[2016] JMSC Civ. 72

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 0891

BETWEEN	PANSY LOGAN	CLAIMANT
A N D	JEAN LORIMER	1ST DEFENDANT
A N D	PAULA ANNETTE MITCHENER	2ND DEFENDANT
A N D	CLAUDET ANDREA HEDMAN	3RD DEFENDANT

Miss Arlene Beckford instructed by Brown, Godfrey and Morgan for the Claimant.

Willwood Adams instructed by Robertson, Smith, Ledgister and Company for the Defendants.

Heard: November 24 and 25, 2013 & May 12, 2016

Construction Agreement - Dwelling House - Breach- Employer or Contractor - Time of the essence - Delay- Variation of work - Escalation costs - Method of valuation - Illegality - Duress - Misrepresentation - Defect liability clause - Damages - Interest.

Daye, J.

[1] The claimant, Pansy Logan on the 28th February 2010 sued the three defendants for the sum of $3,237,125.00 with interest. This sum represents alleged escalation costs arising out of an agreement of the 17th August 2007 between the claimant and the

defendants to build a dwelling house and flat. This dwelling house and a flat was to be constructed on a lot of land at Battersea, Ingleside, Mandeville, Manchester.

[2] The claimant is an interior designer, business woman and building contractor. She has been engaged in building development in the parish of Manchester for some fifteen (15) years. She built several houses for clients during these years.

[3] The defendants are mother and daughters. The 1st defendant is a retired midwife who lived and worked in England for many years. She returned to live in Manchester, Jamaica in 2001. The 2nd and 3rd defendants are daughters of 1st defendant and reside in England and are teacher and nursing officer respectively. They joined with their mother in this agreement to have this house built on this lot of land in Mandeville, Manchester.

Pleadings-Claim

[4] The claimant filed a Claim Form and Particulars of Claim dated 25th February 2010 alleging that a debt of $3,237,125.00 and interest at a rate of 6% per annum was due and owing to her by the defendants which they refused to pay. She claimed this sum was admitted by the defendants and they executed mortgage instrument in her favour for this sum. The claimant contends that this sum was escalation costs incurred during the construction of a dwelling house and flat for the defendants which she duly completed in accordance with the terms of the construction agreement they made on the 17th August, 2007. The contract she claimed provided that the contract price was $19,000,000.00 together with any increase incurred by escalation or otherwise.

Defence

[5] In a Defence filed on the 18th May 2010 the defendants disputed the claim on the grounds that the claimant committed several breaches in the construction of the house which they remedied at their expense. This is really a claim for set off of damages. The defendants also contended the escalation costs cannot be reasonably justified.

In an affidavit supporting the Defence they raised the following:

(a) There was no building plan;
(b) There was no schedule of cost or quantities;
(c) The escalation cost submitted was incorrect;
(d) They paid the total of $27,000,000.00 for construction of the building which was far in excess of the contract price of $19,000,000.00
(e) A further sum of $3,237,125 escalation costs on $27,000,000.00 was unreasonable.

Counter Claim

[6] The Defendants counter claimed on the 29th July 2011 for the sun of $2,106,793.00 as the cost to correct and complete unfinished work done by the claimant on the dwelling house. They claimed the following:

(1) "…….

(2) Damages for breach of contract;

(3) Interest

(4) Costs"

[7] On the Particulars of the Counter Claim the following facts emerged:

(a) The defendants admit they signed both a -

(I) Nomination Agreement August 17, 2007 to purchase Lot 4, Volume1359 and Folio 508 from the claimant on which the house and flat were to be built, and an

(II) Agreement to design and construct a dwelling house August 17, 2007 at Lot 4, Battersea, Ingleside, Manchester.

(b) There is no challenge the defendants paid $16,020,000.00 on these agreements on August 17, 2007.

(c) They paid $660,000.00 on November 7, 2007 for extra work and some adjustment.

(d) There was no plan up to November 7, 2007 and

(e) no double garage as stipulated in the agreement; But the claimants explain the absence of these aspects or areas of the agreement;

(f) $900,000.00 was paid on January 17, 2008 for additional work;

(g) In January 2008 claimant spent all money paid but the construction work was stopped; once again the claimant explained the reasons for the state of the building at that time.

(h) The building had several faults which the defendant informed the claimant about and she promised to rectify. This is an issue between parties whether these faults were remedied.

(i) In February 2008 the claimant produced approved building plan from Manchester Parish Council.

(j) Around June 2008 claimant submitted escalation costs of $3,237,125.00 which Defendants objected to as unreasonable;

(k) Defendant signed promissory note to pay escalation costs to claimant. The 1st defendant explained that the claimant refused to hand over keys to the house unless she was paid the money demanded. Thus the defendants raised the issue of duress.

(l) The claimant did not remedy the defect as agreed and in return no further payment was made;

Defence to Counter Claim

[8] The claimant filed a Defence to this Counter Claim and Particulars of Claim on the 8th August, 2012. She responded as follows:

(a) Construction of the house started with a plan but it was not approved;

(b) There was delay in submitting the plan for approval due to the numerous changes the 1st Defendant requested;

(c) The costs of construction was increased due to the numerous changes requested by the 1st defendant before and during construction;

(d) The 1st defendant requested an underground water tank. This was additional work and costs in excess of $660,000.00;

(e) The additional sum of $900,000.00 was not sufficient to complete the construction;

(f) The claimant gave 1st Defendant a statement that escalation cost was over $5,000,000.00. After JNBS disbursed a $8,000,000,00 loan to the 1st defendant. This sum was paid to the claimant who still complained that there was a shortfall.

(g) It was then the escalation costs of $3,237,125.00 was negotiated with the 1st Defendant who promised to pay this sum.

(h) The 1st Defendant signed an agreement on the 10thJune, 2008 for this sum i.e Promissory Note.

(i) The 1st Defendant executed a mortgage instrument for this sum on the 23rd December 2008.

(j) All work to complete the building at request of 1st Defendant was done before keys were handed over. There was no agreement to do further work.

