[2024] JMCC Comm 16

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
COMMERCIAL DIVISION
CLAIM NO. 2018CD 00003

BETWEEN	**SUSAN WILLIAMS T/A SUSAN WILLIAMS INTERIOR DESIGN**	**1st CLAIMANT**
AND	**SAMANTHA WATES T/A SUSAN WILLIAMS INTERIOR DESIGN**	**2nd CLAIMANT**
AND	**KURT CHIN T/A CHIN'S HARDWARE**	**3rd CLAIMANT**
AND	**PRINCE PALMER T/A PALMER'S UNIQUE FURNITURE MANUFACTURING**	**4th CLAIMANT**
AND	**TRISHANUNI PALMER T/A PALMER'S UNIQUE FURNITURE MANUFACTURING**	**5th CLAIMANT**
AND	**CARMEN BLAIR-PALMER T/A PALMER'S UNIQUE FURNITURE MANUFACTURING**	**6th CLAIMANT**
AND	**MOPEA LIMITED**	**7th CLAIMANT**
AND	**DALEY'S CONSTRUCTION AND HARDWARE LIMITED**	**8th CLAIMANT**
AND	**JTC-32 LLC**	**1st DEFENDANT**
AND	**MR. GUO ZHONG**	**2nd DEFENDANT**
AND	**MRS. DAZHUN ZHANG**	**3rd DEFENDANT**

IN OPEN COURT

Mr Jovell Barrett, Mdmslles Kashina Moore, Rykel Chong and Marsha Grant instructed by Nigel Jones & Co. for the Claimants

Dr Lloyd Barnett, Mr. Wieden Daley and Ms. Shaydia Sirjue instructed by Hart Muirhead Fatta for the Defendants

Heard: **April 17, 18, 19, 20, 26, May 1, 2, 3, 4, 8, 9, 10, 16, 2023 & April 19, 2024**

Commercial Law - Building Contract for luxury villa– Breach of Contract – Whether Unjust Enrichment - Quantum Meruit – Whether Collateral Contract – Defective work

WINT-BLAIR, J

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Background

[1] These claims have been decided after a trial over 13 days with oral evidence from 18 witnesses including 8 experts. There are 23 trial bundles containing no less than 5,525 pages of documents filed by each party. The court also itself recorded all the evidence and it is the notes of the court that are referred to here. The transcribed notes of evidence were not provided to the court.

[2] I am grateful for the industry of counsel appearing in the matter for agreeing to reduce the documentary evidence to logical, coherent volumes as this assistance has been

invaluable. There was certainly no intent to disregard the comprehensive written submissions filed, as every point raised has not been reproduced here. This decision does not attempt to capture all that has been presented in the way that it was and is instead issue-based.

[3] The claimants have based their claim in breach of contract and restitution by reason of unjust enrichment. The agreed evidence is that Mrs. Susan Williams ("Susan Williams")[1], prepared a written document dated April 30, 2016, and emailed it to Dr Li, the defendants' representative. These defendants do not speak English and reside overseas. Dr Li, at all material times, was their interpreter. On May 3, 2016, the second and third defendants signed that written agreement and emailed it to Susan Williams.[2]

[4] The claimants claim that there was a written contract between the first and second claimants and the defendants and also that there was a contract between the third to eighth claimants and the second and third defendants by course of conduct. Their case is that they were all contracted to undertake varying aspects of a renovation project at a luxury villa in Tryall, Hanover which is registered to the first defendant.

[5] The Claimants' case

a) The first, second and seventh claimants were contracted to conduct interior design and decoration.

b) The third claimant was contracted to provide and install mirrors.

c) The fourth, fifth and sixth claimants were contracted to make varied pieces of furniture.

d) The eighth claimant was the main contractor engaged by the defendants to carry out specified structural and electrical works.

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[1] I mean no disrespect by not addressing the parties more formally in this decision.

[2] The defendants contend that there is an error in the spelling of the name of the second defendant who is Mr Guo Zhong. This error is noted. The third defendant's name is misspelled in the pleadings filed by the claimant; however, nothing turns on this.

[6] The case for the claimants was that after the contract had been signed, the third to eighth claimants submitted estimates/quotations for their individual projects, these were compiled by the first claimant and submitted to Dr Li for approval. Each quotation was approved, and the initial deposit requested by the claimants was paid.

[7] As the work progressed, the first and second claimants made requests via email to Dr Li, on behalf of themselves and the other claimants for "progress payments" to be made for the completed work. He responded with approvals from the second and third defendants. Payments for the approved invoices were made through an account at Tryall Club as agreed between the parties. Sums paid to the claimants were in relation to work which had been completed.

[8] There was no agreed date for completion of the project, merely an expressed desire by the defendants that the work was to be completed by December 2016. By virtue of delays due to bad weather, a hurricane warning, and delayed payments, the desired date was not attained.

[9] The majority of the work by the claimants was completed in December 2016 as had been desired. By that time the project was substantially complete, and the villa was ready for occupation. The second and third defendants and their agent Dr Li, inspected the work in December 2016 as did the defendant's accountant, Doria Pan. However, the second and third defendants requested additional work be done by the claimants. The claimants were unable to satisfy these additional requests and they were stopped by the second and third defendants from doing some of the final finishing work listed on their final punch list for completion.

