IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2016 CD 00392

BETWEEN	NAETYN DEVELOPMENT COMPANY LIMITED	CLAIMANT
AND	KIRK HOLBROOKE	DEFENDANT

Building contract – Whether proper party to the contract sued- Whether breach of contract- Terms of contract oral -Value of work done- Whether failure to complete works- Whether amounts paid accounted for.

Anwar Wright and Crystal Brown instructed by Taylor Wright & Co for the Claimant

Georgia Gibson-Henlin Q.C. and Stephanie Williams instructed by Henlin Gibson Henlin for the Defendant

HEARD: 24th, 25th, 26th, 27th, 28th September, 11th October and 7th December, 2018.

IN OPEN COURT

COR: BATTS J

[1] The Claimant is a limited liability company, registered under the Companies Act of Jamaica, with its registered office at 7 Aries Avenue, Smokey Vale, P.O Box 1229, Kingston 8, in the parish of St. Andrew. The claim is brought against the Defendant, Mr Kirk Holbrooke. It is alleged that in the period October 2014 to September 2015, the Claimant paid to the Defendant, or on his instructions, the sum of

$62,429,099.68. The sum was paid for the construction of apartments on premises situated at 18 Edinburgh Avenue, Kingston 8, in the parish of St. Andrew. I will hereinafter refer to the agreed construction works as "the project". The Defendant, it is said, spent only $47,716,566 on the project. The claim at the end of the Claimant's evidence stood at $14,712,533.68, being sums unaccounted for, plus $17,313,673.04 as special damages, for lost rental of the apartments and certain costs incurred in consequence of the Defendant's alleged breach of contract.

[2] The Claimant says that the said contract was partly oral and partly in writing. In so far as it was oral, the Claimant relies on direct discussions in or about September 2014 concerning the scope and nature of the works to be performed. In so far as it was in writing, the Claimant relies on an undated and unsigned Bill of Quantities prepared by Mr Barry Mckoy of Quantity Surveyors Consultants Ltd (Exhibit 2 Tab 24). That document indicates that the estimated cost of the project was $94,143,665. It is alleged that the Defendant was to erect two apartment buildings, containing 12 strata units, with specific tasks reserved for the Claimant to perform. The Claimant asserts that the Defendant failed to complete the project and, in or about October 2015, ceased work on it (see paragraph 24 witness statement of Mr Richard Williams).

[3] By way of Defence it is alleged that the Defendant had no contract with the Claimant. He contends that his company, Proper Construction and Development Limited (hereinafter referred to as Proper), was engaged by the Claimant to do the project. The Claimant's agent was Mr Richard Williams. The Defendant agrees that the contract was oral. He denies ever seeing the Bill of Quantities relied on by the Claimant (Exhibit 2 Tab 24) and says the Bill of Quantities he is aware of is the one at Exhibit 3 Tab 93. That shows an estimated project cost of $91,492,649. It is dated "1/12/15" which the Defendant says is 12th January 2015.It is also prepared by Mr Mckoy of Quantity Surveyors Consultants Ltd. The Defendant says that the Bill of Quantities, although originally part of the contract, later on ceased to be due to significant modifications/ variations. The Defendant denies being paid the amount alleged and says further that Proper is entitled to agreed fees being

20% of the cost of the Project. He, in the event Proper is not found to be the contracting party, has pleaded a counterclaim and set off in the amount of $31,407,329.80.

[4] The relationship, between the Claimant's principal and the Defendant, was very good as they had been friends for approximately 27 years. The Defendant is a developer, contractor and builder. He alleges that, since in or about 2005/2006, he has carried on his profession through Proper. He supported his position by saying, in evidence, that a track record in the construction business is important. This development is now, he says, in Proper's portfolio.

[5] It is common ground between the parties that the contract was not completed. The Claimant alleges that the Defendant ceased work and aborted the project. The Defendant alleges that his company and its workers were locked out of the site. There is no doubt, and I so find, that there was a contract. Money was paid and work was done. The evidence shows the work is valued at millions of dollars. The terms were orally, and informally, agreed. The Claimant says he contracted with the Defendant. The Defendant says at all material times the Claimant was aware that he was contracting with his (the Defendant's) company and not with him personally.

