

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV2017-00304

BETWEEN

KATHLEEN ALLUM-PIERRE

Claimant

AND

STIRLYN BOWRIN

Defendant

Before the Honourable Madame Justice Margaret Y Mohammed

Date of Delivery August 20, 2019

Appearances:

Mr Walede Michael Coppin Attorney at law for the Claimant.

Mr Taureen Dassayne Attorney at law for the Defendant.

JUDGMENT

1. The Claimant and the Defendant were once friends. The Claimant lives in New York but she also owns a house at No 66 St Mary's Village South Oropouche in Trinidad ("the Claimant's house"). The Defendant operates as a contractor in Trinidad and in various parts of the United States of America. The parties entered into an oral agreement ("the agreement") for the Defendant to do construction works ("the construction works") on an extension ("the extension") to the Claimant's house. The Defendant received the sum of TT \$76,500.00 as the down payment from the Claimant as the consideration for the

construction works; the Defendant did no further construction works from in or around July 2016; the Defendant offered to refund some money to the Claimant and to return the Claimant's Lorex Camera 16 channel HD security camera system ("the security camera") but up to the time of the trial it was not returned.

2. The Claimant has alleged that the Defendant did not complete the construction works to the extension and she has not received the security camera. She has brought this action seeking damages for breach of contract and to recover the security camera or its value.

THE CLAIMANT'S CASE

3. The Claimant contended that on Friday 17 June 2016 she and the Defendant entered into the agreement for the Defendant to perform certain works on the Claimant's house. The Claimant pleaded¹ that the terms of the agreement with the Defendant were as follows:
 - a. To prepare estimates for a 20 feet by 40 feet flooring and beam structure extension;
 - b. To construct the approximate 20 feet by 40 feet flooring and beams structure extension;
 - c. To construct a step to the side of the foundation;
 - d. To install the electrical on the top of the extension of the house;
 - e. The agreed amount for the construction works was TT \$130,000.00;
 - f. The sum of TT \$130,000.00 was inclusive of labour, materials and the electrical work;
 - g. The sum of TT\$ 10,000.00 was the estimated costs for the electrical works;
 - h. The payments would be made as the works progressed and in proportion to the works done;
 - i. The Defendant would complete the job in 2 weeks.

¹ Paragraphs 3, 4, 5 and 6 of the Amended Statement of Case.

4. The parties did not agree on the costs for labour or transportation to be used in the construction works.
5. In compliance with the terms of the agreement, the Claimant made 2 down payments to the Defendant. The first down payment was in the sum of TT \$75,000.00 or US \$10,000.00. The second payment was the sum of TT \$1,500.00 for the purchase of materials to do the construction works. The Claimant contended that in total she paid the Defendant the sum of TT \$76,500.00 for completion of 50% of the construction works².
6. The Claimant contended that by the 22 July 2016, the Defendant had only completed 6 upright beams and 4 cross beams to cast the decking and the Defendant stopped working on the extension. The Defendant demanded an advance of another payment in the sum of US \$5,000.00 in order to continue the construction works. The Claimant asserted that she refused to pay any further sum since the construction works which were already done did not represent 50% of the agreed construction works nor was it valued in the sum of TT \$76,500.00.
7. The Claimant also contended that the Defendant did not provide her with the estimates for materials and labour, the bills of quantities or invoices showing materials or labour actually used by the Defendant before filing the instant action and there were no building materials left at the Claimant's house after the Defendant abandoned the construction works. The Claimant contended that the Defendant initially agreed to return the balance of the down payment minus a valuation to be completed by him.
8. The Claimant asserted that in September 2016 she engaged a construction expert to value the construction work done by the Defendant to the extension. The preliminary estimates

² Paragraph 7 of the Amended Statement of Case

revealed that only 20% of the agreed construction works were done and this was valued at around TT \$25,000.00.

9. The Claimant contended that around the 17 June 2016 she and the Defendant had preliminary discussions where the Defendant agreed to find a buyer for the security camera and to sell it for a price of not less than TT \$8,000.00. The Claimant asserted that it was agreed by the parties that the Defendant would hold onto the proceeds of the sale of the security camera and then transmit it to her at a later date and it was not an agreed that the Defendant would be paid any commission if he sold the security camera.
10. The Claimant asserted that after the Defendant abandoned the construction works she requested the Defendant to return the security camera. The Defendant initially agreed to return the security camera and instructed the Claimant to have her niece Victoria Allum pick up the security camera and the refund of the down payment minus the value of the construction works, but subsequently reneged.
11. As a result, the Claimant caused a pre-action protocol letter dated 25 August 2016 to be sent to the Defendant calling upon him for a refund of the monies for the works which were not done by the Defendant. The Defendant replied stating that the Claimant was in breach of the agreement since 75% of the construction works were done and that only the decking was to be cast and completed.
12. In response to the Claimant's pre-action letter to the Defendant, the latter indicated that he had sold the security camera for TT \$8,000.00 and that he had subtracted it from the contract price leaving an outstanding balance of TT \$45,000.00. It was not in dispute that up to the time of the trial the Defendant did not return the security camera nor paid the Claimant the sum for which he sold the camera.
13. Based on the aforesaid facts the Claimant has sought the following reliefs:

- (a) A declaration that the Defendant's actions in demanding a further advance of US \$5,000.00 before the completion of 50% of the value of the construction works was a breach of contract;
- (b) Damages for breach of contract for the failure and or refusal of the Defendant to complete 50% of the value of the construction works and demanding further advances;
- (c) The return of the security camera or in the alternative damages in the sum of TT \$8,000.00 being the value agreed between the Claimant and Defendant for the sale of the security camera or in the alternative an account of profits for the TT \$8,000.00 received by the Defendant for the security camera or alternatively restitution for unjust enrichment;
- (d) Interest;
- (e) Costs;
- (f) Such further and/or other relief as the Court may deem fit and just.

THE DEFENCE AND COUNTERCLAIM

14. The Defendant's position was that he was not in breach of the agreement but rather it was the Claimant who breached it. He asserted that he did not know about any arrangement to return the security camera to Victoria Allum until she telephoned him and so informed him.

15. He based his position on the following facts. On the 17 June 2016, the Defendant visited the Claimant's house. The extension was incomplete. It had a ground flooring or foundation measuring approximately 20 feet by 40 feet which appeared to be cast in concrete and blocked off on all four sides with foundation blocks approximately 8 feet in height with a ring beam cast. There were no concrete posts in between any of the walls or at any of the corners of the walls to strengthen the walls. The Defendant brought this to the attention of the Claimant.

16. The Defendant contended that he agreed with the Claimant to do the following works³:
- a. Prepare and submit an estimate to construct an upper floor decking measuring approximately 24 feet by 48 feet inclusive of a 3 feet cantilever;
 - b. The aforesaid works consisted of breaking and/or cutting specific parts of the concrete wall where the Defendant had to construct the concrete posts, and to dig up specific parts of the ground flooring and/or foundation to insert 6 concrete posts approximately 8 feet high; tying of stirrups to prepare boxing and to cast 4 beams for the upper decking floor measuring approximately 24 feet by 48 feet inclusive of a cantilever 3 feet wide; placing of decking sheets, placing ½ inch and 5/8 inch steel; placing BRC wire onto the decking pan sheets and to cast same 4 inches thick with ready mix cement;
 - c. The agreed price for the construction works which included materials and labour was TT \$130,000.00.
17. The Defendant pleaded that the electrical work and the building of the step were not part of the agreement with Claimant but that the Claimant asked him to leave some iron projecting out from the upper deck as she wanted to build a step at a later date⁴.
18. The Defendant asserted that the Claimant agreed to pay him the sum of US \$5,000.00 upon completion of the upper floor beams and after the completion of same, the Claimant would then discuss further payments for the balance of the moneys with the Defendant for the rest of the work to be done. The Defendant stated that he completed casting the upper floor beams but the Claimant refused to pay him the sum of US \$5,000.00.