(k) As a result as of the delay in paying the escalation costs, the claimant lost her property to Pro Hardware Ltd. which she had to pledge. She incurred interest charges for $253,000.00 from her supplier Nesbeth who she did not pay in time.

[9] Based on the pleadings the issue of facts hereunder are in dispute:-

1. Was there an approved plan at all for the construction of this dwelling house? The answer is yes in the totality of the evidence.

2. Was there delay in obtaining a plan? The answer is yes on the totality of the evidence .

3. Who was responsible for the delay? The claimant was on the totality of the evidence.

4. Was there a schedule of costs relative to this plan? The answer is no on the totality of the evidence.

5. What was the method if any, used to fix the contact price of $19,000,000.00 for this house. It was a fixed price contract without quantities.

6. Were there delay in completing the house i.e breach of time of completing 105 days? The answer is yes on the totality of the evidence.

7. Were there variations and/or modifications by the 1st Defendant to construction? The answer is yes on the totality of the evidence.

8. Was there delay in payment of contract sum by the Defendants? The answer is yes on the totality of the evidence.

9. Was there an agreement to pay the escalation cost of $3,237,125.00 to the claimant? The answer is yes on the totality of the evidence.

10. Was this agreement obtained by duress by the claimant? The answer is no on the totality of the evidence.

11. Did she meet with an architect? The answer is yes on the totality of the evidence.

12. Were there terms of the escalation agreement that required the claimant to remedy defects which were breached? There was no independent verification of alleged breaches.

13. Is the Defect Liability Clause of 180 days applicable to the claimant? The answer is yes on the totality of the evidence

14. Was there fraudulent misrepresentation of a material fact i.e to complete building in 105 days? The answer is no on the totality of the evidence. But negligent mis-representation issue was raised but was not pleaded or proved.

15. Was the construction stalled due to lack of funds by the Defendants or mismanagement and inefficiency by the claimant? Both parties contributed to the delay of construction.

Documentary Evidence

[10] An agreed bundle of documents were admitted with the consent of counsel for the parties. These documents were admitted as Exhibits 1-28. The exhibits disclose a chronology of events that are relevant to the issues that arise on the pleadings and on the case.

[11] The time sequence of action by the parties relative to this construction agreement bears upon their conduct which is a factor that could assist the court as trier of fact and its findings some of the issues in dispute. I consider the following events and time.

(i) On 17th August, 2007 Nomination Agreement, Exhibit 1 was signed by claimant/contractor for sale of Lot 4 to Defendants/Purchaser

(ii) On 17th August 2007, Agreement for Construction of House, Exhibit 2 was signed by Contractor/Claimant and Defendants/Employers.

(iii) 6th November 2007 receipt of $660,000.00 from Decorous Limited to Jean Lorimer for first payment of extra work – Exhibit 23.

(iv) On 17th January 2008 payment of $900,000.00 for extra work endorsed on typed description of extra work – Exhibit – 24

(v) 17th January 2008, copy of Mandeville Cambio receipt of purchase by Jean Lorimer of $900,000.00.

(vi) 13th February 2008, Purchaser's Statement of Account to close sale of land at Lot 4 Battersea by attorney – Oliver Llewellyn showing consideration off $24,000,000.00 and balance due of $8,369,750.00 – Exhibit 22.

(vii) 18th March 2008, Valuation Report of Thomas, Forbes and Associates Ltd of Lot 4 Battersea at request of Pansy Logan - value incomplete was $23,800,000.00 – value on completion $36,500,000.00 – Exhibit 7

(viii) 12th May, 2008, Letter of Undertaking by attorney Keith Smith to attorney Oliver Llewellyn to pay mortgage proceeds of $8,000,000.00 from JNBS on behalf of the Defendant for sale of land – Lot 4 Battersea – Exhibit 5.

(ix) Exhibit 6 – Letter of June 10th 2008 from Defendants promising to pay $3,237,125.00 by September 30, 2008 inclusive of interest. Requested conditions for Promissory note - completion date by August 6, 2008, no further escalation cost.

(x) December 23rd 2008, Instrument of mortgage executed by Defendants to pay $3,237,125.00 with schedule of payment of mortgage at rate of interest at 6% per annum for period of 6 months. Exhibit 8

Agreements

[12] It is pertinent to examine the terms of the agreements made between the parties. One critical clause material to the dispute between the claimant and defendants is the contract price. In fact there are two agreements or contacts between the parties. One is to purchase land to build the dwelling house in question (Nomination agreement) and the other agreement to construct the dwelling house on the land purchased by the

defendants (Construction Agreement). Both of these were signed in 19th August, 2007. (Exhibit 1 and Exhibit 2). By virtue of the latter agreement the claimant is the contractor and the defendants are the employer. The 1st defendant acted on behalf of her daughters – the 2nd and 3rd defendants.

Contract Price

[13] In item 3 of the schedule to the Construction Agreement the contract price is fixed at Nineteen Million Dollars ($19,000,000.00). The sum of Thirteen Million Five Hundred Thousand Dollars ($13,500,000.00) was paid and acknowledged by the contractor at the date of signing the Agreement and the balance was to be paid on completion. Item 6 of the schedule provides that completion to take place 105 days [3½ months] after execution of the Agreement. This means completion ought to have been on or around December 14, 2007. This term will be revisited when dealing with delay, time the essence of the contract and breach by either the contractor of employer.

[14] Returning to the contract price Clause 3 of the Construction Agreement stipulates the contract price is the sum in item 3 of the schedule "together with any increase thereto reasonably incurred" This would mean $19M plus any reasonable increase. The increase must be reasonable. This is one of the main complaints of the defendant/ employer that the increase submitted by the contractor was not reasonable. There are no clauses in the Agreement that direct what is to be a reasonable increase or how and who ought to determine the reasonableness of any increase in the event of any dispute or disagreement between the Defendants/Employer and the Claimant/Contractor.

