



[2026] JMCC COMM. 12

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU 2023 CD 00085

BETWEEN	CHRISTOPHER PANTHER	1ST CLAIMANT
AND	AUSTEN DOUGLAS-PANTHER	2ND CLAIMANT
AND	EVERALD HEMMINGS	1ST DEFENDANT
AND	BENHEM ECO CONSTRUCTION SERVICES LIMITED	2ND DEFENDANT

Ms. Ceejaie Cummings and Ms. Saphari Hay instructed by Johnson Hay & Company, Attorneys-at-law for the Claimants.

Ms. Carol Davis, Attorney-at-law for the Defendants.

Civil procedure– Breach of contract- Whether the Defendants are in breach of the construction contract- Whether the Claimants suffered loss and damage to effect the remedial work- Whether the Defendants are entitled to the sum on Counterclaim- Remedy for breach of contract- measure of damages

IN OPEN COURT

Heard on: 12th-14th, 30th May, 26th June, 18th July, 12th November, 1st, 16th December, 2025 and 14th May 2026

STEPHANE JACKSON-HAISLEY J.

INTRODUCTION

- [1] This is a claim for damages for breach of a contract between the 1st Claimant, Mr. Christopher Panther and his wife, Austen Douglas-Panther the 2nd Claimant and the 1st and 2nd Defendants, Mr. Everald Hemmings and Benhem Eco Construction Services Limited (Benhem), respectively. The contract provided for the expansion of the Panther's dwelling house located at 21 Stalactite Way, Cave Hill Estate, Hellshire in the parish of Saint Catherine (the property) by the 1st Defendant who is a contractor and Director of the 2nd Defendant.
- [2] It is alleged that the Defendants failed to exercise reasonable skill, care and diligence in accordance with the written contract and are in breach of the duty of care as they failed to ensure that the construction task was done in a workmanlike manner with merchantable quality. The Claimants have also alleged that the work was done below the required standard and as a result of this, they have suffered loss and damage and have incurred significant expense. They are also claiming damages amounting to Four Million, Five Hundred and Eighty-Eight Thousand, Four Hundred and Seventy-Eight Dollars and Twenty-Nine Cents (\$4,588,478.29) representing costs of poorly done and unfinished work, costs of construction valuation report and legal expenses.
- [3] The 1st Defendant denies that the 2nd Defendant is a party to the written agreement. He also denies that the work was done in any substandard manner or that the Claimants suffered loss or incurred significant expense. He stated that the 1st Claimant made several substantial changes to the scope of work which caused delays in completing the project and if, which is not being admitted, the Claimants incurred significant expense, it was as a result of the several variations made to the scope of work.
- [4] The Defendants have counterclaimed for damages, loss and consequential costs, Attorney's costs as well as special damages for final payment due for work done

in the sum of One Hundred and Four Thousand, Nine Hundred and Eighty-Six Dollars and Twenty-Three Cents (\$104,986.23).

EVIDENCE ON BEHALF OF THE CLAIMANTS

- [5] The evidence on behalf of the Claimants was presented by Mr. Christopher Panther and his wife Mrs. Douglas-Panther in their capacity as the 1st and 2nd Claimants, respectively. Mr. Philmore Turnbull gave evidence in his capacity as a quantity surveyor and Dr. Shaun Wright, a structural engineer.

Evidence of Christopher Panther

- [6] Mr. Panther stated that he and his wife had an initial meeting with Mr. Hemmings where the approved plan and intentions for expansion were discussed and the parties agreed to execute a contract on September 7, 2021. He asserted that after the mobilization money was paid, Mr. Hemmings took ill and his wife also passed which caused a delay in the commencement of the project for several months.
- [7] He asserted that from the very commencement of the project there were delays as the Parish Council site inspector did not approve the foundation which had to be corrected. He contended that there was material wastage, the workmen were consistently late and they worked at a snail's pace. He stated that the construction was done in poor workmanship manner which included improper erection of blocks, destruction of several drain pipes and casting done with no pipes laid. He contended that though Mr. Hemmings stated that there would be supervision of the workmen on the property, the workmen were left unsupervised and the tools left unattended.
- [8] He averred that he made numerous complaints to Mr. Hemmings and Mrs. Trecha Bennett-Miller, however, the issues were never addressed and Mr. Hemmings was rarely on site to see the material waste. He asserted that since he and his wife

would have been straddled with the loan repayment, he intervened and had discussions with the workmen. However, Mr. Hemmings was upset that he voiced his concerns about the unusual high volume of waste and spoke with the workmen.

- [9] Mr. Panther averred that when Mr. Hemmings pulled his workmen from the site and abandoned the project in June 2022 without any warning, major issues were discovered on the site. Another issue that was a point of contention related to the windows. He stated that the parties discussed window design and he specifically informed Mr. Hemmings that he did not want sliding or projecting windows as they allow only fifty percent (50%) airflow but that he wanted louvre windows and he showed Mr. Hemmings pictures of the type of windows he wanted, however, Mr. Hemmings acquired windows which were different from what they requested.
- [10] Additionally, he contended that the piping in the upstairs bathroom was not done in accordance with instructions which caused water running out the wall and he had to rectify the problem. He contended that an approved plan was always on site however, when measurements were taken, it would appear that Mr. Hemmings was not following the approved drawings.
- [11] During cross-examination, Mr. Panther accepted that variations were made to the original plan which had to be approved by the Parish Council. He, however, contended that some of these suggestions were made by Mrs. Bennett-Miller which were accepted by them and the others were not approved by him. He denied Counsel's suggestion that there were more than one approved plans and stated that there was only one (1) approved plan throughout the life of the project. He, however, contradicted himself when he indicated that the first approved plan was May 2019, then next in 2020 and then in 2022. He also accepted that up to March 15, 2022 he had not received the corrective drawing.

Evidence of Austen Douglas-Panther

- [12]** Mrs. Austen Douglas-Panther averred that after sharing the building plans with Mr. Hemmings, he accepted that he was competent to carry out the project and has significant experience in the construction field. She asserted that the mobilisation fee was paid in June 2020 however, the project did not commence until about fifteen (15) months later which was partly because she and her husband decided to amend the plan to include a balcony upstairs and partly because Mr. Hemmings fell ill and his wife had passed.
- [13]** Mrs. Douglas-Panther averred that the funding of the project commenced from the family's savings. However, they also utilized loans from the National Housing Trust (NHT) which was disbursed two (2) months later than projected. This caused a delay in the payment of Interim Payment Certificate #2. However, the balance of Interim Payment Certificate #3 was paid from the loan funds from the NHT.
- [14]** She asserted that several issues arose during the construction from as early as the preparation of the foundation as the Municipality failed to pass the work at that stage and this had to be rectified. She asserted that there were further delays as the Municipality was reluctant to approve the physical structure on the ground however, this was also rectified when Mr. Panther dialogued with the Municipal Council. During cross-examination, Mrs. Douglas-Panther accepted Counsel's suggestion that changes were made to the building plan on the Panthers' request and the new plan had to be resubmitted to the Municipality for approval.
- [15]** Mrs. Douglas-Panther contended that there were obvious supervisory inadequacies as Mr. Hemmings did not implement a system of control. There were instances when building supplies were taken from the storeroom and were not properly secured or left outside overnight. She asserted that the workmen were tardy in reporting to work and they also failed to report to work for several days. During cross-examination she accepted Counsel's suggestion that the delay in

making payment was a contributing factor to the workers being pulled from the worksite.

- [16] She averred that when Interim Payment Certificate #4 was issued, she was dissatisfied with the progress of the work and a meeting was requested with Mr. Hemmings and Mrs. Bennett-Miller. She asserted that there were inconsistencies with the calculation of the Interim Payment Certificates as they did not reflect the work being done as the variations were inconsistent with previous representations.
- [17] Mrs. Douglas-Panther asserted that the relationship between the parties deteriorated, the work ceased and Mr. Hemmings removed all his tools from the work site. She sought the assistance of an Architect to determine the quantity and quality of the work done and a walk-through of the unfinished building was done on July 30, 2022 at the end of which, both Mr. Hemmings and the Architect signed the Bill of Quantities.

