

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV2016-03126

BETWEEN

ROY STEWART

Claimant

AND

VICTORIA ST. CLAIR

Defendant

Before the Honourable Mr. Justice R. Rahim

Appearances:

Mr. J. George instructed Ms. T. Wilshire by for the claimant

Mr. L. Phillip for the defendant

Judgment

1. This is a claim for breach of contract. In or about January, 2014 the claimant, a general contractor entered into a partly written, partly oral agreement with the defendant to build a structure (“the building”) at Silk Cotton Trace Bon Accord, Tobago. The claimant quite unconventionally and against the relevant legal principles, relies on the drawing plans of the building to claim that the agreement was partially written. However, those drawing plans simply show the layout for both floors of the building. As such it is clear to this court that there was no agreement in writing and the case for the claimant in that regard is wholly misconceived. The claimant and the defendant are second cousins. The defendant was at all material times a resident of the United States of America and occasionally visited and resided at Silk Cotton Trace, Bon Accord, Tobago.

2. The claimant claims that the terms of the agreement were as follows;
 - i. The upper floor of the building to be used as a dwelling for the defendant and the ground floor to be used as a senior citizens centre.
 - ii. The defendant would pay to the claimant the sum of \$1,813,756.58 for the construction of the building. This sum included the cost of labour, material and the general contracting services of the claimant.
 - iii. The defendant would bear any additional costs associated with the services of the claimant which included drawings, project management, modifications and construction management.
 - iv. The claimant would provide the ground work for the foundation of the building which included excavating and filling the site, casting the concrete foundation, masonry and brick work, carpentry and structural work, cladding and covering work, water proofing work, roofing works and the installation of windows and doors.

3. It is the case of the claimant that the defendant thereafter by oral agreement varied the initial terms of the original contract by ordering certain variations. The claimant avers that he performed all the variation works to the building and that he completed the building. He

further avers that upon completion of the building, he handed over same to the defendant with an invoice for the unpaid balance on the new contract. According to the claimant, the defendant refused to settle the invoice. As such, by Claim Form filed on the 19th September, 2016 the claimants claims damages in the sum of \$750,474.58 for breach of contract.

4. By Defence and Counterclaim filed on the 27th June, 2017 the defendant admits that she contracted the claimant to build the building. However, she denies that she owes the claimant any money. She further denies that the agreement was entered into in January, 2014 and that it was partly written and partly oral. According to the claimant the agreement was an oral agreement.
5. The defendant avers that in July, 2013, not January 2014, by oral agreement she contracted the claimant to construct the building which was a two storey, three bedroom dwelling house for the sum of \$1,813,765.58. The defendant admits that the ground floor was to be used as a senior citizens centre and that the contract sum included the cost of labour, materials and the general contracting services of the claimant. However, the defendant denies that she varied the terms of the oral agreement and/or that she requested any variations to the works that were to be carried out. She further denies receiving an invoice from the claimant for an unpaid balance.
6. According to the defendant, the claimant failed to complete the construction of the building and remedy defective works which were identified to him. She avers that she had to contract third parties to complete the construction of the building and to rectify the defective works. She contracted one George Balfour to complete certain paving works to the exterior of the building and to carry out corrective works on the plumbing and sewer system. She also contracted one Anthony Sandy to complete some tiling.
7. In addition to contracting of the aforementioned persons, she had to expend monies to purchase certain materials from Luxury Finishes in Trinidad to complete the kitchen counter and the bathrooms. Moreover, she had to purchase certain tiles from one Steve Woods. As such, she claims that she had expend the sum of \$196,100.00 to complete the

building and repair the defective works left by the claimant. Consequently, the defendant counterclaims for damages for breach of contract and for the sum of \$196,100.00.

Issues

8. The issues to be determined in this case are as follows;
 - i. When did the claimant and the defendant enter into the agreement for the construction of the building;
 - ii. Whether the agreement was a partly written and partly oral agreement or an entirely oral agreement;
 - iii. What were the terms of the agreement;
 - iv. Whether the defendant varied the terms of the agreement;
 - v. Whether the claimant fulfilled his obligations under the contract;
 - vi. How much money did the defendant pay to the claimant pursuant to the agreement;
 - vii. Whether the defendant owes the claimant the sum of \$750,474.58; and
 - viii. If the claimant did not complete his obligations under the contract, whether the claimant owes the defendant the sum of \$196,100.00.

Case for the claimant

9. The claimant gave evidence and called two witnesses, Gloria Stewart and Ezan Benjamin. A witness statement was also filed by the claimant for one Glen Godson Holder (“Holder”) however he was not called at trial and therefore not cross-examined. No explanation was given for his absence. During the trial attorney for the claimant stated that he would be relying on the witness statement of Holder and the court directed that this issue be addressed in closing submissions. However, both attorneys failed to address this issue in closing submissions. The court therefore attached no weight to the evidence given by Holder in his witness statement, the defence not having been given the opportunity to test the veracity of his witness statement. Further, it is to be noted, that unlike affidavits which

are sworn statements, witness statements are not sworn statements and do not become evidence once filed. The witness statement only becomes evidence in chief upon the witness being sworn in court and adopting the contents of his witness statement upon which he is either cross examined or not. Further, the contents of the witness statement may be relied on if there is agreement between the parties but in this case there is no such agreement.

10. According to the claimant, his agreement to construct the building was based on the specifications of Vincent Draughting Services.¹ He testified that it was agreed that the defendant would pay him the sum of \$1,813,765.58 for the constructing of the building. This sum included the cost of labour, materials and the claimant's general contracting services, project management and security.² The claimant further testified that the defendant agreed to pay all costs separate and apart from the initial contract cost which included modifications and any other costs incidental thereto.
11. He testified that before construction began in November, 2014 the defendant instructed him to commission new architectural drawings to include an additional bedroom to the building. The additional bedroom was to accommodate the defendant's children. The claimant approached Vincent Draughting Services to complete the new drawings as per the defendant's specifications.³
12. After he began construction in keeping with the new specifications, the defendant visited the site sometime in December 2014 and instructed the claimant to do additional variation works to the building. It is the evidence that the defendant also instructed him to do other variations to the building via telephone calls. The following are the variations which the defendant instructed the claimant to undertake;

¹ A copy of the drawings produced by Vincent Draughting Services were attached to the claimant's witness statement at "R.S.3".

² The details of the specific works contracted to be done and the estimated costs were attached to the claimant's witness statement at "R.S.2".

³ A copy of these drawings were attached to the claimant's witness statement at "R.S.4".

