NMS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 144/97

BEFORE: **THE HON. MR. JUSTICE DOWNER, J.A**
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**WINSTON SENIOR**	**PLAINTIFF/APPELLANT**
AND	**WILLIAM JACOBS (JR.)**	**1ST DEFENDANT/RESPONDENT**
AND	**JOAN JACOBS (continuing Defendant)**	**2NDDEFENDANT/RESPONDENT**

Carol Vassall for the Plaintiff/Appellant instructed by **Norman Samuels**

Dr. Lloyd Barnett and **Leila Parker** for second Defendant/Respondent

November 18, 19, 20, 21, 2002 and December 20, 2004

BINGHAM, J.A.

This is an appeal from a judgment of Langrin J (as he then was) in respect of a written judgment delivered in the Court below on November 27, 1997.

This trial which commenced in June 1994, occupying five days, continued in September and October 1997 for a further four hearing days at the end of which judgment was reserved.

The hearing proved to be an eventful one, marked by the deaths of two of the original parties. The third party to the suit, Mr. Albert Sharpe, a consultant architect and builder, who was engaged by the first defendant/respondent to oversee the project died before the hearing of the action commenced. The claim made against him was then withdrawn. Following the adjournment of the hearing on 10th June, 1994 the first defendant/respondent underwent major surgery in the United States of America, from which he never recovered. He died in August 1994. A period of three years was taken up by his wife (second defendant/respondent) in settling his affairs and obtaining the necessary representation to enable the continuation of the action on behalf of his estate.

The claim and the counterclaim relate to the construction of a dwelling house by the plaintiff/appellant on a lot of land owned by the first defendant/respondent at Cardiff Hall, Runaway Bay, in Saint Ann. This dwelling house was the subject of a building contract between the plaintiff/appellant and the deceased first defendant/respondent William Jacobs. The second defendant/respondent was also an active participant in the pre-contractual arrangements and throughout the construction of the building.

The agreement between the first plaintiff/appellant and the first defendant/respondent William Jacobs was for the construction of a

A final extension was granted to the contractor for completion to be done by 18th December, 1983. When it became apparent that this attempt also proved unsuccessful, the first defendant/respondent acting on his attorneys' advice terminated the contract and then sought to employ another contractor to remedy the defects and complete the works.

The plaintiff/appellant later consulted an attorney-at-law, Mr. Victor Scott of St. Ann's Bay who wrote to the first defendant/respondent's attorneys-at-law Murray and Tucker of Brown's Town, St. Ann, a letter dated 2nd April 1984 couched in the following terms:

> "Messrs. Murray & Tucker
> Attorneys-at-law
> Brown's Town P.O.
> St. Ann
>
> Attention: Mr. Leighton L. Lindo
>
> I send you a report from Messrs. Davidson & Hanna, Chartered Surveyors relative to construction of the residence of Mr. Jacobs at Cardiff Hall, St. Ann. You will observe that the amount now due payable to Mr. Senior is $155,708.14 less a retention of 5%. Also attached is a report from the Surveyors as to the condition of the work that has been done and approximate cost of remedying the defects.
>
> I hereby demand payment within seven days failing which a Writ will be issued.

> Your clients have taken possession of the premises and have been using same for guests. Their action in the entire matter is unwarranted.
>
> In consequence of non-payment by your client Mr. Senior is being pressed by his creditors.
>
> Please give the matter your prompt attention.
>
> Yours faithfully
>
> V.L.S. SCOTT
>
> VLSS/es
> Encls."

The letter from the appellant's attorney-at-law had been written in response to a letter sent by the defendant/respondent's attorneys-at-law dated 12th December 1983 to the appellant, and enclosed a list of defects to be remedied by him. The letter and the enclosure (list of defects) were expressed in the following manner:

> "12th December, 1983
>
> Mr. Winston Senior
> Senior's Construction & Joinery
> 55 Main Street
> St. Ann's Bay P.O.
> SAINT ANN
>
> Dear Sir:
>
> Re: William Jacobs
>
> You entered into a Contract with Mr. Wiiliam Jacobs, Jnr., of Zionsville, Indiana, U.S.A., for the building of a House at Cardiff Hall, Runaway Bay in the Parish of Saint Ann, on the 12th January, 1983, for the cost or price of Forty-five Dollars (Jamaican) (J$45.00) per square foot. This

worked out to be Two Hundred and Thirty One Thousand Eight Hundred and Sixty Dollars (J$231,860.00).