[6] The first and most important issue for my determination is who were the parties to the contract. The principle that no one is bound by the terms of a contract to which he is not a party is well established ***Tweddle v Atkinson [1861] 1 B & s 393; Price v Easton [1833] 4 B & Ad 433.*** Similarly enshrined, is the principle that a company is a person to be sued in its own right ***Salomon v Salomon [1897] AC 22***. No issue, relating to the piercing of a corporate veil, arises in this case as none was alleged. It is a direct factual question, as to, who were the contracting parties.

[7] On the evidence I am satisfied, on a balance of probabilities, that the Defendant is not the party against whom the claim should have been brought. The claim must therefore be dismissed. My reasons may be shortly stated.

[8] In the first place I rely on the several cheques and invoices in Exhibit 1 (Tabs 1-7, 10,12, 13-19); Exhibit 2 (Tabs 27, 33, 36 & 37, 43) and Exhibit 3 (Tabs 46-59, 61-78,80-83,85-89). There were some duplications however all but two of the cheques (Exhibit 1 at Tabs 8 and 9) were made payable to Proper. The vast majority of invoices are in the name of Proper. The Arc Manufacturing invoices, and receipts for payment, were made in the name of Proper (in some cases to the attention of the Defendant). The Claimant's witness, Mr Richard Williams, stated it was the Defendant who told him the name into which the cheques were to be drawn. He acted accordingly. This evidence supports the Defendant's case as to the Claimant's state of mind in terms of the contracting party. The Claimant's agent Mr Williams did not object to the payee being Proper; nor it seems was he in any way misled. He has given no credible explanation for making payments to a non-party to the contract. I find that at all material times he was aware that the Defendant was acting for and on behalf of Proper. Any other finding would mean he was a party to some deception, so that, Proper would be acquiring material or earning income on the pretext that it was involved in the project when it was not. Proper would be getting a "contractors" price from suppliers when it was not a contractor. Mr Richard Williams, in cross-examination, admitted that he knew that the Defendant through Proper had been undertaking developments since 2005/2006. He also admitted that he found it reasonable to expect that "the company" cannot "go to a shop itself". He accepts that the Claimant acts or operates through him. This is evidence of his understanding that a company acts through its agents.

[9] The second reason for finding that Proper was the contracting party is that Mr Richard Williams did not strike me as a generally credible witness. He is more sophisticated, it appears, than his friend Mr Holbrooke. However, Mr. Holbrooke's demeanour and straight forward approach to the questions asked impressed me. On this issue I rejected the Claimant's denial that Proper was the contracting party. I accepted the Defendant's evidence that he conducts business through Proper. He explained how important that is for the building of relationships and a track record. It was confirmed in cross-examination that he gets preferential rates from

service providers, such as hardware stores, by using Proper as the vehicle for his business. The Claimant therefore had a motive to take advantage of that facility by contracting with Proper.

[10] I find therefore that Proper, and not the Defendant, was the other contracting party. In light of my finding there is no need to decide any other issue. In the event I am wrong, however, I will consider briefly the matter of whether there has been a breach of contract and damages. This will, I believe, avoid the necessity for a retrial in the event another court finds I made an error in arriving at the first finding.

[11] Counsel for the Claimant submitted that the Defendant breached the contract by failing to complete the contract, at all or on time, in accordance with the agreement between the parties. He submitted further that all variations or modifications were agreed before the Bill of Quantities was settled, and no modifications were agreed thereafter, and that the Defendant has produced no evidence to the contrary. Queens' Counsel, for the Defendant, submitted that the Claimant failed to establish that a timeline was set for the completion of the contract. It was admitted by the Defendant in cross examination that a prudent developer would have ensured that a start and end date was set. Mr Richard Williams in his witness statement says August 2015 was the agreed completion date. It was admitted by both parties in evidence that the contract was an informal one. I find as a fact that there was no fixed completion date agreed although approximate time periods were discussed. Time was not of the essence in that regard.