- i. Increase the height of the building foundation by two feet to avoid flooding as the level was below the road. During cross-examination the claimant testified that the defendant instructed him to do this variation via telephone call.
- ii. Increase the buildings overall width on both floors by six feet to utilize more of the land space and to ensure the bedroom sizes were not too small. During cross-examination, the claimant testified that the defendant gave instructions for this variation via phone call.
- iii. Create an additional side staircase to the building for safety purposes. During cross-examination, the claimant testified that the defendant gave instructions to do this variation via phone call and when she visited the site.
- iv. Build an extension to the ground floor dining room area. During cross-examination, the claimant testified that the defendant gave instructions for this variation via phone call.
- v. Build an extension to upper floor dining room area. The claimant could not recall whether the instructions for this variation was given by the defendant via phone call or onsite.
- vi. Create an extension to the upper floor front porch area. During cross-examination, the claimant testified that the defendant instructed to do this variation whilst she was onsite.
- vii. Create a back porch on the upper floor of the building. During cross-examination, the claimant testified that the defendant gave instructions for this variation via phone call.
- viii. Create an extension to the roof over the new upper floor back porch. During cross-examination, the claimant testified that the defendant gave instructions for this variation via phone call.
- ix. Create additional steps at the kitchen door opening. The claimant could not recall whether the instructions for this variation was given by the defendant via phone call or onsite.
- x. Install gypsum ceiling to the ground floor in order to install down lighters. During cross-examination, the claimant testified that the defendant instructed to do this variation whilst she was onsite.

- xi. Create additional design features to the upper floor gypsum ceiling.
- xii. Install sheet rack to the ground floor. During cross-examination, the claimant testified that the defendant instructed to do this variation whilst she was onsite.
- xiii. Add additional electrical work. The claimant could not say for certain whether the instructions for this variation was given by the defendant via phone call or onsite but he testified that it was most likely via phone call;
- xiv. Construct a utilities room to house pump and water heater;
- xv. Purchase and install two 2000 gallon water tanks;
- xvi. Construct a perimeter fence. During cross-examination, the claimant testified that the defendant instructed to do this variation whilst she was onsite.
- xvii. Fabricate and install gates to the property. During cross-examination, the claimant testified that the defendant gave instructions for this variation via phone call.
- xviii. Construct kitchen, bedroom and bathroom cupboards. During cross-examination, the claimant testified that the defendant gave instructions for this variation via phone call.
- xix. Back fill and raise the yard, the claimant could not recall whether the instructions for this variation was given by the defendant via phone call or onsite.
- xx. Use porcelain tiles instead of ceramic tiles on both floors. During cross-examination, the claimant testified that the defendant instructed to do this variation whilst she was onsite.

13. During cross-examination, the claimant testified that the defendant requested the aforementioned variations from either October or September, 2014 to May, 2015.

14. According to him, exterior tiling, kitchen counters and “certain types of tiles” were never part of the original contract as claimed by the defendant in her defence. That corrective works on the plumbing and the sewer system could not have been undertaken as the building was built with a septic tank and not a sewer system as claimed. During cross-examination, the claimant testified that the paving of the exterior of the building, the installation of burglar proofing in the building and the fabricating and installing of a gate and fence around the building was not a part of the original contract. That after speaking

with the defendant about burglar proofing, she instructed him to secure the building by fabricating and installing a gate and fence. Further during cross-examination, the claimant testified that he did complete the tiling of the building, the washrooms, the kitchen and the plumbing in the building. He also testified during cross-examination that there was no defects with the cesspit tank.

15. According to the claimant, he trusted the defendant and so in reliance on that trust he constructed the building with all the new specifications and/or variations as per requested and/or instructed by the defendant.

16. As the defendant informed the claimant that she had an agreement with the Tobago House of Assembly (“THA”) to occupy the senior citizens centre between July and August, the claimant worked on the building from November, 2014 to May, 2015 in order to complete construction within the expected time. During cross-examination, the claimant testified that he completed and handed over the building to the defendant in May, 2015. It was then pointed out to him that at paragraph 5 of his Reply and Defence to Counterclaim filed on the 20th July, 2017 he stated that he completed the building in July, 2016. In response, the claimant testified that he completed and handed over the building to the defendant in May, 2015 and that the defendant opened the building in July, 2016. Paragraph 5 of the Reply provides as follows;

“...the claimant avers that in July, 2016 when he completed the defendant’s building she expressed satisfaction to him about the work completed and presented him with a plaque in commemoration of the good work he had done and completed the contract on time with all the variations...”

17. Between November, 2014 and May, 2015 the claimant employed approximately twenty workmen working with him. The workmen included carpenters, masons and painters. He sometimes employed two shifts of workers in order to complete the building on time. The equipment he used on the site were a backhoe, vibrating plates, jumping jacks and dump trucks.

18. In his witness statement, the claimant testified that over the period of the construction, the sum of \$1,452,291.00 was paid by the defendant. That he put the sum of \$121,000.00 on his personal credit card to augment some of the payments.⁴ However, during cross-examination he testified that the defendant paid him approximately \$1.5 million dollars. He further testified during cross-examination that the defendant opened a joint account with his mother, Gloria Stewart (“Gloria”) at Republic Bank Limited, Tobago. That when he requested money, the defendant deposited same into the joint account and Gloria would withdraw the money and pay it to him. Also during cross-examination, the claimant testified that when the defendant visited Tobago, she sometimes paid him in cash. However, he testified that he could not recall being paid \$60,000.00 in cash in December, 2015. He denied that the son of the defendant, Gregory St. Clair (“Gregory”) paid him \$30,000.00 in cash in December, 2015. According to him, Gregory gave him \$15,000.00 to go to Trinidad to buy the solid surface for the countertops and Gregory paid the rest of money to the contractor the claimant awarded the job of installing the countertops to.

19. During cross-examination, the claimant was referred to certain withdrawal slips attached to the defendant’s witness statement at “V.S.C.1”. He testified that he did instruct the defendant when she visited Tobago to pay certain stores for materials and supplies he had obtained for the building. That those stores included Westside Electrical and Plumbing, Richard’s Hardware, Baj’s Building Supplies and Tobago Glass Supplies. He accepted that withdrawal slip dated the 27th February, 2016 represented one such payment.⁵ However, the claimant testified that he has no knowledge about the sums shown on the withdrawal slips dated the 17th July, 2015, the 18th December, 2015 and the 22nd December, 2015. That those sums were not paid to him. According to the claimant, as he completed the building in May, 2015 the withdrawal slips that were dated post expiration of the contract represented personal items which the defendant bought for herself and not pursuant to the contract.

⁴ A record of the monies received over the period was attached to the claimant’s witness statement at “R.S.5”.

20. Upon completing the building, the claimant handed over same to the defendant.⁶ When he handed over the building to the defendant, he gave her an invoice for the unpaid balance on the new contract which was \$750,474.58. During cross-examination, the claimant testified that he did not put this invoice into evidence. After he gave the defendant the invoice, he made numerous phone calls to her to settle the invoice but she refused to do so. During cross-examination, the claimant denied that in early, 2016 he told the defendant that she did not owe him any money.
21. In March, 2016 the claimant convened a meeting with the defendant, Whitney Alfred (the defendant's advisor on the construction), Wendy St. Clair (the defendant's daughter) and Glen Holder. The claimant testified that at the end of this meeting, the defendant made an undertaking to pay him the outstanding balance of the payments on the new contract in instalments. During cross-examination, the claimant testified that the defendant agreed to pay him approximately \$700,000.00 at the end of the meeting. That she agreed that she would pay him the sum of \$300,000.00 first which represented the sum owed on the original contract and pay the balance owed for the variations thereafter. It was the testimony of the claimant that the defendant did not give a time period in which she was going to pay the monies she owed to him. This was not pleaded and so any evidence of costs of variations were struck out.
22. The claimant called the defendant in April, 2016 and told her that he would be in New York in May, 2016. He testified that she told him that when he came to New York, she would have given him some of the money which was owed to him.
23. In July, 2016 the defendant presented the claimant with a plaque in recognition of his capable and loyal service as a Master Builder. The claimant testified that the defendant told him that the plaque was for his professionalism and for completing the building before the requested completion date of August, 2016.⁷ During this time, the claimant was still asking the defendant for the balance of monies she owed to him.