Under the terms of the Contract, possession of the completed House ought to have been delivered to the owner within Thirty-One (31) weeks from the date of the commencement of the building. As is well known to you, you failed to make this deadline and were in default of the Contract.

On the 12th September, after a meeting between yourself and the writer hereof, you gave an undertaking that the House would be completed by the 31st October, 1983. You failed to keep this promise.

By a Supplemental Agreement entered into by all the parties on the 29th October, 1983, a copy of which is enclosed herewith, you solemnly promised that the House, complete with additional work agreed on by both parties, would be completed by the 21st day of November, 1983.

Once again you failed to honour this Agreement and you are once again in default. Please be advised that Mr. Jacobs will be claiming liquidated damages as set out in the aforementioned Supplemental Agreement.

We are informed that you have given yet another deadline that you will complete and be out of the House with all your workmen before the 18th day of December, 1983. When the writer made an inspection of the premises as of 11th December 1983, there were numerous areas finished so unsatisfactorily as to be unacceptable and several matters not competed, several areas to be redone and we are still concerned as to whether the swimming pool is still leaking or not.

We list hereunder for you immediate attention, the most obvious and urgent faults and omissions which we observed:

1. (a) Counter and Cupboards (b) Standing Broom Cupboard in Staff Dining area to be installed.

2. Grills on front verandah of Master bedroom and Dining area still to be installed.

3. Medicine Cabinets in Bathrooms not yet installed.

4. Louvres on Doreen Ingram's room not yet installed.

5. Paint on courtyard tiles is all stripping.

6. Vertical Drain Pipe in gully basin unfinished and unsightly.

7. Dirt and paint stains on floor.

8. Fountain leaking.

9. Leak at the eastern edge of Livingroom.

10. Clothes Closet in owners' store room not yet installed.

11. Were grills intended for owners' store room?

12. Grills still to be installed on Houseman's room.

13. Hot water Heater still missing.

14. Pool light still missing.

15. Some cupboards not yet stained, or painted.

> Kindly be advised that unless these and all other matters are completed to the satisfaction of the owners and you have left before the 18th instant, a new Builder will be employed at your expense, to do remedial work to complete the structure and you will be sued for damages in addition.
>
> We have strict instructions from the owners not to make any further payments in respect of this matter until we have written authority from them to do so.
>
> Yours faithfully
> MURRAY & TUCKER
>
> PER
> c.c. Mr. & Mrs. William Jacobs."

It was following the first defendant/respondent's failure to comply with the demand for payment made in the letter from the plaintiff/appellant's attorney-at-law that a writ claiming damages against the first defendant/respondent for Breach of Contract was filed. Following this claim the first defendant/respondent responded by his attorneys filing a Counterclaim claiming damages for Breach of Contract in the sum of $145,000.

The plaintiff/appellant's claim for damages for Breach of Contract was later amended increasing the sum claimed to $175,000. This increased sum was founded on the plaintiff/appellant alleging that the building completed was larger in size (area) than that contracted for viz 6,206 square feet instead of 4,708 square feet as called for in the written contract. In addition, there was a claim for payment for the building of

the swimming pool, extras for variation in the contract and a claim for escalation in the prices of building materials occuring during the construction of the premises.

Of these there was no issue raised as to the sum claimed for the construction of the swimming pool and for the claim for certain of the extras due for variations in the contract. The issues as to escalation in the building materials as well as the claim for increase in the size of the building constructed were strongly resisted and challenged and remained live issues at the hearing below.

The claim for escalation in building materials

This claim was not made during the course of the construction of the building. It surfaced after the plaintiff/appellant was ordered to leave the building site following two periods of extension by the first defendant/respondent acting through his attorneys-at-law Mr. Leighton Lindo, of Murray and Tucker, to satisfactorily complete the project. One would have expected that such increases in the cost of building materials would have been brought to the notice of Mr. Albert Sharpe, the consultant acting for the owner, Mr. William Jacobs. He was overseeing the construction. This claim emerged in the particulars of damages as set out in the Amended Statement of Claim. At the trial no supporting oral or documentary proof was forthcoming in advancing this head of the claim. Calling for strict proof of the Particulars of Special Damages pleaded, it

would accordingly fail for lack of sufficiency of proof of special damages claimed (vide dictum of Lord Goddard, C.J. in **Bonham-Carter v. Hyde Park Hotels Ltd** [1948] T.L.R. 177).

