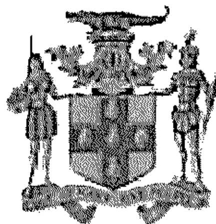

2016 JMSC CIV. 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. C.L. 1999/B 006

BETWEEN	**PRECIOUS BENNETT**	**CLAIMANT**
AND	**LEN SMITH**	**DEFENDANT**
	(T/A L.SMITH & ASSOCIATES)	

Mr. Ian G Wilkinson instructed by Ian G. Wilkinson & Company for the claimant

Mr. Hadrian R. Christie instructed by Patterson Mair Hamilton for the defendant

Heard: October 1, 2012 & February 26, 2016

DAMAGES - BREACH OF CONTRACT - NEGLIGENCE- QUANTITY SURVEYOR – DUTY OF CARE

SIMMONS, J

Nature of proceedings

[1] In this matter the claimant filed an action for damages for breach of contract and negligence arising from a contract made between the claimant and the defendant in November 1995.

[2] The claimant who was desirous of constructing a house engaged the services of the defendant who is a Quantity Surveyor. By letter dated the 28th November 1995, Mr. Smith estimated that it would cost three million two hundred and fifteen thousand nine hundred and seventy six dollars ($3,215,976.00). On the claimant's instructions he negotiated a contract with Mr. Karl Stewart of Jankar Corporation Limited for its construction. The project was to be completed in six months.

[3] The claimant obtained a mortgage loan of three million dollars ($3,000,000.00) from the Victoria Mutual Building Society (VMBS) for the construction. An additional sum of two hundred thousand dollars ($200,000.00) was also provided for increased costs.

[4] The duties of Mr. Smith as stated in the above letter were as follows:-

> "*Pre – contract*
>
> *Visiting site, taking particulars of work completed, measuring works to be completed, pricing same and agreeing amount with proposed contractor and preparation of contract document.*
>
> *Post – contract*
>
> *Surveying works in progress, taking particulars and providing interim valuations for payments on account to the contractor, including making up bills of Variations and adjusting fluctuations in the cost of labour and material.*"

[5] It is alleged that the defendant was negligent in the performance of his duties and also breached the contract by issuing interim valuations and certificates to VMBS. As a consequence, VMBS issued cheques to the contractor in circumstances where the work was not in accordance with the certificates that were issued by the defendant. This, it was alleged, resulted in the mortgage sums being almost exhausted in circumstances where the claimant's house had not been completed.

[6] In September 1997, the defendant advised the claimant that it would cost an additional seven hundred and six thousand five hundred dollars ($706,500.00) to complete the construction. She did not respond to that suggestion.

[7] The claimant subsequently engaged the services of Mr. Clifton George Logan of CGL Associates Ltd., Quantity Surveyors, who later indicated that it would cost eleven million three hundred and forty four thousand eight hundred and eighty eight dollars and seventy two cents ($11,344,888.72) to complete the construction.

[8] At trial, the claimant's case was supported by her own evidence and that of an expert witness, Mr. Clifton George Logan, whose qualifications to speak to the issues were not challenged by the defendant.

[9] The defendant made a submission that there was no case for him to answer, despite being "warned" more than once of the possible consequences. He was unsuccessful and consequently, judgment was awarded to the claimant. The defendant appealed but later withdrew his appeal. The issue of damages must now be resolved.

[10] The claimant has claimed damages for:

i. monies spent to complete the construction of her house;

ii. monies spent to retain the services of another Quantity Surveyor;

iii. misspent drawdowns from the Building Society along with interest; and

iv. distress/discomfort

Measure of damages for breach of contract

[11] On the pleadings, negligence and breach of contract march side by side, the same omissions and actions constituting each cause of action. The compensatory aim of damages for tortious breaches is to put the claimant in as good a position as he would have been in as if no tort had been committed, insofar as this can be achieved by a monetary award. It has been reasoned that this would mean that when an action is brought for negligence in the context of a contractual relationship the claimant should

be put into as good a position as if the defendant had performed his duties under the contract.