⁶ A photograph of the building was attached to the claimant's witness statement at "R.S.6".

⁷ A copy of the plaque was attached to the claimant's witness statement at "R.S.7".

24. By pre-action protocol letter dated the 11th August, 2016 the claimant's attorney at law informed the defendant that she had varied the terms of the original contract by ordering the aforementioned variations and that she was in breach of the contract by failing to pay the sum of \$574,474.58 which represented the unpaid balance on the contract and for the variation works. As such, by this letter the claimant demanded the payment of the sum of \$574,474.58. The claimant testified that his attorney erroneously stated that the balance owed on the original contract and for the variations was the sum of \$574,474.58. According to the claimant, the sum of \$574,474.58 was actually only for the variations works and therefore did not include the unpaid balance on the original contract. During cross-examination, he admitted that the letter was written as per his instructions to his attorney and that he saw the letter before it was sent out. However, in the same breath he testified that his attorney overlooked a certain figure on the spread sheet⁸ and that when he realized that his attorney had made an error in calculating the sum owed to him, he pointed out the error to his attorney. In his witness statement, the claimant testified that an amended letter with the correct sum of \$750,474.58 was sent however, no such letter was placed before this court.

25. **Gloria Stewart** ("Gloria") is the mother of the claimant and the cousin of the defendant. She is eighty years of age. She testified that around ten years ago the defendant approached her and asked her to create a joint account in both of their names at Republic Bank Limited. Gloria testified that this account was to deal with general business. That it was eventually used to deal with the day to day business activities of the defendant's building and not solely to transfer payment. During cross-examination when it was put to Gloria that the account was opened in 2013, she replied by stating "*alright*". She further testified during cross-examination that the purpose of the account was to facilitate payments for the construction of the building.

26. According to Gloria, the defendant informed her that she would deposit funds into the account and that she (Gloria) would then have to withdraw the funds to give to the claimant for the construction of the building as expenses arose. She testified that the defendant

⁸ Counsel for the claimant stated that this spreadsheet referred to by the claimant during cross-examination was the documents which were attached to the claimant's witness statement at "R.S.2" and "R.S.5".

would call her to tell her how to withdraw the funds to give to the claimant. That she withdrew the money from the account and paid same to the claimant in accordance with the defendant's wishes.

27. Gloria testified that she kept all the records of her withdrawals from the account through her passbook for the account. However, sometime in July, 2016 the defendant took the passbook and Gloria's records of the withdrawals. As such, it was the testimony of Gloria that she has not seen the records since the defendant took same.
28. During cross-examination, Gloria was shown five Citibank cheques attached to the defendant's witness statement at "V.S.C1". Although these cheques were made out to Gloria, she testified that she did not recall receiving same.
29. **Ezan Benjamin** ("Benjamin") testified that he worked for the claimant. As such, it was his testimony that he knew the defendant through the claimant. Some of Benjamin's evidence was the same as the claimant's and as such that evidence need not be repeated.
30. Benjamin was responsible for the overall management of the construction of the building which included quality assurance, procuring the goods and services and the making and scheduling of the work. He was instrumental in the day to day activities of the entire project. The arrangement he made with the claimant was that he would get paid at the completion of the construction. He agreed to this because the defendant had stated that she could only send money at certain times and when the money was sent it would only cover some of the construction costs. He testified that the defendant also stated that in order not to attract the attention of the Internal Revenue Service of the United States of America, she could only send certain amounts of money.
31. Benjamin had two shifts working on the construction, a day shift and a night shift. He testified that the claimant and he had a tight deadline because the defendant had instructed them that she wanted to keep the deadline with the THA for the occupation of the senior citizens centre.

32. Benjamin communicated with the defendant through the internet messaging service WhatsApp. He sent photographs of tiles and other material for the defendant to decide what she wanted. He also called the defendant through Magic Jack to get updates on what she wanted. In his witness statement, Benjamin testified that the defendant would call him and make alterations to the building. However during cross-examination he testified that he made all phone calls to the defendant and that during those conversations the defendant would make the requests for the alterations. He further testified during cross-examination that he made those phone calls to the defendant throughout the entire construction period which was from November, 2014 to July, 2015
33. The first alteration she made was the two feet height increase on the foundation. During cross-examination, Benjamin testified that sometimes he got instructions for the alterations from the defendant and other times the defendant having spoken to the claimant, the claimant would relay the instructions for the alterations to Benjamin. He further testified during cross-examination that the defendant instructed to do some alterations when she did a walkthrough of the building.
34. According to Benjamin, the following were the other alterations made by the defendant;
- i. Create an additional side staircase to the building for safety purposes. Benjamin could not recall whether the instructions for this alteration came directly from the defendant or whether the claimant related same to him.
 - ii. Build an extension to the ground floor dining room area.
 - iii. Build an extension to upper floor dining room area.
 - iv. Create an extension to the upper floor front porch area. During cross-examination, Benjamin testified that the instructions for this alteration came directly from the defendant whilst she was walking through the building.
 - v. Create a back porch on the upper floor of the building. During cross-examination, Benjamin testified that the instructions for this alteration came from the claimant, however Benjamin called the defendant to confirm before proceeding.
 - vi. Create an extension to the roof over the new upper floor back porch.

- vii. Create additional steps at the kitchen door opening. Benjamin could not recall whether the instructions for this alteration came directly from the defendant or whether the claimant related same to him.
- viii. Install gypsum ceiling to the ground floor in order to install down lighters. Benjamin could not recall whether the instructions for this alteration came directly from the defendant or whether the claimant related same to him
- ix. Create additional design features to the upper floor gypsum ceiling. During cross-examination, Benjamin testified that the instructions for this alteration came directly from the defendant whilst she was walking through the building. That the defendant stated that she wanted something fancy.
- x. Install sheet rack to the ground floor. During cross-examination, Benjamin testified that the instructions for this alteration came directly from the defendant whilst she was walking through the building.
- xi. Add additional electrical work, instructions for this alteration came directly from the defendant.
- xii. Construct a utilities room to house pump and water heater. During cross-examination, Benjamin testified that the instructions for this alteration came directly from the defendant.
- xiii. Purchase and install two 2000 gallon water tanks. Benjamin could not recall whether the instructions for this alteration came directly from the defendant or whether the claimant related same to him.
- xiv. Construct a perimeter fence. During cross-examination, Benjamin testified that the instructions for this alteration came directly from the defendant.
- xv. Fabricate and install gates to the property. During cross-examination, Benjamin testified that the instructions for this alteration came directly from the defendant.
- xvi. Construct kitchen, bedroom and bathroom cupboards. During cross-examination, Benjamin testified that the instructions for this alteration came directly from the defendant and that it was reiterated by her son Gregory St. Clair on one of his visits to the building.