[12] It is the law that where no timeline for completion is fixed, the contract should be completed within a reasonable time, see ***Pantland Hick v Raymond and Reid [1893] AC 22;*** Lord Herschell L.C. stated at page 28, 29 and 30 respectively:

> *"The bills of lading in the present case contained no such stipulation, and, therefore, in accordance with ordinary and well-known principles the obligation of the respondents was that they should take discharge of the cargo within a reasonable time. The question is, has*

the appellant proved that this reasonable time has been exceeded? This depends upon what circumstances may be taken into consideration in determining whether more than a reasonable time was occupied...My Lords, there appears to me to be no direct authority upon the point, although there are judgments bearing on the subject to which I will presently call attention. I would observe, in the first place, that there is of course no such thing as a reasonable time in the abstract. It must always depend upon circumstances. Upon "the ordinary circumstances" say the learned counsel for the appellant...Could it be contended that in so far as it lasted beyond the ordinary period the delay caused by it was to be excluded in determining whether the cargo had been discharged within a reasonable time? It appears to me that the appellant's contention would involve constant difficulty and dispute, and that the only sound principle is that the "reasonable time" should depend on the circumstances which actually exist. If the cargo has been taken with all reasonable despatch under those circumstances, I think the obligation of the consignee has been fulfilled. When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as they involve delay, have not been caused or contributed to by the consignee. I think the balance of authority, both as regards the cases which relate to contracts by a consignee to take discharge, and those in which the question what is a reasonable time has had to be answered when analogous obligations were under consideration, is distinctly in favour of the view taken by the Court below. In Postlethwaite v. Freeland 5 App. Cas. 599, 608, the law was stated by Lord Selborne thus: "If, on the other hand, there is no fixed time, the law implies an agreement to discharge the cargo within a reasonable time; that is (as was said by Blackburn J. in Ford v. Cotesworth (1)) a reasonable time under the circumstances."

[13] That authority is supported by ***Wilmot-Smith on Construction Contracts, Third Edition*** at paragraph 11.01 which states that if there is no express term of the contract which provides for a completion date, the law will imply a reasonable time for completion. What is a reasonable time will depend upon all the circumstances of the case. That requires evidence and, in a case like this, expert evidence. This is of paramount importance. Where a reasonable time is implied breach of that time does not automatically give a right to terminate. A time of the essence notice should first be served. The burden of proof is on the party seeking to establish that there has been a failure to complete within a reasonable time, see ***Shawton Engineering Ltd v DGP International (t/a Design Group Partnership) 2005 EWCA Civ 1359, 2006 BLR 1,*** at paragraph 44 of the judgment of May LJ.

[14] There was not a great deal of evidence as to the time in which the project was to be completed. There was no evidence either oral or written of a fixed date for completion. There was no expert evidence as to the reasonable time in which completion was to be expected for a project of its nature. The Claimant, on whom rests the burden of proof, has failed to satisfy me on a balance of probabilities that there was a fixed time for completion. The Claimant has also failed to prove that a reasonable period for completion had passed when the contract was terminated. Neither is there any evidence that time was ever made of the essence of this contract. Therefore, there being no evidence as to what was a reasonable time to complete the project with the modifications, I cannot find that the Defendant was in breach by reason of delay.

