[2013] JMSC Civ.88

JUDGMENT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007/HCV-3344

BETWEEN	**FRANK OTTO**	**1ST CLAIMANT**
AND	**LORNA OTTO**	**2ND CLAIMANT**
AND	**ELEGANT ESTATES LIMITED**	**DEFENDANT**

IN OPEN COURT

Mr. Ransford Braham appearing on the 16th and 17th June 2011, and Mr.DavidBatts and Mrs. Daniella Gentles-Silvera appearing on the 5th and 6th December 2011, instructed by Livingston Alexander & Levy, Attorneys-at-Law for the Claimants.

Mr. Lawrence Haynes, Attorney-at-Law for the Defendant.

DAMAGES - BREACH OF CONTRACT - CONSTRUCTION OF JOINT VENTURE AGREEMENT

HEARD: 16, 17 June, 5th, 6th December 2011, 21st June 2013.

Mangatal J:

[1] The Claimants (collectively referred to as "the Ottos") are business persons and were at all material times the registered proprietors of lands registered at Volume 1309

Folio 687, Volume 1358 Folio 747 and Volume 1880 Folio 892 of the Register Book of Titles. The lands are hereafter collectively referred to as "Wedgwood".

[2] The Defendant Elegant Estates Limited ("Elegant") is a limited liability company with registered offices situate at No. 2B Ivy Green Crescent, Kingston 5.

THE CLAIM

[3] On or about the 29th July 2005, the Claimants and the Defendant entered into a written joint venture agreement ("the JVA"). The JVA was subsequently amended by agreement between the parties and the Ottos state that the amendments are set out in a letter from Elegant to the Ottos dated 16th January 2006.

[4] In paragraph 5 of their Particulars of Claim, the Ottos plead that by the amended JVA it was agreed between the parties, among other things as follows:

> **"i) The Defendant desired to carry out a development on 91 lots part of Wedgewood.**
> **ii) The development to be carried out by the Defendant on Wedgewood comprised 81 detached 2 bedroom units and 20 studio apartments with all necessary infrastructure works in accordance with the architectural and engineering plans prepared by the Claimants** (should state Elegant)**(see Clause 1).**
> **iii) The Defendant was to obtain a loan from the Jamaica Mortgage Bank in order to finance the redevelopment.**
> **iv) The Defendant was to appoint an auditor to keep proper books of accounts for the development and ensure that such books of accounts were available for inspection by persons authorized by the Claimants (Clause 2a(iv)).**
> **v) The Claimants were responsible for providing the lots in Wedgewood lots for sale and the sale price per lot was $886,000 (Clause 2b(iii)).**
> **vi)The Defendant was to complete the development on/or before 12 months of the date of the JVA (Clause 3(iv)).**

vii) The purchase moneys received from purchasers, legal fees, stamp duty, transfer tax, registration fees and other costs incidental to the sale were to be delivered to Livingston Alexander & Levy and disbursed as follows(Clause 3(5):

Firstly, $800,000.00 on each 2 bedroom unit and $672,000 on each studio to the Jamaica Mortgage Bank for the release of the Certificate of Title for the lot.

Secondly, the payment of $886,000.00 per lot to the Claimants as follows:

(a) an amount not less than $443,000.00 on completion of the sale;

(b) the balance outstanding plus $30,000.00 on each unit sold and interest on the total amount outstanding at the rate of twenty percent (20%) per annum from the date of completion of the sale of each lot and unit to the date of actual payment.

However all payments were to be made within twelve months of the date of the agreement;

(c) And balance (was) **to be paid into an escrow account to be held jointly by the Defendant and the Jamaica Mortgage Bank (Defendant's letter dated 16th January 2006).**

(viii) The Defendant was solely responsible for the completion of the project and was expressly required to complete the project within 12 months of the date of the Joint Venture Agreement (as amended). Clause 3 (vi) of the Joint Venture Agreement (as amended) provided as follows:

" In the event that the development shall not be completed within 12 months of the date hereof, all sums paid to the proprietors under clause 3(v) shall become payable by Elegant forthwith and shall bear interest at

the rate of twenty percent (20%) per annum on the balance outstanding to the date of full settlement."

(ix) The Claimants are entitled to determine the Joint Venture Agreement (as amended) if the Defendant is in breach of the Joint Venture Agreement (as amended) having given to the Defendant the relevant notice (Clauses 3(14) & 3(16)."

[5] The Ottos allege that Elegant, in breach of the JVA failed to carry out the development in an expeditious and/or timely manner and/or failed to complete the project within 12 months or at all. Further, that the project to date remains incomplete.

[6] The pleading continues, that through their attorneys-at-law by letter dated 17th January 2007 they duly notified Elegant that it was in breach of the JVA (as amended) and gave Elegant ninety(90) days to rectify the said breaches.