Evidence of Philmore Turnbull

- [18] Mr. Turnbull's task was to assess and ascertain the value of the work done on the proposed extension on the subject property. His report dated March 2023 and tendered as exhibit 48 highlighted that in order to arrive a conclusion, he conducted a site visit on February 3, 2023 to determine the status of the building and the amount of work completed and he considered the Contract Bill of Quantities to assess the value of the work done onsite.
- [19] He stated that based on the progress of the work on-site, the value is estimated to be Six Million, Five Hundred and Thirty-Seven Thousand, Nine Hundred and Sixty-Five Dollars and Seventy-Five Cents (\$6,537,965.75). The defective work that was observed on site include hollow rendering, bulging in concrete beams and columns, honeycombing in the concrete beams and columns, puncture drainpipes and fittings as well as defective formwork to roof. He opined that the costs to

correct the defective work is estimated at Eight Hundred and Twenty-One Thousand, Five Hundred and Five Dollars and Ninety-Eight Cents (\$821,505.98). Mr. Turnbull noted that some material was left on site, including cement, PVC pipes and PVC fittings. The material was valued at Sixty-Nine Thousand, Two Hundred and Seventy-Nine Dollars and Seventy-Six Cents (\$69,279.76).

- [20] Mr. Turnbull concluded that the project is approximately forty-nine percent (49%) complete with some defective works and the total value of work done plus the value of the material onsite less the costs to correct the defective work amount to Five Million, Seven Hundred and Eighty-Five Thousand, Seven Hundred and Thirty-Nine Dollars and Fifty-Three Cents (\$5,785,739.53).

Evidence of Dr. Shaun Wright

- [21] Dr. Shaun Wright was contacted by the Panthers to conduct an assessment of the work done based on the claim by the contractor. He prepared two (2) reports, first one is dated August 29, 2022 tendered as exhibit 49 and the second one dated December 22, 2023 tendered as exhibit 50. A preliminary report also dated August 29, 2022 was tendered as exhibit 51.

- [22] In his report tendered as exhibit 49, Mr. Wright stated that the aim of the report was to evaluate the existing work completed as of August 2022 to ascertain the quality, quantity of scope completed and the integrity of the construction. His findings revealed a significant amount of corrective works to be undertaken as a result of poor workmanship, the quality of material and poor work execution. He stated that all rendered walls and ceilings on the ground floor level including the flooring required extensive demolition work to accommodate corrective application. The plumbing and electrical required extensive attention and the decking formwork and steelwork needed to be removed and replaced. Based on his assessment, he arrived at the conclusion that the sum of Three Million, Three Hundred and Eighty-Seven Thousand, Five Hundred and Ninety-Seven Dollars

and Eighty-Three Cents (\$3,387,597.83) is owed to the Claimant for corrective work.

[23] In his report tendered as exhibit 50, Mr. Wright set out the corrective works undertaken to the upper and lower floor level of the property and the work done to realign the outer wall. He concluded that the total sum paid for the corrective work amounted to Two Million, Two Hundred and Fifty-Two Thousand, Two Hundred and Thirty-Two Dollars and Twenty-Two Cents (\$2,252,232.22). He asserted that exhibits 49 and 51 have the same information, however the figures were revised in exhibit 51 on the basis that he received updated information from the client.

[24] During cross-examination, Mr. Wright's response to Counsel's suggestion that the contractor included variations in his claim is that there were no variations because there were no instructions or approval from the clients for contractor's variations. He denied Counsel's suggestion that his report is biased or that the report was not done as an independent person.

EVIDENCE ON BEHALF OF THE DEFENDANTS

[25] Mr. Everaldo Hemmings is a construction manager and a Director of Benhem. He gave evidence on behalf of himself as the 1st Defendant and also in his capacity as a Director of the 2nd Defendant. He was contracted by Mr. Panther during the month of August, 2019 to provide a Bill of Quantities for his dwelling house in Hellshire Heights, St. Catherine for which the plan was approved by the Municipality of Portmore on May 7, 2019.

[26] He asserted that at a meeting held with the Panthers on June 14, 2020, it was discussed that the construction work would cost Nine Million, Four Hundred and Fourteen Thousand, Six Hundred and Seventy-Three Dollars and Nineteen Cents (\$9,414,673.19) and that a mobilization fee of twenty percent (20%) would be paid. He contended that the first contract was executed on June 26, 2020, the

mobilization fee paid on June 30, 2020 and though the work was scheduled to commence on July 13, 2020, it was delayed as on inspection it was discovered that the strip foundation design was not the adequate foundation as the site was rocky. He asserted that this issue was discussed with Mr. Panther and he instructed him to refer the matter to the municipality so that a new drawing could be submitted.

[27] Mr. Hemmings asserted that the new drawing was done during July 2020 and on August 19, 2021, he revised the Bill of Quantities which amounted to Thirteen Million, Four Hundred and Seventy-One Thousand, Nine Hundred and Forty-Four Dollars and One Cent (\$13,471,944.01). He averred that a new contract was submitted to the Panthers for execution on September 7, 2021 and that the work commenced on September 7, 2021. The municipality inspected and approved the material, setting out the building, the foundation reinforcement, excavation, columns and beams of the building on November 1, 2021 and the first interim payment was submitted and accepted by the Panthers.

[28] He contended that in January 2022, Mr. Panther requested a variation to change the windows from sliding to projecting windows and on January 18, 2022, Interim payment Certificate #2 for Two Million, Four Hundred and Fifty-Six Thousand, Eight Hundred and Seven Dollars and Twenty-Seven Cents (\$2,456,807.27) was submitted to the Panthers. Mr. Hemmings accepted that Mr. Panther showed him a picture of the window to be purchased but indicated that this was done after they had the discussion. He stated that on January 27, 2022, Mr. Panther informed him of further variations to the building to include, relocation of the washroom to the ground floor, additional 300mm hangover to the upper floor reinforced concrete slab, redesign of the upper floor plan to include an additional bedroom, bathroom and the relocation of the existing bathroom on the original plan. This new layout of the upper floor was sent to Mr. Hemmings and he was informed that the revised drawing would be submitted to the municipality. During cross-examination, Mr. Hemmings accepted Counsel's suggestion that his business partner made

suggestions for the variations to the upstairs of the building, however he asserted that the decision to change the washroom downstairs was the Panthers.

- [29]** Mr. Hemmings asserted that he did not have sufficient funds to pay the workmen which forced him to stop work on the project. He sent an email requesting the outstanding payment on Interim Certificate #2 on March 11, 2022 and when payment was made on March 22, 2022, he resumed the work that he was able to do as he was still awaiting the revised approved plan from the municipality. He also made arrangements to acquire the windows requested in the first variation.
- [30]** Mr. Hemmings asserted that Mr. Panther sent a series of emails requesting onsite meetings with all the parties as he feared that the workmen were not carrying out the work to required specification and the project delayed. He contended that the project has had many variations which is the root of the delay and there had been many interferences from Mr. Panther which made his workmen very uncomfortable. He further contends that the drawings had been submitted to the municipality on three (3) separate occasions and have had eight (8) mistakes.
- [31]** He stated that at a meeting on July 18, 2022, he agreed to part company with the Panthers and that a site visit was to be conducted on July 20, 2022 for a final measurement and submit his Final Payment Certificate. Another meeting was held on August 14, 2022 where he submitted his final invoice in the sum of One Hundred and Four Thousand, Nine Hundred and Eighty-Six Dollars and Twenty-Three Cents (\$104,986.23).
- [32]** During cross-examination, Mr. Hemmings accepted Counsel's suggestion that he left the August 14 meeting prematurely and he accepted that he received Dr. Wright's report identifying the defects on September 13, 2022. He acknowledged receipt of the demand letter in September 2022 and that the claim was filed in February 2023 however, he denied Counsel's suggestion that he had enough time to repair the defects as by that time the matter was already before the Court. He

denied that he is in breach of the contractual obligation to complete the extension on the Panthers' property by the agreed date and failed to remedy the defects.

Evidence of Rudal McFarlane

[33] Mr. Rudal McFarlane gave evidence in his capacity as a Quantity Surveyor. In arriving at a conclusion that the sum of Two Hundred and Ninety-Five Thousand, Nine Hundred and Fifty-Three Dollars and Eighty-One Cents (\$295,953.81) is due and payable to Mr. Hemmings, he made an assessment of the work executed on the property after reviewing the contract dated September 7, 2021, the evaluation report prepared by Mr. Philmore Turnbull dated March 2023 and he had a meeting with Mr. Hemmings on August 21, 2024. He opined that the best practice approach is to have the input from both sides but in the absence of the Panthers' input, he considered the 2023 March evaluation report.