[15] Absent from this agreement is the appointment of the services of any architect, engineer or surveyor to assist or guide the parties in respect of any disagreement about any terms(s) of the agreement. Neither is there any clause in the Agreement that refers disputes or disagreements between the parties to an arbitrator. The other term addressing contract price is clause 1 of the Agreement to purchase land where the sum of $5M was the consideration, i.e the price to purchase the land. This agreement acknowledged that defendants paid 2.5M as deposit and the balance to be paid not later than 105 days as the date of completion. This agreement was executed

simultaneously with the construction agreement. It was related by reference to the Construction Agreement.

[16] On 13th February 2008 attorney-at-law Oliver Llewellyn for contractor sent the defendants a purchaser's statement of account. This statement of account was decided as "Re: sale of house and land". This characterization is not correct and accurate, though it may have been convenient. This inaccuracy may have contributed or added some weight to how the disputed method of calculating increase costs or escalation was computed. This statement of account, among other things, listed the consideration of the sale of house and land as $24,000,00. Then it lists the deposit paid as $16,020,000.00 and a balance due of $8,369,750.00. The statement of account would be accurate if it describes the transaction between the parties as a 'sale of land and agreement to construct house. This difference would affect the parties as to what sum of money interest would be paid on.

Escalation Costs

[17] Provisions are made for adjustment upwards in the contract price during the and after completion of the construction under Clause 6 of the contraction agreement.

The factors itemized as influencing the contract price are:

(a) Variation of the plan and specification and work approved by the contractor and employer or any government authority.

(b) Modification to the dwelling house and flat due to unsuitability of land.

(c) Increase in the costs, rated and.ir changes for material, equipment, financial costs and taxes.

(d) Increase in labour and wage rates

(e) Devaluation of Jamaica dollar.

(f) Increase in contractor overpaid expenses.

(g) Increase to the construction cost as a result of certain delay.

Further there is provision that any increase for any of the factors above shall form an addition to the contract price. Then there is a material clause dealing with agreement of increase in the contract price. It reads:

> *"Any agreement between the contractor and the employer as to the amount of such increase in the contract price payable by the employer shall be final and conclusive and binding on the parties……"*

[18] The factor that features mainly about the increase in the contract price between the parties is variations. The claimant contends that the escalation costs was due to the many changes and additions that the first defendant made to the plan and the work during its construction between August 2007 when it commenced and construction was halted in January 2008. Also the claimant relied on increase cost of materials supplied in the valuation report as a factor for the escalation costs. She deponed in her witness statement the escalation cost was over $5M but this was negotiated in June 2008 to the sum of $3,237,125.00 by the parties. It is after this the first defendant signed a letter to pay the sum of $3,237,125.00 as escalation costs.

[19] The first defendant on cross-examination at trial on her witness statement accepts the signed agreement for the construction of her house with all the clauses dealing with contract price. She does not dispute that there can be an increase in escalation costs that adjust the contract price upwards. In particular she rejects that she was responsible for any variations that lead to increase to the contract price. The evidence is that she made adjustment to the work but they were all paid for before any claim for escalation costs. It was the claimant she contends was responsible for the escalation because she started the work without a plan and no proper method of costing the work.

[20] The authors of **Hudson's Building and Engineering Contacts**, 10th ed. (1970) at Ch. 9, pages 563,564 explain the effect of different types of building contacts, contract price, variation, fluctuations and adjustments. Addressing building contracts they state:

> *"Building contracts at the present day tend to fall into two broad categories, namely those where the extent and design of the work is not fully known at the time of the contract, where a schedule of rates or prices is usually used, and those where the work is sufficiently known, where contracts are usually either in the specification form without quantities (with a schedule of rates only for the purpose of valuing variations), or in a form with quantities (where the bills will govern the valuation of the whole work). Both types of contracts are "lump sum" contracts ……...they are contracts to carry out and complete define work for a price ascertained or to be ascertained."*

The editors address adjustment of prices at page 164 paragraph and 2 states:

> *"In contracts in the second category without bill of quantities, the price is a firm price, and any schedule of rates or bill of quantities which exist are designed solely for the purpose of placing a value upon the variations, whether by way of omission or addition……..In such contracts the contract price is, subject to variations, fluctuations……..a firm price. In contracts with bills, either party can require re-measurement of the work, and the price…….is recalculated upon the basis of the measurement of works actually carried out (while……will in regard to the greater part of the work involve recalculation of drawings rather than physical measurement of the site), using the schedule rates or bill of quantities for the purpose".*

[21] The instant agreement of the construction of the defendant's dwelling house and flat would fall into the category of a building contract without quantities where the contract price is fixed. There is a difference between bill of quantities and schedule of rates. In bill of quantities the quantities have been estimated opposite each item and

rate. These unlike schedule of rates are usually prepared professionally from contract drawings and specifications and are expected to be reasonably accurate.

[22] The nature of this construction agreement was relevant to the defendant's defence that the escalation cost was unreasonable. The thrust of the cross-examination of the claimant by counsel for the defendant is that where the contract price of $19 million was fixed for house and flat the claimant had no plan and no base cost to fix a price and later to claim any escalation. Such a challenge is impliedly founded on the premise that the construction agreement had to be one with bill of quantities. As **Hudson on Building Contracts** (supra) explains the agreement may be one with a fixed contract price, subject to variations and/or fluctuations. This does not mean that the contractor is not obliged to show the bases on which he arrived at a fixed contract price.

Plan

[23] One of the first steps in construction is that the skilled contractor is obliged to have a plan. The claimant represented herself to be an experienced and skilled building contractor. Under clause 2(2) of the agreement for construction of the house, the dwelling house to be built was described as "….the size, shape and construction shown and set out in the plan and specification thereof as provided by the contractor".

[24] The claimant admits that at time the agreement was signed there was no plan. Her explanation is that this meant there was no final plan but there were drawings and representations of the three (3) bedroom house and flats that were taken from a house plan book that the 1st defendant agreed to. In her witness statement she claims she obtained the services of an architect to prepare and submit plan to the Parish Council of Manchester for approval. The first defendant in cross-examination disputes that she met with any architect and changed or altered the building plans. She does agree that on one occasion she spoke to the person at the site who had drawings. This was a problem between the parties. It was material to the issue of changes and or variations in the agreement by first defendant to the work and to one of the factors under the

agreement that would result in the increase or escalation cost. It was also relevant to the conduct of the claimant who was challenged that she did not act in good faith from the beginning of the contract. There was an agreement eventually on the evidence that a plan was later approved by the Manchester Parish Council for building the dwelling house and flat after constructions started.