[7] It is the Ottos' case that notwithstanding the provisions of the JVA (as amended) Elegant failed to permit them or their servants or agents to inspect the books of account in respect of the development.[

[8] The Ottos aver that consequent on Elegant's breach, they have suffered loss and damage and been put to expense as follows(pages 6-7 of the Particulars of Claim:

"PARTICULARS OF LOSS AND DAMAGE

(To June 30, 2007)

Contract Summary & Interest

A. 80 Single Unit lots @ $886,000.00 each---	**$70,880,000.00**
B. 11 Lots for 20 Apartments @ $886,000 each---	**$ 9,746,000.00**
C. 100 units @ $30,000.00 each----------	**$ 3,000,000.00**
D. Total Contract Sum----------	**$83,626,000.00**
E. Add Total Interest earned----------	**$ 9,130,197.29**
F. Total payables----------	**$ 92,756,197.29**

Less Payments Made

1. **12 Units completed up to 31/10/06**
   @ $443,000.00 each---------- $5,316,000.00
2. **29 Units completed up to 30/06/07**
   @ $443,000.00 each---------- $12,847,000.00
3. **Lump sum paid to Claimants directly**
   01/06/07---------- $ 2,000,000.00
4. **Lump sum paid to Claimants directly**
   01/06/07---------- $2,000,000.00
5. **Total payments made---------- $22,163,000.00**
6. **Balance Outstanding as of 01/06/07---- $70,593,197.29**

AND the Claimants claim:

(1) Payment of the sum of $70,593,197.29.
(2) Damages for breach of contract.
(3) Interest at the rate of twenty percent (20%) per annum.
pursuant to Clause 3(6) of the Joint Venture Agreement (as amended).
(4) An account of sums received and paid by Defendant on account of the Wedgewood development.
(5) Costs.
(6) Any or further relief."

[9] On the 22nd of January 2008, on an application for judgment in default of defence, King J. entered judgment as follows:

> **"(a) Judgment for the Claimants in the sum of $25,188,197.29 with interest at 20% per annum from the 1st July, 2007 until payment.**
>
> **(b) In respect of the balance claimed, judgment for the Claimants with damages to be assessed."**

[10] It is in relation to this assessment of damages ordered at paragraph (b) above in respect of the balance claimed, that I heard evidence and now render my decision.

When the evidence had concluded, there was not sufficient time for closing submissions, and in any event, this matter was so complex, that it necessitated written closing submissions. Those were duly delivered by Counsel. I must apologize to the parties for the delay in delivering this judgment. This was due to pressure of work, and the voluminous and I must confess, confusing, "moving-target" nature of this matter. It has taken me some time to unravel the many issues and copious documentation.

[11] According to the Closing Submissions on behalf of the Ottos, "The 'balance claimed' is the difference between $25,188,197.29 and $70,593,197.29 as well as damages for breach of contract". We shall see if at the end of the day, this is really what is being claimed or due to the Ottos.

[12] In this assessment of damages the Ottos rely upon the Witness Statement of Frank Otto filed on the 27th March, 2009, and the Affidavit of Muriel G. Maitland, filed on the 1st November 2010. Elegant relies upon the Witness Statement of Garfield Daley, the Managing Director of Elegant, which was filed on the 10th March 2009. The parties also relied upon a plethora of documents and many of these documents, after some amount of back and forth and contest, were eventually put in evidence by the consent of the parties. This includes the attachments to the Witness Statements of both Mr. Otto and Mr. Daley. Mr. Otto, Mr. Maitland and Mr. Daley all gave viva voce evidence and were extensively cross-examined.

[13] On the 26th of November 2009, Glen Brown J. made a number of orders in this matter, including an order that Dalma P. James & Associates, Chartered Accountants, review the accounts and other documents related to Wedgewood Gardens Development Phase One and prepare, file and deliver a report setting out:

> **"2.(a) The sums received by the Development and/or the Defendant on behalf of the Development.**
>
> **(b) The sums paid to Jamaica Mortgage Bank.**
>
> **(c) The sums paid to and/or credited to the Claimants to date.**

(d) All sums which are now due and owing to the Claimants (if any) as at the date of the report and if any further sums are now due and payable to the Claimants after the date of the Report, set out that sum or the method of determining what that sum should be.

3. If there are any areas of dispute between the parties the Accountant should identify these areas of dispute and indicate what the position would be if the Claimants' contention is upheld on the one hand and if the Defendant's contention is upheld on the other hand. The determination as to which contention is correct will be for the judge."

[14] A report was prepared by Dalma James on the 30th June 2011 and this Report ("the James Report") was admitted into evidence as Exhibit 1.

[15] The James' Report usefully chrystallizes the main issues and these are as follows:

(A) On what date was Elegant required to complete performance of its contractual obligations?

(B) What value is to be placed on the Building Forms which were given to the Ottos by Elegant in part payment of the balance due? It is to be noted that the Ottos held a Bill of Sale over the Building Forms to secure Elegant's liability to them.

