[2015] JMSC Civ 209

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV 02556

BETWEEN ENID THOMAS CLAIMANT

AND CHRISTOPHER THOMS DEFENDANT

Mr. Micheal Howell instructed by Knight, Junor & Samuels for the claimant.

Ms. Annaliesa Lindsay instructed by John G. Graham & Company for the defendant.

Heard: 23rd and 24th , February, 2nd, July and 6th November, 2015

Breach of contract – Building contract- Abandonment of construction of house – Implied condition of cooperation- Measure of damages

EVAN BROWN, J

Introduction

[1] This seventy-six year old retired claimant had a dream of owning a home. Her dream was not to own a home just anywhere. She desired to be repatriated from the United States of America to Jamaica, her island home, which she left in the 1960s. From 1968 she had been saving towards that end. She bought land in the Vista Del Mar subdivision in the parish of St. Ann and instructed an architect. D.L. Pie Chang produced the plans for the building of the house.

[2] In 2006 she was ready to build her dream home. To realize that goal, the claimant needed a builder. A close friend, Ian Isaacs, introduced her to the defendant as a competent and reliable building contractor. The claimant and the defendant entered into a contract for the defendant to build the house, to be occupied by the claimant and her ninety-five year old mother. After the construction commenced, the claimant even had a dream about the house one night in April 2007. She hoped it was a good omen.

[3] The claimant's dream became a nightmare, one that she never could have envisaged. The contract was signed on the 9th September, 2006, and work commenced later that month. Construction of the house was then slated to be completed in January 2007. Although that was the completion date, it was accepted that the personal circumstances of the defendant would not have allowed him to meet it. October or November 2007 was felt to be more realistic.

[4] That notwithstanding, the project was beset by delays and stoppages. Amidst the delays, completion was hoped for by January of 2009. That hope was dashed and the defendant abandoned the construction of the house later that year. As is the case with many abandoned buildings, the yet unfinished house was subject to vandalism. That was the background against which the claimant filed her claim for damages for breach of contract.

Agreed and Undisputed Facts

[5] On or about the 9th September, 2006, the claimant entered into a contract with the defendant for the construction of a house for the claimant, on land owned by the claimant at Vista-Del-Mar in the parish of St. Ann. The construction of the house should have commenced on that day, with completion expected on the 30th January, 20007. The contract price was $9,500,000.00. At the time of filing the claim the defendant had already been paid $8,947,085.00. A quantity surveyor estimated the value of the work completed to be $8,494,215.03, with an additional $5,410,734.00 required to take it to completion.

[6] The contract was for the building of a two-storey house. Upstairs there would be two bedrooms and a library. Downstairs would accommodate another bedroom, kitchen, laundry, living and dining rooms. In all there were to be three bathrooms. A covered garage was also part of the plan.

[7] The defendant also agreed to construct a retaining wall on the premises at an additional cost of $1,952,915.00. The retaining wall was constructed in due course. Soon after completion, the retaining wall collapsed and the defendant requested an additional $944,740.00 to alter the location of the driveway. He also agreed to replace the retaining wall. That was unfinished at the time the claim was commenced.

Joined Issues

[8] The defendant disputed that a substantial portion of the work on the premises was undone. He counter-averred that the substantial structure of the home to be constructed had been completed. That, the averment ran, was accomplished notwithstanding the several and various changes to the original design demanded by the claimant.

[9] Additionally, the defendant averred in his statement of case, that clear instructions were required from the claimant in order to complete the building. In particular:

> "5.1 The window specifications for the master bedroom, which the Claimant had indicated would have been changed from the original drawings.
>
> 5.2 The window specification for the kitchen, this was dependent on the kitchen design with respect to the height on the counters. This specification would be a change from the original drawings.
>
> 5.3 The design specifications for the railings to be installed by the staircase.