[15] The Claimant's assertion that the Defendant stopped working on the project in September 2015 is not supported by the evidence. WhatsApp conversations suggest that the Defendant continued to work at the property after September 2015, and until in or about March, 2016, see WhatsApp messages in Exhibit 3 Tab 90 as explained by the Defendant in evidence:

Mr. Williams: *I'm there*

17th February 2016

Mr. Holbrooke: *I received the list. Will check tomorrow*

Mr. Williams: *Ok kid*

19th February 2016

Mr. Holbrooke: *Just sent you the Arc quote. The aggregates are going to cost $355,000. He forgot to put the pit stone on the material list.*

Mr. Williams: *K*

Mr. Holbrooke: *Bio man not here. Hasn't been*

Mr. Williams: *He said after the site clear up. Call him*

20th February 2016

Mr. Holbrooke: *Morning. What am I to do with the roof tiles they need to move and put some where*

Mr. Williams: *Scotty says he can take them*

Mr. Holbrooke: *Is he sending for them or am I to get them to him*

Mr. Williams: *Get them to him. He has transport. So just arrange the loading*

Mr. Holbrooke: *So he is sending for the,*

Mr. Williams: *I didn't arrange it but I can*

Mr. Holbrooke: *I'm confused now*

Mr. Williams: *I just mentioned it to him that I need him to keep them and he said yes. I'm just saying he has transport but I see where we at with his payments*

Mr. Williams: *What about Garfield, the workmen are disgruntled*

Mr. Holbrooke:	*I gave Garfield the work not them so he knows how to deal with his people. Everybody get money*
Mr. Williams:	*I told him I will pay the difference for the under molding*
Mr. Holbrooke:	*Yes…he actually didn't mold out my kitchens I paid Dwight to do it. He setup and installed*
Mr. Williams:	*Ok*

19th March 2016

Mr. Williams:	*I need you to get the plumber to move the bath that wants to be corrected*
Mr. Holbrooke:	*He will be there today".*

[16] The Defendant gave evidence that Proper was prevented from completing the project. His evidence was supported by the convincing, if not unchallenged, evidence of Mr Aljuray Taylor. Mr Taylor is the Claimant's former watchman. He said that he received a directive from the Claimant that the Defendant was not to be allowed on the premises. He also said plumbers were working on the site at the time he got the directive. He was given this instruction in or about March 2016. This evidence is consistent with Mr Richard Williams' evidence that he took over the site in March/April 2016 and that the Defendant "had no business" being on the premises after that time. I find on a balance of probabilities that it was the Claimant who locked the Defendant out and prevented completion of the project. The Claimant did this because of dissatisfaction with the rate at which the work was progressing and suspicions about the use to which the money paid was being put.

[17] According to ***McGregor on Damages 17th edition,*** at paragraph 26-018, where the owner acts so as to bar completion the normal measure, being the contract price less the cost to the builder of executing the work, applies. In calculating the builder's costs, the indirect as well as the direct costs must be included, especially overheads. ***Lodder v Slowey [1904] AC 442 PC***, decided that as an alternative

to the contract price approach damages, being the actual value of the work (on quantum meruit) had the contractor been allowed to complete, may be claimed. *"Their lordship also agree"*, said Lord Davey at page 453, *"with the learned judges as to the proper measure of damages, or (more accurately) as to the right of the respondent to treat the contract as at an end and sue for work and labour done instead of suing for damages for breach of the contract"*.

[18] At paragraph 26-021 of ***McGregor on Damages*** is stated the principle that a contractor should be allowed to recover for losses such as the necessary payment of wages during the delay, the increased cost of labour or materials when work is resumed, and deterioration of the building materials during the delay. According to ***Keating on Building Contracts 5th edition*** at page 72, if the employer pays money under a contract, which the contractor fails to complete, the employer can recover that money in an action for money had and received as if there has been a total failure of consideration. If the employer has received any of the benefit bargained for from performance by the contractor, there has not been a total failure of consideration. The employer in that event has to give credit for the value of work performed by the contractor see ***Fibrosa Spolka Akcjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 HL***.