(C) What value is to be placed on the 11 Lots returned to the Ottos by Elegant in part settlement of its liability and what value is to be attributed to them for that particular purpose?

[16] It also seems as if there is an issue as to what really is the nature and extent of the Ottos' pleaded claim? Further, what exactly is it that was set down for assessment of damages? How much remains to be assessed after the $25,188,197.29? In the Defendant's Closing Submissions, Mr. Haynes on behalf of Elegant, at paragraphs 6 and 7 argues forcefully as follows:

"DEFENDANT'S CONTENTION UPON THE ASSESSMENT

6. **The Claimants are entitled to claim no more than the sum of Forty-five Million Four Hundred and Five Thousand Dollars ($45,405,000.00)(and such sum for interest if any as the Court may direct) since this is the only sum which is properly before the court arising out of the Judgment of Mr. Justice King. If (as the Defendant will presently seek to show) that amount and more has already been paid off by the Defendant then the Claimants are entitled to nothing and in fact should be directed to make restitution of any amount which this Court may determine they have received in excess.**

ERRONEOUS POSITION TAKEN BY CLAIMANTS UPON ASSESSMENT

7. **There is a fundamental error in the Claimant's position upon this assessment.**

   The Claimants contend at paragraph 44 of the Witness Statement of Frank Otto the 1st Claimant that as at December 31, 2008 the total amount owing was One Hundred and Ten Million Seven Hundred and Sixty-Five Thousand One Hundred and Ninety Dollars Seventy-nine cents ($110,765,190.79) and gives credit to the Defendant for having paid Sixty-Seven Million Nine Hundred and Thirty-Three Thousand Three Hundred and Twenty One Dollars and Ninety-Six Cents ($67,933,321.96). The Judgment WAS NOT for One Hundred and Ten Million Seven Hundred and Sixty-Five Thousand One Hundred and Ninety Dollars and Seventy-Nine Cents ($110,765,190.79) but rather for Seventy Million Five Hundred and Ninety-Three Thousand One Hundred and Ninety Seven Dollars and Twenty-Nine Cents ($70,593,197.29).

There is no warrant for the Claimants to increase their Claim from Seventy Million Five Hundred and Ninety-Three Thousand One Hundred and Ninety-Seven Dollars and Twenty-Nine Cents ($70,593,197.29)(which was the sum before the Honourable Mr. Justice King) to One Hundred and Ten Million Seven Hundred and Sixty-Five Thousand One Hundred and Ninety Dollars Seventy-Nine Cents (110,765,190.79).

Further Justice King's Judgment was <u>on the 22nd January 2008.</u> The Claimants have enlarge(d) **the period of their Claim beyond the time of the Judgment from which this Assessment now arises. This is plainly wrong."**

[17] I am not sure that the Ottos' Attorneys have specifically addressed that issue in their written submissions, but for example, in relation to certain matters not included in earlier calculations, such as the closing costs and cost of infrastructure, the Attorneys (in paragraph 9 of their submissions) appear to be asking the Court to award such sums as general damages for breach of contract. Paragraph 9 states:

" 9. These points being unchallenged therefore mean that your Ladyship's assessment will start with the amount of $4,561,250.20 being the total for closing costs and cost of infrastructure as stated by Dalma James and which were not included in the earlier calculations. These can lawfully form part of general damages for breach of contract as they will place the Claimants in the position they would have been in had the contract not been breached, that is, had the deposits been retained to pay the closing costs and had the infrastructure been completed as agreed. This is the measure of damages for breach of contract. <u>British Westinghouse Electric & Manufacturing Co. Ltd. v. Underground Electric Railways Co. of London Limited</u> [1912] A.C. 673."

[18] I will return to the issue of the quantum and nature of the assessment later in this judgment as it will perhaps be necessary to go through the claim in some detail to

determine this issue after the fundamental issues set out at paragraph 15 above have been dealt with.

ISSUE (A): THE DATE ELEGANT'S DUTY UNDER THE CONTRACT COMMENCED

[19] It is the Ottos' case that completion was to have occurred within 12 months of the date of the JVA, which was therefore one year from the 29th July 2005, being 29th July 2006. Elegant on the other hand contends that its obligations under the JVA did not commence until it had obtained financing, and, as the financing was not received until December 2005, (in fact the first disbursement according to a statement from the Jamaica Mortgage Bank occurred on the last day of November 2005), twelve months did not begin to run until January 2006. This issue is an important one because it will determine from what date Elegant can be said to have been in breach. This will also determine the date at which the computation of interest was to commence. On the other hand, I will bear in mind that Elegant has not filed any Defence and thus the facts as pleaded by the Ottos as to liability are the governing uncontested facts. Indeed, Rule 10.5 of the Civil Procedure Rules 2002 ("the C.P.R."), which is headed "**Defendant's duty to set out case**", at sub-paragraph (1) states:

"10.5(1) The defence must set out all the facts on which the defendant relies to dispute the claim."