³ Paragraph 3 (b) of the Defence and Counterclaim

⁴ Paragraph 3 (c) and 4 of the Defendant's Defence

19. The Defendant asserted that although he received the sum of TT \$76,500.00 he completed approximately 75% - 80% of the work which he had agreed with the Claimant to perform and not 50% as alleged by the Claimant. The Defendant contended that he completed casting 6 concrete posts and 4 cross beams. However, when the Defendant began to drill holes in the ground beam to 'tie' the steel for the posts he saw that the drill went into the earth. This caused the Defendant to dig the foundation to check to determine the type of ground beam which was previously built. He discovered that there was no proper foundation underneath to support the construction of the upper floor decking, since the 'ground foundation' was just some gravel spread out and cement water thrown over the gravel to bind it.
20. The Defendant then dug up the foundation about 3 feet in depth for the matting and then piled 12 feet in depth for posts; tied stirrups for posts, tied steel for matting, prepared boxing for the posts and cast same in concrete to prevent the upper floor from collapsing. The Defendant contended that the Claimant did not pay him for his labour for the extra work as this was not included in the agreement.
21. The Defendant also contended that after he completed casting the upper floor beams he purchased materials for the upper floor decking, namely, decking pan sheets; ½-inch steel; 5/8 inch steel; 2 x 6 wood; 2 x 4 wood; 1 x 4 laths; 1 – 2 x 4 I-Beam. He also cut and transported approximately 100 pieces of 14 feet bamboo props and all these materials remained at the Claimant's house.
22. The Defendant averred that the Claimant told him about the security camera and requested him to sell it for TT \$8,000.00; to keep the TT \$8,000.00 and apply it as part payment towards the balance of moneys owed to him. He contended that the Claimant did not indicate the payment of any commission was not part of the agreement. Based upon the agreement, the Claimant gave to the Defendant the security camera.

23. The Defendant denied that he abandoned the construction works. Instead, he contended that he was waiting for the Claimant to pay him for the completion of casting the upper floor beam as agreed by them before proceeding. He stated that the Claimant called him and requested him to attend to her residence in New York to collect the payment of US \$5,000.00.
24. The Defendant also contended that he was not aware of the arrangement for the return of the security camera as asserted by the Claimant, until Victoria Allum telephoned him and told him about it. The Defendant then told Victoria Allum that he would not return the security camera until the Claimant stated in writing that she had terminated the agreement for the construction works to the extension.
25. The Defendant asserted that in an attempt to settle this matter amicably and without any litigation, he offered to the Claimant to return the sum of TT \$14,000.00 and the security camera and to close off the job although he had already expended the sum of TT \$107,869.00. The Defendant requested the Claimant to indicate in writing that she will be receiving the moneys together with the security camera and that the agreement shall be terminated but she refused to do so. The Defendant even left a voicemail on the Claimant's telephone to that effect.
26. According to the Defendant prior to September 2016 he had sold the security camera to one Mr. Kern Marcelin. However, Mr Marcelin returned the security camera to the Defendant and asked for a return of his moneys which the Defendant refunded.
27. The Defendant averred that he has already expended the sum of TT \$107,869.00 on the construction works and he was still willing to return the security camera to the Claimant. However, he requested that the Claimant indicate in writing that she was accepting the security camera and that the agreement for the construction works on the extension was terminated.

28. Based on the aforesaid facts the Defendant Counterclaimed seeking the following orders:
- (a) A declaration that the Claimant's actions in stopping the said work was a breach of contract;
 - (b) Damages for breach of contract;
 - (c) An order that the Claimant pay to the Defendant the sum of TT \$31,369.00 being moneys due to the Defendant for the construction works which were completed at the Claimant's house.
29. The Claimant did not file any Defence to the Counterclaim.

THE ISSUES

30. At the trial the issues to be determined were:
- (a) What were the terms of the agreement?
 - (b) Who breached the agreement?
 - (c) Is the Claimant entitled to the return of the security camera?
 - (d) Is the Defendant entitled to judgment on his Counterclaim?
31. The parties gave two different versions. The determination of the issues are fact driven. According to the learning in **Horace Reid v Dowling Charles and Percival Bain**⁵ when determining questions of fact the Court must weigh the versions of the events, on a balance of probabilities, in light of the evidence and in doing so the Court is obliged to check the impression of the evidence of the witnesses on it against: (1) contemporaneous documents; (2) the pleaded case; and (3) the inherent probability or improbability of the rival contentions.

⁵ Privy Council Appeal No. 36 of 1987.

WHAT WERE THE TERMS OF THE AGREEMENT?

32. The Claimant's evidence in her witness statement on the date of the agreement, terms of the agreement, the consideration and the sum she paid to the Defendant were identical to that as set out in her pleaded case. However, the Claimant stated 2 additional terms in her witness statement. At paragraph 5 of her witness statement the Claimant indicated that she and the Defendant agreed that the works would have been completed in 2 weeks and that she would have paid in advance for the works and material and make further payments for further works only when the Defendant demonstrated that he had completed works valued for the sum which was already paid in advance. On cross-examination the Claimant stated that the agreement she made with the Defendant was not on the 17 June 2016 which she pleaded but on the 13 June 2016 since she sent the sum of US \$10,000.00 to him on the 14 June 2016.

33. According to the Claimant, she paid the Defendant the sum of TT \$76,500.00 in advance for completion of 50% of the construction works. In cross-examination she maintained that the price of TT \$130,000.00 for the construction works included the casting of the floor, the step and the electrical since she said that the electrical had to be done before the floor was cast. She explained that the electrical works which she understood she had agreed with the Defendant to do was to run pipes. She accepted that she did not have any plan for the electrical work to be done since she thought that was the Defendant's job but she said that it was supposed to be run in the flooring and it was for the top of the extension since the Claimant's house had electricity.

34. The Claimant testified in cross-examination that the step which she agreed that the Defendant was to construct was not outside but part of the 20 feet x 40 feet. She was uncertain of the type of material which the step was supposed to be constructed since she said "I guess concrete." She admitted that she did not indicate to the Defendant the type of material to construct the steps since she said that she thought the Defendant knew what he was doing.

35. The Claimant admitted in cross-examination that while the construction works were being done at the extension of the Claimant's house, she was in regular contact with him and he sent photographs and videos every time he did work. She indicated that the Defendant informed her that he had to dig the base since it was not strong to put the upright beams. However, she stated that the Defendant did not send her photographs of the work he did in digging the base. She stated that the Defendant dug 3 feet into the floor in order to erect poles but she insisted that no piling works were done. She explained that after the 6 upright and 4 cross beams were erected, the next step was to concrete the top. She explained that when the Defendant stopped working there was still work outstanding such as the casting of the floor, erecting the steps and installing the electrical.
36. The Claimant testified that on the 22 July 2016, the Defendant had only completed 6 upright beams and 4 cross beams to cast the decking when he stopped work on the Claimant's house. The Defendant demanded a further sum of US \$5,000.00 or he would not continue the construction works. The Claimant said that she called her cousin Wayne Woodley ("Mr Woodley") for his opinion since he had experience in the construction industry and who along with some of her relatives were monitoring the Defendant's work since she lived abroad. Mr Woodley informed the Claimant that it did not appear to him that 50% of the construction works were completed and that the Defendant was trying to force her into paying before the payment was due.
37. In cross-examination the Claimant testified that Mr Woodley visited the Claimant's house every day both during the morning and in the afternoon. She explained that Mr Woodley who was supervising the works did not telephone her and indicate that the Defendant was not doing the electrical works but he told her when the Defendant stopped doing the construction works. She said that she telephoned the Defendant at that time as he was in New York. The Defendant told her that he wanted more money and she called her cousin Mr Woodley who indicated that only 25% of the construction works were completed. She

was uncertain of the exact date the Defendant left the job. She accepted that the Defendant told her that he purchased material from a hardware for the posts.