[19] The Claimant contends that he is entitled to a refund of money received by the Defendant but not spent on the project. The Claimant contends that the Defendant was in breach of contract, by not using the monies supplied for the construction works, thereby resulting in a difference of $18,321,104.88, taking into account all rates, charges and contractor's mark-up or profit. Alternatively, that the money was paid to the use of the Defendant and therefore he is liable on quasi-contractual principles. The expert report and valuation of Geecho Consultants &Contractors Ltd prepared by Mr George Henry (Exhibits 6&7) is relied upon by the Claimant in this regard. That report dated 27th April 2018 contains both Mr Henry's valuation of the work done in October 2016 and a second valuation he did in March 2018 adjusting the first. Both value the work as at October 2016. Mr Henry is a licensed Quantity Surveyor with over 27 years' experience. He relied on the quantities and

tasks set out in the Bill of Quantities prepared by Mr Barry Mckoy, as well as visual inspection of all units. His report valued the work done, as at the 10th October 2016, at $47,716,566.00.

[20] The Claimant's counsel submitted that the Defendant has provided no credible or satisfactory evidence of value on termination of the works. During examination-in-chief the Defendant amended paragraph 36 of his witness statement to say that, the Quantity Surveyor, Mr. Kellyman, could not attend court proceedings. He stated that he had therefore hired another expert, Mr. Dean Burrowes. Mr Burrowes gave evidence. His report is Exhibit 10. Claimant's counsel pointed out that Mr Burrowes, a chartered Quantity Surveyor with 38 years' experience, was unable to determine or verify the value of works executed by the contractor. He was unable to say how Mr Kellyman, the Defendant's previous expert, arrived at his values nor could he verify if Mr Kellyman visited the site at all. Mr Burrowes was also unable to verify any rates used. He could not even verify whether variations were done. I accept all those criticisms of Mr Burrowes' evidence. He was however a candid and competent expert witness. Mr Burrowes admitted that a valuation report done closer to termination of the contract would be the most reliable one. The evidence of Mr Burrowes was that the methodology of Mr Henry, who indicated 0% for work that was done, is not in accordance with the industry practise. Mr Henry admitted in cross examination that he deviated from this industry practise on the instructions of the Claimant who advised him that those items were done by him and not by the contractor. Mr Burrowes, in his evidence, indicated that Mr Henry's report was also deficient in that it did not indicate whether there were any materials on site at the time of his inspection.

[21] During cross-examination of Mr Henry the unreliability of his valuation report became apparent, see for example the following exchanges:

> *"J: What is the significance of 0% on page?*
>
> *A: Represent work that client responsible for or client to do.*

Q: Isn't it true that 0% work to be done by client on page 3 of 9 is because Mr

Williams advised you that this was work he was to do?

A: No these were not done at the time

J: Correcting yourself?

A: Yes, correcting myself"

Later on the witness stated:

"A: Understanding was that windows was supplied and installed by Mr Williams

Q: Understanding by Mr Williams communication?

A: Yes

Q: Because of that that is why nothing reflected there?

A: Yes, maam

Q: In report 0% reflects where work not done at all and also where Mr Williams

said work to be done by him and material supplied?

A: Yes

Q: Nowhere in report have you distinguished between 0% that work not done

at all and that Williams said work to be done?

A: Disagree

Q: Is it in report where you distinguish?

A: Not to explain the 0% but explanation to explain items done by Mr Williams

Q: By that mean schedule

A: Yes

Q: By your indication saying that if look in schedule 3(ii) where nothing stated is where this is in schedule?

A: Yes

Q: Go to schedule please

A: Yes, there

Q: In schedule point out what in 3 (ii) in schedule

A: In schedule is item 2 supply and install windows

Q: Not referred to 3 (ii) but 3 (12) would you agree

A: That is a typo error should have been 3 (ii)

J: Report seem to have a few errors

A: Yes, Mi Lord just picking up on this one."