[34] Mr. McFarlane did not have the benefit of seeing the defects as at the time of his evaluation, the work was already covered up. He was unable to substantiate any of the defective work mentioned in the Turnbull report as his assessment was conducted two (2) years after the alleged defective work. He asserted that it would have been beneficial to see date stamped pictures of the defects as simply seeing pictures of the alleged damage could not tell whether the damage occurred because of poor workmanship or as a result of the elements since the work was suspended for so long. He also indicated that it is best not to cover up the work before an assessment is done by the other party.

SUBMISSIONS ON BEHALF OF THE CLAIMANTS

[35] Counsel for the Claimants, Ms. Ceejaie Cummings asserted that the issues that the Court should consider to determine the outcome of this matter are:

- a. whether the Defendants breached the construction agreement by failing to complete the construction in time or at all.

- b. whether the Defendants failed to meet the specifications for the windows.
- c. whether the Defendants failed to carry out the construction in a good and workmanlike manner.
- d. whether the Defendants failed to remedy the defects identified.
- e. the quantum of damages payable to the Claimant.
- f. whether the Defendants have a valid counterclaim.

[36] In supporting her position that the Defendants are in breach of a duty of care, Ms. Cummings posited that for a negligence claim to succeed, it must be shown that a duty of care was owed and there is a breach of that duty. She asserted that there is no dispute that the Claimants and Defendants operated under the construction contract dated September 7, 2021. Though the contract is unsigned by both parties, she asserted that both Defendants are properly named though the 1st Defendant sought to distance the 2nd Defendant from the claim.

[37] Counsel referred the Court to **Bolam v Friern Hospital Management Committee** [1957] 1 WLR 582 and submitted that whilst the present case is one for breach of contract, a duty of care is owed to the Claimants to be treated in the same way the Court treat with claims where negligence is pleaded. Counsel also referred the case of **X-Ray & Diagnostic Ultrasound Consultants Limited v Nelson, Basil, Basil Nelson & Associates (Consulting Engineers) Limited and Arel Limited** [2022] JMCC COMM 29 and submitted that the Court in that case concluded that the same circumstances that give rise to a cause of action against a professional in tort may also give rise to a cause of action in contract. She contended that at all material times the Defendants owed a legal duty of care to the Claimants to exercise professional skill, care and diligence as it was an expressed term of the contract that in carrying out their duty, they had a responsibility to ensure the works being done was properly supervised and carried out in good workmanlike manner.

[38] Ms. Cummings asserted that though the Defendants charged the sum of Two Hundred and Twenty-Five Thousand Dollars (\$225,000.00) for supervision as

evidenced in the Final Payment Certificate, the undisputed evidence is that the project lacked proper supervision which resulted in loss and damage and ultimately required remedial work.

- [39] Counsel submitted that a contractor's duty extends to meeting the specific needs and instructions of the employer. She argued that the 1st Defendant failed to provide the specific type of windows requested to be installed and he admitted during cross-examination that he acted hastily in ordering the windows. She submitted that the Claimants relied on the 1st Defendant's professional skill and judgment to carry out the work in accordance with their instructions and specifications. To support her position, she referred the Court to **Mirant-Asia Pacific Construction (Hong Kong) Ltd. and another v Ove Arup & Partners International Ltd and another** [2004] All ER (D) 12 (Oct) which applied the House of Lords' decision in **Henderson v Merrett Syndicates Ltd** [1994] 3 All ER 506 which states that where a person assumes responsibility for professional or quasi-professional services, a duty arises to exercise reasonable skill and care where the other party relies on those services.
- [40] Ms. Cummings asserted that the expert evidence of Mr. Philmore Turnbull, who is a Quantity Surveyor should be accepted as he conducted an independent site visit on February 3, 2023 and produced a report supported by photographic evidence identifying the defective and incomplete work, quantified the costs of remediation and provided a coherent, fully documented and professional assessment.
- [41] Counsel argued that the Claimants acted reasonably and responsibly after the abandonment of the work. They engaged the services of a structural engineer to assess the condition of the work and prepare a comprehensive evaluation report. They also obtained the services of a Quantity Surveyor to quantify the defects and value the work completed. On the contrary, the 1st Defendant was always aware of the defects, failed to remedy them and consciously rejected adverse expert evidence identifying the defects. He took no steps to address the findings and did

not request an extension of time to remedy the defects. She submitted that the Defendants failure to perform the works in a good workmanlike manner and the subsequent failure to remedy the defective work can be considered a substantial breach of contract between the parties.

[42] As it relates to the counterclaim, Ms. Cummings submitted that the sum being claimed is flawed and should not be accepted by the Court. She asserted that firstly, the Counterclaim ignores the defects and incomplete works as evidenced in the expert reports of Dr. Wright and Mr. Turnbull, it contains an amount paid for the windows that is in dispute and thirdly, the material fluctuation has no accompanying receipts as proof that the materials were purchased. Counsel relied on the case of **Williams v Fitzmaurice** (1858) 3 H & N 844 where it was held that the contractor could not recover for the floor boards because although they were omitted from the specification, it was clearly not to be inferred from the language of the specification that the contractor was to do the flooring. Counsel averred that if the Court finds that the Counterclaim should succeed, the amount can be offset by the damages to be awarded to the Claimants.

[43] Ms. Cummings concluded her submissions stating that the 1st Defendant's premature suspension of the project prior to its completion date when the project was far from complete constitute a repudiatory breach entitling the Claimants to treat the contract as terminated and to recover damages.

SUBMISSIONS ON BEHALF OF THE DEFENDANTS

[44] Counsel for the Defendants, Ms. Carol Davis denies that the Defendants are in breach of the contract and instead argues that the variations and delays caused by the Claimants as well as waiting for the approval of the amended drawing from the Municipal Corporation of Portmore contributed to the Defendants not being able to complete the contract as scheduled.

[45] Counsel asserted that the issues to be determined by the Court are:

- a. Whether the 1st Defendant failed to complete the contract or whether the contract was terminated by agreement between the parties.
- b. Whether the Defendant failed to exercise reasonable skill, care and diligence in the construction of the building expansion.
- c. Whether the Defendant failed to ensure that the construction tasks were done in a workmanlike manner or merchantable quality.
- d. Whether the order of the windows done by the Defendant and paid for by the Claimant was in breach of the agreement between the parties.
- e. Whether the Claimant is entitled to the sum of \$4,588,478 for special damages.
- f. Whether the Defendant is entitled to the sum of \$104,986.23 for his counterclaim.

[46] Counsel asserted that the contract was terminated by agreement between the parties and this can be gleaned from the email communication between the parties starting with email dated May 8, 2022 tendered as Exhibit 2. In that email, Mr. Panther requested an urgent meeting and indicated that no further work should be done until the meeting is held. Counsel argued that in the email of June 22, 2022 the question of separation arose. Mr. Hemmings indicated that his employees will not attend the meeting and Mr. Panther requested the final invoice. Counsel submitted that the authorization of the preparation of the final invoice signalled an agreement that the contract had come to an end.

[47] Counsel asserted that the Defendants notice in writing was not given as stipulated in paragraph 4.1 of the contract which allows for Extension of Time. Nevertheless, notice was not required because the parties agreed to terminate the contract before the Defendants were in a position to assess the extent of the extension of time required. Ms. Davis referred the Court to **Nicola Lauder v Lydia Jones et al** [2015] JMSC Civ 68 which references **Molloy v Liebe** [1910] L.T.R. 616 where

Lord Macnaghten refers to the principle that there is an implied promise that the contractor would be paid for work done at the request of the employer. Counsel submitted that the principle is applicable where what is required is an extension of time.

[48] As it relates to whether the Defendants failed to exercise reasonable skill, care and diligence in the construction of the building, did work in a workmanlike manner or in merchantable quality, Ms. Davis submitted that all the issues are similar in nature however, she argued that the phrase merchantable quality is a phrase usually applied to complaints about sale of goods and is not applicable to work done. Counsel submitted that the standard of care expected of a contractor exercising reasonable care is that the skill is expected of the ordinary skilled man exercising and professing that skill. She referred the Court to the Bolam test as set out by Justice E. Brown in **Nicola Lauder v Lydia Jones**.