- xvii. Back fill and raise yard. During cross-examination, Benjamin testified that the instructions for this alteration was made via phone call from the defendant to the claimant.
 - xviii. Use porcelain tiles instead of ceramic tiles on both floors. During cross-examination, Benjamin testified that the instructions for this alteration came from the defendant.
35. During cross-examination, Benjamin testified that the claimant completed construction of the building. That all tiling work was completed in the building. He further testified that the washroom, the kitchen, the plumbing and the sewer tank was completed. That the paving of the exterior of the building was not in the contract.
36. Benjamin purchased most of the materials from the suppliers. As such, it was his testimony that he knew of all the purchases, the additional work needed to be done, the labour costs and all the associated costs with the alterations. He was also responsible for going to the bank with Gloria to withdraw cash to pay for the construction. He testified that he accompanied Gloria for her safety and to ensure the overall smooth progression of the job. He further testified that he is aware that the defendant did not pay to the claimant all of the monies under the contract and for the additional alterations she ordered.

The case for the defendant

37. The defendant gave evidence and called two witnesses, Gregory St. Clair and George Balfour.
38. The defendant resides at 285 Winthrop Street, Brooklyn, New York. In her witness statement, she testified that in or about July, 2013 by an oral agreement she contracted the claimant to construct the building which was a two storey, three bedroom dwelling house for the sum of \$1,813,765.58 (“the contract sum”). However, during cross-examination she testified that she simply spoke to the claimant about the construction of the building in

July, 2013 and that the contract sum was not agreed upon at that time. That it was after the claimant read her plans, the price was agreed upon. She further testified during cross-examination that she met with the claimant on more than one occasion prior to agreeing to the contract sum. That she could not say for certainty when the contract sum was agreed upon. Thereafter, she testified that whatever date was in her witness statement is the date upon which the contract sum was agreed.

39. She testified that it was agreed that the contract sum included labour and materials for a completed house in every respect which included works such as painting, plumbing, electrical, tiling, construction and installation of kitchen, bedroom and bathroom counters and cupboards, construction and installation of fence and gates to the property and paving of various areas around the exterior of the building. During cross-examination, the defendant testified that she did not know who installed the gate. She further testified during cross-examination that the claimant did not consult with her prior to purchasing the materials for the building. That the defendant instructed her on what she need and that she agreed.

40. According to the defendant, before any works had begun on the building and before the contract sum of \$1,813,765.58 was agreed upon, she supplied the claimant with certain building plans for the building. Thereafter, she and the claimant realized that the said plans were in error for a two bedroom house instead of a three bedroom house. As such, it was her testimony that she and the claimant subsequently had plans drawn for a three bedroom house. That the plan for the three bedroom house formed the basis of the oral agreement and upon which the contract sum was based. She testified that said plans are annexed to the claimant's statement of case and marked "B" but that it does not fully reflect all the works the claimant had agreed to perform under the oral agreement. During cross-examination, the defendant testified that she could not recall the exact date the construction of the building had begun.

41. During cross-examination, the defendant testified that she does not know Benjamin. That the claimant did call to speak about every phrase of the construction of the building but that he did not tell her that the foundation was too low and that since it was flooding it had

to be raised by two feet. It was her testimony that she only found out that the foundation was raised by two feet when she received the documents in this matter. According to the defendant, the only conversation she had with the claimant pertaining to the foundation of the building was that he saved her \$20,000.00 because he did not have to go to the original depth into the land to build the foundation since the land was on coral.

42. During cross-examination, the defendant testified that she did not instruct the claimant to increase the overall width of the building. She also did not instruct the claimant to build an extra staircase.
43. In her witness statement, the defendant testified that neither did she vary the terms of the oral agreement nor did she request any variations to the works that were to be carried out. However, during cross-examination she testified that she did tell the claimant that she wanted gypsum ceiling and additional designs on the ground floor gypsum ceiling. She agreed that the gypsum ceiling and the additional designs on same was not in the original agreement. She further testified during cross-examination that she instructed the claimant to use porcelain tiles instead of ceramic tiles. However, she testified that these changes were not variations in the manner alleged by the claimant as the claimant advised her that there would be no increase in her expenses.
44. As the defendant resides abroad it was agreed that she would transfer funds from abroad to a joint account she held with Gloria at Republic Bank, Tobago. During cross-examination, the defendant testified that this joint account was opened in 2013 or 2014 when the construction of the building began. It was agreed that the requisite funds would be withdrawn by Gloria and paid to the claimant accordingly. The defendant also sent funds to Gloria to pay to the claimant by cheque. These cheques were drawn from the defendant's United States Citibank account.
45. Additionally, on her visits to Tobago during the construction of the building, the defendant made cash payments to the claimant towards the contract sum. When she visited in December, 2015 at the claimant's request she made two cash payments to him which totaled the sum of \$90,000.00. Her son Gregory St. Clair made the first cash payment of

\$30,000.00 on her behalf and she made the second cash payment of \$60,000.00 to the claimant directly. Further, at the claimant's request during her visits she would either use her United States Citibank debit card or withdraw funds from the Republic Bank joint account to pay various bills for materials and supplies for the building that had been obtained by the claimant. The businesses from which the materials and supplies were obtained included Westside Electrical and Plumbing, Richard's Hardware, Baj's Building and Supplies and Tobago Glass supplies. According to the claimant, these payments were all made towards the contract sum.⁹

46. It was the testimony of the defendant that as she paid the agreed contract sum of \$1,813,765.58 in full, she is not indebted to the claimant. During cross-examination, the defendant testified that she paid the claimant approximately two million dollars. She further testified during cross-examination that she did take a note of how much money was being spent on the construction of the building. That she wrote the notes on a note pad. This note pad was not before the court. Thereafter, she testified that she did not think she had to take notes about the amount of monies that were being spent on the construction of the building because she left Gloria in charge of paying the claimant. Moreover, during cross-examination she denied taking Gloria's records of her withdrawals.

47. In or about early July, 2016 during one of her visits to Tobago, the defendant indicated to the claimant that she was unhappy about the fact that although the contract sum was fully paid there was still substantial work to be done on the building. She further indicated to the claimant that certain aspects of the work that had already been completed were defective and required repairs. She testified that the claimant agreed that no further sums were owed, promised to rectify the defective work she had indicated and complete the job in a timely manner. During cross-examination, the defendant denied that the claimant completed the building in May, 2015. She further testified that the plaque she gave the claimant in July, 2016 was not thanks for him completing the building.

⁹ Copies of the defendant's bank statements, withdrawal slips and cheques were attached to her witness statement at "V.S.1".

48. According to the defendant, in a subsequent meeting despite the fact that the job was still incomplete and that no further work was done, the claimant claimed that she owed him \$40,000.00 towards the contract sum. During cross-examination, the defendant testified that Wendy, Alfred and Holder was in attendance of this meeting. Further during cross-examination, the defendant initially testified that this meeting was called to discuss outstanding sums she owed to the claimant. However, she then retracted that statement and testified that as she did not know she allegedly owed money to the claimant, she did not know that the purpose of the meeting was to discuss outstanding payments. Moreover, during cross-examination she testified that she did not agree during the meeting that she owed the claimant money.
49. She testified that the claimant made that wrongful claim although he had previously agreed that no money was owed. The defendant reminded the claimant that he had previously agreed that no further sums were owed and called on him to complete the construction of the building and to rectify the defective work as agreed. However, the claimant failed to complete the building and to repair the defective work.
50. During cross-examination, the defendant testified that she did receive a letter from the claimant's attorney demanding the payment of \$574,474.58. She further testified that she received a second letter from the claimant's attorney demanding the payment of \$750,474.58. Moreover, during cross-examination the defendant testified that she instructed her attorney to reply to claimant's letter and state that she would have owed the claimant a balance of \$96,784.02 if the contract was completed.
51. She testified that no variation works were carried out by the claimant and that he did not give her any invoice for an unpaid balance owed to him. She further testified that she had to contract third parties to complete the construction of the building and to rectify the defective work. She contracted George Balfour ("Balfour") to complete certain paving works around the building and to carrying out corrective works on the plumbing and sewer system. She paid Balfour the sum of \$100,100.00 for the works he carried out on the building.