The claim for variations Ex Contract (Extras)

Paragraph 8 of the Statement of Claim was expressed in the following terms:

> "8. The Plaintiff/appellant in the course of construction of the dwelling house with the direction and or approval of the Defendant/respondent or his agent made the following variations or additions:
>
> (a) Increase in the building area from 4,708.80 square feet to 6,206 square feet at an additional cost of $67,374.
>
> (b) Construction of Kerb Wall Paving of Driveway at a cost of $6,936.00.
>
> (c) Construction of Downpipes of roof of covered Terrace round Courtyard at cost of $5,075.
>
> (d) Provide and Install Burglar Bars $3,806.00
>
> (e) Construct Cattle Trap $1,806.00
>
> (f) Construct Flower Box at Patio $ 492.00
>
> (g) Extension of Pool Terrace $3,748.00
>
> (h) To erect Boundary Fence $1, 88.00
>
> (i) To Tiling of Courtyard $5,740.00
>
> (j) To Relocate kitchen Counter $ 350.00
>
> (k) To construct roof over Entrance area $ 425.00
>
> (l) Relocation of Wash Basin and Door

	in Housekeeper's room	$ 392.00
(m)	Additional Work to Verandah	$4,828.67
(n)	Additional Electrical Work	$7,192.05
(o)	Supplying Fixtures	$5,351.50
(p)	Fluctuations in the prices of building materials	$12,940.00"

In the Amended Defence and Counter Claim at paragraph 7, the defendant/respondent's answer to paragraph 8 above was in the following terms:

> "7. With reference to paragraph 8 of the Statement of Claim, the Defendant/respondent:
>
> (a) denies that any direction and/or approval was given by the defendant/respondent or his agent for increasing the area of the building;
>
> (b) says that the Agreement and plans provided for an appropriately paved driveway but this work was not carried out in accordance with plans;
>
> (c) says that the Agreement and plans provided for appropriate drainage and gutters and this did not constitute extras;
>
> (d) says that the value of the work done with respect to burglar bars is to be established and certified;
>
> (e) says that the cattle trap has not been properly installed, does not provide the intended protection and constitutes a hazard;
>
> (f) says that the claim for the flower boxes is not denied;
>
> (g) says that the extension to the pool deck was not properly executed and the work is totally defective;

(h) says that the claim for the boundary fence is not denied;

(i) says that the claim for tiling the courtyard includes sand bed which is contrary to the Agreement and excessive and must in any event allow a credit in favour of the Defendant/respondent for the grass terrace called for in the plan;

(j) says that the relocation of the kitchen counter was caused by the Plaintiff/appellant's error and misjudgment and cannot therefore be for the Defendant/respondent's account;

(k) says that the claim for the roof over the entrance area is denied as it is verified and certified and the work is defective;

(l) says that the claim for relocation of the washbasin and door in the housekeeper's room is not accepted;

(m) says that the additional work to verandah was due to faulty design by the Plaintiff/appellant and is not therefore for the defendant/respondent's account;

(n) says that the electrical works claimed for are normal and usual and were or should have been included in the original electrical drawings to be prepared by the Plaintiff/appellant and cannot be treated as extra;

(o) says that no bills, voucher or proper verification has been submitted by the Plaintiff/appellant in support of the claim for supplying fixtures and the costs for transportation and contractors' profit cannot be charged to the Defendant/Respondent under this item;

(p) says that no bills, voucher, or proper verification has been submitted by the Plaintiff/appellant in

> support of the claim for fluctuations in prices and so the claim has not been properly made."