[25] It is endorsed on the Certificate of Title of land on which the house was to be built that any development of the land should be submitted to the local planning authority for approval before development started. The issue raised is: Did the claimant knowingly breached this regulation and what effect if any this has on the issue of escalation cost on this contract agreement.

Illegal contract

[26] The claimant agrees she committed a breach when she started construction of the dwelling house without any approved plan from the Manchester Parish Council. She explains that she got an attachment notice which was placed on the land, further it was her opinion the only consequence for her default was the Parish Council would impose a fine. The general rule is that a court will not enforce an illegal contract. This is a rule based on public policy that a court should not aid a party who engages in an unlawful act or illegal agreement. The application of this rule does create injustice many times to a party who is not an innocent in the transaction. A blameworthy party to an illegal transaction may benefit and profit from such a rule. This would be contrary to the policy behind the rule but this occurs at times.

[27] Consequently, the court devised exceptions to the general rule also based on public policy. One was that a guilty party should not profit from his wrong doings. The court allowed a remedy to a party to an illegal contract in some cases such as:

(a) where a party is, not in **pari delicto,** equally guilty. It allowed such party to recover loss,

(b) where mistake of fact render the claimant unaware of the illegality ;

(c) where the claimant was induced by fraudulent misrepresentation **(Hugh v. Liverpool Victory Legal Fraternity Society [1916] 2K, B482.)**

(d) claimant was induced to enter contract on some form of compulsion;

(e) where claimant repudiate the illegal purpose in time;

(f) claimant establish right to property transferred or money paid without relying on the illegal contract. **Bowsmakers Ltd v. Burnett Instruments Ltd. [1945] K B 65.**

[28] In **St. Johns Shipping Corporation v. Joseph Park Ltd. [1957] 1 Q.B 267 at 281,** Delvin J. discussed the effect of an illegal conduct in the course of contract. On the facts of the case the ship owner committed a statutory offence when he over loaded his ship in the performance of certain contracts for the carriage of goods. The ship owner was held entitle to sue to recover the freight, despite the illegality. The judge reasoned that the purpose behind the statute was to penalize the conduct which lead the contravention of the statute and not to prohibit the contract itself. The contract therefore remains enforceable. In this same case Delvin J. rejected argument that the violation of the speed limit in the course of performance of the contract would of itself render the contract unenforceable by the party guilty o the offence. In another case **Shaw v. Groom [1970] 2 Q B 504** a landlord committed an offence by failing to give his tenant a rent book. It was held the landlord was nevertheless entitled to sue for the rent because the purposes behind the legislation was to punish the failure to issue a rent book but not to invalidate the tenancy agreement.

[29] In the instant case the claimant by commencing construction of the house without the Parish Council's approval committed a breach of Parish Council rules and Regulations. She would have committed an offence. The defendants would not have been an equal part of it. This would be illegal in the course of the contract. On the principle of the cases above this would not disentitle the claimant to sue for the debt allegedly owed on the ground that the contract for construction of the house was

unenforceable. I accept the purpose of the rule that planning permission must be obtained before construction was to enforce compliance with this rule and not to render contracts made against the background of the breach of it unenforceable.

[30] The defendants cannot therefore avoid the claim for the alleged debt on this ground of illegality. The issue of fraudulent misrepresentation by the claimant will be addressed on the counter claim. (See paragraphs [31] [46] and [48]).

Time and delay and breach of contract

[31] The issue of the claimant's conduct give rise to other issues concerning whether the claimant breached the construction agreement and was not entitled thereby to sue for the debt. Also the claimant's conduct give rise to the claim of the defendants that the agreement to constructing the house was entered into by fraudulent and/or negligent misrepresentation and therefore they were entitled to damages for either of those torts. This issue is discussed on the counter claim. The time for completion of the payment of the balance of the purchase price of the land was set at (i.e. $2.5 million) was set at 105 days after the signing of the Agreement on the 19th August, 2007 (Clause 2 of Nomination Agreement)

[32] The time the contractor covenanted to construct the dwelling house and flat was also 105 days from the signing of the Agreement on the 19th August, 2007. (Clause 4 of Construction Agreement). There were clauses for extension of time if certain adverse conditions arose outside the control of the contactor. These conditions do not arise in the instant claim.

[33] A certificate of practical completion of the dwelling house and flat was prepared by a civil engineer on behalf of the claimant. It fixed the completion date as 28th November 2008 (Exhibit 4). This date would be outside the 105 days time frame agreed by the claimant/contractor. The claimant contends this delay of nearly twelve (12) months was due to 1st defendant's inability to fund the work and who was seeking a mortgage loan. On the other hand the 1st defendant claims it was the claimant's misrepresentation and failure to perform that caused the delay and the consequential

increase in costs which were not reasonable. The question still remains, does this disentitle the claimant to sue and succeed in her claim for the alleged debt?

[34] The answer would be if the defendants agree to pay the debt they would be bound. Any other claim for breach of contract due to delay would be for damages for breach of contract which the defendants have claimed in their defence. It does appear from the course of conduct between the parties that time was impliedly extended to complete the construction of the dwelling house. This may be inferred from the fact that construction was halted in January 2008 and then the 1st defendant commenced her application for a mortgage loan of $8M from Jamaica National Building Society in order to engage resumption of the construction of the dwelling house and flat.

[35] The parties under clause 6 of the agreement for construction mutually agreed that time shall be of the essence of the contract. The provision of this clause is:

> *"Time shall be of essence of the contract and or the failure of the employer on the due date to pay any sum payable…….or punctually to do any act or thing which by this agreement is required to be done by him the contractor shall……..."*

The contractor may exercise the power to terminate the contract or allow it to continue though this was not a waiver. The contractor was authorized to charge interest in the event of nonpayment of any money due. Again the question is : Does this clause apply to the alleged debt? The alleged debt arose out of promise to pay escalation cost under the agreement. There was a condition of the promise that the contractor should complete building by August 6, 2008.