[10] The claimants having substantially completed the agreed work submitted final invoices to Doria Pan for payment for their respective portions of the renovation work. Despite continually following up with Mrs Pan, all attempts to recover the outstanding payments proved futile. Attempts to meet with the second and third defendants were met with refusals.

[11] The claimants engaged the services of attorney-at-law Mr Wayne Silvera who wrote to the defendants on May 26, 2017, demanding payment of the balances due on the invoices submitted for work done at the villa. The outstanding payments were acknowledged in various email trails marked G, H, M and N and still have not been paid.

[12] In the alternative, if the court finds that there is no contract between the claimants and the second and third defendants then the claimants seek compensation on a quantum meruit basis.

[13] The claimants further claim that the first defendant has benefitted from its property being enhanced by their work. The defendants have been enriched as they have been successfully renting the villa and have been reaping significant rental income for years. The defendants have also been unjustly enriched by the completion of the renovation work at the claimants' expense.

[14] Despite the claimants' repeated requests for payment, the defendants have failed and/or refused to satisfy the outstanding invoices for work completed by the respective claimants. This failure and/or refusal to satisfy the outstanding invoices amounts to a breach of the contractual arrangement made between themselves and the claimants and/or unjust enrichment.

[15] The claimants have each suffered direct loss as a result of the defendants' breach and/or actions and are all seeking to recover varying amounts for work done on the villa. Accordingly, the first and second claimants are seeking to recover damages in the sum of USD$176,877.61. The third claimant is seeking to recover the sum of $493,000.00. The fourth, fifth and sixth claimants are seeking to recover the sum of USD$32,837.85. The seventh claimant is seeking to recover the sum of US$31,078.41 and the eighth claimant is seeking to recover the sum of US$172,416.90.

[16] Each claimant also claims interest on all invoices, which have been submitted and not paid, at the rate of 3% until the judgment is satisfied. The sums are as follows: The first and second claimants - the sum of US$4,434.20, the third claimant - the sum of

J$26,175.92, the fourth, fifth and sixth claimants - the sum of US$1,199.70, the seventh claimant - the sum of US$872.41 and the eighth claimant - the sum of US$4,406.87.

The Defendants' Case

[17] The second and third defendants agree that on or about the third day of May 2016 they signed the letter agreement dated 30th April 2016 presented to them by Susan Williams. The first and second claimants were engaged by the first defendant as the designer and project manager of the project by way of that letter of agreement dated 30th April 2016.

[18] They signed as representatives and were acting as agents for a principal which is, the first defendant company which is the registered proprietor of the villa registered at Volume 1498 Folio 28 of the Register Book of Titles ("the company").

[19] The letter agreement confirms in paragraph one that Mr. Zhong and Mrs. Zhang disclosed their representation of the company to the first claimant upon signing. They argue they are not liable to the claimants and refute any obligation, as they have no contract with the third to eighth claimants. The contract also outlines the responsibilities of the first and second claimants in renovating a luxury villa, as acknowledged in an email by the first claimant to Dr Li on June 2, 2016.

[20] The defendants assert that the third to eighth claimants were subcontractors hired by the first and second claimants. Estimates and quotations were obtained by the first and second claimants and some were approved by the company. The defendants acknowledge that deposits were paid to subcontractors based on the advice of the first claimant. Various sums were paid to the first claimant for invoices related to the project. The work included but was not limited to the following:

> *"Changing of doors; Changing windows; Raising of floor in living room, dining room and master bedroom; Installing Hardwood floors on raised floors; Relocate main stairs; Repaint entire Villa; Change light fixtures; Re-shingle entire roof; Create a gym below pool deck; Modify master bath; Modify powder room; Renovate swimming pool; Add Sonos*

system; Renovate electrical installations; Upgrade kitchen; Install new air conditioning; Change light fixtures; Add Sonos system; Provide Plumbing and Electrical fixtures."

[21] The defendants' case is that it was agreed with the first claimant that the project would be completed by October 2016 so that the villa would be available for rental in the busy winter tourist season which annually runs from 15th December to 30th April, but in breach of contract the first and second claimants, and in breach of their duty of care the third to eighth claimants, have failed to-date to complete the project. This has caused loss and damage to the company despite it having paid not less than US$1,500,000.00 to the claimants in respect of the project for works, materials, furniture, fittings, and equipment.

[22] The defendants say further, that whilst the project remained and is still incomplete, in mitigation of its losses, the company started renting the villa in December 2016 (the first guests received on the 25th of December 2016) after exhorting and waiting several weeks for the claimants to correct and make right the matters complained of.

[23] Further, the company had to engage persons other than the claimants to carry out the necessary corrective work at the villa at substantial expense to the company.

[24] The defendants have pleaded that the third claimant employed poor workmanship and/or failed to follow specifications and/or the accepted methods of installation. They further contend that the third claimant failed to correct or make good this issue despite this being brought to his attention and that the quality of the mirrors in the gym supplied by the third claimant was poor as they became tarnished. As it relates to the third claimant's claim, the sum inclusive of interest for mirrors supplied now being claimed is part of monies already paid by the defendant company to the first and second claimants which fact they do not admit as being either due or payable.