[49] Counsel submitted that there is no particularization of what the 1st Defendant did that was negligent or in breach of care, instead the Claimants appear to rely on three (3) reports provided by experts and described as defective work. She argued that there was no agreement between the parties as to what the defects were and the document signed by the parties tendered as Exhibit 35 shows no list of alleged defects. Counsel argued that the Claimants' experts accepted that exposure to the elements could have affected the condition of the property from June 2022, the time when the construction stopped to February 2, 2023, when a site visit was conducted by Mr. Turnbull. Counsel also argued that the reports relied on by both experts are inconsistent with each other.

[50] Ms. Davis asserted that the contract provided for variations and the Defendants acted entirely within the terms of the contract as it relates to the purchase of the windows. She asserted that there is no dispute that the Claimants requested the variation, that the Defendants valued it and the Claimant paid for the windows. She stated that the windows are presently at the manufacturers workshop,

awaiting delivery and installation. It is submitted that the Claimants were aware when the windows were purchased and the 1st Defendant is not in breach when he acted in accordance with instructions.

[51] Counsel argued that the Claimants are not entitled to Special Damages. She submitted that special damages must be specifically pleaded and proven and it not clear as how the alleged sum of Three Million, Nine Hundred and Ninety-Eight Thousand, Two Hundred and Seventy-Eight Dollars and Twenty-Nine Cents (\$3,998,278.29) arose.

[52] Ms Davis contended that the Defendants are entitled to the sum claimed in the Counterclaim as it arises by simple arithmetic deducting the amount paid by the Claimants from the final certificate provided by the Defendants. Counsel argued whilst Mr. McFarlane's report was not based on consultation with the Claimants, it supports the sum being claimed on the Counterclaim.

DISCUSSION

[53] Having reviewed the pleadings, the evidence and taken into account the submissions, the issues for the Court to consider are:

- i. Which party is in breach of the construction contract?
- ii. What is the quantum of damages to be paid by the party who is in breach?
- iii. Whether the Counterclaim has merit

Which party is in breach of the construction contract.

[54] There is no dispute that the parties entered into a construction contract for the expansion of property located at 21 Stalactite Way, Cave Hill, Hellshire in the parish of St. Catherine. A contract dated September 7, 2021 was tendered into evidence however, it was not signed by the Claimants. Throughout the evidence no issue was taken as to whether it was in operation or not. In fact, during cross-

examination, Mr. Panther admitted that the contract on which he sued is a written one. It is clear from the evidence led that the parties relied on its terms to govern the contractual relationship. Further, based on the conduct of the parties throughout, they demonstrated a clear intention to be bound by it. It is also evident that the contract between the parties has now come to an end.

[55] The issue has also been raised as to whether the 2nd Defendant is a proper party to the contract and to the claim. The uncontested evidence is that the 2nd Defendant was formed because the Claimants indicated a preference to make payments to a company and not to the 1st Defendant himself. Although the contract itself said it was made between the Claimants and the 1st Defendant, the name of the company appears at the head of the written contract. In letter signed by Mr. Hemmings, he signed as director of the company. The interim payment certificates were signed by Mr. Hemmings in his capacity as director of the company and the receipts were issued in the name of the company also signed by Mr. Hemmings as director. In these circumstances, I find that the company is a proper party to the Claim.

[56] The main question to be determined by the Court is which party breached the terms of this construction contract. In determining this, there are other issues to contend with. Those issues can be summarized as follows:

- i. Whether the 1st Defendant owed a contractual duty of care to the Claimants to properly supervise the building expansion and did the 1st Defendant breach that duty?
- ii. Whether the 1st Defendant failed to meet the specification of the Claimants for the supply of windows?
- iii. Whether the contract was terminated by the 1st Defendant or by an agreement between the parties and whether 1st Defendant failed to complete the contract in time or at all.

- iv. Whether the 1st Defendant failed to exercise reasonable skill, care and diligence failed to carry out the construction work in a good and workmanlike manner resulting in poor quality and defective work and whether the Claimants suffered loss and damage as a result?

Whether the 1st Defendant owed a contractual duty of care to the Claimants to properly supervise the building expansion and did the 1st Defendant breach that duty?

[57] It is clear that supervision of the work site was a term of the contract. If there was any doubt in this, the fact that the 1st Defendant charged a specific fee of Two Hundred and Twenty-Five Thousand Dollars (\$225,000.00) for supervision would have settled this. The Claimants, in particular Mr. Panther raised concerns throughout the construction process of the manner in which the 1st Defendant carried out the construction and supervised the work site. They were concerned that there was significant wastage of material and the contractor employed to oversee the work on the property was not always present. They alleged that supervision was inadequate and sought to lead evidence to substantiate this. Mr. Panther gave evidence that the person who was first assigned the task of supervising the works was removed from the work site and was not replaced by anyone and that despite Mr. Hemmings' promise that either himself or Mrs. Bennett-Miller would be on site each day, this did not take place.

[58] According to Mr. Panther, it is this lack of supervision that caused workmen to be absent from work and to do the work poorly and cause wastage resulting in defective work. He averred that supervision of the project was inadequate and in proof of that the Claimants highlighted the testimony of the 1st Defendant that he kept no records of site visits or workmen attendance. They also asserted that Mr. Hemmings himself rarely visited the site. Mr. Hemmings however insisted that there was supervision on site and that a Mr. Douglas was the supervisor. The

Claimants accepted that Mr. Douglas was seen on site but maintained that he was never introduced to them as supervisor.

[59] The fact that they were never introduced to Mr. Douglas as a supervisor suggested some lapse in communication between the parties, but the Panthers have not denied that Mr. Douglas was present on the site. This supports the 1st Defendant's evidence that Mr. Douglas was in fact present on the work site as a supervisor. Additionally, there is no direct correlation to any lack of supervision and any defects flowing therefrom to satisfy the court on a balance of probabilities that this was the cause of the defects.

[60] Although Mr. Panther makes these assertions about the effect of the lack of supervision and its effect on the nature of the work, he is not qualified to make these assertions. He is by profession a lecturer in computer programming and he accepted during cross-examination that he has no qualification in any aspect of construction. The Claimants have failed to prove or lead evidence on which I can find or draw any reasonable inference that there was an absence of proper supervision and that this resulted in loss and damage to the Claimants.

Whether the 1st Defendant failed to meet the specification of the Claimants for the supply of windows?

[61] The parties agreed that there was an oral agreement in relation to the type of windows that were to be installed on the building. According to the Claimants, they requested louvre windows which provide one hundred percent (100%) airflow. The 1st Defendant initially suggested projecting windows but the Claimants rejected this suggestion and they told the 1st Defendant that they wanted louvre windows and showed him a sample of what they wanted. Further they showed him pictures of the windows and even took him to a location and showed him similar type window

to what they wanted. Thereafter Mr. Hemmings said he was going to buy the windows and assured them that it was the right windows.

[62] They paid for the windows but the windows bought were not the ones that they had requested and they insisted that they had not agreed to any variation. At first Mr. Hemmings indicated that he was not shown pictures but then said he was shown pictures after the dispute arose. During cross-examination he insisted on his position that he had not bought the wrong windows, but it is clear from the transcript evidence that he was seeking to justify that the windows they ordered were no different from the ones he ordered.

[63] During the meeting when the discussion surrounding the windows came up he agreed that he would not charge for the windows but said he would use them on another project. However, when he prepared the final estimate he included the windows as a charge. When confronted as to this change in position his response was that he was entitled to change his mind.

[64] As on assessment of the evidence surrounding the windows, I find the evidence of Mr. Panther to be more credible than that of Mr. Hemmings and accept that the Panthers did show Mr. Hemmings pictures of the windows they wanted but that the windows purchased by Mr. Hemmings were different from the ones they had agreed on. Mr. Hemmings pointed out that they signed off on the invoice with the windows when it was sent to them to which Mr. Panther agreed but explained that he wasn't paying attention to what the invoice stipulated. In any event Mr. Hemmings was the one in charge of ordering the windows and so it was his duty to ensure that they were the type requested by the Claimants.