Promise to pay

[36] Reference was already made to the clause that the parties have made an agreement as to the amount of any increase to the contract price. Such an agreement appears to have been made between the parties in a letter dated June 10, 2008 (Exhibit 6). The letter is signed by the 1st defendant and on behalf of the 2nd and 3rd defendants. It reads:

"We the under signed do promise to pay you (Pansy Logan) the sum of three million two hundred and thirty seven thousand, one hundred and twenty-five dollars ($3,237,125.00) by September 39, 2008. We also request a mini contract to substantiate this promissory note stating that":-

1. House will be completed and hand over by 6th August 2008 (6.8.08)
2. There must be no further escalation cost.
3. Definite completion in order to apply to JNBS for an extension date of commitment for mortgage financing.
   This could either be 4th July including working days or 30th July excluding working days."

[37] Endorsed and initialled by the 1st defendant on this promissory note was a term that the sum to be paid was inclusive of interest. The claimant sought to secure the payment of this sum by obtaining an Instrument of Mortgage prepared by attorney at law Barlow Ricketts. The mortgage was a second mortgage over the land on which the house was built. It was dated December 23, 2008. It was for the sum of $3,237,125.00 and at an interest of 6% per annum for 6 months. It contained a 6 month schedule of payment. The 1st defendant admits there was no payment made on any of these agreements. She explained in cross-examination among other things, that the promissory note was made on condition that the house was to be completed on a specific time and there would be no further escalation cost. She alleged the house was not completed on time even though there was a certification of practical completion. Many things were left incomplete. It is true that the promissory note was conditional and there was a dispute by the 1st defendant that the claimant did not satisfy the conditions. Nevertheless the agreement to pay was binding and conclusive. The defendants' remedy would be not to refuse payment, but make a claim for damages for breach of this supplemental agreement.

Duress

[38] Another reason the 1st defendant made no payment on any of the agreements to pay was she claims the agreement i.e. promissory note was made because the claimant refused to hand over keys for her to take possession of the house unless she paid the amount for escalation costs. The claimant's version is that this sum for escalation was negotiated by the parties. So the 1st defendant's position is that she was coerced by the claimant. At common law duress consists of:

(i) Actual or threatened physical violence and imprisonment and sometimes threat to goods – **The Evia Luck** [1992] 2 A.C. 153…

(ii) Threatened criminal proceedings

(iii) Implied threat of criminal proceeding

(iv) economic duress lately developed by common law (See **Contract Law, Ewan McKendrick** paragraph 17. 2)

[39] The effect of duress is to make the contract voidable. Duress must be of the person and may be of goods. There is no evidence by the 1st defendant of any threat or actual violence by the claimant to her or of any threat of criminal proceedings against her. There appears to be some hard bargaining by the claimant. But this does not amount to duress in law. The other circumstance where coercion may be relied on by a party to a transaction is a claim of undue influence in equity. One party would have to be in a dominant relationship in relation to another such as the class of fiduciary relationship. The parties here were two adult experienced women. Economic duress is where the person uses his superior economic power in an illegitimate way so as to coerce the other party to agree to a particular set of terms per **Kerr, The Siboen and the Sibotre** [1976] 1 Lloyds Rep. 293 applied in **R v. Attorney General for England and Wales** [2003] U.K. P.C 22. Economic duress is pressure amounting to compulsion of the will of the victim's (i.e. vitiate victim's consent) and the illegitimacy of the pressure. There should be no alternative course open to the innocent party. Factors that are taken into account to determine illegitimate pressure are: bad or good faith of a

person applying the pressure, did victim protest, did victim affirm contract (relevant to threats to breach contract). In any event those are two features that appear in the circumstances of the agreement to pay the alleged debt. Exhibit 6 is a promissory note personally prepared by the 1st defendant. The language of it was clear. The conditions stated indicate that the writer was quite aware of her rights and was acting voluntarily. Then the mortgage instrument was prepared by a lawyer after discussions with the parties. It was in the same amount of money as the promissory note. There were more specific terms of payment schedule and interest rate. So it cannot be reasonably made out that the 1st defendant made these agreements, under duress and therefore the agreement to pay the debt was voidable i.e. to be set aside.

Variations

[40] The claimant's contention is that the escalation costs that gave rise to the debt was due to variation. The 1st defendant agreed she made variations to the construction during the work. These variations were paid for, she claimed by payment of the additional sum of 1.6 million dollars. The claimant admits receiving the sum of money for the additional construction of a underground water tank and excavation of the space for a double car garage. But, say the claimant there are other separate and different variations. The 1st defendant admitted under cross-examination that she contracted for a three bedroom house and flat. She also accepted that the flat which was originally a two storey flat turned out to be a single level flat and it had two bedrooms. The flat also was constructed in the area originally designated for the double garage. In cross-examination she explained that the area the flat was being built on was taking away the best view from her house and she objected to this. The flat was built as an income earner. The conclusion cannot be avoided that there were variations to the work i.e. the building and these were with the consent of the 1st defendant. This was a factor that would lead to an increase in the contract price. There was no express term how to value the increase.

Method of Valuation

[41] There was no appointed architect, engineer or surveyor under the agreement. The parties did not have the benefit of these services. At certain stages during the course of the contract there was an architect who prepared a plan for approval. There was an engineer who supplied the Certificate of Practical completion and later a quantity surveyor sent a report as well as a valuation.

[42] The 1st defendant's counsel challenged the method of calculation of the escalation costs in cross-examination, based on the valuation report. (Exhibit 7). He submitted that the valuation was misleading and false because there was no plan from which to firstly obtain a fix contract price. Then secondly, there was no base cost from which to assess any increase on escalation cost. He submitted these costs were wrong and unfounded.