38. In the Claimant's witness statement, she had said that she paid the Defendant TT \$76,500.00 to complete 50% of the work but in cross-examination she was unable to indicate that 50% of the work was completed because she had no knowledge in construction. She denied that when the Defendant left the work he left material at the Claimant's house since she said she spoke with Mr Woodley who informed her that there were only a few pieces of bamboo. The Claimant testified that she was never provided with any of the receipts by the Defendant which he annexed to his Defence.
39. In my opinion the Claimant's evidence that the agreement included the construction of the step, electrical works and that the further payment of US \$5000.00 after 50% of the construction works were completed were not credible. The Claimant was unable to indicate the nature of the step to be constructed by the Defendant. If this was a term of the agreement, it was more probable that she would have known the type of material the step was to be construction with, in particular since this would have impacted on costs.
40. The Claimant had no knowledge of any plan or design for the electrical work. Again, if this was a term of the agreement it was more probable that the Claimant would have been aware of the details since this would have impacted on the costs of the construction works.
41. The Claimant's evidence was that the construction of the 6 upright beams and the 4 cross beams did not constitute 50% of the construction works. The Claimant accepted in cross-examination that the Defendant was in regular contact with her while the construction was being undertaken by him. She accepted that the Defendant provided her with regular updates by way of telephone calls, photographs and video call. The Claimant did not dispute that the said photographs were sent to her by the Defendant. Therefore, the Claimant was apprised of the construction work as it progressed and there was no query

from her during the time of the said construction on the percentage of the work which had been completed. In light of the photographs and the regular communication from the Defendant on keeping the Claimant informed of the progress of the construction works, it is more probable that the Claimant was informed of the lack of the ground beam under the existing walls and the additional works which the Defendant undertook. However, there was no evidence from the Claimant of the extent of work which covered 50% of the construction works. In my opinion if this was a term of the agreement it was more probable that she would have known the details of what constituted 50% of the construction works.

42. The evidence of the Claimant's witness, Mr Woodley did not assist the Claimant's case. Mr Woodley testified that he was asked by the Claimant to supervise the works being done on the Claimant's house due to his knowledge in construction. He said that the Claimant told him that the Defendant was to perform the following works:
- (a) Do the estimates for a 20 feet by 40 feet flooring and beam structure extension.
 - (b) Construct an approximate 20 feet by 40 feet flooring and beams structure extension.
 - (c) Construct a step to the side of the foundation.
 - (d) Install the electrical on the top of the extension of the Claimant's house.
43. He was informed that one of the terms of the agreement was that the Defendant was to provide all the materials and labour to complete the construction works and that the Claimant had paid the Defendant TT \$76,500.00 to commence the construction works and that payments would have been made as the works progressed in proportion to the construction works done. Notably absent from his evidence was that the sum of TT \$76,500.00 was to represent 50% of the construction works.
44. According to Mr Woodley on or about the 22 July 2016, the Defendant had only completed 6 upright beams and 4 cross beams to cast the decking when he stopped working. He stated that the Claimant asked his opinion on whether the Defendant had

done construction works inclusive of material valued at TT \$76,500.00 and he indicated that it did not appear so to him and that the Defendant was trying to force her into paying before payment was due.

45. In cross-examination Mr Woodley stated that he understood that the Defendant was supposed to build the decking, steps and install electrical. He stated that the Claimant had explained to him that the electrical was to be placed inside of the floor and the beams which were cast and that she had a plan for the electrical. Notably he did not state that the Claimant asked him if the construction works were 50% completed.
46. Mr Woodley also testified that the Defendant did not leave any materials at the Claimant's house save and except 5 to 8 pieces of bamboo used for the support of the beams. The said bamboo had begun to rot which he moved and discarded in the bush. Mr Woodley stated that he was also present when Mr Mark Hood, Quantity Surveyor, conducted the site visit on 11 December 2017 and he showed him the few pieces of bamboo which he had discarded in the bush. He stated that Mr Hood the Quantity Surveyor visited in 2016 and that he had removed the bamboo 2 months after the works stopped.
47. In cross-examination, Mr Woodley stated that he visited the extension of the Claimant's house when the works were taking place every day and he continued to visit the extension of the Claimant's house after the works had stopped. He said that usually he spent about 30 minutes in the morning and about 1 ½ hours in the evening period at the Claimant's house. He accepted that the property on which the Claimant's house was situated was not fenced. According to Mr Woodley, work was done on the Claimant's house during Monday to Friday. He accepted that on some days when he visited he did not see any workers and he did not remain on the site all day. He stated that he did not see any piling and he could not recall the date the Defendant stopped working. According to Mr

Woodley, the works were done in 6 months and the Claimant told him that the step which the Defendant had to construct was a concrete step.

48. Mr Woodley's evidence on the terms of the agreement was based on information he received from the Claimant since he was not present when the parties had their discussions. I therefore attached little weight to his understanding of the terms of the agreement. His evidence on his estimate on the extent of the construction works which the Defendant had completed was unreliable and without any credible basis. The Claimant testified that she terminated the agreement, after listening to her cousin, Mr Woodley who told her that he was of the opinion that the Defendant had not completed 50% of the construction works. However, Mr Woodley's evidence was that he did not have any training in valuing construction works to be in a position to indicate to the Claimant that only 50% of the construction works were done. By his own admission he was not present during the day on all days when the Defendant and his workers were present so he was not in a position to advise the Claimant on the extent of the work which was done by the Defendant including the piling. Mr Woodley did not even provide any proper basis setting out the value of the construction works which the Defendant had done when the latter requested the US \$5,000.00.
49. Further, Mr Woodley's evidence that the parties had agreed that the Defendant was to construct a concrete step contradicted the Claimant's evidence since she said she did not know the type of material the step was to be made of.
50. The Defendant's evidence in his witness statement was that he had visited the Claimant's house with the Claimant prior to the 27 June 2016. He saw an extension structure which was incomplete. There was an existing house and to the side of that house there was what appeared to be the extension. The extension had a ground flooring or foundation about 20 feet by 40 feet which appeared to be cast in concrete and was blocked off on all 4 sides with foundation blocks approximately 8 feet in height with no ring beam cast. Only

1 of the 4 walls was completely solid with concrete blocks. In the 3 other walls there were door spaces. One door was coming from the existing building and the other 2 were on 2 of the walls. He said that there were no concrete posts in between any of the walls or at any of the corners of the walls.

51. In cross-examination the Defendant admitted that he was not an engineer but that he had 30 years' experience in construction. He accepted that a site visit was important since this was where he looked at the foundation, soil and obtained information from the client. He stated that he visited the site before he quoted a price to the Claimant for the construction works but he did not exhibit the quote. He testified that he had sent it by fax to his fiancée in New York to give it to the Claimant.
52. The Defendant stated that after the visit to the Claimant's house, he and the Claimant entered into an agreement. She asked the Defendant to prepare and submit an estimate. He gave the Claimant an estimate when he went to New York, and he had a copy of it, but that copy of his estimate was at his New York home. The terms of the agreement, the price of the work which included material and labour which the Defendant gave evidence of was the same as that set out in the Defence and Counterclaim. He also maintained that he did not agree to construct a step or to do any electrical work. He stated that when he and the Claimant spoke she told him to leave some steel projecting from the upper floor so that she could build a step later.
53. According to the Defendant, they also agreed that when he was finished with the completion of the upper floor beams, she would pay him the sum of US \$5,000.00 and after the works were completed, she would then pay him the balance. However when he finished the concrete beams on the upper floor, the Claimant refused to pay him US \$5,000.00.