[20] Rule 10.7, which is headed

"Consequences of not setting out defence", states:

"10.7 The defendant may not rely on any allegation or factual argument which is not set out in the defence, but which could have been set out there, unless the court gives permission."

[21] More importantly, Rule 10. 2 (4) (as amended in November 2011), states:

"10.2(4) Defence where liability admitted

In particular, a defendant who admits liability but wishes to call evidence regarding the issue of quantum must file and serve a defence dealing with that issue."

Prior to the amendment, Rule 10.2(4) had stated "In particular, a defendant who admits liability, but wishes to be heard on the issue of quantum, must file and serve a defence dealing with that issue."

[22] However, as this was a Court- ordered assessment, not as much weight was or can be attached to these points. In addition, at the start of the assessment, I raised with the parties whether, in light of certain decisions emanating from the Court of Appeal, the Defendant had a right of cross-examination. The parties agreed that since it was a Court-ordered assessment, no issue would be taken on that score.

[23] The JVA, at clauses 3(6), and 3(14), upon which the Ottos place reliance, states as follows:

"**3(6) Elegant shall be solely responsible for the supervision of the construction and delivery of the units in the Development (in accordance with the agreed specifications as mentioned and referred to in the Conditions of Approval) within a twelve (12) month period. <u>In the event that the Development shall not be completed within twelve(12) months of the date hereof</u>, all sums payable to the Proprietors under Clause 3(5) hereof shall become payable by Elegant forthwith and shall bear interest at the rate of 20% per annum on the balance outstanding to the date of full settlement.**

.....

3(14) The Proprietors may determine, with notice in writing of not less than 90 days, the Agreement with Elegant if Elegant shall make default in any one or more of the following:

(i) If Elegant without reasonable cause wholly suspends the carrying out of the development before the completion thereof;

(ii) consistently fails to proceed regularly and diligently with the Development;

(iii) fails to complete the development within twelve (12) months of the date hereof.

In any such event and on determination of this Agreement all amounts payable to the Proprietors by the Developer under this Agreement including sums to settle the loan with Jamaica Mortgage Bank, shall be payable forthwith with interest at the rate of twenty percent (20%) per annum on the amounts outstanding to the date of payment in full."

(Emphasis added)

[24] Elegant relies on Clause 3(4) of the JVA, which states:

" 4. As soon as practically possible after the execution hereof and obtaining the necessary approvals and financing Elegant shall commence the Development on or before the expiry of 14 days from the disbursement of funds required for mobilization from Jamaica Mortgage Bank and pursue the same with due dispatch to ensure completion of the development on or before the expiry of Twelve(12) months of the date hereof as to which time shall be of the essence."

(Emphasis added)

[25] There are aspects of Clause 2 that are in my view also significant. Clause 2(a)(i) and (ii), and 2(b)(i),(ii), and (vi) state as follows:

"2. Elegant and the Proprietors shall co-operate one with the other so as to, as far as possible ensure the smooth and efficient running of the Development as well as the successful completion thereof, but each of them shall undertake and be responsible for particular assignments and responsibilities as follows:

(a) Elegant shall:

(i) be responsible for and use its best endeavours to procure from Jamaica Mortgage Bank, a loan or line of credit in such amount as shall be required for financing the Development in accordance with its obligations under this Agreement subject to the Proprietors' cooperation and compliance pursuant to Clause 2(b) below. The financing of the Development shall extend to satisfying all its financial obligations inclusive of labour, material, hireage of equipment costs, security of Wedgewood, payment of insurance premiums and all statutory and legal obligations relating to the construction of the Development;

(ii) be responsible for obtaining all necessary approvals as shall be required from government or quasi-government departments and agencies for the commencement and completion of the Development;

....

(b) The Proprietors shall:

(i) contribute Wedgewood to the development which shall be an expense of the Development;

(ii) Put up Wedgewood as security for the loan to be obtained by Elegant from Jamaica Mortgage Bank as aforementioned in Clause 2(a)(i) above.

.....

(vi) execute all agreements, transfers, deed and other instruments as shall be required for obtaining of splinter titles for the lots, roads and/or parks constituting the development and the transfer of units to purchasers."

[26] It was submitted by Mr. Batts and Mrs. Gentles-Silvera, citing the leading case on construction of agreements, **Investor Compensation Scheme Ltd. v. West**

Bromwich Building Society et al [1998] 1 W.L.R. 896, that in order to determine what was the true intention of parties to a contract the document is to be interpreted in accordance with what a reasonable person having all the background knowledge, which would have been available to the parties, would have understood the words to mean. At pages 912-913 of the Judgment of the House of Lords, Lord Hoffman provided guidance as to the modern-day principles in the oft-cited passages there set out.