5.4 The colour schemes for the various rooms/areas of the house, for the painting to be done.

5.5 The specifications for the five (5) main doors of the house that lead to the outside & also all internal doors.

5.6 The completion of the retaining wall, which is dependent on the grading of the property.

5.7 The claimant to decide on the grading of the property, and to have it done by a third party.

5.8 The completion of the laying of the drainage pipes in the yard, which is also dependent on the grading of the property.

5.9 The size of the tiles and the rooms to be tiled, which would need to be completed before the installation of the doors.

5.10 The fixtures to be installed in the master bedroom, including a jacuzzi to be chosen by the claimant.

5.11 Tiles for the three other bathrooms which are yet to be chosen by the claimant.

5.12 The design for the kitchen, for which the claimant is yet to decide.

5.13 The manner in which the staircase is to finished, whether by tiling or carpeting.

5.14 The types of locks to be fitted to all doors."

[10] The claimant contended that she suffered loss and damages as a result of the defendant's refusal to complete the house. Further, in consequence of not being able to occupy the house, she was caused great distress. The defendant, in denying those averments, countered that by failing to provide him with the instructions adverted to in the preceding paragraph, he was not placed in a position to complete the house.

[11] Throughout the construction, the process was subjected to delays, the defendant alleged. The delays were grouped under three heads. Firstly, delays were occasioned by the protracted manner in which the claimant submitted her

instructions to the defendant. Secondly, delays were caused by 'other events'. Thirdly, delays were caused by having to resort to mediation in respect of the retaining wall and boundary lines.

[12] As a result of the disputed matters, the defendant not only advised but insisted that the claimant secure the services of a quantity surveyor, the defendant averred. The purpose of the quantity surveyor was to advise on the cost of completing the construction of the house, the defendant said. The quantity surveyor became necessary, the defendant averred, because the claimant made material changes to the drawings obtained from D.L. Pie Chang.

[13] The defendant alleged that, so far reaching were the changes made by the claimant, that the scope of the original contract was changed drastically. It was therefore the defendant's contention that the completion of the house, as drawn by D.L. Pie Chang was no longer feasible and that a quantity surveyor was required, together with the claimant's agreement to underwrite that cost.

Findings and analysis

[14] It is convenient to commence the analysis with the allegation that the claimant made several changes to the original contract, rendering it nugatory. The argument of the defendant was based on his contention that the drawings lacked specifics. That was a contention which found no common ground between the parties. In fact, the claimant specifically denied that she demanded changes to be made to the design. It was her case, however, that she agreed to and paid for some variations. The picture painted of the claimant was that of someone who was quite unprepared to build according to the design obtained from the architect.

[15] This, therefore, raises the question of the necessity to make the "myriad" variations that the defendant spoke of. To put the issue in the terms advanced by learned counsel for the defence, it must be ascertained from the evidence

whether, and to what extent, there were any variations in the construction of the house from the architectural drawings? In the view of the defendant's counsel, in keeping with the concept of building the dream home, the specifications that the claimant required changed. This, counsel said, created variations in the scope of the work to be done by the defendant.

[16] Conceptually, a dream home is expected to reflect in its design the idiosyncrasies of the homeowner. It was therefore unsurprising that the claimant asserted that she knew what she wanted. In her words, she helped to draw the plan. That is, she explained, she gave instructions for a small house and everything that was there was what she wanted. In short, she wanted "a simple house with no frills." So, the question is, can I accept that evidence?

[17] In this regard, the evidence of the Mr. Dennis Robinson, quantity surveyor, must be considered and weighed. Mr. Robinson visited the site in the company of the claimant on the 29th May, 2013. His inspection of the drawings and observation of the building led him to conclude that there were no major variations between both. In answer to written questions posed to him by counsel for the defendant, Mr. Robinson explained that the variations were limited to extra block work built in the foundation of the verandah.

[18] On the contrary, the defendant, in his examination in chief, listed a total of seven variations, which he said the claimant demanded. The first in the list concerned the windows. The size of the windows was changed after the openings were completed. He said the variation came about when the claimant realised the windows were above her budget. The change was therefore made to facilitate a cheaper alternative.