[65] As contractor, the 1st Defendant is obliged to meet the needs and instructions of his employers, the Panthers. In ordering windows that were different from the ones shown and agreed to, he breached the agreement for the provision of windows.

[66] The failure to provide the correct windows amount to a breach but it could not be described as a material breach. It is important at this juncture to make a distinction between a breach which would result in the termination of a contract and one which would result in a claim for damages. The **Nicola Lauder** case was relied on by both parties. It is of note though that only the Supreme Court version of the case was referred to although there is the Court of Appeal decision, which after much analysis, affirmed the decision on liability but allowed the appeal on damages. Nonetheless the categorisation of the terms of a contract still remain useful. At paragraph 104 E Brown J (as he then was) said:

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

[67] The failure by the Defendants to provide the type of windows requested by the Panthers constitutes a minor breach so would be considered a breach of warranty, the effect of which would give rise to a claim for damages but would not bring the contract to an end. The Claimants having already paid for the windows, this issue can be resolved by the sum paid being deducted from any sums they are required to pay to the Defendants. Any claim made by the Defendants for compensation in relation to the windows would therefore fail.

Whether the contract was terminated by the 1st Defendant or by an agreement between the parties and whether 1st Defendant failed to complete the contract in time or at all.

[68] The contract between the parties was for a fixed term and was slated to expire on June 20, 2022. It is the Claimants' case that it was the 1st Defendant who terminated the contract with only eight (8) days remaining on the agreed completion date, and that in so doing he breached the contract. According to the 1st Defendant, he suspended the work because an issue has arisen regarding the windows which needed to be resolved and that the termination of the contract was by agreement between the parties.

[69] It is therefore important to examine the circumstances under which the works ceased and determine whether it was by way of a mutual agreement or a unilateral statement by the 1st Defendant. I accept the Defendants' argument that the question of whether the contract was terminated by agreement is best shown by an examination of the emails between the parties at the time of the breakdown.

[70] The first relevant email came from Mr. Panther on May 8, 2022 and was tendered in evidence as exhibit 2. It reads as follows:

Dear Mr. Hemmings,

.....

I am therefore using this medium to request an urgent meeting onsite with Mrs. Bennett-Miller, Mr. Duen Douglas, the plumber and I to discuss the proposed routing of the pipes for the bathroom in the front upstairs bedroom.

It is my recommendation that you advise Mr. Douglas not to proceed with any further work relating to that bathroom until an onsite meeting with all parties is held, to discuss the way forward with this very critical matter.

*Kind regards,
Christopher Panther*

[71] Contrary to the 1st Defendant's contention there was nothing in this email that stated that no further work should be done on the project, what is stated is that no further work relating to the upstairs bathroom should be done until the meeting is held.

[72] After the email of May 8, 2022, both parties continued their communication on the issues surrounding the construction on the property and in the next email dated June 22, 2022 at 7:47pm, tendered as exhibit 17, Mr. Hemmings indicated that *“I am suspending all activities on the project until after June 28, 2022 and an agreement is made about the conditions under which the project will continue.”* In response to this email, Mr. Panther questioned whether the work stoppage will aid in the completion of the project for June month end. By email dated June 23, 2022 at 7:18am Mr. Hemmings responded that the question of discussion separation can be discussed at the meeting on June 28, 2022 and ended the message by saying *“I will be preparing my final invoice submission for the termination of the contract”*. Mr. Panther responded in an email by saying *“Please go ahead and prepare your final invoice”*. Mr Hemmings then indicated that he will have to come on site to do his final measurement.

[73] On behalf of the Defendants, it was contended that Mr. Panther, by authorizing the preparation of the final invoice, was signalling to the 1st Defendant an agreement that their contract had come to an end. However, I do not think that statement by Mr. Panther is an agreement as the context in which it was said has to be carefully scrutinized. On a careful examination of these emails, it is clear that it was Mr. Hemmings who stated that he is suspending all activities until after a meeting. This was a clear statement which was supported by the fact that the work on site was in fact suspended.

[74] The next question is whether Mr. Hemmings breached the contract when he suspended the work on the project. Could the issues have been resolved without a completion suspension? The suggestion from Mr. Panther was that the work on the bathroom be suspended as there was some issue with the plumbing. This was one bathroom out of the entire house and no reason has been given as to why the rest of the work could not have continued while the work in the bathroom was put on pause. There was nothing in the contract providing for a suspension of the entire

works on such a basis. To suspend the entire work in these circumstances does not appear to have been within the contemplation of the parties to the contract bearing in mind that this contract had a fixed completion date.

[75] In cross-examination, Mr. Hemmings accepted that the suspension was influenced by his deteriorating relationship with Mr. Panther who he alleged was undermining his authority. Mr. Hemmings accepted during cross-examination that the abandonment of the project would cause the Claimants to incur substantial expense. At the time he suspended the work he had not yet or near completed his obligations under the contract. The evidence does not support, on the part of Mr. Hemmings, a contractual entitlement to suspend the works. Therefore, when he did so, despite it being conditional on them meeting, it was a unilateral decision made by him and constituted a breach.

[76] According to Mr. Hemmings, the work would be suspended pending the meeting so it seems that his intention was not to terminate the contract at that point, however, the events that transpired did nothing to remedy the actions of Mr. Hemmings and prevent the termination of the contract. The meeting did not take place on June 28, 2022 due to illness of Mrs. Bennett-Miller. A series of correspondence transpired after that. It was not until July 20, 2022 that the parties met. It was at the July 20, 2022 meeting that they decided to part company and that Mr. Hemmings would visit the site on July 30 to conduct the final measurements and submit his final payment certificate. The meeting took place by zoom and was recorded and the transcript tendered into evidence.

[77] At the beginning of the meeting Mr. Panther set the stage by indicating that *“Mr Hemmings has withdrawn the crew from the twenty about the twenty first or so of June and a they haven’t returned to do anything. I think it is reasonable to assume that there is no interest in completing the project. Right? So at this point, it’s just to decide how we part company.”* Mr. Hemmings responded asking to correct his statement and then embarked on a discussion surrounding the window. Mr.

Hemmings later stated that if there is a stalemate we need to be discussing separation. He went on to say he will be preparing his final invoice submission for the termination of the contract. The discussion continued following which Mr. Hemmings stated *"Hear how we go ahead with this now..."* followed by *"I am going to prepare my final estimate. ...I am going to prepare my final invoice without the windows...It is going to include material o-site, and it's going to include variations on the project so far....the final invoice will include the work completed so far, materials on site and variations. I have to come and directly measure."* He told Mr. Panther what he referred to as his rights to be there or have someone there on his behalf. He acknowledged that the onus is on him to ensure that the steel work is passed by the Parish Council.

[78] When the question was posed by Mrs. Bennett-Miller to Mr. Hemmings as to whether he wanted to continue with the project, he at first said it was up to Mr. Panther but when Mrs. Bennett-Miller pointed out that he was the one that said "termination" from the beginning, he eventually stated what he intended to do which was to do the measurements, inspection of the steel work but that he would leave the window out of it. Thereafter the meeting ended abruptly.

[79] The meeting did not result in any agreed position and it is my view that it was a unilateral decision by Mr. Hemmings to bring the contract to an end. Mr. Hemmings acknowledged that they would have to get a new contractor. He stated what he was prepared to do which was that he would come to the site and retrieve his tools, ensure that the steel work was up to the standard required by the parish council and do the measurement of the work he has done to date so that a final invoice can be prepared. At the time he did this he had not satisfied all his obligations under the contract.

[80] Furthermore, there is the question of whether the contract even if it had continued could have been completed within the time agreed. It was a term of the contract that completion would be by June 30, 2022. According to the 1st Defendant, the

delay was caused by the Claimants because of the variations they made which required approval from the Municipal Council and the failure to pay an interim bill on time. The Claimants accepted that they made variations to the original plan, which included the addition of an upstairs balcony, as well as the inclusion of a washroom and that these variations needed to be approved by the Municipality and so would have delayed the construction. The Claimants also accepted that there was late payment by them of Interim Payment Certificate Number 2.

[81] On behalf of Mr. Hemmings, it was contended that he could not have proceeded to complete the project when there was an outstanding approval from the Municipal Council, therefore the completion date would have had to be extended until sometime after the actual approval was received. Therefore, it was the Claimants who frustrated the contract when they requested variations which had to be approved by the Municipality and up to the time the work was suspended, there was no approved plan on the project. Further that the completion date would have to be extended and Mr. Hemmings could not properly prepare an extension of time until after he received the approval.