54. The Defendant testified that he employed 4 persons on the project at the Claimant's house. In total for the majority of the time on this project there were only 5 persons working including him; he was the supervisor, his son Kyle also worked for him, two Venezuelan persons by the names of "Jose Raphael" and "Rodriguez Guiliani" and Sherwin Richards who is a carpenter. He also employed Kifa Gonzales for 1 week and "Kojak" who only worked 1 day and was paid \$300.00 to cut and load some bamboo from Moruga Road, Sixth Company Village.
55. The Defendant testified that he was unable to find Jose, Rodriguez and Kifa to give any witness statements in this matter because he did not know where they were and he was unable to find Kojack. The only person whom he met and spoke to, to give a witness statement was Sherwin Richards.
56. In cross-examination, the Defendant testified that he hired 5 persons to work on the extension. He said they worked between 5 to 6 days per week and he accepted that in his witness statement he claimed a total weekly wage for each worker for 6 days for 6 weeks. He explained that the workers worked sometimes 5 or 6 days but sometimes when they worked late he paid them extra. He accepted that he was not on the site all the time and that he did not submit any detailed drawing of the work to the Court.
57. The Defendant explained in his witness statement that when he was putting up a building, he knew from his experience that the best thing to stabilize and to strengthen a wall was by tying the concrete posts, at the corners of the wall and tying the concrete posts into the walls. He explained that tying the walls into the post meant to put steel into the wall and inserting same into the concrete post and casting them together. He stated that the extension to the Claimant's house did not have any concrete posts which he drew to the Claimant's attention.

58. The Defendant explained that in order to do the construction works and prop up the boxing board when they were are casting the beams, they used bamboo. In total he got about 100 pieces of bamboo for this project. He did not pay for the bamboo and so he did not charge the Claimant for them. However, he charged the Claimant the sum of \$1,500.00 in total for the labour and transport costs of cutting and moving the bamboo from Moruga to South Oropouche. He annexed a copy of the invoice to his witness statement. In cross-examination the Defendant testified that he left between 75 to 80 pieces of bamboo when he left the site.
59. The Defendant stated that he purchased the items to begin the project from Seecharan Shopping Centre Limited because he was accustomed dealing with them. He ordered the items listed on the Cash Bill dated the 27 June 2016, but not all of the items were delivered on that day. He did not want to store all of the items on the site because he did not need them all at once. He spoke to the owners of Seecharan Shopping Centre Limited and he told them when he wanted an item on the list which he paid for on the 27 June 2016; he called Seecharan and Kyle picked up the items. On the 27 June 2016, he spent TT \$26,743.00.
60. In cross-examination the Defendant testified that he purchased the material in his name from the hardware but all was not delivered at the same time but that every day a truck brought materials for the workers. He stated that he left the material on the site and he knew that the Claimant's house was not fenced.
61. According to the Defendant, on the first day, he assigned Jose and Rodriguez to cut the wall in order to insert the concrete posts. He told them to start at the wall closest to the existing house. Mr Richards at that time was tying the steel for the matting and post. He sent Kyle, with his truck, to get the cement to cast the post. Kyle brought some of the items and the hardware brought some of the items. Sometime later Jose and Rodriguez finished cutting the wall and he saw and heard Mr Richards marking out an area on the

ground for them to cut. When they finished cutting the ground, he saw them digging the ground.

62. The Defendant stated that Mr Richards pointed out to him that there was no ground beam attaching the column of the existing house to the newly built wall on the extension. At that point in time he took out his Samsung Note telephone and turned on the camera and started taking pictures. He sent these pictures and other pictures and videos to the Claimant by **“What’s App”**, but he did not backup his messages, so he did not have any records for them. He attached 4 photographs showing the areas that were dug showing there was no ground beam, to his witness statement marked “D”. The photographs numbered 1, 2, 3, and 4 were taken on the 27 June 2016 and were a representation of what he saw when the ground was dug up.
63. According to the Defendant, Mr Richards told him to work on one section at a time, as he was concerned, that the whole wall would have fallen, because there was no ground beam tying into the wall. Based on Mr Richards’ suggestion they only worked on one section at a time. In total, they built 6 columns. They also tied in the wall with the existing three beams from the house. They dug under the existing wall from each column of the existing house to about 10 feet along the bottom of the wall, where they put the new column. They also dug a trench about 18 inches directly below the base of the wall one at a time and carefully as they did not want the existing walls to fall. In respect of the six columns that they had to build, 3 were closer to the middle of the extension and the other 3 were closer to the outer end of the extension.
64. The Defendant testified that he and his workers spent a little over two weeks to cut the four corners of the wall, to cut the ground, to dig up the ground, to tie the steel, to place the matting, to build the boxing and to cast the matting and columns.

65. The Defendant also stated that after the 6 columns were put up they started to build the beams on the first floor. They had to build 3, 20-foot beams, 1, 40-foot beam and 6 or 7, 3 feet beams. They tied the steel for those beams, built scaffolding using 2 x 4 half plank, built boxing board for all those beams, propped up the beams with bamboo and also put pieces of 2 x 2 wood and 2 x 4 wood to help prop up the beams. They also cast the beams manually by mixing the concrete by hand, and they used concrete buckets to move the concrete up unto the scaffold and then into the beams. This took about 3 weeks to complete. According to the Defendant, as the work progressed he took pictures of the work that was done. He attached 9 photographs which he took using his phone camera.
66. After completing casting of the upper floor beams the Defendant said he proceeded to purchase materials for the upper floor decking, that is, decking pan sheets; ½ inch steel, 5/8 inch steel; 2 x 6 wood; 2 x 4 wood; 1 x 4 laths; 1 – 2 x 4 I-Beam (to weld onto the Claimant’s house for a stronger support for the upper floor decking) and cutting and transporting approximately 100 pieces of 14 feet bamboo props. He stated that all these materials were on the job site under the Claimant’s house next to the extension when he left. The area where the Claimant’s house was, was an open area that did not have any fence. He said he spent the sum of \$17, 826.00 on the 11 July 2016. When he paid for these items, he was given the Cash Bill dated the 11 July 2016, which he attached to his witness statement.
67. The Defendant testified that after the upper beams were completed he asked the Claimant for the US \$5,000.00 payment, but she refused to pay it. He spoke to the Claimant a few times and during one of those times, she told him to sell the security camera for \$8,000.00 and apply that money as part payment towards the balance of moneys owed to him. Sometime in early August 2016, the Claimant contacted him and asked him to come to her home in New York to collect the US \$5000. He went to her home and she told him **“that everybody is telling me that you charge me too much money”**, she also told him that **“I have no money to give you now as I now come back from visiting**

my ill brother in England”. According to the Defendant it was at that point, the Claimant sent him the photograph of her brother in a bed.