In determining the issues arising in respect of the several items alleged in the claim and traversed in the defence, the learned trial judge heeded the relevant principles of law to be applied in coming to a conclusion in the matter. He said:

> "Since there was no specific provision in the written agreement for alterations, additions, or omissions from the contract the builder was under no obligation to make any of them. If he did he could only recover payment if he can show that the work was an extra, falling outside the contract and specifications, and was not expressly or impliedly included in the work contracted for or necessary for its completion. Also that it was authorized or ratified by the owner and was not performed entirely voluntarily by the builder.
>
> In relation to a claim by the owner for breach of contract and duty of care in that the plaintiff/appellant provided defective plans and did defective work, the owner is liable to pay the contract sum but he may recover by way of set off or counterclaim the costs of making good any defects or omissions which represent a departure from the contract." (Emphasis added)

The learned judge referred to the following statement in Halsbury's Laws of England 3rd Edition Vol. 3 para. 956 at page 487:

> " In the case of defective work done by the contractor the employer may defend an action for the price on the ground of breach of contract, and counterclaim for the damages which he has sustained. The reduced value of the work owing to its defective construction may be an element of such damages ...".

The learned judge then said:

> "The measure of damages for failure by the contractor to complete a building contract will include the difference between the price of the work as agreed upon in the contract and the cost the owner is actually put to in its completion."

Before going more fully into the consideration of the manner in which the learned trial judge dealt with the issues raised in the claim and counterclaim, it may be convenient to advert to a procedural question complained of in ground (a). This ground read:

> "The learned trial judge erred in interposing the defendant/respondent during the conduct of the plaintiff/appellant's case despite objections from the plaintiff/appellant's Attorney-at-law."

The circumstances which led the learned trial judge to allow the defendant William Jacobs to give evidence before the close of the plaintiff's case, were brought about by the urgent need that the witness, who was seriously ill, should testify and be released from the hearing so that he could return to the United States of America where he resided, so as to undergo major surgery. The application was objected to by learned counsel for the plaintiff/appellant, on the ground that he was not consenting to the application. The learned judge overruled the objection and interposed the evidence of the witness.

Before us, Miss Vassall arguing for the plaintiff/appellant, submitted that the course taken by the learned trial judge was wrong. If this submission found favour with the Court, it would be possible in the interests

of justice, in all fairness, to place no weight on the evidence given by Mr. Jacobs. She contended that Mrs. Jacobs was the person who did most of the work in connection with the construction of the house. She had knowledge in respect of the state of the building up to the termination of the contract with the appellant. Her knowledge also related to the nature and extent of the work which was carried out in remedying the existing defects after the expulsion of the contractor from the building site on 18th December 1983.

Learned Counsel relied in support on the following authorities:

1. Volume 17, Halsburys Law of England 4th Edition Paragraph 1106
2. **Briscoe v. Briscoe** [1968] 1 All E.R. 464
3. **Enoch and Zaretzy v. Bochand Company's Arbitration** [1910] 79 K.B.D. 363

Dr. Barnett in response submitted that the reason for the learned trial judge taking the course he did, resulted from an application by counsel who then appeared for the plaintiff/appellant below seeking an adjournment to call a witness who was not then available to give evidence for the plaintiff/appellant. The application was then made by learned Queen's Counsel for the defendant/respondent, Mrs. Hudson Phillips, to interpose the defendant/respondent Mr. Jacobs who resided in the United States of America, and who was scheduled for major surgery. If the adjournment was granted, there was no likelihood of the matter

coming back on the list in the near future. This would also deprive the defence of a material witness. Counsel pointed out that by calling the defendant/respondent at the time he gave evidence was advantageous to the plaintiff/appellant as any evidence given by him could be rebutted before the close of the plaintiff/appellant's case. He cited in support section 355 of the Judicature (Civil Procedure Code) Law which gives to the Court wide powers in certain circumstances, to be exercised in the interests of justice.

Given the situation with which the Court was faced, I am of the view that the learned trial judge adopted the proper course in doing what he did. The evidence of the witness once given was subject to cross- examination. The fact that counsel for the plaintiff/appellant failed to make use of the opportunity to exercise that right, was of no moment. Certainly, no blame for this could be attributed to the defence or to the Court.

Of importance, was that the course taken could not prejudice the case being presented for the plaintiff/appellant. Although it may not be considered as hindsight on the part of the learned judge in taking the course that he did, as events unfolded the interest of justice was served as following the adjournment in June 1994, the defendant/respondent died following surgery in August, 1994.