[82] However, when Mr. Hemmings was asked whether it was his established practice to continue works to other aspects of the building, notwithstanding pending municipal approvals, he accepted that waiting on this further approval to include the washroom did not hinder the project.

[83] Mr. Hemmings also suggested that the issue of the windows also led to the delay in his completion within the agreed time and had some bearing on the approval process however when pressed he accepted that the issue of the windows had no connection to any pending Municipal approval and that other aspects of the work could have continued.

[84] On behalf of the Claimants, it was contended that Mr. Hemmings, being the contractor and recognising that the approval process would have caused some

delay, should have applied for an extension of the time within which he was required to complete the works. Clause 4.1 of the contract provides for an extension to be requested where the contractor is of the view that the contract would not be completed on time. Clause 4.1 provides as follows:

Extension of Time

If it becomes apparent that the Works will not be completed by the date set for completion in the Work Schedule agreed between the parties for reasons beyond the control of the Contractor, including compliance with any variations issued under this contract, whose issue is not due to the default of the contractor, then the contractor shall so notify the Employer in writing and the Employer shall make in writing, such extension of time for completion as may be reasonable.

Reasons within the control of the Contractor include any default of any nominated subcontractor employed by or under him or in connection with the Works and of any supplier of materials for the Works.

- [85] In response the Defendants' argument is that the 1st Defendant did not notify the employer of a need for extension because the parties agreed to terminate the contract before he was in a position to assess the extent of the extension of time required. The Defendants' reliance on the authority of **Nicole Launder v Lydia Jones** regarding the principle of an implied promise that the contractor be paid for works done even if there is no written variation, does not advance the case for the Defendants as in this case the contract provided for the request for an extension to be done in writing.
- [86] Based on clause 4.1, Mr. Hemmings in order to comply with the provisions of the contract should have applied for an extension. It is also not clear to me why Mr. Hemmings could not have applied for an extension before getting the approval as he ought at the very least to have appreciated that this would result in some delay.
- [87] At the time the work was suspended there were only eight (8) days left for completion. On all accounts the remaining work could not have been completed in the time left. In all the circumstances, I accept on a balance of probabilities that having failed to apply for an extension and having suspended the contract without

any good justification, the 1st Defendant failed to complete the contract within the agreed time.

- [88] The effect of the failure to complete within the agreed time has to be considered in the context of the legal position. It has been recognised in a number of cases that the failure to complete a building within the time agreed does not entitle the employer to dismiss the contractor but is a breach of warranty entitling him to damages. This is clearly set out in the case of **Alval Limited v the Attorney General of Jamaica** Claim No. 2004/HCV00380 (unrep) delivered October 28, 2011 relied on by the Claimants. Edwards J at paragraph 17 said as follows.

[17] Usually in construction contracts finishing late does not entitle the employer to dismiss but is a breach of warranty entitling him to damages. An exhaustive review of the authorities reveals that construction contracts are rarely determined for lateness. Damages are usually provided for in the contract calculated as a fixed sum for delay for each day, week or month. This is referred to as liquidated damages. For liquidated damages to be payable there must be a fixed date for completion, that is, a definite date from which to act as a starting point in calculating the damages due.

- [89] The Defendants' failure to complete within the time agreed alone would therefore not have terminated the contract. This contract therefore was terminated based on the actions of the 1st Defendant. In the circumstances in which he terminated the contract he is in breach and therefore the Claimants would be entitled to damages for this.

Whether the 1st Defendant failed to exercise reasonable skill, care and diligence or failed to carry out the construction work in a good and workmanlike manner resulting in poor quality and defective work and whether the Claimants suffered loss and damage as a result?

[90] It was an express term of the contract that the contractor shall carry out his duties with reasonable skill, care and diligence and use materials and workmanship of the quality and standards as specified by the Bureau of Standards of Building Works.

[91] The case of **Nicola Lauder v Lydia Jones** relied on by the parties also supports the fact of this being an implied term of a building contract. At para 110 of the judgment, the learned Judge expressed:

“In the absence of that absolute warranty, the duty of the contractor is to exercise reasonable care and skill...”

[92] Counsel for the Claimants argued that the evidence before the Court is that the work was not done in a good and workmanlike manner and that the expert evidence establishes that the property suffered from defects. According to the Defendants, all the work done was of good building standard and with respect to the structural integrity of the building and it was also in keeping with good building standards and approved by the Portmore Municipal Corporation.

[93] The Claimants, in particular Mr. Panther gave some evidence of what he observed taking place on site and suggested that the work was not being carried out according to the requisite standard, however the evidence before this Court is that Mr. Panther is not an expert in the construction field and so I am unable to place much weight on his evidence in this regard. As no expert has given evidence as to being present on the site and making observations as to how the work was carried out so as to determine whether it was done with reasonable skill and diligence and in a workman like manner, the best evidence the Court is left with is the evidence of the experts who assessed the work onsite after the construction by Mr. Hemmings had halted.

[94] Counsel on behalf of the Defendants contended that as the contract was not completed by agreement of the parties, the usual procedure for defects could not

be implemented. She submitted that the parties should have identified and agreed to the defects and the contractor be given an opportunity to correct same. This course of action may have made the process simpler, in that Mr. Hemmings would have had an opportunity to correct any defects made. The Claimants response to that is that they made efforts to do this and had in fact engaged Dr. Shaun Wright soon after Mr. Hemmings suspended his work on the site. Mr. Hemmings during cross-examination confirmed his receipt of Dr. Wright's first evaluation report. It would have been up to Mr. Hemmings at this point, if he did not agree to this report to secure his own expert to assess the work and any defect and have it remedied. He did not do this. The Claimants could not therefore be faulted for going ahead and engaging another contractor to correct the defects and complete the works.

[95] What remains is for the Court to consider the expert evidence given in the case. The Bahamian Supreme Court decision of **Clearlie Todman-Brown v Melvin Rymer**, Claim No. BVIHCV2009/0195 (unreported, delivered 11 May 2011) relied on by the Claimants supports the point that a claimant may discharge the burden of proving defects in construction works though the calling of expert evidence.

[96] Therefore, the question of the extent of the work on site and any defects detected would impact the question of whether the work was carried out according to the expected standard. Dr. Shaun Wright and two (2) other experts gave evidence in this case. Dr. Shaun Wright and Mr. Philmore Turnbull, quantity surveyor gave evidence in support of the Claimants' case. Mr. Rudal McFarlane, quantity surveyor gave evidence in support of the Defendants' case.

[97] Dr. Shaun Wright was engaged by the Claimants and on July 30, 2022 he did a walkthrough of the building and was accompanied by Mr. Hemmings. They both went through the Bill of Quantities following which they both signed it. Dr. Wright attempted to do a costing of his findings and thereafter the parties met with him. The 1st Defendant's version is that although he signed the Revised Bill of Quantities his understanding was that both he and Mr. Wright would prepare final

documents however Mr. Wright turned up at the meeting without any documentation and so he formed the view that the meeting has no purpose, so he left.

- [98]** Dr. Wright gave evidence that he is a structural and construction engineer. He produced two reports. Report one was titled "Construction Final Accounting Evaluation" and Report 2 was titled "Corrective Works Completed". Report one was done after an examination of the worksite on August 29, 2022. The stated aim was to determine the true cost of works completed to the standard, quality and execution by the contractor. It was said to include a comprehensive reviewing and assessment of the interim claims and final claim submitted by the contractor.
- [99]** The Particulars of the final claim submitted included variations-omission/addition, fluctuations- material, mobilization, works completed (actual) and payments honoured to interim claim. He identified defects and uncompleted work claimed to be omitted or deducted from final claim submitted: He identified defects and uncompleted which included poor quality of bonding roughcasting of walls and ceilings on the ground floor level and unacceptable flooring concrete finish surfaces requiring extensive corrective works. He also deducted the cost for the windows as the windows that Mr. Hemmings supplied were not the ones requested by the Panthers and they did not approve of it and the contractor had been paid for them. He arrived at a total sum due of Three Million, Eight Hundred and Eight Thousand, Three Hundred and Ninety-Seven Dollars and Forty-One Cents (\$3,808,397.41) as being due to the Panthers.
- [100]** His second Report dated October 23, 2024 was done after the corrective work had been completed at the premises. He arrived at a grand total of Two Million, Two Hundred and Fifty-Two Thousand, Two Hundred and Thirty-Two Dollars and Twenty-Two Cents (\$2,252,232.22). This did not include the sum for the delivery and installation of windows. The total sum in Report 2 differed from the total sum in Report 1.