[25] The defendants maintain in relation to the fourth, fifth, and sixth claimants that they employed poor workmanship and/or failed to follow specifications and/or failed to follow

accepted methods of installation, which they have failed to correct or make good despite the same having been brought to their attention in relation to furniture they supplied.

[26] It was also pleaded that the fourth, fifth and sixth claimants' claim for US$33,037.55 or other sum) inclusive of interest and the seventh claimant's claim for US$31,951.12 (or other sum) inclusive of interest are not payable, since, inter alia, the company has already paid the sum as part of monies paid to the first and second claimants which fact they do not admit as being either due or payable.

[27] Further, the defendants maintain in relation to the seventh claimant that it never contracted with them and that the side tables in the master bedroom made by the seventh claimant were defective in that they were poorly made of rough pine wood and not mahogany as had been specified, they were also "rocking" and unstable.

[28] The defendants further maintain that the eighth claimant's claim for US$176,823.77 (or other sums) inclusive of interest is not payable on account of the matters set forth in the claim and in particular in respect of that claimant's defective work. The defendant contends that the eighth claimant carried out the majority of the (defective) works. Consequently, the defendants contend that they are not liable to the eighth claimant for the sums claimed or any sums at all.

[29] Further, the first and second claimants failed to exercise reasonable or efficient supervisory and managerial skills to prevent the failures of the third to eighth claimants. Additionally, the defendants contend that the first and second claimants failed to have the works agreed to be done in a good and workmanlike manner with all reasonable skill and care, resulting in poor quality of and defective work.

[30] The defendants say that there was no acknowledgement of the alleged debt, and in any event, the invoices were not approved by the company or any of the other defendants.

[31] The defendants are aware of requests for meetings, that the company made payments for customs fees and agree that the first inspection of the alleged works was done in or about December 2016 and that thereafter the claimants were made aware of the poor

workmanship and failed to correct it despite the first claimant having promised to do so. The defendants stated that no further payment would be made until the corrective works were carried out.

[32] In fact, by its admission in an email dated the 7th of December 2016 the first claimant admitted, among other things, that there were areas of work to be made good. In an email dated the 24th of February 2017, a representative of the eighth claimant admitted that there were works done by the eighth claimant at the villa that needed to be corrected.

[33] It was also an implied term of the letter agreement that the materials, furnishing, fittings and equipment to be supplied would be reasonably fit for the purpose for which they would be used and be of the agreed luxury and of a very high quality. It is also an implied term under section 15 of the Sale of Goods Act that the materials, furnishing, fittings and equipment to be supplied would be reasonably fit for the purpose for which they would be used and of good quality.

[34] The defendants say further that, as confirmed by the said document titled "*CREATE ABUNDANCE FOR QUOTATION TO ACHIEVE A COMPLETE ESTIMATED COSTING AND BUDGET',* the following are among the items supplied to the Company at the Villa and paid for that should have been made of mahogany but are not mahogany:

Mahogany parquet floor	Upstairs
Mahogany parquet flooring	Main entry room
Mahogany library shelving	Entry living room
2 mahogany framed sofas	Entry living room
2 upholstered reading chairs with low mahogany games	Entry living room
Table	
Mahogany dining table for 12	Main Verandah
10 directors' chairs or mahogany chairs with cane seats	Main Verandah
2 mahogany sofas	Main Verandah
4 mahogany chairs	Main Verandah

1 mahogany dining table with pedestal base and 18 chairs	Dining room
1 mahogany sideboard	Dining room
Drapery rods of stained mahogany	Dining room
1 built in mahogany bar cabinet with lower accommodation	Dining room
for icemaker, bar refrigerator and sink with faucet	
1 mahogany entry console	Master bedroom
1 carved mahogany chaise with cushion	Master bedroom
1 mahogany desk with slipcovered chair	Master bedroom
Wooden mahogany rod with rings for doorway curtains	Master bedroom
1 mahogany vanity with marble slab	Master bedroom
1 Queen sized bed- mahogany Jamaican carved	Upper guest bedroom south east
1 mahogany vanity	Bathroom
Mahogany rods and rings- stained for doorway curtains	Lower east corner bedroom AKA Caroline
Mahogany rods and rings- stained for doorway curtains	Lower north east bedroom AKA Wendy Kids
Mahogany rods and rings- stained for doorway curtains	Lower northeast corner bedroom AKA JILL cont'd
Mahogany rods and rings- stained for doorway curtains	Lower pool bedroom AKA MAX
Mahogany rods and rings- stained for doorway curtains	Lower pool bedroom AKA ROBERT
Mahogany king size beds	All bedrooms in northern section the villa

[35] The failure to meet specifications and to supply items paid for by the company has resulted in loss and damage. The provision of items of lower quality than specified when the company paid the claimants for the higher specified quality has also resulted in the claimants obtaining a financial benefit by deceit and/or breach of contract

[36] Further the claimants knowingly failed to supply items paid for by the company and failed to inform the defendants of this failure to supply items namely:1 bed bench for upper south bedroom, 1 sofa for lower foyer, 2 side tables for lower foyer, 1 ottoman

for lower north-east corner room, 1 desk for lower pool room, 1 desk lamp for lower pool room, 1 desk for upper pool room, 1 under TV chest for upper pool room, 1 desk lamp for upper pool room, 2 coffee makers, 1 expresso/cappuccino maker, 2 electric kettles; 1 juicer.