[19] The claimant frankly admitted that there was a change to the size of the windows. According to the claimant, the fact that the windows were too big was something known to the defendant before the construction began. Further, the

windows were all changed from louvres to glass. All of this was reflected in the bills of quantities. Under cross-examination, the claimant vacillated between saying the windows were changed based on a joint decision between her and the defendant, and that she requested it. She settled on the latter position.

Windows in the kitchen and bathroom of master bedroom

[20] Having decreased the size of the windows in the kitchen and master bathroom, their base could not be completed in advance of determining the height of the kitchen counter and the jacuzzi, the defendant also contended. Taking first the window in the master bathroom, the claimant agreed the defendant told her the window would have been impacted by the jacuzzi. She, however, told him to go ahead and build it. Can I accept her word on that?

[21] Undoubtedly, the claimant preferred the jacuzzi to be sited by the window. She said as much in an email to the defendant. The claimant having accepted that the location of the window would have impacted the jacuzzi, the question is what form that impact would have taken. Starting from the basic proposition that a jacuzzi is used when one is nude or semi-nude, the most likely impact would have been on the claimant's privacy and that of her aged mother, if she also was to make use of it.

[22] Since privacy was a concern, the location of the window in the master bathroom clearly depended on knowing the specifications of the jacuzzi. The claimant agreed that she had identified several jacuzzis of varying specifications. In fact, from July of 2007 the claimant expressed being "totally spaced out" from the decision making process. She was then leaning towards a corner model. Up to the time of trial the jacuzzi had not yet been purchased. And, in answer to defence counsel, she had not abandoned the idea of purchasing one.

[23] I will now turn my attention to the window in the kitchen. The claimant would only admit that the defendant took her to look at cabinetry but no selection

was made. She specifically denied that they had any discussion concerning the height of the cabinetry affecting the size of the window in the kitchen. She asserted that the defendant had initially told her he could get the cabinetry built. According to the claimant, the type of cabinetry had been agreed between herself and the defendant.

[24] That position, however, does not square with email correspondence between the parties. In an email dated 22nd July, 2007, the defendant wrote to the claimant, "the kitchen cupboards are awaiting your final decision." Clearly, up to that time no decision had been taken on the cabinetry. There was no email from the claimant specifically responding to that statement. The closest response was one dated the 29th July, 2007. In that email the claimant gave a general apology for the delay but did not address the contention that the cupboards awaited her final decision.

[25] From a layman's perspective, it is not difficult to appreciate how the height of the cabinetry could impact the size and location of the window in the kitchen. It is, therefore, more than a little incomprehensible that no discussion took place about the necessity to make a final decision on the cabinetry in advance of the completion of the window, as the claimant asserted. In as much as the claimant appears to have had the final say in the choice of cabinetry, and the completion of the window depended on that decision, the failure to complete the window cannot be laid at the feet of the defendant.

Modification of staircase

[26] I will now look away from the problems besetting the windows to the alleged modification of the staircase, the second item in the defendant's list of modifications demanded by the claimant. According to the defendant, the staircase had to be modified to make it more user-friendly. That, it was said, was to accommodate the claimant's mother who was ninety-five years old at the time of trial. The modification was necessary because the claimant's mother could not

manage the staircase as designed by the architect. The claimant denied this and went on to say that the staircase built reflected the one on the plan. She said she could not build a house and request a staircase for the elderly, as that would impact on her ability to sell it.

[27] Under cross- examination the claimant went on to say she was not going to sell the house. Of course, as the defendant's counsel put to her in somewhat a backhanded way, no one builds a dream house with a sale in mind; certainly not when you are building in the twilight years of your life. I, therefore, find that limb of her denial to be less than credible.