[12] **McGregor on Damages**, 16th edition, at paragraph 247, offers the following guidance when assessing damages:-

> *"the starting point in resolving a problem as to the measure of damages for breach of contract is the rule that the plaintiff is entitled to be placed so far as money can do it, in the same position as he would have been in had the contract been performed. The rule is limited first, but not substantially, by the principles as to causation; the second and much more far reaching limit is that the scope of protection is marked out by what was in the contemplation of the parties. When damages is said to be too remote in contract it is generally this latter factor that is in issue"*

[13] The case of ***Mertens v Home Freeholds Co, Ltd and Others*** [1921] All ER Rep 372 is also instructive. In that case the claimant and the defendant entered into a contract to build a dwelling house at a particular price. The construction was to be completed within six (6) months. That was not done and due to certain events a license was now required to complete the construction. The license was refused and the work was not completed until three (3) years later and at a greater cost. It was held by the Court of Appeal that the measure of damages was what it would cost the claimant to complete the construction. The court rejected the submission that the measure of damages was to be determined by the cost of completion at the time of the breach.

[14] The Court of Appeal referred to and approved the following passage in **Hudson On Building Contracts** (4th Edn) Vol 1 at p 491. It was stated as follows:-

> *"...the right measure is properly stated in HUDSON ON BUILDING CONTRACTS (4th Edn) Vol 1 at p 491, citing from the American case of Hirt v Hahn (1):*

> *"B agreed to erect a house for the plaintiff according to plane by a certain date. The defendant's were the sureties. After partly completing, B ceased work, and the plaintiff, after giving notice to the sureties entered and completed and sued the sureties. HELD, that the measure of damages was what it cost the plaintiff to complete the house substantially as it was originally intended and in a reasonable manner, less any amount that would have been due and payable to B by the plaintiff had B completed the house at the time agreed by the terms of his contract."*

[15] It is important, before continuing, to point out that the defendant relied on cases where the measure of damages was held to be a diminution in value. (***Perry v Sidney Phillips & Son (a firm)*** [1982] 1WLR 1297 and ***Philips v Ward*** [1956] 1 All ER 874) The cases cited dealt with instances where surveyors negligently told plaintiffs that the properties being purchased were passable. This was later proved to be untrue. Consequently, the plaintiffs in those cases paid more for the properties than what they were actually worth. Though the cases are not entirely irrelevant, the measure of damages used in those cases cannot be used in this instance because the facts are different. The claimant's house was not overvalued but needed to be completed.

Causation

[16] In order to determine whether the claimant is entitled to be compensated as claimed the issues of causation and remoteness are relevant.

[17] Causation in contract, like tort, is governed by the *sine qua non* or 'but for' test. The claimant must establish that but for the breach of contract she would not have suffered the loss.

[18] To understand whether or not it can be said that but for the actions of the defendant the claimant would not have suffered loss it is important to examine the role of a Quantity Surveyor.

[19] The claimant's expert witness, Mr. Clifton Logan's uncontested evidence is that a Quantity Surveyor is expected to make a determination as to the cost associated with

building and engineering contracts, from the first estimate to the final accounts for the project. He stated that a Quantity Surveyor is also responsible for making sure the construction costs and production are managed effectively.

[20] Further, he stated, a Quantity Surveyor provides numerous services depending on the stage of the building project. At the construction stage of any project, a Quantity Surveyor is to carry out certain services such as the following:

a. advise on the implementation of pre-purchasing or pre-ordering arrangements;
b. prepare recommendations for interim payments to contractors, subcontractors and suppliers;

c. advise on the cost implications of proposed variations and where applicable negotiate a reasonable price with the contractor for such works;

d. assess the financial implications of fluctuation in the cost of labour and material or other matters directly relating to the project; and

e. prepare interim cost reports indicating the financial implications of all matters that have affected or will affect the works including providing an indication of the projected completion cost.