[101] Mr. Turnbull is a quantity surveyor and produced a report dated March 2023. He stated that his task was to assess and ascertain the value of the work done on the proposed extension. He came to the conclusion that the project was 49% complete with some defective work. He stated the value of the work to be Six Million, Five Hundred and Thirty-Seven Thousand, Nine Hundred and Sixty-Five Dollars and Seventy-Five Cents (\$6,537,965.75) with material on site amounting to Sixty-Nine Thousand, Two Hundred and Seventy-Nine Dollars and Seventy-Six Cents (\$69,279.76).

[102] Mr. Turnbull also stated that the work done on site by the contractor had several defects which would need to be corrected. He showed how he arrived at the value of the defective work. He listed a number of defects that he observed which came under the headings hollow rendering, bulging in concrete beams and columns, honeycombing in concrete beams and columns, puncture in drainpipes and fittings and defective formwork to roof. He set out the sum to correct the defective work as being Eight Hundred and Twenty-One Thousand, Five Hundred and Five Dollars and Ninety-Eights Cents (\$821,505.98). When that sum is deducted from the total of the sum paid to the contractor and the material on site, this amounted to Five Million, Seven Hundred and Eighty-Five Thousand, Seven Hundred and Thirty-Nine Dollars (\$5,785,739) as being due to the Claimants.

[103] Mr. Rudal McFarlane on behalf of the Defendants prepared a Quantity Surveyor Report. His report assessed the work executed under the contractual arrangement. He relied on the Contract document, the Evaluation report prepared by Mr. Turnbull and the meeting with contractor representative Mr. Everald Hemmings on August 21, 2024. He conceded that normally the best approach to finalize reports and valuations would be to have inputs from both sides and that in the absence of that approach his evaluation report on the client's behalf is taken as client input. He also indicated that no pictures were able to be taken since the works would have been covered up by new works at the time he came into the picture.

[104] He commented on the defects set out in Mr. Turnbull's report and for each item said he was not able to substantiate or evidence the item and so could not include a comment. After analysing all the written information, he prepared a valuation of the works in place. It was his opinion that the value of the works including deposits and materials on or off site and inclusive of works by nominated sub-contractors amounted to Nine Million, Nine Hundred and Fifty-Four Thousand, Seven Hundred and Forty-Eight Dollars and Six Cents (\$9,954,748.06) and he deducted the total sum paid to the 1st Defendant which was Nine Million, Seven Hundred and Sixty-Nine Thousand and two Dollars and Seventy-Three Cents (\$9,769,002.73) and arrived at the figure of Two Hundred and Ninety-Five Thousand, Nine Hundred and Fifty-Three Dollars and Eighty-One Cents (\$295,953.81) as being the amount recommended for payment.

[105] Counsel for the Claimants argued that the work carried out by the Defendants was not executed to acceptable standards as opined by Dr. Shaun Wright who carried out a detailed inspection on July 30, 2022 and his report confirmed the existence of the defects. Counsel submitted that the Court should accept his assessment as it was based on actual measurement as well as a personal site visit conducted in the presence of the 1st Defendant. She asserted that Dr. Wright's report clearly sets out the methodology employed and includes photographic evidence of the defects complete with date and time stamps.

[106] Counsel also submitted that Mr. Turnbull's report, though done six (6) months after the project was suspended, sets out a detailed report of the defects on the property after an actual site visit was conducted.

[107] In contrast, Counsel asserted that the expert relied on by the Defendants should be rejected on the basis that Mr. McFarlane conducted a valuation of works that was already completed. She posited that he was engaged after the commencement of the proceedings, did not conduct a site visit nor arranged a joint

inspection and his report is based on information supplied by the Defendants solely. During cross-examination, Mr. McFarlane accepted that he was provided with selective portions of the Mr. Turnbull's report containing evidence substantiating the defects. Counsel argued that this undermines the credibility of the report.

[108] Counsel for the Defendants has pointed out that the Claimants' case in respect of the defects is inconsistent as the reports of Messrs. Wright and Turnbull are inconsistent with each other, particularly as it relates to the nature of the defects and the cost of correcting them.

[109] On an assessment of examination carried out by Dr. Wright, although he is relied on by the Claimants, he did his inspection in the presence of the 1st Defendant and so at the very least the 1st Defendant would have had some opportunity to point out what he chose to highlight. I agree with the Claimants that his report itself clearly sets out the methodology he employed which included photographic evidence of defects. Counsel for the Claimants submitted that Dr. Shaun Wright's report would provide a more accurate assessment of any defective work having conducted a site visit immediately after the work stoppage and that Dr. Wright being a structural engineer would have the requisite expertise to comment on the quality of work. However, as he is not a quantity surveyor he would not be able to quantify the loss.

[110] In light of this, Mr. Turnbull was engaged to quantify the remedial costs. Mr. Turnbull provided a detail of the defects on the property though his onsite visit was conducted six (6) months after the work stopped. It was argued by Counsel for the Defendants that the defects could be as result of the elements since the work was uncovered.

[111] Mr. McFarlane gave evidence on behalf of the Defendants. He started out with a distinct disadvantage as he did conduct a site visit of the premises. His report was

based primarily on the information supplied to him by Mr. Hemmings. Mr. McFarlane admitted that he did not conduct an onsite visit and his report is shaped from the contractor's narrative only. His report would be less credible. He accepted that he did not seek any input from the Claimants or any of their experts, nor did he assess the photographic evidence contained in Mr. Turnbull's report.

[112] I accept the contention made by the Claimants that he merely accepted Mr. Hemming's representations regarding material, quantities, and completion percentage without independent corroboration. He admitted that he was only provided with excerpts of Mr. Turnbull's report and nothing from Dr. Wright's report. He accepted however that these reports would have been informative. I agree with counsel for the Claimants that the failure on the part of Mr. Hemmings to provide only selected portions of Mr. Turnbull's report undermines the credibility of the Defendants' position.

[113] There are three (3) experts here for me to consider. I recognise that the findings of an expert do not bind me and that I can accept or reject any of the findings if I do not find favour with them. In my examination of the experts relied on by the Claimants, I recognise that there are discrepancies between the two but do not find they go to the root of the Claimants' case. On the other hand, the deficiencies inherent in the nature of the examination carried out by Mr. McFarlane render his report less acceptable than any of the Claimants' experts. I note that Dr. Wright and Mr. Turnbull have distinct professions and so their tasks were somewhat different.

[114] On a balance of probabilities, I find the expert evidence on behalf of the Claimants to be more credible and convincing. These two (2) experts conducted a site visit of the property, and their assessment was conducted closest to the time that the work was suspended. I am prepared to accept Mr. Turnbull's assessment that the work was only forty-nine percent (49%) complete, had defective work and the Claimants would have had to employ third parties to complete the work.

[115] I therefore accept that there were defects in the work carried out by Mr. Hemmings and so this leads to a fair inference that the work was not carried out in a workman like manner. Therefore, the Defendants are in breach of the contract. The next question is what then is the nature of the breach what effect it would have on the contract as a whole.

[116] The authority of **Nicola Lauder v Everett Brady** [2015] JMSC Civ 68 relied on by both Counsel is also instructive. At paragraph 153, Brown J stated as follows:

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

[117] In **Nicola Lauder v Everett Brady**, at paragraph 156, Brown J found that the character of the breach cannot be described as anything less than fundamental. He noted that the evidence of the quantity surveyor is that all the beams to accommodate the slab had to be removed and the timber sheet used did not comply with the design, so to get the roof as designed, everything had to be removed and to get the roof as designed.

[118] In the case at bar, the evidence is not that everything had to be removed but that the quality of work necessitated substantial corrective work which was done by Dr. Wright. The substantiates the Claimants' assertion that the Defendants failed to carry out the construction work in a good and workmanlike manner resulting in poor quality and defective work. This would be a material breach would not only

have brought the contract to an end if it had not ended but would also make the Defendants liable to compensate the Claimants.