52. She also contracted Anthony Sandy (“Sandy”) to complete some of the tiling. She paid him the sum of \$20,200.00. Further, she had to purchase certain materials from Luxury Finishes in Trinidad in order to complete the kitchen counter and bathrooms. Those materials costed \$21,400.00. Additionally, she had to purchase certain tiles from Steve Woods at the cost of \$54,000.00.¹⁰ The defendant therefore paid a total of \$196,100.00 to complete the building and to repair the defective work left by the claimant.
53. As such, the defendant testified that she does not owe the claimant any money. That the claimant owes her the sum of \$196,100.00 as same represents the sum she paid to complete the job.
54. During cross-examination, the defendant testified that she did have an arrangement with the THA to occupy the ground floor of the building. That providing the building was completed by May, 2015 the THA was supposed to occupy same. However, the defendant testified that to date the building is still incomplete and unoccupied.
55. Further during cross-examination the defendant testified that she has undertaken construction many times. That she recently built a three million dollars church in New York.
56. According to the defendant, over time the claimant has substantially increased the sums that he claims are owed to him by her. She testified that he initially agreed that no money was owed to him but thereafter claimed that \$40,000.00 was owed to him. That by his pre-action protocol letter dated the 11th August, 2016 he claimed that the sum of \$574,474.58 was owed to him and then by his Claim Form and Statement of Case claimed that he is owed the sum of \$750,474.58.
57. **Gregory St. Clair** (“Gregory”) is the son of the defendant. He resides at 130-30 224th Street Laurelton, Queens, New York. He testified that during the construction of the

¹⁰ Copies of the relevant documentation evidencing the payments made by the defendant to the third parties were attached to her witness statement at “V.S.2”.

building, he visited the site on several occasions during his trips to Tobago. As such, he was able to observe the progress of the job.

58. In December, 2015 on one of his trips to Tobago, he visited the construction site and paid the claimant the sum of \$30,000.00 in cash on behalf of the defendant. He testified that the \$30,000.00 was towards the contract sum for the construction of the building. During cross-examination, Gregory testified that he paid the \$30,000.00 to the claimant at the claimant's residence. He further testified that the defendant travelled to Tobago in December, 2015 and that she paid the claimant the sum of \$60,000.00. This sum was also towards the contract sum for the construction of the building. During cross-examination, he testified that the defendant informed him that she travelled to Tobago and paid the claimant the \$60,000.00. That he was not present when the defendant paid the claimant the \$60,000.00.
59. According to Gregory, at this time the building was still incomplete. He testified that there was substantial paving and tiling to be done. There was also work to be done in the kitchen and bathroom areas. Further, the gate and fences to the property had to be installed.
60. It was the testimony of Gregory that the claimant did not complete the construction of the building. That the defendant had to contract other persons to finish the project and also to rectify certain defects in the works that was done by the claimant.
61. **George Balfour** ("Balfour") resides at #12 Sandy Hill Trace, Culloden Bay Road, Golden Lane, Tobago. He has been a general contractor for over fifteen years. He is competent in painting, tile laying, joinery, plumbing, metal fabrication, masonry and carpentry. He has been employed on many residential and commercial projects throughout Tobago over the years.
62. In or about February 2016 the defendant contracted Balfour's services to complete the construction of and to carry out certain repair work to the building. Balfour first inspected the building to ascertain what work had to be done to complete the construction of the building in addition to the work that was required to repair or correct certain defective work that was carried out on the building.

63. He testified that the work that had to be done included the following;

- i. significant construction and paving work around the exterior of the building;
- ii. certain corrective or completion work on the plumbing and sewer system;
- iii. completion of the washrooms and kitchens
- iv. substantial tile work;
- v. fabrication or installation of a burglar proof gate; and
- vi. corrective work on the main gate to the building.

64. Balfour employed several workmen to complete the relevant work on the building. He prepared an invoice dated the 28th January, 2017 detailing the work that had to be done.¹¹ Balfour charged the defendant the sum of \$100,100.00 for the work that he did on the building. He testified that the defendant paid him the said sum in full. During cross-examination, Balfour testified that he issued an invoice and signed paid in full on it instead of issuing receipts to the defendant because of the manner in which she paid him. The defendant did not pay the entire sum of \$100,100.00 at once.

65. During cross-examination, Balfour testified that he did tiling work on the building. That it was not noted on the invoice because he did not charge the defendant a separate fee for the tiling works he performed. Balfour further testified that he did not note all the works he performed on the building in detail in the invoice.

66. During cross-examination, Balfour testified that he did not do any electrical work on the building. He also did not install kitchen or bathroom cupboards. Further, he did not construct and install any fence. He was however involved in the paving of the exterior of the building.

67. According to Balfour, Sandy was contracted to complete the tile work, the construction of the washrooms, the fabrication and installation of the burglar proof gate and to do the corrective work on the main gate to the building. He testified that Sandy charged the

¹¹ A copy of this invoice was annexed to Balfour's witness statement at "G.B.1".

defendant the sum of \$20,200.00 for the works he did on the building. This sum which was paid by defendant to Sandy in full was in addition to the sum of \$100,100.00 which was paid to Balfour.

68. Balfour testified that in order to complete the relevant tile work on the building certain tiles were purchased from Steve Woods. The cost of the tiles was \$54,400.00. Other materials were bought from Luxury Finishing in Trinidad for the sum of \$21,400.00. Balfour testified that these sums were in addition to the sum of \$100,100.00 which was paid to him.

69. According to Balfour, the above mentioned works were completed in or about October, 2016. During cross-examination, Balfour testified that he did not have a one-time contract with the defendant to carry out the above mentioned works. That the first encounter he had with the defendant, she showed him a couple of things to be done and as the time went by she showed him other things she wanted done.

70. He testified that during the period he was contracted to work on the building, the claimant did not do any work on same.

Issues 1, 2 & 3— *the agreement*

71. It is undisputed that the agreed contract sum for the construction of the building was \$1,813,756.58. However, it is clear to this court that the claimant and the defendant did not execute a written agreement outlining the works to be performed. The court therefore finds that the agreement was an oral one. The estimate attached to the claimant's witness statement at "R.S.2" was not annexed to claimant's statement of case and reply, however, it was contained in the claimant's standard list of disclosure filed on the 28th November, 2017. Therefore, the defendant did have an opportunity to address same in her witness statement if it was her case that the works outlined in the estimate did not include all of the works to be done by the claimant but she did not. Therefore, it is more plausible than not that the defendant having agreed to the contract sum of \$1,813,765.58, she would have been privy to this estimate. As such, the court finds that the works outlined in the estimate were the works the claimant was contracted to do.