[21] The defendant's duties as outlined in the letter dated the 28th November 1995 are strikingly similar to the duties of a Quantity Surveyor as outlined by Mr. Logan. It is undisputed that in performing his duties, the defendant carried out several surveys of the construction and submitted reports/certificates to VMBS. VMBS, acting on the said reports/certificates and in reliance thereon caused cheques to be issued to the contractor over a period of time from proceeds of the loan. However, the work done did not reflect the monies which had been paid over.

[22] It seems to me that, having regard to the defendant's role as a Quantity Surveyor it can be said that but for his actions in carrying out surveys and submitting reports/certificates to the claimants' mortgagee (VMBS) monies would not have been paid over and ineffectively used and the claimant would not have suffered loss.

Remoteness

[23] The case of ***Hadley v Baxendale*** (1854) 9 Exch 341 was referred to by both the claimant and defendant in their respective submissions. In that case Alderson B said the following:

> *"...Where two parties have made a contract which one of them has broken,* ***the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.*** *Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have*

specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract..."

[24] The rule in ***Hadley v Baxendale*** prevents consequential losses from extending too far. The case suggests that there are two types of recoverable loss:

1. losses arising as a natural consequence of the breach; and
2. losses in the contemplation of the parties when the agreement is formed.

[25] Counsel for the defendant submitted that the inability to complete the construction for the estimated sum of three million two hundred and fifteen thousand nine hundred and seventy six dollars ($3,215,976.00) was not a "natural" result of the defendant's breach of contract and that it cannot be classified as either "fair" or "reasonable". Mr. Christie further submitted that it was not within the contemplation of the parties at the time they made the contract that if the defendant breached the contract the claimant would dismiss the contractor and seek to recover all costs from him.

[26] With respect, these submissions cannot be accepted; it is my view that if the defendant fails to properly carry out his contractual duties and resultantly the contractor ineffectively disposes of money for the construction of the house and cannot complete it, then the claimant's financial loss arises naturally and a reasonable person would have realized that such loss was likely to result from the breach.

[27] What may have reasonably been in the contemplation of both parties at the time they made the contract is an objective exercise for the Court. If a Quantity Surveyor is employed to give an estimate of the cost of construction, to measure the amount of work that has been carried out and to prepare reports which will lead to a contractor

getting funds for work then it may be said that a reasonable man could reasonably proceed against the Quantity Surveyor in the event of a breach because he was, in essence, operating as a construction cost consultant. I also bear in mind that it was the defendant who had recommended the contractor to the claimant. This seems to suggest that she trusted the defendant's judgment and relied on him. It is therefore not unreasonable for her to proceed against him where his issuing of the certificates caused VMBS to pay the various sums to the contractor.

[28] Therefore, I am of the view that the consequences of the defendant's actions or omissions are not too remote so as to be incapable of forming the basis for an award of damages.

The duty to mitigate one's losses

[29] It is a well known principle that a party who has suffered loss has to take reasonable action to minimize the amount of loss suffered. (See ***British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*** [1912] AC 673). However, the burden of proof on the issue of mitigation is on the defendant.

[30] The defendant contends that an offer was made to the claimant by the contractor to complete the construction for three million eight hundred and sixty two thousand five hundred dollars ($3,862,500.00). Therefore it would have cost her seven hundred and six thousand five hundred dollars ($706,500.00) over and above the funds available from VMBS to complete the construction. The claimant's evidence was that she could not afford to pay the further sum of $706,500.00.

[31] Importantly, the door to mitigation may be opened by the party who is in breach. However, not every offer of the party in breach will be refused to claimant's detriment. In ***Payzu v Saunders*** [1919] 2 K.B. 581, Bankes LJ said:

> *"It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law, but must be one of fact in the circumstances of each particular case. There*

may be cases where as matter of fact it would be unreasonable to expect a plaintiff in view of the treatment he has received from the defendant to consider an offer made. If he had been rendering personal services and had been dismissed after being accused in presence of others of being a thief, and if after that his employer had offered to take him back into his service, most persons would think he would be justified in refusing the offer, and that it would be unreasonable to ask him in this way to mitigate the damages in an action of wrongful dismissal. But that is not to state a principle of law, but a conclusion of fact to be arrived at on a consideration of all the circumstances of the case."