[27] As stated in **Investor Compensation Scheme** , it is a generally accepted principle of interpretation of contracts that words are to be interpreted in their plain and ordinary sense. As submitted by Counsel for the Ottos, this rule is subject to an exception where such an application or interpretation will lead to an absurdity or repugnancy or inconsistency with the rest of the document. In such a case the court will modify the ordinary or grammatical meaning to avoid such an absurdity or ambiguity or repugnancy- see **Caledonia Railway Co. v. North Railway Co.** (1881) H.L. 114. Further, that the Court will correct mistakes by construction if there is a clear mistake on the face of the document meaning something must have gone wrong with the language, it is clear what a reasonable person would have understood the parties to have meant, and it is clear what the correction ought to be to cure the mistake-see **Chartbrook Ltd. v. Persimmon Homes Ltd.** [2009] 4 All E.R. 677, cited by the Ottos' Attorneys-at-law.

[28] Throughout the JVA completion is referred to as being "12 months of the date hereof" (clauses 3(4), 3(6) and 3(14)). The ordinary meaning of these clauses is that completion is to be counted as 12 months from the 29th July 2005, which would mean the 29th of July 2006. To interpret clause 3(4) as put forward by Elegant and in particular the words "Elegant shall commence the development on or before the expiry of 14 days from the disbursement of funds", in its natural and ordinary meaning by itself would mean that the contract started 14 days after Elegant obtained the funds from Jamaica Mortgage Bank, which was December 2005, and that therefore completion is to be counted from that date. I agree with Counsel for the Ottos that this interpretation is not in accordance with what a reasonable person would understand when regard is had to the entire contract. Firstly, the clauses above-referred-to discuss completion as being 12 months from the date "hereof". This means that completion is to be counted from the

date of the JVA, being 29th July 2005. Secondly, the construction advanced by Elegant, (which has not in any event been pleaded as a defence), would lead to inconsistency and absurdity in relation to the rest of the contract.

[29] Clause 2(a) (i) spoke to Elegant using "its best endeavours" to procure a loan or line of credit from Jamaica Mortgage Bank. The loan or line of credit from Jamaica Mortgage Bank was not made a special condition, for example, whereby failing the securing of the loan, the contract would be frustrated or the parties would have the right to rescind.

[30] I agree entirely with the submission by the Ottos at paragraph 21 of their closing submissions. Clause 3(4), I accept, should be interpreted as meaning that construction should commence at the very latest 14 days after funds had been disbursed to ensure completion by 29th July 2006. Clause 3(4) indicates the intention of the parties to have the development completed 12 months after signing even if construction commenced 14 days after the money was disbursed. This is in my view supported by the fact that the words which follow the sentence in the clause "Elegant shall commence the development on or before the expiry of 14 days", are "to ensure completion of the development on or before the expiry of 12 months from the date hereof". Furthermore, clauses 3(4), 3(6) and 3(14) all state that the development is to be completed 12 months from the date of the contract, with Clause 3(4) making time of the essence for completion of the development. I agree with Counsel for the Ottos that this would hardly be necessary (or possible) if there was any doubt as to the date by which the Development was to be completed.

[31] I also find that Elegant's interpretation of the JVA and contract is inconsistent with its own conduct after the JVA was signed. It was Mr. Daley's evidence that his contractual obligations did not begin until January 2006. He stated that for that reason he had not made a request for an extension of time until sometime after that, sometime in 2006. However, I formed the impression that Mr. Daley was not being frank and forthright with the Court because he and Elegant in fact first made a request for an extension of time by letter dated 16th January 2006. That would, on Elegant's case,

have been just a few days after the contract commenced. The letter, which was exhibit 6, written to Mr. Frank Otto, is worthy of quotation in full:

> **"Dear Sir,**
>
> **Re: Wedgewood Gardens Joint Venture**
>
> **This is to formally advise that there may be adjustments to the twelve(12) month duration of the Wedgewood Gardens Project that was signed effective July 29, 2005. Due to the extremely long and abnormally heavy rainy season, the executive** (execution?) **of the project which had started in earnest in July had to be curtailed completely until late August. After one week of work it was again curtailed completely until late August. After one week of work it was again curtailed until November 2, 2005. Although the rains had ceased in some instances for two to three days at a time in between, the site was excessively water logged and absolutely no work could be implemented. The building form which was on site from October 6, 2005, laid idle until November 2.**
>
> **Could we meet to formally decide how to make the necessary adjustments in keeping with the provisions in our joint venture agreement that relates to acts of God. The delay cumulatively runs approximately twelve (12) weeks.**
>
> **Sincerely,**
>
> **ELEGANT ESTATES LIMITED**
>
> **Sgd**
>
> **Garfield Daley**
>
> **Managing Director"**

[32] The evidence also reveals that Elegant commenced construction in or about July 2005. By letter dated 24th August 2005 to the National Housing Trust, written one month after the date of the contract, the Defendant wrote "approximately fifty two units have already been sold (since July 2005) and the proposed completion of the project is May 2006". Elegant wrote in December 2005, that they "were preparing to hand over the entire first road of houses..." In fact, from July 2005, Agreements for Sale were entered into and deposits were paid.