[37] The claimants failed to inform the defendants that low-quality furniture, fittings and other goods and materials had been provided rather than luxurious and high-quality ones and failed to refund the company in the light of the matters set forth above in the particulars, dishonestly profiting thereby at the defendants' expense.

[38] The defendants further say that the first and second claimants' claim for hours of service and the 10% surcharge on invoices of items purchased for the project of US$181,311.81 (or other sum) inclusive of interest is unjustified and are grossly overstated primarily in the areas of the purchases of fabric, furniture and lighting.

[39] The company, Mr Zhong and Mrs Zhang claim damages for breach of contract for poor performance of the alleged works and/or failure to follow specifications and/or the accepted methods and/or poor-quality materials, furniture and fittings as aforesaid.

[40] Further or alternatively, by virtue of the negligence of all of the claimants or a combination of them, the defendants have suffered loss and damage.

[41] The claimants failed to complete the project on time, or at all. It is reasonable to contemplate that this default would injure the defendants and breach their duty of care to the defendants.

[42] Further or alternatively, the company, Mr Zhong and Mrs Zhang claim, to be entitled to set off against the claimants' respective claims so much of the money counterclaimed hereinafter as will wholly extinguish the same.

[43] The company says that in any event as the disclosed principal or as an undisclosed principal, it is entitled to enforce the contract as the person in the reasonable contemplation of the parties and who has suffered damages, to bring the claim for negligence.

[44] The company has and/or the second and third Defendants suffered loss and damage in incurring the costs of the remedial works required being the sum of US$970,070.00 or such other sum as may be the cost assessed by experts to complete building, furniture, fixtures, equipment and pool or replace or correct the same as calculated in the spreadsheet contained in the report by Colin Mitchell, volumes 1 and 2 of which are together attached hereto as **"J.Z. 1"** or as may be otherwise assessed aforesaid.

[45] All sums expressed in United States currency herein are convertible at the rate of J$127.6144: US$1.00, which is the weighted average selling rate of exchange between the Jamaican and United States currencies on the 29th day of November 2018 as confirmed by the Bank of Jamaica's Foreign Exchange Spot Trading Summary attached as **"J.Z. 2".**

[46] In consequence of the claimants' said negligence and/or breach of contract, the company has suffered substantial loss, embarrassment and damage. This resulted from the unavailability of the villa beyond the October 2016 deadline for completion of the project, and/or any renting of the villa at a rental rate lower than it could command in the absence of the claimant and said negligence and/or breach of contract. A villa of the standard in the particular location within all probability earns an average of approximately US$40,000.00 per month. As a consequence, the company and/or the second and third defendants have suffered and continue to suffer substantial damage to its reputation and goodwill as the owner of a very high standard villa business.

Reply and Defence to Counterclaim

[47] The claimants in reply, deny that they were negligent, that the work was not done in a good and workmanlike manner, that poor quality materials were used or that they failed to follow specifications. The claimants also deny that they deceived or breached their respective contracts with the said defendants.

The Approach of the Court

[48] In order to do my duty as the trial judge, I have adopted the approach formed over many years, that in assessing the credibility of a witness, demeanour is but one of the many factors to be considered. There is also the substance of the evidence which is generally approached with reason, logic and common sense. The court will consider the evidence of each witness against the backdrop of the documentary evidence adduced at trial.

[49] I find support for this approach in the dictum of Robert Goff LJ from a case cited by counsel for the defendants in **Armagas Ltd v Mundogas SA (The Ocean Frost)**[3] which states that:

> "… *I have found it essential when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth."*

[50] In Phipson on Evidence, 12th edition, it states as follows: -

> *"Documents which are or have been, in the possession of a party will be admissible against him as original evidence to show his knowledge of their contents, his connection with, or complicity in, the transactions to which they relate and are receivable against him as admissions to prove the contents if he has in any way recognized, adopted or acted upon them."*

[3] [1988] 1 Lloyd's Rep 1, 57 cited in Charles Villeneuve, Kyoto Securities Limited v Joel Gaillard and anor [2011] UKPC 1 at para 67

[51] The evidence before the court was partly oral and partly documentary. The assessment of the witnesses will fall under the issues identified by the court. The documents presented at trial are therefore items of real evidence. It is for the court to determine the weight to be attached to the various aspects of the evidence presented.

[52] The Issues

1. Who are the parties to the contract?
2. Whether the second and third defendants are proper parties to the claim
3. Who are the parties to the contract with the defendants?
4. Was it an implied term of the contract that the work would be of a standard of high quality
5. Was Susan Williams Interior Design the main contractor and were the other claimants' her subcontractors.
6. Whether there were substantial defects and material deficiencies in the works done, materials supplied or used
7. Delay
8. Whether the defendants were overcharged
9. Unjust Enrichment or Contract
10. Whether there was an acknowledgement of debt by the defendants
11. Whether the defendants breached their contract with the eighth claimant
12. Whether there was mitigation of loss on the part of the defendants
13. Whether there was any loss caused to the owners
14. Whether time was of the essence of the agreement between the parties

15. Whether the seventh claimant is entitled to the damages claimed

16. Whether the first claimant is liable for items not supplied by the claimants

Issue 1: Who are the proper parties to the contract?