[28] The second limb of the claimant's denial is a little more problematic. The thrust of the defendant's complaint was that the claimant's mother could not manage the risers of the staircase, as designed. The riser is the height of each tread in the staircase. The claimant, however, did not direct her mind to this in her response. She spoke only to the width of the staircase, saying that she even told the defendant that the width of the staircase was better suited for elderly persons.

[29] The claimant may, however, be forgiven for her lack of specificity, being a lay person. No measurement came from the defendant either. I would have expected a builder to have said, for example, the risers were five inches high on the plan and the claimant requested a modification of two inches. I am therefore left with the omnibus observation of the quantity surveyor that he saw no modification, which I accept.

[30] Even without those precise measurements, still, I must ask myself, was it probable that the claimant had a concern with the risers in the circumstances of the case? The risers of the staircase may be compared to the gradient of a hill. The gentler the slope, the easier will be the climb. The converse is equally true. Therefore, the lower the risers, the easier the staircase will be to climb. Likewise,

the higher the risers, the more difficult it will be to climb the staircase. That difficulty may be exacerbated with the advance in years, coupled with the concomitant compromise of physical mobility.

[31] In saying that the claimant's elderly mother could not manage the staircase risers as designed, I understand the defendant to be saying he identified that as a design shortcoming. I do not understand him to be saying that the staircase was built and then found to be impractical for use by the claimant's elderly mother. Were it so, the defendant would have said so as he did in the case of having to cut the walls after they had been rendered, for example.

[32] Accepting the height of the risers as a recognized design shortcoming, it is entirely reasonable that the defendant would have raised that with the claimant and a decision taken to effect the modification. I therefore accept that the staircase was modified to make it more user-friendly, as the defendant alleged. It is obvious to me that the claimant was concerned that the staircase was built to facilitate use by elderly persons. However, I remain unconvinced that the modification of the staircase contributed to any appreciable delay in the construction of the house, accepting as I have, that this was an antecedent design shortcoming.

[33] I now turn my attention to the defendant's third complaint. The defendant alleged that the structural installation of the house required additional support because of the type of roof tiles the claimant wanted. That is, she wanted clay tiles which were heavy. This required more rafters to be laid together in addition to the strengthening of the existing hip rafters. The section of the roof above the upstairs balcony was redesigned after consultation with the claimant.

[34] In response, the claimant insisted there was no room for misunderstanding on the part of the defendant. Clay tiles were reflected in two places on the architect's blueprint although decra tiles were listed in the contract.

Notwithstanding the listing of decra tiles in the contract, the defendant knew she wanted clay tiles. In this the claimant was consistent, both in her correspondence to the defendant and in her oral evidence.

[35] I accept the claimant's evidence that both parties knew that she wanted clay tiles. Hence, no eyebrows were raised when decra tiles found their way into the contract. No explanation was given by the claimant about how she came to sign a contract with decra tiles when she desired clay tiles. Be that as it may, taking together all the evidence on the point and weighing that with her demeanour, I preferred her evidence to the defendant's on this point. Since it was known from the very beginning that the claimant wanted clay tiles, the consequent modifications were also a matter to have been anticipated.

[36] That takes me to the fourth variation, namely, that the size of some of the door openings were enlarged or reduced, as requested. This variation elicited a multifaceted response from the claimant. After her initial flat denial that she requested those changes, she went on to say three things in her examination in chief.

[37] First, although she paid for doors measuring five feet wide, the doors the defendant installed were only three feet wide. Secondly, she did not remember any discussion with the defendant regarding the size of the doors. Thirdly, she was incapable of reading the plan and it was the defendant who was advising her. Consequently, she left everything up to him.

[38] When she was cross-examined, the claimant jettisoned the section of her evidence concerning the master bedroom door. It was put to her that she said the defendant had been paid $67,990.00 for the variation of the master bedroom door. While she accepted having paid the money, she maintained she did not know what she was paying for.