[43] The valuation report and the reliance on it by the claimant may not be the ideal or best source of valuation in the circumstances where the construction of the dwelling house started off without an approved plan. It was a construction without bill of quantities and one for a fixed price. Such contracts according to **Hudson on Building Contacts** are frequently used in building contracts. But the valuation report was some guide for negotiation by the parties and the parties agreed to escalation costs after negotiations.

Defect Liability Clause

[44] The first defendant claims damages of $2,106.793.00 for breach of construction agreement. Her contention was that she had to incur expense to remedy defects on the building after she took possession. She relied on her Quality Surveyor Report dated July 1, 2011 (Ext. 27). This assessment of the value of work was based on the contract documents and used the rates for the year 2007. The assessment was based on the Jamaican Standard Method of Measurement of Building Works (2nd ed., December (1987) and current supplements issued by the Jamaica Institute of Quantity Surveyors.

[45] The claim that there were un-

remedied defects to the building when the 1st defendant took possession in 2008 was another point of dispute between the parties. The claimant accepted that she agreed to remedy defects on the building and did so, but in any event these were minor defects. The 1st defendant had submitted a hand written inventory of things to be remedied. There is a discrepancy in the inventory of the 8th December 2008 and the Quantity Surveyor's report which mentioned details and items of additional things to be remedied. The Quantity Surveyor's report would be based on the assumption that the contract for construction was a measured contract. But it was shown that the contract was one for a fixed price and made without quantities.

[46] In any event, the claimant contends that she is protected by the Defect Liability Clause in the construction agreement from any liability for defect after 180 days. This clause (6B) provides that the contractor:

The defendants' claim was outside the 180 days and was not for structural defect. The contract was protected from liability under this clause.

> *"shall be relieved from any liability of any nature whatsoever .... in respect of the said dwelling house and flat, unless structured defects due to material workmanship not in accordance with clause 2 hereof in walls, roofs, flooring or foundation shall appear or arise within one hundred and eighty (180) days of completion of the said dwelling house and flat.....". Liability would only arise in structured defects to walls, roof and floor."*

Misrepresentation & Damages

[47] The 1st defendant counter claimed for damages for misrepresentation which is a tort. The thrust of the defendant's submission on the head of damages is that the claimant fraudulently represented that she was experienced and skilled in construction of houses because she stipulated that she could complete the house of that size and style within 105 days and she knew she could not do so. Counsel for defendants submitted the defendant relied on the claimant's skill and knowledge to their detriment and have suffered loss. He said where the defendant acted falsely because she

claimed the debt was due for escalation costs and later she told attorney-at-law Barlow Ricketts the money was payment owed for the land on which the house was built. Counsel relied on an Affidavit filed which was part of the bundle of exhibits. The claimant denied she told the Attorney this. The affidavit was not tested in cross examination and I am unable to place weight on it to contradict the claimant. I do not find she gave this reason to the Attorney Mr. Barlow Ricketts.

[48] It was decided in the House of Lords decision in **Derry v Peek (1889**) Vol. XIV A.C. 337 that in an action of deceit, the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation had been made knowingly, or without belief in truth or recklessly without caring whether it be true or false.

Lord Herschell opined (at p.325 para.2):

> *"In my opinion, making a false statement through want of care falls far short of, and is a very different thing from, fraud and the same may be said of false representation honestly believed though on insufficient ground".*

[49] The director on the facts of the case discussed above were held not to have made any false representation on a prospector that stated that new tram carriage damage would be used by steam power and not by horse power which the authorities subsequently did not approve. On the facts of the instant case, when the construction for the dwelling house and flat was halted, according to the Valuation Report in 2008, the building was 70 percent complete. Bearing in mind that there was a dispute that the reason the construction ceased was due to the lack of funds by the 1st defendant and the 1st defendant had made variations that had adjusted the contract price upwards sitting as a reasonable man, I cannot hold that the claimant knowingly made a false representation that she would complete the building in 105 days. The claimant may have misjudged the time of completing the construction of the building as well as the cost of completing it. But such misjudgment is not actual proof of fraud. The 1st defendant has therefore not made out a case for damages against the claimant for fraudulent misrepresentation.

Negligent Misrepresentation

[50] A claim for damages for negligent misrepresentation may arise against the claimant. The House of Lords in **Headly Byrne v Heller (1964)A,C**, 465 first laid down the principle that was applicable for such a claim. Lord Reid stated as follows:

> *".... it should now be regarded as settled that if someone possessed of special skill undertakes, quite irrespective of contract, to apply that skill, for the assistance of another person who rely upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful enquiry, a person take it upon himself to give information or advice to, or allow his information or advice to be passed on to another person who, as he knows or should know will place reliance upon it, then a duty of care will arise".*

Lord Diplock who delivered the majority judgment of the Privy Council in **Mutual Life and Citizens Association Co. Ltd. v Evatt [1970] A.C**. 497 explained the principle of a duty of care developed in Headley Bryne (supra.). He stated in this passage:

> "*But here and in cases cited within the principle laid down in Headly Byrne the only duty in question is a duty to take reasonable care before giving the advice".*

Then he said in another passage containing the ratio of the decision:

> *"In our judgment when an enquirer consult a businessman in the course of his business and makes it plain to him that he is seeking considered advice and intend to act on it in a particular way, any reasonable business man would realize, that if he chooses to give advice without warning or qualification, he is putting himself under a moral obligation to take some care. It appears to be well within the principle established by the Headley Byrne case to regard his action in giving such advice as creating a special relationship between him and the enquirer and to translate his moral*

obligation into a legal obligation to take care as is reasonable in the whole circumstances".

[51] Sinclair Haynes J. in **Life of Jamaica v Dr. Velma Nicholson-Lee C.L. 1995/L096** del. 23rd June 2009 discussed negligent misrepresentation arising from an advertisement placed by the insurance company inviting the public to purchase one of its insurance policies. The learned judge relied on the opinion of Lord Denning M.R. that the duty of care for negligent misrepresentation in **McInerrary v. Lloyds Bank [1974]** Lloyds R. 245 at 251. There Lord Denning showed a professional person, ordinary persons, and persons who made statements to induce others to enter into a contract, had a duty to take care in giving the statement or advice, where it is known that the person who receives the advice will relay on it.