Scrutton LJ also noted that:

"In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact."

[32] The defendant submitted that the claimant's duty to mitigate her losses would have obliged her to accept the contractor's offer to complete the construction. Respectfully, this submission is tenuous. Though building contracts were not the contracts contemplated in ***Payzu***, the case decided that what is reasonable for a person to do in mitigation of his loss is a question of fact.

[33] Importantly, the claimant gave evidence that she no longer trusted the defendant. It must also be borne in mind that the offer to complete came from the same person who was unable to effectively use the sums that had been provided to honour his contractual obligations.

Is the duty to mitigate discharged for an impecunious claimant?

[34] In ***Clippens Oil Company v Edinburgh and District Water Trustees*** [1907] A.C. 291 Lord Collins stated as follows:

> *"It was contended that this implied that the defenders were entitled to measure the damages on the footing that it was the duty of the company to do all that was reasonably possible to mitigate the loss, and that if, through lack of funds, they were unable to incur the necessary expense of such remedial measures the defenders ought not to suffer for it. If this were the true construction to put upon the passage cited, I think there would be force in the observation, for in my opinion the wrong-doer must take his victim talem qualem, and if the position of the latter is aggravated because he is without the means of mitigating it, so much the worse for the wrong-doer, who has got to be answerable for the consequences flowing from his tortious act".* [my emphasis]

[35] Additionally, In ***Lagden v O'Connor*** [2003] All ER (D) 87 (Dec) the House of Lords declared that:

> *"The law did not assess damages payable to an innocent claimant on the basis that he was expected to perform the impossible. The common law prided itself on being sensible and reasonable. It had regard to practical realities. As elsewhere a negligent driver had to take his victim as he found him".*

[36] Lord Collins' statement in the ***Clippens Oil Company*** case seems to indicate that the duty to mitigate is discharged for an impecunious claimant but the more recent House of Lords decision in ***Lagden*** does not go so far. Significantly, in ***Lagden*** the claimant had taken steps to mitigate his loss but the appropriateness of the steps taken were under consideration.

[37] The more recent cases (***Lagden v O'Connor*** and ***Gilheaney v McGovern and McGovern*** [2009] NIQB 38) impliedly suggest that if a claimant fails to carry out *any* mitigative steps to minimise his loss then the duty to mitigate would not be discharged even if his failure was as a result of his lack of means. However, it must be reiterated that as regards the issue of mitigation the burden is on the defendant to show that the claimant has failed to mitigate her loss. In ***Roper and another v Johnson*** (1873) L.R. 8 C.P. 167, Grove J eloquently stated as follows:-

> *"The expression "mitigation" used in the judgment of Cockburn, C.J., in Frost v. Knight rather shews that the onus of proof lies on the defendant. The plaintiffs having made out a prima facie case of damages, actual and prospective, to a given amount, the defendant should have given evidence to shew how and to what extent that claim ought to be mitigated. No such evidence was attempted to be given. It is entirely upon the absence of that evidence that I rest my judgment".*

[38] The only evidence put forward by the defendant in an effort to discharge his burden of proof was the reference to the subsequent offer to complete construction. The claimant admitted in cross examination that she did not respond to the proposal. The defendant did not conduct any further exploration of this issue. There is also no evidence as to the effect (if any) which the claimant's delay had on the cost of construction.

[39] The defendant also submitted that the claimant should not be permitted to rely on her impecuniosity because it was never pleaded by her. It would therefore be remiss of me not to bring the defendant's attention to the case of ***Geest plc v Lansiquot*** [2002] UKPC 48 where it was acknowledged that:-

> *"it would have been the clear duty of the company to plead in its defence that the plaintiff had failed to mitigate her damage and to give appropriate particulars sufficient to alert the plaintiff to the nature of the company's case, to enable the plaintiff to direct her*

evidence to the real areas of dispute and avoid surprise…if a defendant intends to contend that a plaintiff has failed to act reasonably to mitigate his or her damage, notice of such contention should be clearly given to the plaintiff long enough before the hearing to enable the plaintiff to prepare to meet it".