[33] I therefore accept the Ottos' case and the construction of the JVA as contended for by them, that completion was to have taken place by 29th July 2006.

[34] In paragraph 20 of his Witness Statement (examination-in-chief), Mr. Otto states that whilst Elegant requested several extensions of time, and the Ottos finally agreed to a four month extension (see letter dated July 12, 2006 from Frank Otto to Garfield Daley), this did not affect the date from which interest under Clauses 5 and 6 would be calculated. He stated that there was no extension of time as to the date from which interest would start to accrue. Whilst Mr. Otto was extensively cross-examined, I do not think that he was shaken upon this issue.

[35] The Ottos therefore claim that it is from the 29th July 2006 that interest should be calculated. In their closing submissions, Mr. Batts and Mrs. Silvera submit that Paragraph A of the James' Report at page 2 accurately sets out the Ottos claim under this Head. The James' Report states:

> **"A. The Parties disagree on the point in time when payment is due to the Claimants. The Claimants argue that the payment for the sale of the lots become due on the earlier of the sale of the lots or 12 months from the date of the joint venture agreement (July 2005), They also argue that Clause 13 which deals with allowable delays in practical completion has no effect on when payment is due to them.**
>
> **If the Claimants' contention is correct the payment for all units became due in August 2006, and interest at 20 % per annum is incurred until**

payment is made. The following summarizes the position of the Claimants' balance with Elegant Estate Limited to 28 February 2010:

Payments to the Ottos	**$**
Payments on sale of lots from LINVAL	**40,000,073.15**
Other payments and recovery	**20,575,863.39**
Return of 11 lots	**9, 746,000.00**

	$75,489,276.88
Entitlement	
Sale of lots(including 20 apartments	
In 11 lots)	**83,626,000.00**
Interest	**33,907,959.01**

	117,533,959.01
Owing to the Ottos	**$47, 212,022.47"**

ISSUE (B)-VALUE OF BUILDING FORMS

[36] There is a significant dispute between the Ottos and Elegant on this score. The Ottos contend that the value of the Form is $6.3 Million dollars. Elegant's contention is that the Form is worth US$400,000.00 or approximately $26.1 Million (according to the James' Report, paragraph B-page 2).

The evidence in support of the value of the Forms put forward by the Ottos

[37] The Ottos put forward the following:

(a) A valuation by Mr. Euriel Maitland, Real Estate Dealer and Appraisor, who placed the market value at J$7.2 Million as at the 15th of July 2008. Mr. Maitland gave oral evidence and was cross-examined.

(b) Quotations obtained from overseas suppliers for forms which were brand new in October 2007, which were stated to be US $ 145,425 from Millenium Designs, when the dollar was, according to Mr. Otto's Witness Statement, paragraph 50, US$1.0 to J$71.20, which when converted was J$ 10,354,260.00. Also, from Precise Forms, valued at US $92, 725.23 when the conversion rate was said to be US$1.00 to J$71.13.

(c) A valuation from Neville A. Mills Associates Ltd., Quantity Surveyors who also offer project Management Services, which stated the value of the Forms as at October 2007 to be approximately J$7.3 Million.

(d) The price that Elegant actually paid for the Forms, which was US$140,000.00 on the 23RD OF March 2005.

(e) It was Mr. Otto's evidence that he advertised the Forms and that the Forms were eventually sold for $6.3 Million dollars, after potential purchasers had made somewhat higher offers, but ultimately offers were withdrawn and/or reduced.

The evidence to support the value put forward by Elegant

[38] At paragraph 18 of his Witness Statement, Mr. Daley refers to and relies upon a Valuation by Keith Alexander (Succ.) Ltd., Property Appraisers and Auctioneers, the inspection having been performed on the 26th March 2007, valued the forms as having a market value of US$400,000.00.

[39] Mr. Daley in examination-in-chief also claimed that the vendor of the Forms had told him that the Forms were really valued for much more, but that they were sold to him at a preferential or concessionary price. He claimed that the true price for the Forms

was US$418,000.00 but he bought for US$150,000.00. He also claimed that he was to pay the vendor other charges, a series of payments, being what he referred to as "technical consultancy fees" over time. None of this was however supported by any documentation. In cross-examination Mr. Daley denied that the Pro-Forma exhibited as FO 30 to Mr. Ottey's Witness Statement which stated the purchase price to Elegant from Global Marketing to be US$140,000.00 was in fact the pro-forma Invoice in respect of the Building Forms, the subject matter of this case.

[40] It also has to be noted that the value placed on the building forms in the Bill of Sale, which Elegant gave the Ottos as security state a value of J$10.6 Million. In paragraph (6) (iii) of his Witness Statement, Mr. Daley describes this as the "cost price at which he bought the building forms".