68. The Defendant testified that the job took 5 weeks in total and the labour costs were TT \$58,800.00. He tried to settle the matter with the Claimant by offering to return TT \$14,000.00 and the security camera although he had spent about TT \$107,869.00. He asked the Claimant to indicate in writing that she would receive the money together with the camera and that the job was terminated but she failed to do so. He stated that he did not abandon the job but it was the Claimant who failed to pay him and told him to stop working.
69. The Defendant’s evidence that it was not a term of the agreement to construct the step, to install electrical and to be paid a further sum of US\$ 5,000.00 after 50% of the construction works were completed was consistent in his case, his witness statement and he maintained this position in his cross-examination. His position was also supported by the contemporaneous document namely the two bills, dated the 27 June 2016 and the 11 July, 2016 from Seecharan Shopping Centre Limited which did not contain any purchases of electrical items, like electrical sockets and cables. For these reasons I found his evidence to be credible.
70. Further, the Defendant’s evidence that the Claimant asked him to travel to New York in early August, 2016 to collect the US \$5,000.00 was not discredited in cross-examination which demonstrated that his version was more probable. The Defendant stated both in his Defence and Counterclaim which he repeated in his witness statement that the Claimant told him **“that everybody is telling me that you charge me too much money”** and that she also said **“I have no money to give you now as I now come back from visiting my ill brother in England”**. The Defendant attached a photograph of the Claimant’s brother to his Defence and Counterclaim. The Claimant did not dispute that she had this conversation with the Defendant or that the person in the photograph was her brother.

In my opinion, the consistency in this aspect of the Defendant's case which was unshaken demonstrated that his version was more probable.

71. Mr Sherwin Richards ("Mr Richards") was the Defendant's witness. He testified that he has been a carpenter for over 40 years and he worked for the Defendant on the Claimant's house during the period 27 June 2016 to the end of July 2016. According to Mr Richards, he went to the Claimant's house on the 27 June 2016. He recalled seeing an extension structure which was incomplete. He said that there was a ground flooring or foundation about 20 feet by 40 feet which appeared to be cast in concrete and blocked off on all 4 sides with foundation blocks approximately 8 feet in height with no ring beam cast. There were 3 entrances to the extension and there was no concrete posts in between any of the walls or at any corners of the walls. He said that based on his experience when he is building a wall to put weight on another floor or level of a building he would ensure:
- (a) That there is a ground beam which is also called a tie beam, which is supposed to be tied to each column.
 - (b) A matting made out of steel is tied into the column.
 - (c) The column is then tied into the walls.
 - (d) The column and walls are then tied into the beam that runs above it.
72. According to Mr Richards on the first day they went on the site, the 27 June 2016 the Venezuelan workers started to cut the wall with a Hilty grinder. At that time, he started to tie the steel for the matting and the columns. Kyle collected the cement and gravel and somebody from a hardware also brought some items. Whilst this was happening, the Defendant was helping both Mr Richards and the Venezuelans with moving the material they cut from the wall. After they cut the wall, they cut the concrete on the ground. After they finished cutting through the concrete, Mr Richards placed the mark when they had to put the matting. The Venezuelans dug and he saw that there was no ground beam to support the wall. He marked out where they had to dig for them to put in the matting and column. He suggested to the Defendant that they work on one section at a time, as he

was afraid that the whole wall would have fallen, because there was no ground beam tying into the wall. In total, they had to build 6 columns. They had to tie in the wall with the existing three beams from the house. They dug under the existing wall from the house to the site of the new columns a trench about 18 inches deep. This had to be done one at a time and carefully as they did not want the existing wall to fall. This trench had to be dug under the entire existing wall. The six columns were located 3 in the middle and 3 closer to the outer end of the extension.

73. According to Mr Richards, the workers took a little over 2 weeks to cut the four corners of the wall, to cut the ground, to dig up the ground, to tie the steel, to place the matting, to build the boxing and to cast the matting and columns. Mr Richards stated that they erected the 4 columns which were each 10 feet high, and they started to build the beam on the first floor. He said they had to build three (3) 20-foot beams, one (1) 40-foot beam and six (6) or seven (7) 3-foot beams. They tied the steel for those beams, built scaffolding using 2 x 4 half plank, built boxing board for all those beams, prop up the beams with bamboo and also put pieces of 2 x 2 wood and 2 x 4 wood to help prop up the beams. The beams were cast manually whereby the concrete was mixed by hand, and they used concrete buckets to move the concrete up unto the scaffold and then into the beams. This took about 3 weeks to complete which was the normal average time that work like this would have taken to finish based on his experience.
74. According to Mr Richards, sometime in the end of July 2016 he was informed by the Defendant that the Claimant told him to hold up the work. He said that when he left the job site there was materials such as bamboo, different lengths of steel, decking pan, 2 x 4 wood, some gravel, some cement, some ply, some BRC and other items which he was unable to specifically recall. They were stored under the existing house which was open and not blocked of. The area where the house and extension was located had no fence and was open.

75. In cross-examination Mr Richards testified that he had no experience as a structural engineer. He confirmed that there were 4 persons who worked on the site. He said that he did not see any plan and he never met the Claimant. He accepted that he did not state in his witness statement that he did not state the type of material the Defendant's son, Kyle received from the hardware.
76. In my opinion, Mr Richards appeared to be a credible and reliable witness since he was present during the construction works, and his evidence in chief was not undermined in cross-examination.
77. During the course of the case management of the action, the parties had agreed to engage the services of Mr Mark Hood, Quantity Surveyor in order to assist them in their discussion to resolve the matter without a trial. Mr Hood visited the site and prepared a report dated 11 December 2017 ("the Hood Report"). The parties agreed to tender the Hood Report into evidence at the trial as an expert.
78. The Hood Report stated that Mr Hood's qualification was that he was Fellow of the Royal Institution of Chartered Surveyors, a member of the Chartered Institute of Arbitrators, a member of the Institute of Surveyors of Trinidad and Tobago, an Honorary Member of the Caribbean Institute of Forensic Accounting and a certified Mediator of the Trinidad and Tobago Board of Mediation. He stated that his specialties included quantity surveying, contract claims, dispute resolution and he has been an expert witness on various construction contracts.
79. Mr Hood set out in the Hood Report the common understanding of the scope of the agreement and the Claimant's and Defendant's respective understanding of the scope of the agreement. He stated that he visited the site and he did not observe any materials stored for future construction works; he observed 4 pieces of bamboo in the bush and there was a quantity of bent steel stirrups about 50 metres. He conducted a valuation of

the construction works based on both the Claimant's and Defendant's understanding of the scope of the agreement and he set out his findings at paragraphs 4.3 and 4.4 as:

"4.3 Progress Valuation based on Claimant's Understanding of Scope

4.3.1 Utilizing the Contract Amount based on the Claimant's understanding of the scope of work in the Contract, we have evaluated the progress as follows:

- Pile/pad foundation work 100% \$10,123
- 6 no. Posts work 100% \$ 9,961
- 4 no. Beam work 95% \$24,252
- Deck slab work 0% \$ 0
- Step, Electrical 0% \$ 0
- Prelims, OHP **included**
- **Total Work** 34% **\$44,335**
- **Total Materials Stored** **\$ 0**

4.3.2. The Total valuation is in the amount of **\$44,335** for works conducted (34% complete) and \$0 for materials stored on site (Appendix E)."

"4.4 Progress Valuation based on Defendant's Understanding of the Scope

4.4.1 Utilizing the Contract Amount based on the Defendant's understanding of the scope of work in the Contract, we have evaluated the progress as follows:

- 6 no Posts work 100% \$14,600
- 4 no. Beams work 95% \$35,548
- Deck slab work 0% \$ 0
- Prelims, OHP included
- **Total Work** 39% **\$50,148**
- **Extra Pile/pad foundation** 100% **\$14,838**

Joint Expert Report – Matters of Quantum

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- **Total Materials Stored** **\$0**

4.4.2 The total valuation is in the amount of \$50,148 for works conducted (39% complete), \$14,838 for the piling/pad extra works and \$0 for materials stored on site is in the total amount of \$64,986 (Appendix F). This makes an overall completion of 45%.