[40] It may therefore be said that the claimant was not under a legal obligation to plead her impecuniosity if she was not apprised of the defendant's intention to contend that she failed to act reasonably to mitigate her losses. The claimant is only required to show that the defendant's conduct caused the losses claimed. If this is not sufficient to dispose of the defendant's submission regarding the pleadings, Rule 8.9A of the ***Civil Procedure Rules 2002 (CPR)*** enables the Court to allow the claimant to rely on an allegation or factual argument which was not initially pleaded. The claimant gave evidence of her impecuniosity and was not challenged by the defendant. She mentioned her difficulty with paying both rent and mortgage as the house was not habitable.

[41] The defendant's written submissions on damages boldly suggests that the claimant could have borrowed further sums to complete the construction of the house but she made no effort to do so. This point was not raised during cross examination. Therefore, the defendants should not be permitted to belatedly rely upon such a submission (having opted to rely on a no case submission).

[42] It must be emphasized that with regard to mitigation the claimant is only required to act reasonably and this is a question of fact determined by the circumstances of the case. The claimant had already borrowed money to finance the construction and in the circumstances of this case I am of the view that she did not act unreasonably in refusing to immediately borrow further sums to fund the completion of the construction.

[43] This Court is therefore of the view that in the circumstances, the claimant was under no obligation to mitigate her loss by accepting the offer to complete the

construction for an additional cost of seven hundred and six thousand five hundred dollars ($706,500.00).

[44] Where the time taken to mitigate the loss is concerned the case of ***Mertens v Home Freeholds Co, Ltd and Others*** [1921] All ER Rep 372 is once again instructive. Lord Sterndale MR said:-

> *"It follows that the plaintiff, as the building owner, must set to work to build his house in a reasonable time and in a reasonable manner, and is not entitled to delay for several years, and then, when prices have gone up, if they have gone up, to charge the defaulting builder with the increased price".*

[45] The evidence in this matter is that the work was done over a long period of time. At the time when it was quantified by Mr. Logan it was approximately 95% complete. He visited the property in 1998 and in 2010. His report which is dated the 29th April 2010 documents his findings in 1998 and stated what was done up to 2010. He valued the work that had been done post July 1997. It is therefore clear that the work was done over a considerable period of time.

The award

Cost to complete construction

[46] Evidence was given that the sum of eleven million three hundred and forty four thousand eight hundred and eighty eight dollars and seventy two cents ($11,344,888.72) was the estimate cost for completing the house. However, after being cross-examined the claimant admitted to variations which could have led to such a steep figure. It was submitted by the claimant and unchallenged by the defendant that the sum of two million three hundred and forty three thousand three hundred and fifty nine dollars and eighty five cents ($2,343,359.85) was the sum attributable to the variations.

[47] If the contract had been performed the claimant would not have had to spend sums in excess of three million two hundred and fifteen thousand nine hundred and

seventy six dollars ($3,215,976.00) plus two hundred thousand dollars ($200,000.00) which was provided to deal with any increase in the cost of construction. However, as a result of the breach the claimant ended up spending approximately $11,344,888.72, noting of course, the variations.

[48] The claimant's evidence is that the remaining three hundred and eighty six thousand seven hundred and eighty seven dollars and fifty cents ($386,787.50) out of the mortgage sum had not been paid over to the contractor by VMBS. Therefore, VMBS paid out a total of two million six hundred and thirteen thousand two hundred and twelve dollars and fifty cents ($2,613,212.50) to him.