72. A summary of the works outlined in the estimate are as follows;

- i. Provisional work – plumbing, step and railing works and electrical works;
- ii. Site preparation – excavating and filling;
- iii. Foundations works;
- iv. Masonry;
- v. Carpentry, timber framing;
- vi. Cladding, covering, siding;
- vii. Waterproofing;
- viii. Installation of windows, doors and stairs;
- ix. Surface finishes- ceramic tiling, painting, clear finishing excreta.

73. The court further finds that it is more probable than not that the actual agreement to construct the building for the sum of \$1,813,765.58 took place in January, 2014. Upon an analysis of the evidence, it is clear that the defendant admitted in her pleadings and evidence that the agreement took place in July, 2013 was wrong. She testified that she had had initial talks with the claimant about the construction of the building in July, 2013 and that the price and details of the construction was agreed upon a later date. The court therefore finds that the claimant's evidence was more reliable in this regard.

Issue 4 – *whether the defendant varied the terms of the agreement*

74. According to the evidence of the defendant, the contract sum included labour and materials for a completed house in every respect which included works such as painting, plumbing, electrical, tiling, construction and installation of kitchen, bedroom and bathroom counters and cupboards, construction and installation of fence and gates to the property and paving of various areas around the exterior of the building. However, upon examination of the estimate it was pellucid that same did not include sums for construction and installation of kitchen, bathroom and bedroom counters, construction and installation of fence and gates to the property and paving of various areas around the exterior of the building. The court therefore finds that the contract sum of \$1,813,765.58 did not include those items.

75. Further, the court does not agree with the submission of the defendant that the estimate is contradictory. The defendant submitted that when one examines the estimate, it is contradictory since the agreed contract sum of \$1,813,765.58 appears to include the sum of \$124,000.00 for electrical works when the very document expressly states at page one that such works are not included. The defendant further submitted that another point which contradicts the claimant's case is the fact that if electrical works were not originally agreed to by the parties then the alleged variations set out by the claimant in his statement of case and witness statement ought to have said 'electrical work' and not 'additional electrical work.' When one examines the estimate it is clear that sum included in the estimate for electrical works was a provisional sum. As the court understands, this sum was included in the estimate although electrical works was not agreed upon to be a part of the work of the claimant in the event that the need arose for the claimant to perform electrical works.

76. According to the claimant, before construction began in November, 2014 the defendant instructed him to commission new architectural drawings to include an additional bedroom to the building and so he approached Vincent Draughting Services to complete the new drawings as per the defendant's specifications. He testified that after he began construction in keeping with the new specifications, the defendant visited the site sometime in December 2014 and instructed him to do additional variation works to the building. It was his evidence that the defendant also instructed him to do other variations to the building via telephone calls. The variations which the claimant testified that the defendant instructed him to undertake are as follows;

- i. Increase the height of the building foundation by two feet to avoid flooding as the level was below the road;
- ii. Increase the buildings overall width on both floors by six feet to utilize more of the land space and to ensure the bedroom sizes were not too small;
- iii. Create an additional side staircase to the building for safety purposes. Build an extension to the ground floor dining room area;
- iv. Build an extension to upper floor dining room area;
- v. Create an extension to the upper floor front porch area;
- vi. Create a back porch on the upper floor of the building;

- vii. Create an extension to the roof over the new upper floor back porch;
- viii. Create additional steps at the kitchen door opening;
- ix. Install gypsum ceiling to the ground floor in order to install down lighters;
- x. Create additional design features to the upper floor gypsum ceiling;
- xi. Install sheet rack to the ground floor;
- xii. Add additional electrical work;
- xiii. Construct a utilities room to house pump and water heater;
- xiv. Purchase and install two 2000 gallon water tanks;
- xv. Construct a perimeter fence;
- xvi. Fabricate and install gates to the property;
- xvii. Construct kitchen, bedroom and bathroom cupboards;
- xviii. Back fill and raise the yard; and
- xix. Use porcelain tiles instead of ceramic tiles on both floors.

77. The evidence of the claimant in relation to the variations was corroborated by Benjamin.

78. The defendant testified that before any works had begun on the building and before the contract sum of \$1,813,765.58 was agreed upon, she supplied the claimant with certain building plans for the building. That thereafter, she and the claimant realized that the said plans were in error for a two-bedroom house instead of a three-bedroom house. As such, it was her testimony that she and the claimant subsequently had plans drawn for a three-bedroom house. As such, it was her testimony that the plan for the three-bedroom house formed the basis of the oral agreement and upon which the contract sum was based.

79. When the court examined the dates of the plans, both were dated the 10th January, 2014. The court therefore finds that as the claimant testified that the agreement to construct the building was entered into in January, 2014 it is more likely than not that the defendant is speaking the truth when she testified that the plan for the three bedroom house formed the basis of the oral agreement and upon which the contract sum was based and the court so finds. As such, the court finds that the change from two bedrooms to three bedrooms was **not** a variation to the agreement.

80. In her witness statement, the defendant testified that she did not request and/or instruct any variations to the works that were to be carried out. Although the defendant was adamant throughout her cross-examination that she made no requests for alterations or variations to the works, she admitted that she did request changes. During cross-examination, she testified that she did tell the claimant that she wanted gypsum ceiling and additional designs on the ground floor gypsum ceiling. She agreed that the gypsum ceiling and the additional designs on same was not in the original agreement. She further testified during cross-examination that she instructed the claimant to use porcelain tiles instead of ceramic tiles. However, she testified that these changes were not variations in the manner alleged by the claimant as the claimant advised her that there would be no increase in her expenses.
81. Further during cross-examination, the defendant testified that the claimant did not tell her that the foundation was too low and that since it was flooding it had to be raised by two feet. It was her testimony that she only found out that the foundation was raised by two feet when she received the documents in this matter. According to the defendant, the only conversation she had with the claimant pertaining to the foundation of the building was that he saved her \$20,000.00 because he did not have to go to the original depth into the land to build the foundation since the land was on coral.
82. Moreover, during cross-examination the defendant testified that she did not instruct the claimant to increase the overall width of the building and build an extra staircase.
83. The court finds that the admission by the defendant that she did request the above mentioned variations was a material inconsistency within the defendant's case. This admission by the defendant not only contradicted her witness statement but also her pleadings that she made no variations to the works to be done. As such, the court finds that the defendant was not a credible witness on that issue. That she was being selective in her admissions by choosing the smaller items to admit. Further, as the defendant did not allege in her pleadings that the claimant represented that there would be no increase in costs for the additional items, that evidence was not plausible having regard to the fact that as a matter of common sense having examined the increase which can reasonably be inferred

from the evidence, it was substantial relative to the original contract. It is more likely than not that a contractor would not absorb such a cost.

84. Consequently, the court finds that the claimant's and Benjamin's evidence in relation to the variations is to be preferred. That the claimant's and Benjamin's evidence was clear and plausible. The court therefore finds that on a balance of probabilities that the defendant did request the abovementioned variations to the works.