[53] On this issue, it is undisputed that the second and third defendants entered into a written agreement dated April 30, 2016, with the first and second claimants for renovation works at the villa.[4] This document has been referred to as the letter agreement in the submissions. I will be referring in this judgment to a contract, this is the same document as the letter agreement. It is similarly undisputed that the proprietor of the villa is the first defendant.[5]

[54] The pleaded case of the claimants is that the letter agreement which the court is referring to as the contract is between the first and second claimants and the second and third defendants and the contract between the third to eighth claimants and the defendants was by course of conduct.[6]

[55] The claimants rely on the judgment of Laing, J (as he then was) in **Equillibrio Solutions Jamaica Ltd v Peter Jervis & Associates Limited**[7] and further on the case of **CRS GT Limited McLaren Automotive Limited and Others.**[8] These cases state the basic principles of a valid contract as being an intention to create legal relations, an offer and acceptance of the offer, an agreement and consideration. Contracts may be formed by the parties signing a written document which embodies all its terms, or partly oral and partly in writing or entirely oral.

[56] The defendants contend that the contractual arrangements involved a main overarching contract between the company and first and second claimants and collateral contracts between the first claimant and the third to eighth claimants which was not with the

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[4] Further amended particulars of claim Bundle C1, page 18, para 7
[5] Supra para 6
[6] Supra para 8
[7] [2021] JMCC Comm 26 at paras 9 – 12
[8] 2018 EWHC 3209

second and third defendants. Further that there was no contract between the second claimant and any of the defendants.[9] However, this last submission is not in line with the pleadings by the defendants which I will reproduce here:

[57] Bundle D1: page 3 of the second further amended defence at paragraph 8 states:

> *"In further response to paragraph 9 of the Further Amended Particulars of Claim, the Defendants say that none of them has ever contracted with either the third, fourth, fifth, sixth, seventh, or eighth Claimants."*

[58] The defendants do not dispute the written agreement for the renovation of the villa with the first and second claimants or that some of the work was done. There is no dispute that the defendants paid approximately US$1.5 Million dollars for the renovation project. However, the defendants contend that the work done was neither good, workmanlike nor of the high standard of quality agreed with the claimants by implication. The resolution of this issue is dependent on the resolution of the second issue.

Issue 2: Are the second and third defendants proper parties to the claim

[59] The first and second claimants contend that the written contract with the second and third defendants was executed by the latter in their personal capacity for these reasons:

a. There was no reference in the contract to the first defendant. At trial, the defendants failed to disclose or to provide any credible evidence that the first defendant was the contracting entity. A principal may come in and take the benefit of a contract made by his agent, however this has no application where an agent expressly uses words importing that he is the principal, (See **Humble v Hunter.**[10])

b. Neither second nor third defendant purported to sign on behalf of the first defendant.

[9] Page 6 para 3.6 written submissions of the defendants
[10] [1843-60] All ER Rep 468

c. Neither second nor third defendant disclosed that they were acting as agent of the first defendant. The contract is addressed to the second and third defendants and it refers to the villa to be renovated as "*your villa*." In the contract reference was made to the villa being owned by the second and third defendants by use of the language "*your villa".*

e. There were no amendments or objections to any of the terms of the written agreement. No areas of concern were raised regarding any language used in the written contract when it was accepted by Dr Li and signed by the second and third defendants.

f. A principal is vicariously liable for acts performed by its agent excluding where the agent contracts in his own name, without qualification, for then he would be personally liable on the contract, unless the circumstances were such that it was obvious to a third party that the agent was contracting on behalf of a principal even where that principal was undisclosed (see **Blue Power Group Limited v Hyacinth McDonald and Anor**[11])

g. It was submitted by Mr Barrett that paragraphs 7 and 8 of the witness statement and the cross-examination of Dr Morgan Li demonstrate that Dr Li is not a credible witness as in his witness statement[12] he stated that he had explained to the second and third defendants that they were signing as representatives of the first defendant while in cross-examination he stated that at the time the contract was signed he did not know who the first defendant was. These are inconsistent positions.

h. At trial, Dr Li did not indicate that the second and third defendant were directors of the first defendant company, rather his evidence demonstrated that they were the owners of the villa.

[11] [2012] JMSC 169
[12] Para 8

i. The defendants made no amendments to the written contract nor did they raise any areas of concern at the time of execution.

j. Ms Doria Pan, accountant employed to the first defendant, in her evidence considered the second defendant to be the owner of the villa and Mr Marlon Campbell, Head of House, only knew the second defendant and third defendants to be the owners of the villa.

k. The name on the account at the Tryall Club from which money was paid to the claimants and other vendors was that of the third defendant.

l. It was the second and third defendants who were paying for the renovations of the villa and who always maintained that they were the owners of the villa.

m. At trial, the defendants failed to provide any credible evidence that the first defendant was the contracting entity. Reliance was placed on **Humble v Hunter**[13] for the proposition that a principal may come in and take the benefit of a contract made by his agent however this has no application where an agent expressly uses words importing that he is the principal.

