.26-004. Or, to put it in the language of Younger LJ, in **Mertens v Home Freeholds Company** [1921] 2 KB 526, 541:*

“the damages which the plaintiff has sustained is ... the cost to which the plaintiff was put in reasonably carrying out ... that work which the defendant had failed to do, less only the sum which the plaintiff was bound to pay the defendant for carrying out the same work.”

[44] In my view, the Defendant in this case is prima facie liable to compensate the Claimant on a cost of cure basis, that is, he must pay for the cost of putting the defects right or the cost of completing the work. The Court must therefore consider the financial expenditure the Claimant has to undertake in order to put herself in as good a position as if the contractual benefit had been received. I am guided by the case of **Tito v. Waddell (No. 2); Tito et al v. Attorney General** [1977] Ch 106. In this case a British Company mining for phosphate on Ocean Island, a small island in the Pacific, had promised by contract to restore the mined out land by replanting trees. They however failed to do so and were sued for their breach of contract. One of the issues for determination by the court was whether the claimants, were entitled to the cost of the replacement of the trees as damages, that is, the cost of cure. Megarry VC in delivering the judgment of the court stated at page 333: -

“...if the plaintiff establishes that the contractual work has been or will be done, then in all normal circumstances, it seems to me that he has shown that the cost of doing it is, or is part of, his loss and is recoverable as damages.”

[45] The fact that the Claimant has cured is a decisive factor in favouring the cost of cure approach in this case. The Claimant's viva voce evidence is that she

employed new workers. A number of receipts were tendered into evidence totalling One Million Six Hundred and Twenty-Three Thousand Seven Hundred and Fifty Thousand Dollars (\$1,623,750.00) that was expended to bring her property to a habitable level so that she could move in. I therefore find that this sum, being the cost of the work (cost of cure) is recoverable.

[46] The Claimant is also seeking damages for loss of amenities and inconvenience. I find that this case is an appropriate one for which this award should be made. I am guided by the case of **Ruxley Electronics and Construction Ltd. v. Forsyth** (supra) where the House of Lords awarded the plaintiff compensation for loss of amenity. In this case the plaintiff's enjoyment of his swimming pool was diminished as the pool, though perfectly usable, had not been constructed by the defendant to the depth agreed under the contract. In this case, Lord Lloyd of Berwick opined as follows at paragraph 88: -

"...What is then to be the position where, in the case of a new house, the building does not conform in some minor respect to the contract, as for example, where there is a difference in level between two rooms, necessitating a step. Suppose there is no measurable difference in value, and the cost of reinstatement would be prohibitive. Is there any reason why the court should not award by way of damages for breach of contract some modest sum not based on difference in value, but solely to compensate the buyer for his disappointed expectations? Is the law of damages so inflexible, as I asked earlier, that it cannot find some middle ground in such a case?..."

[47] It is the Claimant's evidence that when she moved back to Jamaica in October 2008 she was going back and forth from Saint Catherine because she had nowhere to sleep. The evidence supports that the Claimant suffered inconvenience for at the very least, the nine (9) month period for which she was unable to move into her house and had to reside elsewhere.

[48] The authorities maintain that damages awarded under this head should be modest compensation. Learned Counsel for the Claimant submitted the case of **Stevenson Samuels and Larene Samuels v Lorraine Cato** (supra) where the Honourable Mr. Justice David Fraser applied the principles of **Ruxley Electronics and Construction Ltd. v. Forsyth** (supra) and awarded the sum of

Seven Hundred Thousand Dollars (\$700,000.00) for compensation for the distress, loss of enjoyment and inconvenience suffered by the Claimant. In this case, the Claimants entered into a contract to replace the existing roof with a new roof using metro tiles. The inconvenience and distress were caused by a leaking roof which lasted for two years; from August 2008 to July 2010.