85. Further, the court does not believe the evidence of the defendant that she does not know Benjamin and that she never spoke to him. The court finds that it is clear from the evidence that Benjamin being the project manager was in constant communication with the defendant and was also present during the defendant's walkthrough of the building.

86. The defendant made heavy weather about the fact that the claimant testified that some of the instructions for the variations came via telephone calls placed to him by the defendant whereas Benjamin testified that defendant made calls to him to give instructions on some of the variations. The court finds that this inconsistency was not a material one and that it was very likely that Benjamin being the project manager would have been in constant communication with the defendant. The differences in the evidence are to be expected as there is no evidence that notes were being recorded of the dates and times of the conversations. The court would have had cause for concern if in those circumstances the evidence was *ad idem* to a fault.

Issue 5 - *whether the claimant fulfilled his obligations under the contract*

87. It was the evidence of the claimant that he fulfilled his obligations under the contract and also carried out all the variations as requested by the defendant. On the other hand, the defendant testified that the claimant failed to complete the building and repair certain defective works. She further testified that she had to hire third parties to complete the building. The parties' evidence in relation to the completion of the building was therefore diametrically opposed.

88. Lord Ackner in the Privy Council decision of *Horace Reid v Dowling Charles & Anor*,¹² at page 6 had the following to say;

“Mr. James Guthrie, in his able submissions on behalf of the Mr. Reid, emphasized to Their Lordships that where there is an acute conflict of evidence between neighbours, particularly in rights of way disputes, the impression which their evidence makes upon the trial judge is of the greatest importance. This is certainly true. However, in such a situation, where the wrong impression can be gained by the most experienced of judges if he relies solely on the demeanour of the witnesses, it is important for him to check that impression against contemporary documents, where they exist, against the pleaded case and against the inherent probability or improbability of the rival contentions, in the light in particular of facts and matters which are common ground or unchallenged, or disputed only as an afterthought or otherwise in a very unsatisfactory manner. Unless this approach is adopted, there is a real risk that the evidence will not be properly evaluated and the trial judge will in the result have failed to take proper advantage of having seen and heard the witnesses.”

89. In July, 2016 the defendant presented the claimant with a plaque which stated *“In recognition of you capable and loyal service as Master Builder”*. During cross-examination, the defendant testified that the plaque was not thanks for him completing the building. The court finds that the presentation of this plaque by the defendant to the claimant speaks volumes about the defendant’s attitude towards the claimant’s work on the construction of the building. It clearly shows that the defendant was pleased with work of the claimant. It simply does not accord with common sense that the defendant would have presented this plaque to the claimant if the claimant did not fulfill his obligations under the agreement. The court therefore finds that the claimant did complete the building as per the agreement and that he also did carry out all the variations that the defendant requested.

90. During cross-examination, the claimant testified that he completed and handed over the building to the defendant in 2015. Further during cross-examination when attorney for the

¹² PCA No. 36 of 1987

defendant pointed out to the claimant that at paragraph 5 of his Reply he stated that “...*in July, 2016 when he completed the defendant’s building she expressed satisfaction to him about the work completed and presented him with a plaque...*” the claimant reiterated that he completed and handed over the building to the defendant in May, 2015 and that the defendant opened the building in July, 2016. The court finds that although paragraph 5 of the claimant’s reply is poorly worded, it is capable of bearing the meaning the claimant attributes to it. The contents of the paragraph must be taken in the context of when the claimant was given the plaque. The court therefore finds that paragraph 5 of the claimant’s reply was not contradictory to his evidence that he completed and handed over the building in 2015.

91. Moreover, during cross-examination the defendant testified that providing the building was completed by May, 2015 the THA was supposed to occupy same. As such, it more likely than not that the building was supposed to be completed by May, 2015. The fact that the defendant presented the claimant with the plaque coupled with the fact that the THA was supposed to occupy same by May, 2015 supports the claimant’s case that he completed the building in 2015. The court therefore finds that the claimant did complete the building in May, 2015.

Issue 6 - *how much money did the defendant pay to the claimant pursuant to the agreement*

92. In his witness statement, the claimant testified that the defendant paid him the sum of \$1,452,291.00 and that he put the sum of \$121,000.00 on his personal credit card. He did not state whether the \$121,000.00 placed on his credit card was repaid to him by the defendant but according to the document he attached to his witness statement at “R.S.5” (which he refers to as the drawn-downs), the defendant paid to him the sum of \$1,573,291.00. Further during cross-examination, the claimant testified that the defendant paid to him approximately 1.5 million dollars. As such, it is reasonable to infer that the defendant did repay him the sum of \$121,000.00 since \$1,452,291.00 added to \$121,000.00 equals \$1,573,291.00.

93. The payments in the claimant's draw-downs span from the 20th November, 2014 to the 15th October, 2015. Therefore, it is clear that the claimant was being paid monies even after he completed and handed over the building. As there were no documentary evidence such as receipts to support the claimant's draw downs, the court attached little weight to this document in relation to the exact sums drawn down and paid except in manner appearing later on. The court therefore preferred the evidence of the defendant in relation to the sums she paid to the claimant as same were supported by documentary evidence such as withdrawal slips, bank statements and cheques.
94. In her witness statement, the claimant testified that she paid to the claimant the agreed contract sum of \$1,813,765.58 in full. During cross-examination, she testified that she paid the claimant approximately two million dollars.
95. It is undisputed that the defendant opened a joint account at Republic Bank with the claimant's mother, Gloria. It is further undisputed that the defendant deposited monies into the joint account which were withdrawn by Gloria and paid to the claimant. In Gloria's witness statement she testified that the joint account was opened some ten years ago to deal with the general business of the defendant and that when the construction of the building began it was used to facilitate payments for the construction. During cross-examination, when it was put to Gloria that the bank account was opened in 2013, she responded by saying "alright". The defendant during cross-examination testified that the joint account was opened in either 2013 or 2014 when the construction of the building began. The bank statements for the joint account together with the relevant withdrawal slips signed by Gloria and the defendant evidencing the various sums withdrawn and paid towards the contract sum were annexed to the defendant's witness statement in a bundle marked "V.S.C.1".
96. Gloria testified that she withdrew the sum of \$1,452,291.00 from the joint account and paid it to the claimant. The defendant submitted that she has no objection to the sum of \$1,452,291.00 which Gloria in her witness statement admitted to withdrawing from the joint account and paying to the claimant.

97. Within the documents attached to the defendant's witness statement at "V.S.C.1" were five cheques issued by the defendant from her United States Citibank account payable to Gloria. During cross-examination, Gloria was shown these cheques and she testified that she did not recall receiving them. As the cheques were made payable to Gloria and the dates of the cheques fall well within the construction period (January 2014 to May, 2015) it is plausible that those cheques were paid to Gloria to be paid to the claimant for the construction of the building.¹³ The court therefore finds that the cheques which totaled to the sum of \$24,250.00 USD (equivalent to \$147,925.00 TTD using an exchange rate of 6.1) were sums paid to Gloria who in turn paid it to the claimant on her instructions towards the contract sum.

98. Moreover, within the documents tendered by the defendant there were several withdrawal slips which were signed by her. These slips were dated from the 27th February, 2015 to the 22nd December, 2015. The withdrawal slips also show the relevant sums withdrawn by the defendant and made payable to Richard's Hardware and Westside Electrical and Plumbing. During cross-examination, the claimant admitted that when the defendant visited Tobago, he instructed her to pay those stores for the materials he had obtained for the building.