[60] The defendants contend in their written submissions that the legal status of the second and third defendants have been clearly conceded by the claimants in their particulars of claim where it is stated that the second and third defendants are "*the representatives of the proprietors of the villa*…"[14]. The court will deal summarily with this point here; the statement *"the representatives of the proprietors of the villa"* was deleted before the filing of the further amended particulars of claim, the validity of which there could be no complaint, it having been filed in accordance with the Civil Procedure Rules ("CPR.") The statement quoted above therefore no longer exists as a part of the claim.

[61] The defendants submitted that they rely on the fact that Ms Susan Williams signed the contract as principal rather than as partner and that this loose nomenclature did not

[13] [1834-60] All ER Rep 468
[14] Trial Bundle C2, p. 343 para 7

indicate the identity of the contracting parties. Again, this does not accord with the defendant's pleadings[15] which state that the contract was with the first and second claimant.

[62] It was further argued by the defendants that:

a. the language "*with yourself and your principals"* used by Susan Williams in the written agreement which she drafted and emailed to Dr Li for the second and third defendants acknowledged that the second and third defendants were the agents of an unnamed principal.

b. This was further acknowledged by the paragraph in the contract she drafted headed "Client Responsibility" which states: "*Working time frames will be detailed by us to the client"* rather than the use of the "words *detailed by us to you"*[16].

c. As it was Ms Williams who had drafted the written contract, she failed to name the principal despite knowing it existed. Reliance is placed on the cases of **Southwell v Bowditch**[17] and **N and J Vlassopulos Ltd v Ney Shipping Ltd., ("the Santa Carina")**[18] and **Boyter v Thomson.**[19])

d. It is a basic principle of the law of contract that a contract confers rights and imposes obligations only on the parties to it.[20] Based on the principle of privity of contract, the claim against the second and third defendants is unsustainable as a company is a separate and distinct legal person from its officers or shareholders. An officer acting on behalf of a company in negotiations or in the company performing its contract cannot be held personally liable for any breach of that contract. Therefore, the second and third defendants cannot be liable to any of the claimants because of an alleged breach by the company/owner.

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[15] paragraph 7 of the second further amended defence
[16] See Contract dated April 30, 2016, Trial Bundle 10 pages 7-8
[17] (1876) 1 CPD 374
[18] (1977) 1 Lloyd's Rep. 478
[19] [1995] 2 A.C. 629 at 632
[20] See Percy v Board of National Mission of the Church of Scotland [2006] 2 A.C. 28

Discussion

[63] It is my view that the claimants have put their case in three alternative ways. First, the second and third defendants contracted as principals and not as agents for the company. Second, if the second and third defendants contracted as agents for the company, they did so in such a way as to make themselves personally liable as well as the company. Third, the second and third defendants were the real principals in any event, as they were the owners of the villa; therefore, whatever the arrangement was with the first defendant, the second and third defendants were in substance the owners and operators of the villa on behalf of the first defendant and ultimately for their own account. The claimants seek to show that the second and third defendants are in fact the principals though professing to act as agents. The onus of proof is upon the claimants to establish this aspect of their case.

[64] In answer, the defendants reject all three propositions. They argue that the second and third defendants contracted solely as agents for the company and were under no personal liability. In paragraph 7 of its pleadings, the defendants state that the contract on its first page confirms that the second and third defendants no later than the date of its signing disclosed to the first claimant that they were acting for a principal.

[65] At paragraph 43, the first defendant states that in any event as the disclosed principal or as an undisclosed principal it is entitled to enforce the contract as the person in the reasonable contemplation of the parties and who has suffered loss and damages.

[66] The salient parts of the written contract with which this court is concerned state:

> "*April 30, 2016*
>
> *…*
>
> *Dear Mr and Mrs Zhang,*
>
> *Thank you for your consideration in using our services for the redesign that you are considering for your villa at Tryall, previously named L'Dor V'Dor now called Create Abundance.*

It was such a pleasure to meet with you and Dr Li yesterday. I understand the design transformation, change of personality and breath of spirit that is urgently needed to ensure this house becomes the home that brings to you, your family and friends the luxury, comfort, joy and 'vibe' you seek.

Please find herewith a working contract which illustrates design and project management services we offer. Do let me know if there are any amendments or changes that you would like to see reflected within this agreement.

THE PREMISIS [sic]

The interior and exterior of Create Abundance Villa, located at Tryall Golf Tennis and Beach Club, Sandy Bay, Hanover, JAMAICA.

DESIGN SERVICES OFFERED

Please note that Susan Williams and the design team of SW Interior Design will make every effort to ensure that services rendered by other parties and items supplied are as per approved specifications and standards. SW Interior Design however, does not accept personal responsibility or liability for areas of error made by other parties."

1) *To consult with yourself and your principals*

2) *To prepare surveys and all analysis of the project where appropriate*

3) *Preparation of preliminary layouts*

4) *Preparation of preliminary budget and cost estimates for all projects detailed.*

5) *Preparation of drawings and other materials illustrating design and, where appropriate, architectural concepts.*

6) *Preparation of plans for all work detailed*

7) *Preparation of reflected ceiling plans – if needed*

8) *Preparation of sample boards*

9) *Specifications services*

10) *Supervisory services*

11) *Consultations with various third parties e.g. general contractors, masons, carpenters etc*

12) *Shipping supervision*

13) Accounting records

<u>REMUNERATION</u>

1) *It is suggested that these services be offered on a time management basis at an hourly fee of US$80.00.*

2) *All items purchased through my offices will carry a mark-up of 10%, all trade discounts will be enjoyed directly by you.*

3) *Out of pocket expenses directly associated with the execution of this commission, shall be reimbursed.*

4) *Design Invoices will be submitted directly to you for payment approval on a bi-monthly basis and should be settled within 7 days of presentation.*

5) *Taxes will be billed as per the law.*

It is noted that all invoices will be submitted for payment on your behalf via Tryall accounting.