[49] In order to assess the damages the mortgage amount that was not paid out would therefore need to be deducted from any amount that is found to be due and payable to the claimant. (see ***Mertens v Home Freeholds Co, Ltd and Others,*** supra). The computation would be as follows:-

(Cost of completion- variations – mortgage amount not paid out)

($11,344,888.72-$2,343,359.85- $386,787.50 = $8,614,741.37.

[50] The claimant also submitted that she ought to be compensated for building materials that she had paid for which could not be identified in the construction or on site. It is clear that the defendant was not in control of the construction site. I therefore find that he cannot be held responsible for any loss which may have occurred.

Cost of expert witness

[51] Evidence was given that the sum of three hundred and forty five thousand two hundred and fifty two dollars and eighty six cents ($345,252.86) was the sum payable to the expert witness. This sum is accepted by the Court and will be added to the total figure to be recovered by the claimant.

Mortgage Interest Payments

[52] In ***Hayes and another v James and Charles Dodd (a firm)*** [1990] 2 All ER 815, the plaintiffs, who ran a motor repair business decided to purchase larger premises. They entered into negotiations to purchase a leasehold workshop and yard which had access by means of a narrow tunnel from the street at the front of the property and access over the land at the rear of the property. In the course of the negotiations the defendants, who were acting as the plaintiffs' solicitors, were given notice that the owner of the land at the rear of the property asserted that there was no right of way over his land; the defendants, however, informed the plaintiffs that there was such a right of way. Access via the rear of the property was critical to the success of the repair business and in reliance on the defendants' assurance the plaintiffs purchased the workshop and yard and also a freehold maisonette which was part of the property, for a total of sixty five thousand pounds (£65,000) with the assistance of a bank loan of fifty five thousand pounds (£55,000). Within two or three days of completion on 28th July 1982 the owner of the land at the rear of the property blocked the rear access, with the result that the plaintiffs were unable to run their business properly. After twelve (12) months they closed the business down.

[53] The plaintiffs brought an action for damages for breach of contract. The Court allowed the recovery of interest on the bank loan. In this case it was acknowledged that but for the defendant's negligence they would not have had to pay any of it.

[54] The case of ***Patel and another v Hooper and Jackson (a firm)*** [1999] 1 All ER 992 also bears relevance. In this case the plaintiffs obtained an offer of a loan from a building society in order to purchase a house. The defendants, a firm of estate agents and surveyors, were instructed by the building society to make a report and valuation of the house on its own and the plaintiffs' behalf. The defendants described the house as having been neglected in the past and requiring extensive repairs and renovations, and valued it at ninety thousand pounds (£90,000.00). After completing the purchase for ninety five thousand pounds (£95,000.00) in September 1988, the plaintiffs formed the view that the house was uninhabitable. They did not move into it and instructed

new surveyors who prepared a full structural survey and determined that the property was uninhabitable unless works costing in the region of twenty five thousand pounds (£25,000.00) exclusive of value added tax and professional fees were carried out. The plaintiffs, being unable to contemplate such further expenditure, decided to remain in temporary accommodation and offer the house for sale. They received one offer for ninety three thousand pounds (£93,000.00) but the prospective purchaser withdrew after obtaining a survey report. The plaintiffs commenced proceedings against the defendants, alleging that the property had been negligently overvalued, its true value at the date of the defendants' survey being sixty five thousand pounds (£65,000.00) and that they had been unable to resell it.

[55] It was held that it would be wrong to compensate the plaintiffs for mortgage interest payments and insurance premiums since those constituted expenditure which they would have incurred in any event if they had purchased another property.

[56] I am of the view that the reasoning in ***Patel*** is applicable in this case. An injured party is not entitled to be put in a better position than he would have enjoyed if the breach had not occurred. In ***Perry v Sidney Phillips & Son (a firm)*** [1982] 1 WLR 1297 Denning LJ said:-

> *"The general rule is that the injured party is to be fairly compensated for the damage he has sustained neither more nor less"*

[57] I am therefore of the view that the claimant should not recover the mortgage interest payments. Those payments constitute expenditure which the claimant would have incurred in any event, even if the defendant had properly carried out his duties. In this instance it cannot be said that but for the defendant's breach of contract the claimant would not have had to pay any of it.