RESOLUTION OF ISSUE (B)

[41] I must say that the evidence presented by the Ottos was far more credible than that presented by Elegant. I found Mr. Daley's evidence as to the value of the Forms compared to what he paid for the Form, and his explanation about a series of payments, and "consultancy fees" quite incredulous. In addition, the Valuation which was prepared by the Keith Alexander Company was signed by Messrs. Norris Marston and Anthony Harris, neither of whom gave evidence. I am not entirely sure that I accept Counsel for the Ottos' Submission at paragraph 31 of their written submissions that these Valuators or Appraisers thought they were offering advice in relation to land as well as the Forms. However, as Counsel point out, the Valuation Report does state under the Heading "Limiting Conditions", "The Titles are assumed to be good and marketable, and the property is appraised as though free and clear...." and "Information in this Report as to value should not be used for other lands and buildings and is invalid if so used". I also accept that further, that Valuation does not appear to have mentioned depreciation, or age, which one might reasonably expect to at least be mentioned since the Building Forms were no longer new and were in fact used.

[42] I am of the view that having regard to the totality of the evidence, on a balance of probabilities, including the value stated by Elegant on the Bill of Sale given to

Elegant, the value of J$6.3 Million dollars advanced by the Ottos, is far more acceptable than the more than four times higher figure of J$26 Million put forward by Mr. Daley.

[43] This is important because the variance in figures would have produced vastly different results. The figures set out in Paragraph A on page 2 of the James' Report used the Ottos' value of J$6.3 Million for the Forms in making this calculation.

CHARGE FOR USE OF FORMS

[44] It was Elegant's position that there should be a reduction in any sum found due to the Ottos to take into account the use of the Forms by the Ottos in their own development in the period 7 October 2007 to 5 October 2007. In respect of that figure, in paragraphs 21 and 22 of his Witness Statement, Mr. Daley states as follows:

> **" (21) The Defendant will contend that after the Claimants seized the Form in August 2008, they charged one F.M. Barnes a contractor the sum of Five Hundred Thousand Dollars ($500,000.00) per unit to complete three units making a total of One Million Five Hundred Thousand Dollars ($1,500,000.00). (A payment which the Claimants acknowledge receiving in his summary).**
>
> **(22) The defendant will contend that it is entitled to charge the same rate for the 28 units completed by the Claimants using the Building Form. This would give a net benefit to the Claimants in the sum of Fourteen Million Dollars (J$14,000,000.00) (28 X 500,000)."**

[45] In response, Mr. Otto in his Witness Statement, paragraphs 55-58, concedes that a sum is due to be attached to rental of the Forms in reduction of the amount outstanding from Elegant. However, he claims that the amount at which Forms were rented to Mr. Barnes constituted a special arrangement and cannot guide the considerations here. The evidence on this point is a bit confusing, but he seemed to be saying that the sum of $1.5 Million represented not rental but took into account the fact that those monies were payable to Elegant and pledged to the Ottos. He suggests

instead that the way to calculate the rental is to use the cost of the Forms as $10,600,000.00 and divide this by the number of times the Forms may be used, which he suggests 2000. The rental per Form per usage would therefore amount to $5,300, according to Mr. Otto. Since the Forms were used 28 times at the Wedgewood Gardens Phase 2 St. Catherine, the total rental that could be credited should be $148,400.

[46] It seems to me that if Elegant wanted to make such a claim this ought properly to have been the subject of a Defence, Set Off, and/or Counterclaim. There is absolutely no pleaded basis upon which the Court could properly resolve this issue. In my judgment, the parties have really stretched the ambits of an assessment, (though I appreciate that in a civil case much can take place by consent), very far. The methods of accounting and set-off of claims have really been difficult to follow. I will comment on this further when I address the point about what exactly is the nature of the assessment as it presently stands.

ISSUE (C)- VALUE TO APPLY TO THE 11 LOTS.

[47] The Ottos contend that the value to be ascribed to the 11 Lots is the value ascribed to the Lots at the time when the Agreements were signed and the lands assigned to Elegant. The Ottos have not sold the Lots so this is a notional market value that is being ascribed. The total which the Ottos use for the 11 Lots is J$9,746,000.00 and that was the figure used in Mr. James' calculation at paragraph A on page 2 of the James' Report.

[48] Elegant, on the other hand, contends that the Lots ought to be credited to them at market value at the time of the transfer in December 2008 since Elegant claims to have developed the other parts of the property and that that makes these Lots more valuable. The value ascribed by them for each Lot on that basis is $1.6 Million, totalling $17,600,000.00.