99. The court engaged in a calculation exercise and found that according to the withdrawal slips signed by the defendant the sum of \$342,281.00 TTD was withdrawn by the defendant from the joint account during that period. When the court compared the claimant's draw-downs with the defendant's withdrawal slips more than one of the dates of the withdrawals coincided with the dates on the claimant's draw-downs. Further, as the claimant's draw-downs shows that the last payment he recorded as receiving was the 15th October, 2015, it is clear that although the claimant completed and handed over the building in May, 2015 he was still receiving payments from the defendant. As such, the court finds that although the sums withdrawn by the defendant were subsequent to the completion and handing over of the building in May, 2015 that those monies were paid to the claimant.

¹³ The dates of the cheques were the 7th January, 2015, the 31st March, 2015, the 22nd April, 2015 and the 28th April, 2015. One of the dates was illegible.

100. Additionally, within the documents tendered by the defendant were United States Citibank bank statements. Within those statements it was seen that the defendant made payments to Tobago Glass Supplies on the 7th July, 2015 in the sum of \$1,365.94 USD and to Baj's Building Supplies on the 17th July 2015 in the sum of \$310.73 USD. The court finds that these two payments which amounts to \$10,227.68 TTD was also paid by the defendant towards the contract sum.

101. Further, it was the evidence of the defendant that in the month of December, 2015 her son Gregory paid to the claimant \$30,000.00 in cash on her behalf towards the contract sum. This evidence was corroborated by Gregory who testified that on one of his trips to Tobago he met with the claimant and paid him the said sum of \$30,000.00 in cash. During cross-examination, the claimant denied that Gregory paid him \$30,000.00 in cash in December, 2015. According to him, Gregory gave him \$15,000.00 to go to Trinidad to buy the solid surface for the countertops and Gregory paid the rest of money to the contractor the claimant awarded the job of installing the countertops to. It accords with common sense that if the Gregory paid the rest of the money to the contractor the claimant hired to do the job, then that sum was also towards the contract sum. As such, the court finds that Gregory did pay to the claimant the sum of \$30,000.00 in cash towards the contract sum.

102. When the above mentioned sums are tallied, it amounts to the sum of 1,982,724.60. The court therefore finds that the defendant paid to the claimant the agreed contract sum of \$1,813,756.58 in full and also the sum of **\$168,959.00** over the agreed contract sum.

Issue 7 - whether the defendant owes the claimant the sum of \$750,474.58

103. The court having found that the defendant did vary the agreement by requesting certain alterations to the building, it accords with common sense that the contract sum would have increased. The claimant claims that the sum of \$750,474.58 is owed to him by the defendant. According to the claimant, that sum represents monies owed on the agreed contract sum and for the variations. As the court found that the defendant paid more than the agreed contract sum to the claimant, it is clear that that sum must be reduced.

104. It is clear on the evidence that no figure was agreed upon for the variations but that the defendant agreed to pay the costs of the variations once billed thereafter. The claimant testified that upon handing over the building, he gave the defendant an invoice with the outstanding monies owed to him. This invoice however was not before this court and the defendant denied receiving same. It is more plausible than not that the defendant having requested the variations and having agreed to pay for same when billed that the claimant would have supplied her with such an invoice. However, without this invoice the court is at a loss as to how much the claimant is claiming that he charged the defendant for the variations she requested. Further, there was no pleading or evidence as to any specific figure for the alleged variations.

105. One of the notable inconsistencies within the claimant's case is the fact that his pre-action letter dated of the 11th August, 2016 stated that he was claiming the sum of \$574,474.58 which represented the unpaid balance on the contract and for the variation works. The claimant attempted to explain this discrepancy by stating that the sum of \$574,474.58 was for the variations works. The court agrees with the submission of the defendant that if the claimant's explanation about the discrepancy in the sums claimed was genuine, he would have pleaded in his statement of case that the sum of \$574,474.58 was for the variations works. Further, the sum which the claimant attempted to insert in his witness statement as the sum claimed for the variations and which was struck out by this court was quite different from the sum of \$574,474.58.

106. Additionally, the court agrees with the submissions of the defendant that if it was to accept that \$574,474.58 represented the sum for the variations then the difference between that sum and the total sum claimed (\$750,474.58) which is \$176,000.00 would represent what the claimant claims was the unpaid balance on the contract sum. If \$176,000.00 is correct then it would follow that the difference between that figure and the contract sum (\$1,813,765.58-\$176,000.00) which is \$1,637,765.58 would be the sum paid by the defendant on the contract. However, that the sum of \$1,637,765.58 far exceeds the figures claimed by the claimant as being the total sum paid by defendant on the contract sum.

107. Further, the unpaid balance of \$176,000.00 and the figure of \$574,474.58 for the variations were also inconsistent with the claimant's testimony during cross-examination when he testified that the alleged unpaid balance under the original contract was \$350,000.00 and unpaid sum for variations was \$400,000.00. As such, it impossible to reconcile what sum the claimant is actually claiming for the variations.

108. The court agrees with the submission of claimant that that if there was an agreement for work to be undertaken, but no agreement as to price to be paid, then the contractor could be paid on a quantum merit. However, the court will be engaging in speculation if it was to award the claimant on a quantum merit basis as there is absolutely no evidence before the court as to what the costs of the variations were and how those costs were calculated.

109. The defendant during cross-examination admitted that she instructed her attorney to reply to claimant's letter and state that she would have owed the claimant a balance of \$96,784.02 if the contract was completed. The defendant submitted that the claimant is clearly attempting to improperly refer to letter dated the 23rd September, 2016 which was annexed to his witness statement as "R.S.9." That apart from the fact that the letter expressly stated that the sums referred to as being paid by the defendant were subject to corrections, the overriding point is that the claimant is well aware that the letter was struck out by the court and therefore no reliance can be placed thereon. Be that as it may, the attorney for the claimant was not prohibited from asking such a question. Further, this testimony of the defendant was in direct contradiction to her pleadings and evidence that she did not owe the claimant any monies. The court will therefore find even though the defendant paid the sum of \$168,959.00 over the agreed contract sum that she owes the claimant the sum of \$96,784.02.

Issue 8 - if the claimant did not complete his obligations under the contract, whether the claimant owes the defendant the sum of \$196,100.00

110. This has become a non-issue as the court found that the claimant did complete the building as per the agreement and that he also completed all of the variations.

In closing

111. The court must comment in this case that the state of the claimant's case was highly unsatisfactory. The burden lay on the claimant to prove his case with proper evidence. The claimant's case is contradictory in material respects and manifestly unclear and uncertain. The evidence in this case at times appeared to be wildly erroneous in that figures were simply alleged and repeated without mathematical calculation and proof.

Disposition

112. The judgment of the court is therefore as follows;

- A. The defendant shall pay to the claimant the sum of \$96,784.02 in damages for breach of contract;
- B. The counterclaim is dismissed;
- C. The defendant shall pay to the claimant the prescribed costs of the claim;
- D. The defendant shall pay to the claimant the prescribed costs of the counterclaim.

Dated this 16th day of July, 2018

Ricky Rahim
Judge