Distress/Discomfort

[58] In his written submissions the defendant states that the claimant has not advanced a proper claim for an award of damages for distress/discomfort.

[59] It is however well understood that such damages do not have to be specifically pleaded. In paragraph nine of the claimant's amended particulars of claim she refers to trouble and inconvenience which the experience has caused her. The claimant also gave oral evidence in this regard. She said:-

> *"It was devastating, I felt like I was losing my mind"*

[60] The claimant also gave evidence that she moved into the house in 2002, at that time, the house did not have proper bathroom and kitchen facilities.

[61] The appropriate context for damages for mental distress is where the predominant object of the contract is the provision of some mental satisfaction, whether by the giving of pleasure or the removal of distress. I am of the view that a building contract is not such a contract unless there is an express contractual provision to that effect or although it was not written it was specifically contemplated by the parties at the time of contracting.

[62] In ***Watts v Morrow*** [1991] 4 All ER 937 Gibson LJ stated as follows:-

> *"There was no express provision for the provision of peace of mind or freedom from distress and no such implied promise was alleged. In my view, in the case of an ordinary surveyor's contract, damages are only recoverable for distress caused by physical consequences of the breach of contract"*

[63] In this case the defendant surveyor had wrongly pronounced that the house that the plaintiffs were purchasing was in good condition. The plaintiffs, for supervisory purposes, chose to live at the house while the repairs were being carried out. In ***Watts***

the Court of Appeal endorsed the trial judge's award of damages for physical inconvenience and discomfort.

[64] In light of the foregoing, the claimant will be unable to recover damages for mental distress simpliciter. However, the claimant may recover damages for physical inconvenience and discomfort.

[65] In ***Rawlings v Rentokil Laboratories*** [1972] EGD 744 a damp roof system was inadequately installed in the plaintiff's house. The plaintiff recovered damages for the discomfort and inconvenience of being in the house in its defective state.

[66] Helpfully, in the case of ***Farley v Skinner*** [2001] UKHL 49 Lord Clyde declared:-

> *"in my view the real discomfort which the judge found to exist constituted an inconvenience to the Plaintiff which is not a mere matter of disappointment or sentiment...plainly it significantly interferes with his enjoyment of the property and in my view that inconvenience is something for which damages can and should be awarded"*

[67] In the instant case the claimant had to move into an incomplete house without proper facilities and I find that under such circumstances her enjoyment of the property was hindered and it cannot be said that it was a mere matter of disappointment or sentiment.

[68] Importantly, in ***Farley*** Lord Steyn indicated that awards in this area should be restrained and modest. In ***Rawlings*** an award of fifty pounds (£50.00) was made. The claimant in this case has submitted that an award of two million dollars ($2,000,000.00) would be appropriate. The defendant has however argued that a nominal award of one hundred and fifty thousand dollars ($150,000.00) would represent a nominal award.

[69] I agree with the submissions of the defendant. I therefore find that the claimant is entitled to one hundred and fifty thousand dollars ($150,000) as damages for the physical inconvenience and discomfort which she suffered.

Interest on Damages

[70] Section 3 of the ***Law Reform (Miscellaneous Provisions) Act***, 1955 enables the court to award interest, if it thinks fit, on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of judgment. It is by virtue of this section that interest will be awarded to the claimant.

[71] However, the award of interest is discretionary. In light of the protracted period of delay by the claimant in completing the construction, it is my view that interest should not be awarded on the sum computed as damages for pecuniary losses.

[72] Accordingly, damages are assessed as follows:-

i) General damages in the sum of $8,959,994.24 plus interest at the rate of 3% from today to the date of payment;

ii) *$150,000.00 for the inconvenience and discomfort suffered with interest thereon at 3% per annum from the 1st of January 2003 to the 31st of December 2012. (period during which the claimant endured the inconvenience); and*

iii) *Costs to be agreed or taxed*