4.4.3 If the Defendant had removed (or not delivered to site) the final materials (no materials on site were evident from the site visit), then the valuation of the Defendant's work is **\$64,986.**"

80. The Hood Report stated at paragraph 5.1.6:

"Having valued the works completed, this whole dispute therefore rests on 2 main issues:

- The scope of the construction works (i.e. if steps and electrical were included or not).
- Whether the piling/ pad works constituted an extra to the Contract Amount.
- Whether or not there was a balance of materials stored on the site in July 2016 to enable the works to be completed. The Claimant says no; the Defendant says yes. No materials stored were evident on the site visit.
- The validity of the Defendant's recorded costs."

81. In my opinion the findings of the Hood Report did not assist the Claimant's case since based on the pleadings the determination of the terms of the agreement was an issue of fact and the Hood Report stated that its findings were contingent on the Court's determination of issues surrounding the terms of the agreement.

82. In the **Darwin Azad Sahadath and Anor vs WASA**⁶, Kokaram J stated at paragraphs 91, 92 and 93 of the court's judgment the role of experts in Court matters as :

⁶ CV2016-01737 The general principles expressed by the learned trial judge were endorsed on appeal.

“91. Experts cannot usurp the function of the Judge as the ultimate arbiter of fact. It is for the Court to determine the issue of causation and loss based upon the totality of the evidence. Experts usefully provide assistance to the Court to arrive at its conclusion. They do so by providing the necessary scientific data to assist the Court in arriving at its conclusions. The unsupported scientific opinion of an expert is insufficient to assist a Court in this exercise. The expert evidence must be characterised by reason, logic and impartiality.

92. In **The Ikarian Reefer** [1993] F.S.R 563 Justice Cresswell set out the duties and responsibilities of expert witnesses as follows:

“1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation: see *Whitehouse v Jordan* ((1981) 1 WLR 246, 256) per Lord Wilberforce.

2. Independent assistance should be provided to the court by way of objective unbiased opinion regarding matters within the expertise of the expert witness; see *Polivitte Ltd v Commercial Union Assurance Co plc* ((1987) 1 Lloyd's Rep 379, 386) per Mr Justice Garland, and *Re J* ((1990) FCR 193) per Mr Justice Cazalet. An expert witness in the High Court should never assume the role of advocate.

3. Facts or assumptions upon which the opinion was based should be stated together with material facts which could detract from the concluded opinion.

4. An expert witness should make it clear when a question or issue fell outside his expertise.

5. If the opinion was not properly researched because it was considered that insufficient data was available then that had to be stated with an indication that the opinion was provisional (see *Re J*). If the witness could not assert that the report contained the truth, the whole truth and nothing but the truth then that qualification should be stated on the report: see

Derby & Co Ltd and Others v Weldon and Others (No 9) (The Times, November 9, 1990) per Lord Justice Staughton.

6. If, after exchange of reports, an expert witness changed his mind on a material matter then the change of view should be communicated to the other side through legal representatives without delay and, when appropriate, to the court.

7. Photographs, plans, survey reports and other documents referred to in the expert evidence had to be provided to the other side at the same time as the exchange of reports.”

93. Expert evidence which lacks the qualities of cogency, usefulness and impartiality are poor resources to assist the Court’s determination of fact.”

83. Apart from the failure by the Hood Report to assist in determining the terms of the agreement, it also lacked cogency, usefulness and impartiality which made it a poor resource for the Court for the following reasons. First, it did not indicate how the expert arrived at the percentages which were set out at paragraphs 4.3 and 4.4. Second, there was no information in the Hood Report that the expert ascertained from the parties what he/she understood as the extent of the work to be covered using percentages. Third, the video which the expert referred to at paragraph 1.2.3 which he received directly from the Claimant’s Attorney via What’s App was not attached to the Hood Report in breach of Part 33 of the Civil Proceedings Rules 1998 (“the CPR”).

84. Fourth, in paragraphs 3.2.3 and 3.3.4 the Hood Report referred to “Prices are market rates”. However there were no documents attached, referenced or referred to which showed the underlying market rates which the expert considered in arriving at the relevant percentages with respect to the completion of the construction works.

85. Fifth, the Hood Report noted at paragraph 2.4.4 that the Defendant did “extra work” and at paragraph 3.4.2 the expert noted that the Defendant only would have discovered the

necessity to pile the foundation when holes were drilled into the ground. This was material in impacting on the time frame to complete the construction works and the rates of labour charged. However, it was unclear from the Hood report if this was taken into account in quantifying the value of the completed construction works.

86. I have concluded that the terms of the agreement between the parties did not include the construction of a step and the installation of electrical fittings for the following reasons.
87. First, there was no credible evidence from the Claimant or her witness Mr Woodley of the nature of the step to be constructed by the Defendant. In cross-examination, the Claimant was unable to state the type of step to be constructed i.e. if it was a concrete step, steel step or wooden steps. Her witness Mr Woodley contradicted the Claimant's evidence when he testified in cross-examination that the Claimant told him about the type of steps that she was building which was of concrete. In my opinion if the Claimant and the Defendant had agreed that he was to build a step as part of the construction works to the extension of the Claimant's house, as the Claimant asserted, it is more probable that she would have known the type of step she wanted since this would have affected the construction price.
88. Second, the Claimant failed to provide any credible evidence about the nature and extent of the electrical works which she asserted she agreed with the Defendant to do. In cross-examination, the Claimant when questioned about the nature of the electrical work, was unable to indicate what the design was and she did not produce any plan for the electrical work. Again, if this was a term of the agreement, it is more probable that the Claimant would have known the details since this would have impacted on the cost of the construction works.
89. Third, the Defendants contemporaneous documents which were attached to his Defence and to his witness statement namely the two bills, dated the 27 June 2016 and the 11

July, 2016 from Seecharan Shopping Centre Limited did not contain any purchases of electrical items, like electrical sockets and cables. This supported the Defendant's assertion that there was no such agreement.

90. Fourth, the Hood Report did not assist in the determination of this issue of fact. The Claimant's case was limited to a claim in breach of contract. The expert's opinion on the value of the construction works done, was of little relevance to the main issue in this case of whether or not it was a term of the agreement between the parties that the disbursement of the US \$5,000.00 would be done when 50% of the work was done.

WHO BREACHED THE AGREEMENT?

91. The Claimant contended that it was the Defendant who abandoned the job and that he that breached the agreement when he did so. In order to succeed with this assertion the onus was on the Claimant to prove that it was a term of the agreement that the sum of TT \$76,500.00 which she paid the Defendant was to cover 50 % of the construction work and that when she refused to pay him any additional sum as he had not completed 50% of the said works.
92. On the other hand, the Defendant contended that the Claimant agreed to pay the Defendant the sum of US \$5,000.00 upon completion of the upper floor beams and after completion of same the Claimant would then discuss further payments of the balance of the moneys with the Defendant for the rest of the work to be done. In order to succeed with this assertion the Defendant had to prove that the sum of TT \$76,500.00 was to cover all the construction works associated with the completion of the upper floor beams.
93. Having concluded that the Claimant failed to demonstrate that it was a term of the agreement that the sum of TT \$76,500.00 which she paid to the Defendant was to cover 50% of the construction works, it follows that when she refused to pay him any further sums to continue and complete the construction works she breached the terms of the agreement.

IS THE CLAIMANT ENTITLED TO THE RETURN OF THE SECURITY CAMERA?