<u>PURCHASING</u>

1) *We will prepare purchase orders on our stationary[sic], which will be presented to you for your review and approval before presentation for payments and issuance to the vendor.*

2) *Each purchase order prepared by our office shall contain in addition to quantity, specifications etc, a marking instruction to facilitate installation.*

3) *For the preparation of purchase orders we shall be remunerated on the hourly fee basis noted above.*

<u>CLIENT RESPONSIBILITY</u>

1) *Approval of payments of all vendors, decorators, general contractors bills etc. on a timely basis.*

2) *Storage costs and insurance of items in storage.*

3) *Responsibility for ensuring that the sites are clear and available for sufficient time needed to complete all projects relating to those areas. Working time frames will be detailed by us to the client. Availability of the site for the completion of this work will be requested of the client.*

4) *All shipping, handling and clearance for items that are to be imported will be completed through appointed agents, who will be responsible for completion*

of all shipping documentation, insurances[sic], payments and delivery to an on site storage area.

Please guide me if I have erred in any of the details noted above.

Thank you for your interest in using our services and we look forward to the great pleasure of working with you should you choose to use us to assist you.

Yours faithfully,

Susan Williams

Principal

SW Interior Design

Agreement to the above working terms

Signed *May 3, 2016*

Mr. and/or Mrs Zhang *Date"*

[67] It was put to Susan Williams in cross-examination that she met the owners at an early stage. The owners lived abroad, this was their first home in Jamaica and they relied on her to supervise the progress of the work.

[68] Dr Li gave evidence that when he met with Susan Williams, he did not give her a document that said the owner she was contracting with was the first defendant, his evidence was that the owners of the villa were the second and third defendants. He also agreed that the contract did not identify either the second or third defendant as a director of the company. In cross-examination, there was the following exchange:

- *Q: agree you have not provided any evidence confirming that the second and third defendants were contracting with the first claimant as the directors of JTC-32 LLC (refer to bundle 9 page 32)*
- *Q: do you see, please guide me if I have erred in any of the details noted above*
- *A: yes*

[69] The claimants also relied on the evidence of Ms Doria Pan:

- *Q: you are the accountant for which company*
- *A: Create Abundance*
- *Q: do you know JTC-32 LLC*
- *A: yes*

- *Q: that is a different company from create abundance*
- *A: yes*
- *Q: you are not the accountant for JTC-32 LLC*
- *A: they have the same boss, the two companies*
- *Q: who is that boss*
- *A: Mr Guo*
- *Q: is that Mr Guo*
- *A: yes it is Mr Guo*

[70] The defendants cited the UK Court of Appeal case of **H & J Vlassopulos Ltd v Ney Shipping Ltd, ("the Santa Carina")**, where Lord Denning, MR set out the law in a case decided by that Court of Appeal concerning two brokers supplying bunkers for ships. The plaintiffs were agents for a shipping company, the defendants fixed charters for ships and often arranged bunkers to be supplied at a port of call if the need arose. The appeal court examined a head time charter and decided whether as a result of a telephone message asking for bunkers to be supplied the brokers were liable to pay for it. The brokers who supplied the fuel sought to make the brokers who made the order liable. The brokers for the suppliers knew they were agents when the order was placed by the plaintiffs. The learned judge said that the rule of evidence whereby it is impermissible to admit oral evidence to alter or contradict a written contract applied to written orders and written contracts but not to oral orders or oral contracts (not rigidly.)

[71] He set out two categories of cases, one where an agent made an oral contract without disclosing the name of the principal (so that his credit is unknown to the other contracting party), the agent is liable to pay for the goods or to fulfil the contract. If the contracting party knows of the agent but not the principal, it is to be inferred that he does not rely on the credit of the agent but looks to the principal, whoever it may be.

> *"This is something which Lord Diplock contemplated in the case of Teheran-Europe Co Ltd v S.T. Belton (Tractors) Ltd.*[21] *He said that "he may be willing to treat as a party to the contract anyone on whose behalf the agent may have been authorised to contract." This applies particularly to the case of a broker."*

[72] Roskill, LJ in having set out the factual background to the case said that the learned trial judge had applied the "written contract rule." Approaching the problem as if there had

[21] (1968) 2 Q.B. 545

been a contract written and signed by the defendants without qualification upon it. The learned trial judge had cited a line of cases where a person gives a written order for goods or signs a written contract when he is known to be acting as an agent. He concluded that the defendants were liable because they had contracted in such a way as to make themselves personally liable upon the contract.