[52] In **Appleton Hall Ltd. v T. Geddes Grant Distributors Ltd.** (2011) JMCA 30, Harrison J.A. discussed and applied the decision of the House of Lords in **Caparo Industries [1990]** A.C. 605 of the requisite principle governing a person's duty of care for giving advice or information to another who relies on it and suffered financial loss. He found that liability and the principle did not require that a person who gives advice or information had to be an expert or in the business of giving advice as the **Mutual Life** case suggests. He held that the Court of Appeal was bound by a decision of the House of Lords on the common law. Therefore **Caparo Industries** was followed and not the Privy Council's decision of Mutual Life**.**

[53] This was a case that the Appellant commenced proceedings against the Respondent for breach of contract and negligent misrepresentation in advising them to purchase a particular fungicide for use in spraying papaya and plants which affected the plants and caused loss of production and income. In **Caparo Industries**, Lord Oliver identified four factors necessary before for a duty of care for giving information or advice, the branch of which, that cause a financial loss result in liability to arise or negligent statement or advice: They were that:

(1) The advisee should make known the purpose for which he needs the advice

(2) The adviser knows the advice will be communicated to the advisee or an ascertainable class

(3) The adviser knows the advisee will set upon the advice for the purpose stated without independent enquiry

(4) The advisee acted upon the advice to his detriment

[54] Applying this principle to the instant case, it is not strictly one where the 1st defendant sought advice for the building of her house for the claimant. It is one where the claimant represented in the written contract, she would complete the building in 105 days. The 1st defendant did rely on this representation when she signed the contract. She relied on this without any independent enquiry. The claimant ought reasonably to have known the 1st defendant would rely on the representation. The 1st defendant did act on this reliance and suffered a detriment. There was a delay and she suffered loss. Some of the delay to complete the building was due to the 1st defendant and some was due to the claimant. The loss would be an increase in the contract price due to increase in costs of material. The Valuation Report gives some guide to the percentage movement of prices. The 1st defendant did not really attempt to prove the loss due to negligent misrepresentation. She adduced proof of loss due to expenses incurred to remedy defects in the building.

Damages

[55] The claimant's claim for damages for the loss she sustained is outlined in her witness statement (para.142 to 150, viz.

(1) The use of $3,237,125.00 owed to her.

(2) Interest on this sum of money which she would have invested

(3) Almost lost her residence – notice of payment of mortgage May 2011 from Total Credit Services.

(4) Lost interest of rate at 22 percent per annum on the said money owed.

(5) Lost property valued $7,500,000.00. Request payment of$7,500,000.00 paid less $2,000.00 paid by the hardware.

(6) Incurred an additional $235,000.00 in interest to creditor Mr. Nesbeth.

(7) Interest on any sum ordered by the Court.

(8) Incurred legal fees and expense.

The test for recovery of damages for breach of contract and in this case breach of the agreement to pay a debt i.e. the escalation costs.

[56] The authors of **McGregor on Damages**, 17th ed., 2003 explained that the object of an award is to give the claimant compensation for damages, loss or injury he has suffered. This may be pecuniary or non-pecuniary loss which comprises financial and material loss, such as loss of business profit or expenses and physical pain or injury to feelings respectively**.**

Contract

[57] The general test is that a claimant can only recover in respect of losses which were within the reasonable contemplation of the parties at the time of entry into the contract. The rule originated in **Hadley v Baxendal (1854) 9 Exch. 341**. This was a claim for loss of profit as damages. Alderson B. held that the damages recoverable were on two limbs:

> "*natural" according to the usual course of things or as a result that is reasonable in the contemplation of the parties. The two types of losses i.e. "natural" and "special" for breach of contract arose in* ***Victoria County (Windsor) Ltd. v Newman Industries Ltd. [1949] 2KB 528.*** *The claimant had sued to recover loss of profit for late delivery of a boiler for their business.*

The Court of Appeal held that the defendants were liable for loss of profits which flowed naturally from their breach of contract but not for loss of profit from some of exceptionally lucrative contract that they did not know about (see **McGregor on Damages** Ch. 6 para. 6 -145 and 6-152).

Tort

[58] Denning M.R. in **Spartan Steel & Alloys Ltd. v Martin & Co. (Contractors) Ltd**. [1973] 1 Q.B. 27 held in a claim for damages in tort where liability was admitted as to what damages were recoverable. He found damages were recoverable where defendant's negligence covers actual physical damage to persons or property or economic loss (i.e. pure economic loss) independent of physical damage. The learned judge based his decisions on policy grounds. The contrast between the decisions of claims for damages in comparison to tort, raises unsettled issues about the test of damages in contract and the test being one and the same**. (See Heron II- Czarniknow) Ltd. V. Koufos [1969] 1 A.C. 350)**

Claim for Debt

[59] In **McGregor on Damages** (supra.) the learned authors of Chapter 25 said that the normal measure of damages for failure to pay money is nominal damages and interest for detention of the debt . Interest is not awarded for damages at common law, but statute in England gives the Court discretion to award simple interest. The learned authors relied on the dicta of Romer L.J. in **Trans Trust S.P.R.L. v Danubian Trading Co. Ltd. [1952] 2 Q.B. 297** that he did not subscribe to the notion that damages cannot be recovered for non-payment. The principle is that damages is within the contemplation of the parties if it is recoverable.

[60] The claimant's claim is based on a debt. This was an agreement to pay escalation costs arising out of the main agreement to construct a dwelling house and a flat. It is therefore relevant to determine what was the loss in contemplation of the parties when the agreement to pay the escalation cost was made and also the loss that would flow naturally i.e. in the ordinary course of things for the failure to pay the debt in the time agreed.