- [49] In comparing both cases and examining the updated awards, Learned Counsel commended that the sum of Five Hundred Thousand (\$500,000.00) would be an appropriate award under this head in the instant case. I see no reason to vary same.
- [50] In relation to the Claimant's request for damages for the delay, it is an established principle that a Claimant claiming damages must satisfy the Court as to the fact of damage and to its amount. I find that the damage suffered as a result of the delay in this case is the Claimant's inconvenience of being able to move into her home. I find that the award made for loss of inconvenience and amenities sufficiently covers this.
- [51] The Claimant also sought to recover the cost of Ten Thousand Dollars (\$10,000.00) being the cost of obtaining the Quality Surveyor's Report although not specially pleaded. There are authorities to suggest that the Court appears to be breaking away from the precedent that special damages must be specially proven. The case of **Whalley v PF Developments and Another** [2013] EWCA Civ. 306 is one such authority. The claimants appealed against the level of damages awarded to them in respect of a trespass by the respondent developer. The trial judge had rejected the claim for unpleaded special damages. The claimants said that the sums had been covered in the evidence at the court's request. The appeal succeeded and it was held that though the claimants could have sought leave to amend their pleadings, there had been no prejudice to the defendant, and indeed the defendants had responded to the evidence without objection. The damages should be recalculated to assess the sums claimed.

[52] The objective of pleadings is to alert each party to what is being sought and what will be dealt with at the trial. I find that the circumstances of this case, in keeping with logic, compels me to award the cost of Ten Thousand Dollars (\$10,000.00), for special damages, a cost incurred by the Claimant as a result of the Defendant's breach.

Is the Defendant entitled to judgment on his counterclaim?

Submissions for the Defendant

[53] The Defendant averred that after he began to purchase materials for the Claimant he realized that the estimate he provided to the Claimant mistakenly excluded the costs for electrical, ceiling, bedding material and labour costs. He indicated that as soon as he realised this, he telephoned the Claimant and explained the mistake to her.

[54] It is the Defendant's evidence that the Claimant indicated to him that whatever extra sums that were spent by him she would fully reimburse him when she returned to Jamaica. The Defendant stated that based on this agreement, he relied on that promise to his detriment and used his personal monies to buy material and pay workmen. The Defendant presented approximately ninety-seven (97) receipts for some of the material bought to do the construction.

[55] The Defendant counterclaimed for the sum of Six Hundred and Fifty-Six Thousand Five Hundred and Seventy-Five Dollars and Forty-Five Cents (\$656,575.47), being his personal money spent on construction. He stated that this sum does not include his supervisory fee.

Submissions on behalf of the Claimant

[56] In response to the Defendant's Counterclaim, the Claimant submitted that the Defendant has failed to provide the Court with any or any sufficient evidence in support of the sums claimed. He did not substantiate in any way that these sums were advanced by him.

- [57] Learned Counsel for the Claimant further averred that the Defendant made no requests of the Claimant to reimburse him of any of the surplus sums allegedly spent by him and that the first time he is claiming these sums is in his Defence and Counterclaim.
- [58] The Claimant asked the Court to conclude from the evidence that on a balance of probabilities, the Claimant does not owe the alleged sum and by claiming this sum, the Defendant is attempting to reduce his liability.
- [59] In relation to the Defendant's Counterclaim he averred that he inadvertently excluded the cost for electrical and ceiling materials and labour cost from the initial estimated cost. In my view, these costs fell within the scope of the contract and would be deemed indispensably necessary work for the completion of the contract. These costs are incidental to the contract and the Defendant would have no right to have the contract price adjusted to take account of the error. I am guided by the case of **Williams v Fitzmaurice** (1858) 3 H & N. 844 where there was a contract to build a house "*to be completed and dry and fit for Major Fitzmaurice's occupation by August 1st, 1858.*" In the specification the contractor undertook to provide "*the whole of the materials mentioned or otherwise in the foregoing particulars necessary for the completion of the work*" and "*to perform all the works of every kind mentioned in the foregoing specification for the sum of £1,100.*" Flooring was omitted from the specification, and the contractor, on this ground, refused to put in the flooring unless it was paid for as an extra. It was held that the contractor could not recover the cost of the floor boards because although they were omitted from the specification, it was clearly to be inferred from the language of the specification that the contractor was to do the flooring.
- [60] The Defendant's counterclaim is therefore dismissed for the reason stated above.

ORDERS & DISPOSITION

- [61] Judgment for the Claimant as follows -

1. General damages in the sum of \$2,123,750.00 with interest at a rate of 3% per annum from the 21st day of July 2009 to the 19th day of December 2018;
2. Special Damages in sum of \$10,000.00 with interest at a rate of 3% per annum from the 31st day of October 2009 to the 19th day of December 2018;
3. Costs to the Claimant to be taxed if not agreed.