The issue as to the claim for the increased area of the building

It was the submission of Miss Vassall for the plaintiff/appellant that the written contract which was drafted by the first defendant/respondent's attorneys-at-law called for the construction of a house of the size of 4,708 square feet. The size on completion when measured by the quantity surveyor , Mr. Davidson, was 6,206 square feet. As this structure did not vary from the original plan, she argued, this amounted to a common mistake. This would result in the plaintiff/ appellant being entitled to the additional cost claimed. This larger structure would of necessity result in a longer period needed to complete the building.

Dr. Barnett in responding referred to the fact that both Mr. and Mrs. Jacobs, the defendants/respondents, were lay persons not skilled in the building trade. They approached the plaintiff/appellant who undertook to prepare the drawings and to build them a house of high quality of a particular size and at a price that was agreed. Counsel submitted that apart from whatever else may have been said the plan that was used to build the house was one provided by the plaintiff/appellant, as the contractor and the details and specifications therein were his responsibility. He cited in support a passage from ***Keating on Building Contracts*** 6th Edition at pages 56 – 60.

Under the sub-heading of Workmanship appearing at page 56, the extent of the duty placed on the contractor/appellant is set out. It reads:

> "... the Contractor must do the work with the proper skill and care. It is suggested that this is a continuing duty during construction and not only on completion. In deciding what degree of skill is required the court will, it is submitted, consider all the circumstances of the Contract including the degree of skill expressly or impliedly professed by the Contractor. Breach of duty includes the use of materials containing patent defects, even though the source of such materials has been chosen by the employer." [Emphasis added]

On the issue as to the size of the building, counsel submitted that when Mrs. Jacobs gave the sketch plan to the plaintiff/appellant she can be taken to have meant nothing more than that she wanted a building of the size called for in the Contract. The sketch plan related to layout not size. The original plan called for an area of 4,119 square feet. This was subsequently varied to 4,708 square feet and the price was fixed by the plaintiff/appellant. It was this inconsistency in the pleadings that the learned trial judge had to deal with. There was no written authorization as called for in the written Contract, allowing for this eventual increase in the area of the building from 4708 square feet to 6206 square feet. As the responsibility for the designs and plans was that of the plaintiff/appellant, the increase in size and overall increased cost of the construction would fall on the plaintiff/appellant.

The learned trial judge in determining this issue rejected the arguments advanced for the plaintiff/appellant. He founded his decision on the fact that there was no written authority given to the Contractor (plaintiff/appellant) to change the area of the building or anything on the building plans. While it was not being denied that the area on ground of the completed structure was in excess of 4,708 square feet, in the light of the clear and express words stated in the written agreement, he concluded that the plaintiff/appellant was not entitled to payment for the additional sum of $67,374 .00 claimed. I am firmly of the view that given the evidence falling for his consideration he came to the right conclusion.

The issue as to the defects

This issue, as has been previously shown, is concerned with the plaintiff/appellant's claim as it related to certain items falling under the rubric of variations. He was contending that the works done amounted to variations or extras outside of what was called for in the Contract. This would qualify as being increases in the labour cost of the construction over and above the original contract price.

The defendants/respondents for their part, while admitting a part of the claim for the extra work done, contend that the greater portion of the claim falling under this head was due to faulty and poor workmanship which needed remedying, as well as work incidental to what was called

for within the terms of the contract. As such it would not qualify as variations or extras.

The items falling for determination relate to those set out in the Amended Statement of Claim, numbered and described (at p. 33 of the Record of Appeal). Of the fifteen items listed, the learned trial judge allowed six as being extras or variations. He saw these as subsequent variations made at the request of the owner and allowed the claim on that basis. These items being (b), (e), (f), (h) and (i) for:

$6,936.00
492.00
1,806.00
1,188.00
5,740.00

amounted to $16,162.00. To this may be added the sum of $20,000.00 as the cost of construction of the swimming pool.

Items(d), (g), (j), (k), (l), (m), (n), (o) and (p), were all disallowed by the learned trial judge. He found that the items were remedial work, the result of negligent workmanship and faulty design of plan. He disallowed the claim for (o) – the supply of fixtures for $5,351.50 on the ground that this sum had been paid for by Mrs Jacobs (vide document No. 15). That at (p) – a claim for increases in building materials, was refused on the ground that "a proper claim had not been presented". As previously indicated, this claim would also fail as being one falling under the head of special damages, it had to be specially pleaded and strictly proven.