[22] Mr Burrowes gave evidence that most of the values in his report are from the report of Mr Henry. He also stated that, where the reports of Mr Henry and Mr Kellyman concurred, it was not in his place to disagree, therefore, those sums were allowed. Where amounts diverged he used the lower of the two figures, except for the valuation of electrical works which conventionally is paid for in three stages. He gave evidence that he allowed 1/3 of the electrical work because at least the 1st fix would have been done. He further gave evidence that in one instance he reduced the amount claimed for the preliminaries by Mr Kellyman on the basis that he did not find it to be reasonable. He stated that he also adjusted preliminary items which covered onsite overheads. Those costs he stated would be distributed over the entire period of the construction work, therefore, the Defendant could not get paid for it in its entirety. In cross-examination the following exchange occurred:

"Q: When you say at bullet point 3 on page 3 you were relying on Mr. Kellyman's report

A: Yes

Q: Is the court to understand that the valuation 57 million on page 3 based on Mr. Kellyman's report

A: Not only Kellyman. That was an integral part but I also used Mr Henry's report

Q: Were variation referred to in Mr Henry report

A: No

Q: But referred to in Mr Kellyman's report

A: Yes and Particulars of claim and defence and counterclaim

Q: No way for you to justify variations

A: *No I could not*

Q: *Put to you Mr Burrowes that you arrived at numbers at page 9 by favouring Mr Kellyman Payment Certificate over Mr Henrys report*

A: *No I would not say so. I looked at both. Many of the values given there are Mr. Henry's values*

Q: *Your choice was heavily influenced by the copy of Kellyman's report*

A: *My report based on a combination of both report. Most of my figures based on Mr. Henry report. There is one for finishes and I chose to use a lower value for floor, wall and ceiling finishes than both Henry and Kellyman. I would have used lower of two value agreed. In cases fixtures, joinery fixtures I used lower of two values because any change would be referred as a variation. The bias if any would be towards Mr. Henry's report.*

Q: *You added these items and get $2,641,229.00*

A: *No, no. That 2,641,299.00 corresponds with Mr Henrys report for substructure. I used Henry's figures"*

Mr. Burrowes went on to state further that:

"J: *Comparing your final figure to Mr Henry dealing with total number due to Holbrooke how compare?*

A: *Mine come to approximately $15 million more than Mr. Henry. The variations were however not allowed for Mr Henry. Those amounted to 13 million and I got those from Kellyman. Accepted this except for electrical. I accepted Kellyman because in construction contract it is employer to go and check a construction claim."*

[23] Mr. Burrowes gave evidence concerning the treatment of variations in the absence of a written contract. During cross-examination when Mr. Burrowes was asked about the payment for variations he said the following:

> *"Q: Agree that your conclusion justify Mr. Kellyman's conclusion that Defendant should be paid for variation?*
>
> *A: Yes. In absence of conditions of contract that stipulates how variation to be paid and valuation in simple terms each variations are to be paid and valued in the simplest terms, each variation ought to be seen as a separate contract for additional work and would therefore needs to be negotiated.*
>
> *Q: These variations would form part of contract and would not be separate*
>
> *A: Not form part it would be separate*
>
> *Q: You were retained by Kirk Holbrooke and you formed view of when asked to justify Mr Kellyman conclusions*
>
> *A: No I was not asked to do that. I know my duty is to the court."*

[24] I accept Queens' Counsel's submission that the evidence, of Mr Dean Burrowes, was unbiased and independent. It provides the best indication to the court of the value of works done by the contractor. In arriving at his conclusion, Mr Burrowes took into account the opinions of the other two experts. Mr Burrowes is a credible witness who provided the court with useful information and understanding. He demonstrated that he conducted his assessment in a fair and independent manner. The reliability of Mr Burrowes' evidence can be shown in the way that he critiqued both the report of Mr Henry and Mr Kellyman. Mr Burrowes went on to clarify that the basis of his assessment was that Mr Kellyman's report was a request for payment and Mr Henry's report is a valuation for the work done at termination. He was candid in acknowledging his inability to give an opinion given the fact that he could not personally distinguish the work which was done by the contractor from that done by the owner. In his words at paragraph 4 of his report; *"Without a mutual agreed value at termination, or photographs representing the works at termination,*

it is only possible to arrive at a reasonable valuation by examining the claims and selecting the areas in which the parties have concurrence". Mr Burrowes concluded that the approximate valuation at termination is estimated to be $57,931,602.