94. Both the Claimant and the Defendant testified that the Defendant had agreed to return the security camera to the Claimant. In cross-examination the Claimant accepted that the Defendant offered to return the security camera. However, she was unable to provide any explanation for her failure to collect it. The Defendant also explained in his Defence and Counterclaim and in his evidence that although the security camera was initially sold the purchaser returned it to him and as such, he was in a position to return it to the Claimant.

95. The Claimant's witness, Ms Victoria Allum testified that on the 7 August 2016, she called the Defendant at the Claimant's request and asked that he return the security camera and the balance of the contract price minus the value of the works he had completed at the job site. She testified that the Defendant initially had agreed to return the security camera and the balance of monies minus a valuation to be completed by him and he told her that he would make the arrangements for her to pick up the security camera. Ms Allum also testified that the Defendant stated that since the transaction was between he and the Claimant, he wanted the Claimant to indicate in writing what was being done. Ms Allum testified that she informed the Claimant of the Defendant's request.

96. Ms Allum testified that on 10 August 2016 she was informed by the Claimant that the Defendant had left a voicemail on her phone in which he accepted that he would repay some monies as demanded but he asked that the terms of the refund and return of the security camera be reduced into writing. She contacted the Defendant later that month and he informed her that he was no longer willing to return any money or the security camera. In cross-examination, Ms Allum stated the Claimant had told her that the Defendant had indicated that he was willing to give her a sum of money and the security camera.

97. It was submitted on behalf of the Claimant that the offer by the Defendant to settle the matter before the institution of the instant action by giving the Claimant TT \$14,000.00 and the security camera ought to be viewed by the Court as an admission of liability. I do not share this view since the Defendant has from the institution of the instant matter been forthright with the Court on his efforts to resolve the dispute without any litigation since the parties were once friends.
98. The dispute between the parties on the return of the security camera was contingent on the Claimant reducing into writing the details surrounding the return. In light of the evidence by the parties, there was nothing preventing the security camera being returned to the Claimant.

IS THE DEFENDANT ENTITLED TO THE RELIEFS IN THE COUNTERCLAIM?

99. The orders sought by the Defendant in the Counterclaim were for a declaration that the Claimant's actions in stopping the construction works on the extension to the Claimant's house was a breach of contract; damages for breach of contract and an order that the Claimant pay to the Defendant the sum of TT \$31,369.00 being moneys due to the Defendant for work completed at the Claimant's house.
100. Having found that the Claimant was in breach of the agreement it follows that that only outstanding relief is whether the court should order the Claimant to pay the Defendant the sum of TT \$31,369.00 being moneys due to the Defendant for work completed at the Claimant's house.
101. It was submitted on behalf of the Defendant that he is entitled to the orders he sought in his Counterclaim since the Claimant failed to file any Defence to the Counterclaim and as such she is deemed to have admitted the Counterclaim. The Defendant also contended that the Defendant's Counterclaim was intimately connected to the Claimant's claim. As such, the Claimant's failure to file a Defence meant that she was deemed to have

admitted the Defendant's Counterclaim. Counsel further argued that the Defendant was able to prove from the evidence provided at the trial that he is entitled to the relief in his Counterclaim.

102. Counsel for the Claimant submitted that the Defendant failed to plead material facts in support of his Counterclaim which were not dealt with by the Claimant in her Amended Statement of Case which required the Claimant to file a Reply. Rather the Defendant has simply incorporated his Defence as the basis of his Counterclaim and prayed for monetary reliefs in his Counterclaim. As such, Counsel submitted that both the Statement of Claim and the Defence must therefore be considered in conjunction with each other and the rules with respect to a Reply.
103. In my opinion, the Defendant is entitled to the reliefs which he has sought in the Counterclaim for the following reasons. First, the Defendant provided credible evidence to support the sum claimed. The Defendant's Defence and Counterclaim and his witness statement was consistent. He stated that the Claimant paid him TT \$76,500.00 but when he ceased work he had expended a total of TT \$107,869.00 and as such she still owed him the sum of TT\$31,369.00. In both the Defence and Counterclaim and the Defendant's witness statement the Defendant detailed how he arrived at the sum of TT\$31,369.00. According to the Defendant on the 27 June 2016, he purchased materials from Seecharan Shopping Centre Limited where he spent a total of TT \$26,743.00. He annexed a copy of the invoice which he had received from Seecharan to his witness statement⁷. He explained that he did not take delivery of all the materials at once, but as he needed them.
104. The Defendant also stated that after the completion of the casting of the upper floor beams, on the 11 July 2016, he purchased material for the upper floor decking which cost him the sum of TT \$17,826.00. He annexed a copy of the receipt which he received from Seecharan Shopping Centre Limited for the said purchase⁸. He explained that all the

⁷ Exhibit C at paragraph 10 of the Defendant's witness statement

⁸ Exhibit F at paragraph 15 of the Defendant's witness statement

materials which he purchased on the 11 July 2016 were left under the Claimant's house next to the extension. He noted that the Claimant's house was not on property which was fenced.

105. The Defendant testified that he spent the sum of TT \$58,000.00 on labour for the construction works and he attached a letter⁹ to his witness statement which showed a breakdown of his labour costs. The other expenses which the Defendant said he incurred were for the labour and transport as the cost for cutting and moving the 100 pieces of bamboo in the sum of \$1,500.00. He exhibited an invoice dated 9 July 2016 to his witness statement¹⁰.
106. It was submitted on behalf of the Claimant that in cross-examination the Defendant said that when he left the site there were approximately 75-80 pieces of bamboo left on the site, but when he was pointed to the photograph which the Defendant exhibited to his witness statement as proof that he left bamboo, he said there were more than 30 pieces of bamboo in the picture.
107. It was not in dispute that the expert, Mr Hood visited the extension to the Claimant's house in December 2017, which was approximately 18 months after the construction works stopped in July 2016. The Hood Report stated that the expert only observed a few pieces of bamboo which were thrown in the bushes which Mr Woodley has shown him and the latter had explained that he had thrown the bamboo there since they had termites.
108. Both parties acknowledged that the photograph of the bamboo which the Defendant relied on was not dated. In my opinion, given that the property on which the Claimant's house was on, was not fenced; the nature of bamboo is degradable and the 18 month

⁹ Exhibit H at paragraph 18 of the Defendant's witness statement

¹⁰ Exhibit B at paragraph 9 of the Defendant's witness statement

lapse between when the construction works stopped and when the expert visited, it was more probable that these may be reasons to account for the expert not observing 75-80 pieces of bamboo when he visited. For these reasons I was not satisfied that the Defendant's credibility on the cutting and transporting costs for the bamboo was undermined.

109. The Defendant exhibited an invoice dated 8 August 2016, which stated transport costs from Seecharan Shopping Centre Limited to the address of the Claimant's house. The Defendant's explanation in his witness statement to account for this sum was that when he required the materials which he purchased on the 27 June 2016 his son Kyle collected it from Seecharan. He did not give any evidence that there was any additional costs attached for the transportation.
110. The Defendant's evidence on the expenses he incurred were not shaken in cross-examination.
111. The Claimant's evidence was that before the Defence and Counterclaim was filed she was not provided with any of the invoices for the purchase of the materials, the labour costs, transportation costs for the bamboo and the materials from the hardware. She admitted in cross-examination that the Defendant was in regular contact with her during the construction works and that he sent her photographs and videos of the said works. She also admitted that the photographs which the Defendant annexed to his Defence and Counterclaim and witness statement were the photographs which the Defendant sent to her.
112. The Claimant's witness Mr Woodley stated that he visited the Claimant's house twice every day during and after the construction. He said that after the Defendant abandoned the construction only about a few pieces of bamboo were left by the Claimant's house which he eventually threw in some bushes since they were affected by termites.