Liquidated Damages

[61] There is just one other consideration on damages. There is a liquidated damages clause in the nomination agreement i.e. to purchase the land on which to build the house and flat. (Clause 11) Such clauses in a contract or an agreement in advance on what is the amount of damages that will be paid by a party for a breach of the

contract be liquidated damages clauses. This clause provided that if there is a balance of the purchase price remaining unpaid after the closing date, the purchaser was entitled to choose one of two compensation for damages for the breach. The first was to recind the contract and forfeit 10% of the purchase price. The second was to demand interest on the unpaid balance at the rate of 12% per annum compounded monthly until the balance purchase price is paid. The liquidated damage here is linked with interests. (See para. 62) This clause was only applicable to the purchase of the land to build house and flat. There was no similar clause under the agreement to pay the debt. This 1st defendant expressly promised to pay the debt inclusive of interest (see para…..) and on condition the claimant agreed on a fixed time to complete construction. Based on the conduct of the parties, it is reasonable to imply they agreed to extend the time of completion. So this clause would not apply. There would be no breach of this clause. The purchaser in the Nomination Agreement was one and the same person; the contractor i.e. the claimant under the Agreement to construct the dwelling house and flat.

Remoteness of Damages

[62] The claimant's claim for damages identified in her witness statement as (1) (2) (4) (5) (6) and (7) (para.) are really claims for interest (see para.62) on the debt. Claim (3) and (5) are claims for economic loss. Clause 8 is a claim for costs. The claim for interest will be dealt with separately. The economic loss claim cannot be said to have been in the contemplation of the parties at the time of the agreement to pay escalation costs was made. These losses would have arisen due to special circumstances as to how the claimant operated her business of developing land. These special circumstances must be communicated to the defendant at the time of agreement to pay the debt in order for it to be in the contemplation of the parties. There was no such communication. Therefore such loss was too remote and not recoverable. In **Bain v. Fothergill [1874-80] All E.R. 83** the purchaser's claim to recover loss of bargain from a vendor in a sale or real estate where the vendor failed to deliver title, that he did not know could not be delivered, was not upheld. The court's reason was that this was too remote. It was not in the contemplation of the parties at the time of agreement.

Interest

[63] The question of interest does seem to have been in the contemplation of the parties when the Agreement of debt was made. It was stated that the debt was inclusive of interest. This was for the benefit of the defendants. It was also linked to the 1st defendant's condition to complete construction within the fixed time. There are other terms or clauses relating to the payment of interest. These identified hereunder ...(a) clause 11, already adverted to, linked payment of interest with liquidated damages. It imposes compound interest on the defendants at 12 percent per annum for balance of purchase price after the date of completion.

(b) The mortgage estimated fixed at six per cent per annum interest on the debt within the time of six months to pay. A schedule of payment was included,

(c) Clause 4 (b) of the Agreement for construction impose a duty on the employer to pay interest at the prime rate charged by the contractor's bank from the due date of payment to the actual date of payment for late payment if balance of the purchase price was not paid on time.

(d) The claimant in the witness statement specified that the prime commercial rate relevant to the claim was 22% per annum.

[64] There are inconsistencies in the rate of interest to be charged. But the parties agreed in principle that interests were to be received for the unpaid balances. Further the mortgage instrument was the last document that fixed an interest rate of six percent per annum as the rate to apply to the debt. I find the claimant entitled to six percent per annum on this debt from the date of the due payment on the 23rd December 2008 to date of judgment. Therefore the claimant is awarded interest at six percent (6%) per annum on the judgment debt from the date of judgment to the date of payment. I award costs to the claimant against the defendants on this agreement and claim.

[65] The 1st defendant claimed damages for breach of contract on her Counterclaim. There was the main contract and then the agreement to pay the debt. Was there any main breach of the main contract by the claimant? I found the claimant was responsible

for the delay in completing the contract in 105 days. I also found that the 1st respondent was partly responsible for the delay. There was a breach then on the terms in the main contract for completion. But at the same time, the parties by their conduct extended the time for completion. It means in the end that liability for breach of this term would arise unless and until another term for the contract was fixed.

[66] The only other term for time to complete the construction of the dwelling house and flat was the agreement to pay the escalation costs. The 1st defendant had expressly requested the 30th July, 2008 as the final day for completion. The Certificate of Practical Completion was delivered on December 15, 2008. This claimant then would breach the agreement to pay the debt in respect of the term for time for completion. The 1st defendant has not proved the loss to her for the breach of the term of time to completion of this agreement to pay the debt. She concentrated on the alleged defects of the dwelling house that were un-remedied. This concerned a term of the main contract. Though the main contract was connected to the agreement to pay the debt, the main contract term was not what governed the subsidiary agreement to pay the debt. So the evidence of loss (e.g. Valuation Report) is not applicable to the Agreement of debt. So there is no proof of loss for this breach on the Counter-claim.

[67] However since there is a breach of contract which the 1st defendant pleaded, I award nominal damages of $25,000.00 taking account of the value of the Jamaican Currency and on a minimum realistic sum. Then I award costs to the defendant on the Counter-claim. There are no damages for negligent misrepresentation by the claimant to complete within 105 days. There was an implied extension of time for completion by the parties. Further, the 1st defendant did not adduce any evidence on a balance of probability that she requested that date for completion. She testified in cross examination that it was imposed and she accepted it. It means this time of 105 days was a term of the contract and any breach of it would be in contract.

[68] Also, again the 1st defendant did not adduce any specific loss arising from negligent misrepresentation which was not pleaded and this may account for the absence of the evidence to prove it. Already the Court found that fraudulent misrepresentation was not proved.

Conclusion

Judgment for the Claimant on the Claim for the sum of $3,237,125.00

Interest on $3,237,125.00 at the rate of six percent (6%) per annum from December 23rd 2008 to date of judgment.

Interest on judgment debt at the rate of six percent (6%) per annum from the date of judgment to the date of payment.

Costs to the Claimant on claim to be agreed or taxed.

Judgment for the Defendants on the Counter-claim of Nominal Damages $25,000.00

Judgment for the Defendants for sum of $49,168.00 (per. receipt approved Building Plan)

Interest on $47,168.00 at rate of 3% per annum from September 18, 2008 to date of payment.

Costs to the Defendants on the Counter-claim to be agreed or taxed