[25] He who asserts must prove. The Claimant has the evidentiary burden to show that it did in fact give to the Defendant the sum of $62,429,099.68. The documentary evidence, in terms of receipts and cheques, presented by the Claimant (see Exhibits 1, 2, 3 and 5) total $55,858,147.00. The Claimant also relies on a handwritten note made by the Defendant (Exhibit 4) which has $62,429,099.62 as the amount paid. The Defendant admits some cash advances were made and that he gave no receipts for those. He also, in cross-examination, admitted that Exhibit 4 was his handwritten note. He says it was made in the course of discussions with a mutual friend who had been asked to mediate. He denied its accuracy. The Defendant explained that the handwritten note represented a willingness on his part to put an end to the matter, and insisted that at no point did he receive the figure stated on the handwritten note. Why would someone admit to receiving something that they did not? I do not find the Defendant credible on this point. The document, Exhibit 4, clearly shows that the Defendant was admitting that he received the stated amount from the Claimant. Exhibit 4 coupled with the admission that the Defendant accepted cash advances for which no receipts were given, has solidified my finding that the Defendant did receive from the Claimant the amount of $62,429,099.68.

[26] I also find, accepting the expert analysis of Mr Burrowes, that the value of the work done on the project was approximately $57,931,602.00, inclusive of variations. The Claimant says that it reserved for itself the roof, windows, supply of doors, supply of kitchen cupboards, sanitary fixtures and electrical material as well as 100 sheets of plywood and the construction of a disposal system. This I am prepared to accept. These items, again relying on Mr Burrowes' analysis, are valued at $2,038,015.00. They are to be deducted from the valuation for work done by the Defendant. The value of work done by the Defendant as at March 2016 is therefore $55,893,587.00

[27] I have found that the contract was terminated by the Claimant in March 2016 (paragraph 16 above). The evidence of the expert Mr Burrowes, which I accept, is that where modifications and variations are requested then that will inevitably increase the period of the contract. The Claimant did agree some modifications, to the Bill of Quantities of January 2015, such as one specific top floor apartment and the provisioning for air conditioning units and surveillance cameras. He however disagreed that the installation of the washrooms under the steps was another modification. I accept that modifications resulted in an extension of the time anticipated for completion of the project. The value of modifications totalled some $13,523,786.00 and is therefore not inconsequential. I find also that at no time did the Claimant communicate to the Defendant that there was such a delay as to cause termination. No notice to make time of the essence was served. In the circumstances I find that there was no delay in the completion of the project such as to cause a lawful termination of the contract. The Defendant was not in breach and, in locking the Defendant out as he did, the Claimant wrongfully terminated the contract. This means that the Defendant was entitled to damages. I would assess this as 20% of the estimated project cost plus variations because that would have been the amount earned had the project been completed. At any rate we have no evidence suggesting otherwise. I accept the Defendant's evidence as to the estimated project cost (Exhibit 3 Tab 93).

[28] Had it been necessary for my decision I would have found as a fact that the Claimant wrongfully terminated the contract. Further that the Defendant did not, as at the date the contract was terminated, use all the money paid to him on the project (the cost of which had escalated somewhat in consequence of variations). In summary therefore, had I found that the Defendant was the contracting party, I would have awarded damages to the Defendant, on the Counterclaim, in the amount of $14,467,774.32 arrived at as follows:

Amount paid to Defendant	$62,429,099.68
Less value of work done by Defendant	$55,893,587.00
Less Contractor's fee of 20% of value of project plus escalation (being damages for wrongful termination breach by Claimant)	$21,003,287.00
TOTAL	$14,467,774.32

[29] In the result however, and as I have found that Proper was the contracting party, the Claimant cannot recover against the Defendant for any or any alleged overpayment. The Defendant has a counterclaim. That however fails, for the same reason the Claimant fails on his claim, in that Proper was never made a party to the action. The claim is therefore dismissed and so is the counterclaim. Costs will go to the Defendant who has been substantially successful. Such costs are to be taxed if not agreed.

David Batts
Puisne Judge