[39] In light of the changing positions in respect of the doors, I hope it is not unkind to say the claimant was the personification of the vacillating witness. Even after taking account of her lack of knowledge of what was happening and nervousness, I am unable to accept her as credible on the point. I find that variation of the doors was in fact requested by the claimant. That, however, is not the end of the matter.

[40] The request for variation of the size of the doors was not the only contributing factor in any resultant delay. Email correspondence from as far back as 9th November, 2008 demonstrates that the defendant was not without fault in this regard. In that email the claimant complained about not seeing a promised email from the defendant which should have provided the design, size, cost and type of wood for the three front doors. She complained that it was the third or fourth time the defendant was promising to provide the information in as many months.

[41] The fifth demand made by the claimant was to change the windows from French wood windows to 'pvc' sliding windows together with sliding mesh cover. The claimant said in her evidence in chief that she requested changes to the specifications of the windows. However, the change she spoke of was from large glass and louvres to small glass windows of the same design as that on the plan. The important point, however, is that she requested the variation, as the defendant alleged.

[42] I turn now to the sixth demand alleged by the defendant. The defendant said the beams inside the house were changed to include arches. Although the claimant said she did not demand any changes to the design, she admitted to this variation. This was one of the variations for which the defendant had been paid. In this case he was paid $22,000.00. The claimant strove to say, during cross-examination, that this was the only change that she referred to when she

said in examination in chief, “at times I would request certain changes in the specifications but each request was finalized.”

[43] The last variation allegedly demanded by the claimant was in respect of the walls. It was alleged that after the walls had been completely rendered and ready for painting, the walls had to be cut for installation of a security system. The wiring for the security system required additional piping to be embedded in the walls. The claimant was uncertain of whether she requested that the house be wired for security. Her answer was no more definitive than “it could be.” I accept that she made this request.

[44] It is abundantly clear that, contrary to the protestation of the claimant that the defendant was to just build the house and give her the key, the claimant did not require the builder to build in strict adherence to the drawings obtained from D.L. Pie Chang. Although she helped to draw the plan, in the manner she explained, the plan was a less than perfect expression of her dream. Indeed, the feeling that the house was being fashioned, contemporaneous with its erection, is one that presses upon me with the might of several tons of steel.

[45] It is a matter of common sense that the several variations would not all have been made at the same time, as the defendant contended. Hence, I cannot but accept that the variations contributed in no small way to the delay in the completion of the construction. Delays, however, are a fact of life in the construction industry and so, by themselves, may not be a sufficient excuse for a party’s failure to perform his contractual obligations.

[46] At the base of all the delays and the eventual abandonment of the project by the defendant was what the defendant described as the deterioration of the relationship between the parties. The claimant said her experience with the defendant was terrible. She went on to describe him as persistently dishonest

and inept. That view of the defendant squares with the defendant's evidence that the claimant was "continuously suspicious of the funds requested."

[47] That kind of breakdown in their relationship undoubtedly impacted the construction of the house. The question is, "did that breakdown cause either to run afoul of the implied term of co-operation?" Learned counsel for the defendant submitted that there is ample evidence of a lack of co-operation between the parties. That, she submitted, resulted in the claimant failing to provide necessary and relevant details and instructions to the defendant to facilitate the completion of her dream house in a timely manner.

[48] That submission was grounded in a quotation from ***The Law of Contracts volume II Specific Contracts.*** At paragraph 37-070, the learned authors say:

> *"Construction contracts will often require a high degree of collaboration between the contractor and the employer (or his representative under the contract), and between the main contractor and his specialist sub-contractors. The implication of a term as to co-operation between contracting parties is well established and arises as a matter of law since otherwise A might frustrate the performance of an obligation by B which was dependent on action being taken or not taken by A."*

[49] That statement of the law is grounded in authority of much antiquity. In ***Mackay v Dick and Another*** (1881) 6 App. Cas. 251,263 Lord Blackburn expressed it in the following terms:

> *"where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that both agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on the circumstances."*

The consequence for the party who is found to have withheld that necessary co-operation is that the event is held to have been accomplished.