[49] However, in cross-examination, Mr. Daley admitted that roads, culverts and sidewalks and water related infrastructure were not completed in relation to those 11

Lots, though he claims that some of these were matters that were Mr. Otto's responsibility, such as water and piping. However, Mr. Daley admits that he received and retained the sum of $6.3 Million, he says this was for completion of roads, and not entire infrastructure. Nevertheless, in my judgment, on a balance of probabilities this means that the Lots are essentially in the same condition as they were when the Agreements were signed. In my judgment, the parties really ought to have obtained a more up-to-date value on them. However, in default of that, I will use the figure which seems the most reasonable on balance, and that is the $9,746, 000.00.

ISSUE 4-WHAT IS THE AMOUNT OF THE BALANCE DUE ON THIS ASSESSMENT?

[50] This really has been a very confusing case. I think there is definitely some amount of overlap, and I agree with Mr. Haynes that it is strange that the claim was for $70, 593,197.29 at the time when King J. entered the default judgment, and yet at paragraph 44 of his Witness Statement Mr. Otto now stated that the amount outstanding as at December 31, 2008 was $110,765,190.79. Whilst I think interest must account for some of that difference, and credit given for sale of the Building Forms, and value of the 11 Lots not initially given credit for, neither the evidence or the closing submissions really address this issue in great or sufficient detail.

[51] In cross-examination, Mr. Daley admitted that in April 2007 he sent an email to Mr. Otto, (Exhibit 9), in which he acknowledged an amount of $75 Million outstanding to the Ottos. Exhibit 8 is a letter from Mr. Daley to Mr. Otto promising to pay off the shortfall to the Ottos.

[52] However, what is it that the Ottos are really claiming? Here is what is stated at paragraphs 44, 59 and 60 of Mr. Otto's Witness Statement:

> **"44. As at December 31, 2008, the total amount that was owing to us by the Defendant was $110,765,190.79 and we received the sum of $67,933,321.96. The outstanding balance is therefore $42,831,868.83. The summary of accounts referred to in paragraph 19 of the Defendant's Witness Statement is not an accurate statement of the monies collected as at December 31, 2008. The revised Summary of Accounts setting out all monies owing to**

and received by us as at December 31, 2008 is attached and marked as "FO-23". ....

59. We therefore claim that the value of $42, 831,868.83 is owing to us by the Defendant as at December 31 2008 with interest accruing at the rate of 20 % per annum until payment.

60. That we seek at this assessment of damages <u>in addition to the judgment of the Honourable Mr. Justice King of $25,188,197.29 with interest at 20 % per annum, the sum of $17,643,671.54 with interest at the rate of 20 % per annum until payment."</u>

(My emphasis)

[53] It is to be noted, that Mr. James was required to submit his Report, and has in the James Report, done an admirable job, computing the various claims as he was required to do, on the basis of each party's claims, assertions, assumptions and calculations. Indeed, as a Chartered Accountant I find his evidence most useful and reliable, particularly given the countless figures, voluminous substantiating documents, and many twists and turns of the calculation trail relevant to this assessment. However, there is no indication that he was told to subtract the sum of $25,188,197.29 for which judgment was already decreed by King J. on the 22nd of January 2008 when, for example, in A on page 2 of his Report, he states a figure of $47,212,022.47 as being owed to the Ottos. In addition, Mr. Otto's Summary of Accounts and the figures in the James Report also include interest so there may be some double counting and or/inaccuracy. In addition, at page 2 of the James Report, the Chartered Accountant, states as follows:

"According to the records provided, LINVAL paid over to JMB a total amount of $151,719,913.32 as loan repayment and for the escrow account. The JMB statements of account showed receipts by JMB of only $134,239,709.64. <u>The JMB should be called upon to explain the difference of $22,207,081.60".</u>

(My emphasis)

[54] I would just refer to paragraph 17 above, and state that in response to Counsel's request that I award the sums for closing costs and cost of infrastructure, not included in previous calculations, and it would seem not pleaded, as general damages, I appreciate that there is a view that a Court may in exceptional circumstances award damages even though they should have been pleaded- see for example the recent English Court of Appeal decision in **Whalley v. PF Developments Ltd.** [2013] E.W.C.A Civ. 306. However, this would perhaps only be allowed where there was no issue taken by the other side and where they had had ample opportunity to respond to the issues raised, in a Witness Statement, or otherwise. This case is definitely not such a case since issue has clearly, and understandably, been joined as to the nature of the claim as originally pleaded and mounted, and the various discrepancies in the summaries and figures provided by the Ottos. Earlier in the Judgment, I described the claim as being a moving target. It really has been.

[55] In all the circumstances, I am of the view that, on the totality of the evidence, including admissions by Elegant as to sums owed from time to time, and given the difficult task the Court has been faced with, doing the best that the Court can do in the circumstances, damages are to be assessed in respect of the balance claimed, after taking into account the $25,188,197.29 awarded by King J. on the 22nd January 2008 as follows:

In respect of the balance, damages assessed in the sum of $17,643,671.54, with interest thereon from the 1st March 2010, at the rate of 20 % per annum until payment or execution of the judgment. Costs to the Claimants to be taxed if not agreed.