What is the quantum of damages to be paid by the Defendants?

[119] In the authorities relied on with respect to building contracts, the normal measure of damages is said to be the cost to cure. In **Aldith Simms v Howard Gordon** [2018] JMSC Civ 192, relied on by the Claimants, the court pointed out at paragraph 44 that the cost to cure is that the Defendant *must pay for the cost of putting the defects rights or the cost of completing the work*.

[120] Both Dr. Wright and Mr. Turnbull have given evidence of the cost of the defective work. Mr. Turnbull opined that the costs to correct the defective work is estimated at Eight Hundred and Twenty-One Thousand, Five Hundred and Five Dollars and Ninety-Eight Cents (\$821,505.98). Counsel for the Claimants argued that the Defendants provided no evidence to dispute the corrective work and their expert Mr. McFarlane could not speak to any corrective work since he prepared a valuation of work that was already completed. I am in agreement with this.

[121] However, there are discrepancies between the reports of Dr. Wright and Mr. Turnbull. On one hand the Claimants are relying on the assessment of Mr. Turnbull that the corrective work amounted to the sum of Eight Hundred and Twenty-One Thousand, Five Hundred and Five Dollars and Ninety-Eight Cents (\$821,505.98) and on the other hand they are relying on the report of Dr. Wright who details the corrective works done by him which amounted to Two Million Two Hundred and Fifty-Two Thousand Two Hundred and Thirty Dollars and Twenty-Two Cents (\$2,252,232.22). This report was prepared December 2023. My calculations of the receipts supplied by the Claimants do not reflect the sum claimed and in some instances, the receipts are duplicated. In my calculations, I arrived at a figure of

One Million, Six Hundred and Sixty-Eight Thousand Thirty-Nine Dollars and Sixty-Four Cents (\$1,668,039.64).

[122] In light of this error in calculation, it renders Dr. Wright's report less than credible than that of Mr. Turnbull. Mr. Turnbull's report was also not without fault. He accepted in cross-examination that he made an error in relation to the percentage figure he arrived at for finishes. Mr. Turnbull when asked about the deterioration of the work site due to the lapse in time between when the work ceased and when he made his assessment, he accepted that some of the observations would be as a result of exposure to the elements. I have taken into account these issues in Mr. Turnbull's report but I find his report to me more acceptable than that of Mr. McFarlane.

[123] Additionally, as it relates to the figure for defect, he arrived at the figure after an assessment of the actual defects unlike Dr. Wright who assessed it based on what was spent to do the corrective works. I note that the corrective works were effected months after the assessment by of Mr. Turnbull. I take into account the fact that Mr. Wright being engaged to make the corrective works, his evidence would not be as independent as that of Mr. Turnbull. I also find Mr. Turnbull being a quantity surveyor to be more qualified to speak on costing. I find the report as to the cost of the defective work provided by Mr. Turnbull to be more acceptable. I am prepared to make an award for the sum of Eight Hundred and Twenty-One Thousand, Five Hundred and Five Dollars and Ninety-Eight Cents (\$821,505.98) for the cost of the defective work.

[124] Counsel for the Claimants also contends that the Claimants are entitled to the sum of Three Million, One Hundred and Sixty-Six Thousand, Seven Hundred and Seventy-Two Dollars and Thirty-One Cents (\$3,166,772.31) for work not done but claimed as done. This sum is a deduction from the amount paid by the Claimants in the sum of Nine Million, Seven Hundred and Eighty-Four Thousand, Seventeen Dollars and Eighty-Two Cents (\$9,784,017.82) from the value of the work

assessed by the Quantity Surveyor in the sum of Six Million, Five Hundred and Forty-Seven Thousand, Nine Hundred and Sixty-Five Dollars and Seventy-Five Cents (\$6,547,965.75) and the value of the materials found on site in the sum of Sixty-Nine Thousand, Two Hundred and Seventy-Nine and Seventy-Six Cents (\$69,279.76).

[125] There are also some discrepancies with the sums arrived at by Dr. Wright and the sums arrived at by Mr. Turnbull. Dr. Wright's assessment of the value of the work done by the contractor was the sum of Five Million, Nine Hundred and Seventy-Five Thousand, Six Hundred and Twenty Dollars and Forty-One Cents (\$5,975,620.41). He subtracted this from the total paid to the contractor and arrived at Three Million, Eight Hundred and Eight Thousand, Three Hundred and Ninety-Seven Dollars and Forty-One Cents (\$3,808,397.41) as being the total sum due to the contractor. Mr Turnbull's assessment as to what is due amounts to Three Million, One Hundred and Sixty-Six Thousand, Seven Hundred and Seventy-Two Dollars and Thirty-One Cents (\$3,166,772.31) resulting in a different figure from that of Dr. Wright. In light of the fact that Mr. Turnbull is a quantity surveyor I accept his assessment over that of Dr. Wright and find that that is the sum which the Defendants would be required to refund to the Claimants.

[126] I find that the sum of Three Million, One Hundred and Sixty-Six Thousand, Seven Hundred and Seventy-Two Dollars and Thirty-One Cents (\$3,166,772.31) is due to the Claimants. This sum when added to the cost to cure the defective work amounts to a total of Three Million, Nine Hundred and Eighty-Eight Thousand, Two Hundred and Seventy-Eight Dollars and Twenty-Nine Cents (\$3,988,278.29).

[127] Ms. Cummings also argued that the sum of One Million Dollars (\$1,000,000.00) for loss of amenities and inconvenience for having to give up a bedroom to facilitate storage for the purpose of construction should be awarded to the Claimants. Counsel urged upon the Court paragraph 46 of **Aldith Simms v Howard Gordon** where Palmer-Hamilton J quoted a section in **Ruxley Electronics & Construction**

Ltd. v Forsyth [1995] ABC.LR. 06/29 where the plaintiff's enjoyment of his swimming pool, though perfectly usable, had not been constructed to the agreed depth under the contract. Ms. Cummings submitted that the Claimants were forced to use one of their bedrooms for the storage and the abandonment of the project contributed to significant delay and inconvenience until the corrective work was carried out.

[128] I find the cases mentioned above to be distinguishable. In the **Ruxley Electronics & Construction Ltd v Forsythe** case the way the swimming pool was constructed presented a permanent inconvenience which it would not make sense to cure so an award was made on this basis. In the **Aldith Simms** case the inconvenience had to do with the Claimant being unable to move into her house and reside elsewhere. Having to give up a bedroom to facilitate storage could not be placed in the same category of inconvenience and would more be an attempt at mitigating loss. I am not prepared to award an additional sum for loss of amenities.

Whether the Counterclaim has merit?

[129] On behalf of the Defendants it was submitted that the counterclaim arises by simple arithmetic deducting the amount paid from the final certificate which amounts to One Hundred and Four Thousand Nine Hundred and Eighty-Six Dollar and Twenty-Three Cents (\$104,986.23). Counsel asserts that Mr. McFarlane's report supports this figure. Further that Mr. McFarlane's report supports the 1st Defendant's claim to be paid for the amount due on the final invoice. Counsel for the Claimants submitted that the Defendants' unilateral suspension and abandonment of the work constitute a breach of the contract and they are not entitled to any sum on Counterclaim.

[130] Mr. McFarlane's report has a recommendation for payment of Two Hundred and Ninety-Five Thousand, Nine Hundred and Fifty-Three Dollars and Eighty-One Cents (\$295,953.81) which is a totally different figure from what was submitted. In

any event, I have already accepted that the Claimants settled all the Interim Payment Certificate which has also been accepted by Mr. McFarlane in his report. I have also accepted that the work was incomplete and the Claimants employed a third party to complete the work that the Defendants were originally employed to conduct. I found instead that it is the Defendant who is liable to pay the Claimants. The Counterclaim therefore fails.

[131] My Orders are as follows:

1. Judgment on the Claim is for the Claimants with damages assessed in the sum of \$3,988,278.29 with interest at a rate of 6% from the date of judgment to the date of payment.
2. Judgment on the Counterclaim is for the Counter Defendants/Claimants.
3. Costs to the Claimants to be taxed if not agreed.

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Stephane Jackson-Haisley
Puisne Judge