[50] The recognition that generally a construction contract will require a high degree of collaboration between the builder and the homeowner cannot be more evident than in the case at bar. Although the quantity surveyor found a house being built substantially according to the plan, which I accept, as is often said, the devil is in the details. While the superstructure required no variation, save for the size of the windows and arches, the internal fittings and finishes were the subject of much deliberation. In all of this, "the prime consideration is ... that instructions should be given at such time in such manner as not to hinder or prevent the contractor from performing his duties under the contract," according to the learned authors of ***Keating on Building Contracts*** 5th ed. p.50.

[51] According to the parties' bills of quantities contract, the defendant was to provide all the labour and construction materials, while the claimant was to provide the funds. The defendant would normally send the claims to the claimant based on the stage reached in the construction and the next point he hoped to reach. Additionally, in the event of any variation, the defendant would submit separate written claims, all of which were honoured.

[52] That notwithstanding, the complaint of the defendant was that the funds were not released to him in a timely manner. In an email of the 22nd February, 2007, the defendant told the claimant that he had exhausted the money she sent and had spent just under $1.5m of his own money. If that is accepted, it speaks to a cash flow problem on the project, for which the claimant would have been responsible. This allegation was not traversed in cross-examination of the defendant.

[53] Although it was not traversed during cross-examination, the claimant was asked to comment on it in her examination in chief. The claimant said there was no time when the defendant was short of money. She said up to February he had received $6m and no work had been done on the house. Frankly, I would have

found a contemporaneous email response more convincing than a reply in the witness box approximately eight years after the fact.

[54] Learned counsel for the claimant elicited from the defendant that at some point he got so frustrated with the contract that he stopped working. The real question is what led to that frustration? This was a project that was beset by delays of many colours. One shade was disputes concerning the claims submitted by the defendant. On three occasions a mediator had to be called in to validate the defendant's claims. The disputes resulted in stoppages which continued until a resolution was found.

[55] This, of course, is evidence of the deep-seated distrust of the defendant harboured by the claimant, to which reference was made earlier. It is obvious that the employment of a quantity surveyor would have gone a long way to allay the claimant's suspicions and promote harmony between the parties. However, as the claimant said to her counsel, she had no intention to get one for herself. In hindsight, she opined that she "should have gotten a quantity person from day one but that is now water under the bridge." That ninth hour realization came in an email of the 13th August, 2008.

[56] Although the claimant refused to hire a quantity surveyor, that did not stop her from having recourse to independent advice of that character. In that same email, reference is made to "the Quantity person who is a retired contractor and engineer." That informal advice did not in any way allay any of the claimant's fears of being treated as a 'milch cow' by the defendant. That is predicated on 'the Quantity persons' opinion that items in the defendant's bill were too expensive.

[57] I do not accept, however, as was averred, that the house could not have been completed without the intervention of a quantity surveyor. In as much as that averment was premised on "myriad" changes to the drawings by D.L. Pie

Chang, it remained unsupported by the evidence. First, it is sheer hyperbole to describe the changes or variations requested by the claimant as myriad. Secondly, as has been said before, no bill for any variation was dishonoured; disputed perhaps but not dishonoured.

[58] Undoubtedly, all of those disputes led to the personal frustration of the defendant. Did that frustration entitle him to refuse further performance of the contract? The frustration which the law contemplates that would excuse a party from further performance of his contractual obligations is an intervening event or change of circumstances, for which neither party is responsible, of such a character that it prematurely determines the contract. See, for example, ***Taylor v Caldwell*** 122 ER 309.

[59] While the defendant did not plead frustration as a defence, his admission to the claimant's counsel makes it clear that he abandoned the project because he was, in common Jamaican parlance, 'fed up' with the claimant. Having reached breaking point, the reasonable thing for the defendant to have done was to advise the claimant that in order to complete the house he needed concrete instructions on the outstanding matters within a reasonable time, failing which he would consider his obligations under the contract at an end.