113. In my opinion, the Claimant was aware of the nature and extent of the construction work which was being undertaken by the Defendant and she was in no position to dispute the sums he spent. In the case of the purchase of the building materials, the Defendant's evidence was supported by the contemporaneous documents namely the receipts. With respect to the labour for the construction work which was done, the Defendant provided a detailed breakdown of the names and numbers of workers, their wages per week and the nature of the work they did. This evidence was not undermined in cross-examination by the Claimant. On the other hand, the Defendant gave unchallenged evidence that he paid the sum of TT \$1, 5000.00 for the costs of cutting and transporting the bamboo and that the costs for transporting the materials from the hardware was TT \$3,000.00.
114. It was not in dispute that the advance which the Claimant paid to the Defendant was the sum of TT \$76,500.00. In my opinion, the Defendant was able to prove that he spent the sum of TT \$ 31,369.00 on the construction works on the extension and as such, he is entitled to recover the said sum.
115. Secondly, even if the Defendant did not provide evidence to prove the sum claimed, the failure by the Claimant to file a Defence to the Counterclaim meant that the Claimant would have deemed to have admitted the sum claimed by the Defendant in his Counterclaim.
116. Rule 18.1 (1) (a) CPR defines an "ancillary claim" as:
"18.1 (1) An "ancillary claim" is any claim other than a claim by a claimant against a defendant or a claim by a defendant to be entitled to set off and includes-
(a) A Counterclaim by a defendant against the claimant or against the claimant and some other person."
117. Rule 18.2 CPR provides that the Counterclaim is to be treated as if it were a claim for the purposes of the Rules save and except the provisions of time to be served and for default

judgment under Part 12. Rule 18.5(6) again states that all rules which apply to claims also apply to Counterclaims except the rules with respect to time for service (Rule 8.13 and 8.14); Appearance (Part 9); the provisions in Part 12 which enable a Claimant to enter judgment in default for failure to file a defence and rule 12.7 which deals with the nature of default judgment. Rule 18.9 expressly provides that a party has 28 days after service of the Counterclaim to file its defence.

118. The effect of the failure to file a Defence to the Counterclaim was one of the issues which was examined in the local Court of Appeal decision of **Satnarine Maharaj v Great Northern Insurance Limited**¹¹ by Mendonca JA, delivering the judgment of the Court of Appeal. Paragraphs 16 to 21 of the Court's judgment stated:

“16. Under the CPR a Counterclaim is treated as an ancillary claim. This is to be found at rule 18.1(1) (a) which provides as follows:

“18.1 An ‘ancillary claim’ is any claim other than a claim by a claimant against a defendant or a claim by a defendant to be entitled to a set off and includes-
(a) a Counterclaim by a defendant against the claimant or against the claimant and some other person;”

The person making the ancillary claim is the ancillary claimant and the ancillary defendant is the defendant to that claim (see rule 18.1(2)).

Rule 18.2 provides that an ancillary claim is to be treated as if it were a claim for the purposes of the CPR but 18.2(2) disapplies certain rules to an ancillary claim including the provisions of Part 12 which enable a claimant to enter a default judgment and “rule 12.7 (nature of default judgment)”.

17. The ancillary defendant may file a defence and the rules relating to a defence to a claim are applicable to a defence to an ancillary claim except part 12 (see rule 18.9).

¹¹ Civil Appeal No P198 of 2015

18. Rule 18.12 contains provisions that are applicable where the ancillary defendant fails to file a defence. Of relevance is rule 18.12(2) (a) which is as follows:

“(2) The party against whom the ancillary claim is made-

(a) is deemed to admit the ancillary claim, and is bound by any judgment or decision in the main proceedings insofar as it is relevant to any matter arising in the ancillary claim;”

19. Counsel for the appellant before this Court accepted that by failing to file a defence to the Counterclaim the appellant was deemed to admit the Counterclaim. This was the clear effect of rule 18.2(2) (a). This he submitted, however, did not entitle the second respondent as ancillary claimant to judgment on the Counterclaim. Rather, the second respondent was entitled to have the admissions taken into account in the main claim between the appellant and the respondents. In other words the respondents must wait until the Court hears the dispute between the appellant and the respondents. Counsel submitted that if that approach is adopted in this case, the deemed admissions of the appellant was that the accident was caused “wholly or in part” by the appellant’s negligence. A trial of the claim was necessary to determine whether he was wholly liable or partly liable, and if the latter the extent of his liability. The Judge was therefore wrong to make the orders on the respondents’ application that are the subject of this appeal.

20. Counsel for the respondents emphasized rule 18.12(2) (a). He submitted that the effect of that rule was that the appellant having failed to file a defence to the Counterclaim was deemed to admit it. The appellant, therefore, was deemed to admit the allegations of liability for the collision and had lost the opportunity to challenge liability or to seek an apportionment of liability. If the Court were to continue with the claim the effect of that would be to allow the appellant a further opportunity to dispute the allegations and having admitted them he

should not be allowed to do so. In the circumstances, the respondent contends the Judge was entitled to strike out the claim and give judgment in favour of the second respondent on the Counterclaim.

21. **It is clear from the submissions that there is no issue between the parties that by having failed to defend the Counterclaim the appellant is deemed to admit it. The parties were ad idem that this meant that the appellant was deemed to admit not only the relief claimed in the Counterclaim but the averments contained in Counterclaim as well. We think that the parties were correct to adopt that position as that is so from the plain wording of rule 18.12(2)(a).** Where they part company however is on the effect of the admissions in this case. That is of course the crux of the dispute and lies at the heart of determining this appeal.” (Emphasis added)

119. At paragraph 24 of the judgment in **Satnarine Maharaj** Mendonca JA continued:

“...The appellant, however, conceded that in an appropriate case the admissions deemed to arise from the failure to defend the Counterclaim can result in the dismissal of the claim. We think it must be right that there would be cases where the deemed admissions arising from the failure to defend the Counterclaim can result in the dismissal of the claim. **One such case is where the effect of the claimant admitting the Counterclaim would lead to a contradictory outcome on the claim if it were allowed to continue.** To permit the claimant to proceed with the claim in those circumstances would be an abuse of process.” (Emphasis added)

120. Therefore, applying the law as set out in **Satnarine Maharaj** it is clear that, the Claimant’s failure to file a Defence meant that she was deemed to have admitted the Defendant’s counterclaim. The Claimant’s claim and the Defendant’s Counterclaim were connected since they concerned the loss arising from the alleged breach of the agreement for the construction works.

Costs

121. Costs follow the event. The Defendant has successfully defended the action and has proven his case in the Counterclaim. It was unclear from the Claimant's case the sum she was seeking to recover as damages for breach of the agreement apart from the return of the sum of TT \$8,000.00. In this regard, pursuant to Rule 67.5(1) the cost of the claim is prescribed costs on the sum of TT \$8,000.00, which is the sum of \$2,400.00. The sum the Defendant has successfully recovered is \$31,369.00. Pursuant to Rule 67.5(1) the prescribed costs on this sum is \$9,342.25

Order

122. The Claimant's action is dismissed.
123. Judgment for the Defendant on the Counterclaim namely:
- (a) It is declared that the Claimant's actions in stopping the construction works was in breach of the contract.
 - (b) The Claimant to pay the Defendant the sum of TT \$31,369.00 being monies due to the Defendant for the construction works completed at the Claimant's house.
124. It is also ordered that the Defendant return the security camera to the Claimant forthwith.
125. The Claimant to pay the Defendant's costs of the claim in the sum of \$2,400.00 and the costs of the Counterclaim in the sum of \$9,342.25.

Margaret Y Mohammed

Judge