While it may have satisfied the former condition, it failed to come up to the requirement as to the latter.

The learned trial judge found that there was no evidence adduced by the plaintifff/appellant regarding a bill of quantities with the prices attached. This was no doubt due to the plaintiff/appellant's failure to employ a quantity surveyor on the job. The learned trial judge found that as a consequence, the actual effect of the increase or the total price could not be ascertained. He also allowed the claim for the balance of $28,000.00, the sum outstanding on the contract price. When quantified, the claim was allowed in part, in the sum of $64,162.00.

Against this sum of $64,162.00, the counterclaim now falls to be examined. The learned trial judge made an award of $145,400.00 on the counterclaim. When this sum is set-off against that of $64,162.00 awarded on the claim the balance remaining in favour of the defendant/respondent was $81,238.00. To this sum, he then awarded $4,200.00 as liquidated damages at a rate of $100.00 per day for 42 days being the extra period that the contractor (plaintiff/appellant) was allowed to remain on the building site after the contract period had ended. Added to this was a further award of $67,926.00 for the cost of airfares and accommodation costing U.S. $1,888.23 which when converted resulted in the sum referred to above. This latter award was the result of a term included in the supplementary agreement entered

into by the parties as a condition for the contractor being granted an extension of the contract period to complete the house in November 1983.

Of the sum of $145,400.00 awarded for the cost of remedial work carried out on the house, the largest portion of this sum relates to the cost of replacement of the entire roof due to the faulty design and poor workmanship done during its construction. The remainder consisted in correcting defects due to faulty workmanship on the building.

As time was stated to be of the essence in the written contract, the plaintiff/appellant's duty was to construct and complete the building and the swimming pool of a size and quality as set out in the contract and within the period stated therein. It is common ground that he failed to meet any of these conditions. This was so despite being allowed two further extensions totaling six (6) weeks, from (November 1 to December 18, 1983).

Learned counsel, Dr. Barnett, for the defendants/respondents correctly submitted that the defendants/respondents, Mr and Mrs Jacobs, were lay persons with a limited knowledge of building construction. They sought to rely on the professed skill and experience which the plaintiff/appellant held out himself as having to undertake the job contracted for. Given the problems which surfaced during the life of the

contract it is clear that he failed to carry out this task to the required standard.

The construction of the house was plagued with one major problem from the outset due to the faulty design of the plans relating to the roof of the building. This was the considered opinion of both experts, Mr Mattis and Mr Davidson. Added to this, was the poor quality of the shingles used. As the evidence from the two experts indicated, in order to obtain the desired effect, the plans ought to have called for a roof having a slope of an angle of at least 40 degrees. This would have enabled such rainfall as took place to run off without settling on it. The shingles used was not of the standard and type acceptable in the trade. This resulted in them being of a cupping or curling formation when laid out on the rafters. To obtain the desired result the use of a quarter of an inch sawn shingle would produce a flat curl shingle. As this situation was common throughout the entire roof, it was the opinion of Mr Mattis that the entire roof would need replacement.

The plaintiff/appellant Mr Senior had testified that it was Mr Albert Sharpe who had instructed him to change the shape of the roof. He was unable to produce any written authorization to this effect. In my opinion, the learned trial judge was right in concluding that as the contract called for such changes to be effected by the written authorization of the owner or his agent, the contractor (plaintiff/appellant) would be responsible for

the cost of remedying this defect. As the sum claimed was not challenged, this was allowed in the sum of $111,500.00.