[60] Up to the time the defendant refused to perform the contract, notwithstanding the absence of cordiality between the parties, the claimant was honouring her obligations to the defendant. All the variations for which she had been billed were paid. Indeed, it was never said that she had any outstanding financial obligations to him. On the other hand, he had materials in storage to continue the construction. So, why was the construction of the house aborted in light of that?

[61] It is not enough to show that the relationship between the parties had broken down, or that the doing of certain things on the site awaited the claimant's

instructions. What must be demonstrated is that the claimant by act or omission hindered or prevented him from doing his duties under the contract: ***Keating on Building Contracts***, *op. cit*. That, in my opinion, has not been shown. A builder cannot just abandon a construction site with impunity, simply because the relationship with his employer has soured. If that were to be countenanced, it would become the harbinger of catastrophe for not only the construction sector but commerce in general. In abandoning the construction the defendant was clearly in breach of contract.

[62] The abandonment of the contract in the instant case is not dissimilar to the position in ***Sumpter v Hedges*** [1898] 1 QB 673. In that case, having been contracted to construct certain buildings on the defendant's land for a stipulated sum, the plaintiff contractor abandoned the project after he advised the defendant he had no money and therefore could not go on. Although this was a lump sum contract the plaintiff had received a part of the price. The defendant finished the house and the action was brought to recover the remainder of the price. It was held that he could not recover.

[63] Like in ***Sumpter v Hedges***, *supra*, the contract between the claimant and defendant is a lump sum contract. That is, the contract was to build a house for the sum of $9,500,000.00. If the house had been completed according to the bills of quantities, the defendant would have been entitled to no more than the contract price. In the same vein, where there was variation, that is extra work, the defendant duly recovered the amounts from the claimant. The defendant had an obligation to continue with the construction of the house to completion unless he was prevented from so doing either by the claimant or supervening events.

[64] I hold that the claimant did not prevent the defendant from continuing the project to completion, notwithstanding their differences. By email of the 18th March, 2008, the claimant told the defendant that she needed a date when she

could expect the completion of the house. Another email on the 9th November, 2008 beseeched, "I need to have this house no later than January 2009."

[65] Both emails presented the defendant with the golden opportunity, as the professional, to outline to the claimant her dependent obligations to facilitate the completion of the house. Instead, the defendant picked up his marbles and went home, leaving the claimant to wonder how she contributed to the delay in the completion of the house. The result is that there was never any *consensus ad idem* between the parties in respect of the discharge of their respective obligations. The defendant stands in breach of contract and is therefore liable in damages.

Assessment of Damages

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

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

Both the learned authors of ***McGregor on Damages*** and ***Keating on Building Contracts*** rely on ***Mertens v Home Freehold Company*** for the principle upon which damages should be assessed in these circumstances.

[67] The quantity surveyor estimated the house to have been two-thirds completed. The outstanding third comprised the remaining stairs, doors, windows, reaming, painting, floor tiling, fitments, electrical and plumbing services, sanitary fitting, soil drainage and paving. The estimated cost at completion was $13,206,702.47, at an average of $4,804.19 per square foot. The value of what

was already done was estimated to be $8,494,215.03.The quantity surveyor is therefore saying the cost of completion is $4,712,487.44.

[68] Applying the learning from ***Mertens v Home Freehold Company***, *supra*, the cost to the claimant is the difference between the actual cost and what the claimant would have had to pay the defendant in any event. That is to say, the defendant having been paid $8,947,085.00 of the contract price of $9,500,000.00, the claimant would have had to pay him $552,915. The cost to the claimant of completing the house is therefore $4,712,487.44 less $552,915.00, that is, $4,159,572.44.I therefore give judgment for the claimant in the sum of $4,159,572.44. Costs to the claimant, to be taxed if not agreed.