The Counter Claim for the plaintiff/appellant's Breach of Contract for work done not in accordance with the contract

This heading could also be described as the defendant/respondent's claim for defective workmanship. It related to eleven items set out in the particulars of damages in the counter claim. These were as follows:

"1.	Cost of re-shingling defective roof	$111,500.00
2.	Cost of flashing to rear roof	700.00
3.	Cost of retiling, S.E. bedroom, main bedroom, living room, dining room and bedroom beside S.E. bedroom	$ 17,500.00
4.	Bonding loose tiles under covered walkway and re-lay in parts	$ 1,800.00
5.	Correction to fixed glazing	$ 1,000.00
6.	Correction to decorative block panel	$ 1,200.00
7.	Cost of replacing twisted louvre blades in areas	$ 2,500.00
8.	Costs of general correction to joinery	$ 2,500.00
9.	Cost of ramp to carport	$ 1,500.00
10.	Cost of raising carport floor	$ 1,200.00
11.	Cost of painting in parts after repairs	$ 3,000.00
12.	Cost of disposing of debris	$ 1,000.00
		$145,400.00"

These defects were identified by both Mr Mattis and Mr Davidson. They agreed that they were genuine defects but they differ only in respect as to what each person was saying was the required cost of remedying them. Mr Mattis fixed a higher sum for effecting same.

The learned trial judge accepted the evidence of Mr Mattis as to the sum fixed by him for doing the work. This resulted from the need for the removal and replacement of the materials in the section of the building where the works were poorly done. In the result when quantified he made an award on the counter claim of $145,400.00.

Given the principles of law governing claims and counter claims, the first defendant/respondent was entitled to set off the sum awarded on the counter claim against that awarded to the plaintiff/appellant on the claim. When effected the result is a balance left due to the first defendant/respondent on the counter claim of $81,238.00.

To this sum has to be added the amount of $4,200.00 being a claim for liquidated damages at a rate of $100.00 per day for 42 days representing the period from November 1 to December 18, 1983 during which the contract period was extended to allow the contractor (plaintiff/appellant) to complete the construction. The plaintiff/appellant had contended that he was removed from the site in November 1983. The first defendant/respondent stated that he terminated the contract on December 18, 1983 by written notice delivered to the plaintiff/appellant by his attorneys-at-law. The learned trial judge accepted the first defendant/respondent's account. As the claim arose out of a term in the written contract, based on the finding made there was a proper basis for making the award. The learned trial judge having seen and heard the

parties, was at a distinct advantage in coming to the conclusion that he did. Accordingly, there existed no basis for interfering with this finding.

The defendant's claim for the cost of air-fares and accommodation for two guests

When the extension was granted to the plaintiff/appellant in November, 1983 a supplementary agreement was executed which called for the contractor, in the event that the house was not completed by November 21, 1983 to undertake the cost of the airfares and hotel accommodation for two guests of the defendant/respondent Mr Jacobs. As the evidence revealed, the contractor failed to complete the house by that date.

The learned trial judge allowed this claim for U.S.$1,888.23 which when converted to Jamaican dollars was $67,926.00. He gave no reason for granting this sum. I do not share his view on this matter. When one takes into consideration the obvious pressure that the plaintiff/appellant may have been undergoing in attempting to complete the construction of the house and the swimming pool, to require him to enter into a further agreement without the benefit of legal advice or assistance, not only seemed to be unfair but clearly placed him at a distinct disadvantage. This in the circumstances totally unwarranted and uncalled for. It was in effect placing too onerous a burden on the plaintiff/appellant.

What the supplementary agreement when examined and closely considered can be seen as amounting to, was a state of affairs in which the first defendant/respondent William Jacobs had chosen of his own volition, to invite

two friends from his homeland to spend a holiday in Jamaica at his expense. When the contractor (plaintiff/appellant) failed to complete the building on time, he seized on this failure and sought to fix this expense upon the plaintiff/appellant. In my opinion there existed no legal or rational basis for this claim or the award made. I would accordingly set aside the award as being totally unjustifiable.

In the event, final judgment is entered for the defendant/respondent on the counter claim for $85,138.00. The result is that the appeal of the plaintiff/appellant succeeds in part. His appeal in respect of the claim fails but succeeds on the counter claim. The plaintiff/appellant is to have half the costs of this appeal such costs to be taxed if not agreed.

DOWNER, J.A.

I concur

PANTON, J.A.

I agree

DOWNER, J.A:

(1) Appeal allowed in part.

(2) Appeal in respect of the claim dismissed.

(3) Appeal on the Counter Claim allowed in part.

(4) Judgment below set aside and judgment entered for the defendant/respondent for $85,138.00.

(5) The plaintiff/appellant to have half the costs of the appeal, such costs to be taxed if not agreed.