[73] Lord Justice Roskill in discussing the correctness of that conclusion said that if the defendants had signed an order without qualification of any kind and the plaintiffs (assuming they were entitled to sue) had sued upon a written contract without qualification he had no doubt that on the authorities, the plaintiffs would have been entitled to recover, but that was not the position in that case which was a case of an oral contract made between two brokers on the telephone. That case is therefore distinguishable from the instant on the facts; however the written contract principle assists the first and second claimants.

[74] In the eminent treatise Goode on Commercial Law,[22] the learned authors state:

> *"However, in the case of signed contracts in writing there is an established rule that where A signs in his own name, he is personally liable unless it is clear from the document that he is signing in his capacity as agent. The mere addition of words of description after the signature, such as 'agent' or 'director', will not normally suffice to displace A's liability; it is necessary for him to indicate that he is acting in a representative capacity, e.g. 'for and on behalf of' P."*

[75] The learned authors in a footnote to this statement state that much depends on the context and the commercial understanding of the words used. The words 'as agent' have sometimes been held sufficient to indicate a representative capacity and sometimes not.

[76] The evidence in the case at bar is that the second and third defendants met with the first claimant. They met with no other claimant. They had no contract with any other claimant, all conduct on their part was predicated upon the statements and representations made to them by the first claimant. On a reading of the entire contract

[22] Roy Goode & Ewan McKendrick, fourth ed. Page 192

before this court, the signature of the second and third defendants applies to the entire contract and to all of its terms.

[77] In Halsbury's Laws of England[23], the effect of the cases on wholly written contracts was summarized as follows*:*

> *'Prima facie a party is personally liable on a contract if he puts his unqualified signature to it. In order, therefore, to exonerate the agent from liability, the contract must show, when construed as a whole, that he contracted as agent only, and did not undertake any personal liability. It is not sufficient that he should have described himself in the contract as an agent. But if he states in the contract, or indicates by an addition to his signature, that he is contracting as agent only on behalf of a principal, he is not liable, unless the rest of the contract clearly involves his personal liability, or unless he is shown to be the real principal.'*
>
> *As appears from that passage, a distinction has been drawn between cases in which a person contracts expressly as agent and those in which, although he describes himself as an agent, he does not contract expressly as such."*

[78] The defendants have pleaded that the principal had been disclosed to the first claimant as it paid deposits to the subcontractors contracted by the first claimant and that whether disclosed or undisclosed, the first defendant is entitled to enforce the contract.

[79] The defendants have submitted that the first claimant had knowledge of a principal based on the contract she drafted. The evidence is that the second and third defendants had dual roles, as directors of the company which was the registered owner of the villa and as owners themselves. The second and third defendants are claiming that in all their dealings with the first claimant, they were acting on behalf the company.

[80] The question is whether they made this clear to the first claimant by their words oral or written, or by their conduct that they were acting as agents on behalf of the owners; or whether they led Susan Williams to suppose that they were playing the role of owners as well. Deciding the question of whether the second and third defendants contracted to the exclusion of its principal, or jointly and severally with it, raises a question of

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[23] third ed. (1952), Vol. 1, at pp.228 and 229, para. 517

objective intention. That intention is to be gathered from the nature of the contract, its terms and the surrounding circumstances.

[81] It seems to me that, as the second and third defendants were known or correctly assumed to be the owners of the villa by Susan Williams, she agreed to the contract for the renovation of the villa. It follows that she could have safely assumed that work was to be done and would be paid for as agreed with the owners. The owners in turn would accept personal liability for the payment as the contrary was neither established on the evidence nor made clear to the first claimant in any document provided at trial.

[82] The contract that was signed made it clear that invoices would be sent to the defendants for their approval, and the course of dealings showed that this was the case. There is no evidence from the defendants that invoices for work done were sent to the company, there was no evidence disclosing the first defendant by name or address. Invoices were addressed to the villa and not to the first defendant. The evidence of Doria Pan is that the first defendant is a separate company from Create Abundance. The company being invoiced at all material times was Create Abundance and that was the name of the villa.

[83] The question remains whether it was made clear to the first claimant at the time of the contract that, although the second and third defendants were also the owners of the villa and would therefore derive personal benefit from the repairs, they were disowning any personal liability to pay for the work. Unless they did so, it seems to me that the first claimant was entitled to assume that when she placed orders for goods to be supplied to the villa, those supply invoices would be approved by the second and third defendants and payments would flow from them.

[84] Payments made on invoices submitted were not made in the name of or on account of the first defendant at any stage. All invoices were submitted through the first claimant and payments made through the account at Tryall or directly with Dr Li's approval by means of a credit card on record with the first claimant in the name of Guo Zhong.

[85] In the instant case, there was nothing said verbally to Susan Williams by Dr Li or Doria Pan, nothing contained in the email correspondence, and no words in the written

contract that has been presented in evidence to show that the second and third defendants although owners of the villa, were disowning personal liability for the cost of the renovation work to the villa which had been contracted for.

[86] There is no evidence in the written agreement to show that the defendants signed the contract as agent or added any words to the effect that they were acting as agent for, on account of, or on behalf of the company or that they added any qualifying words. The defendants have been described as the owners, Mr Guo Zhong and Mrs Dazhun Zhang or as "the family"[24] in the evidence. There is correspondence from Dr Li referring to the second and third defendants as the family and in response, Susan Williams referred to them also as the family.[25]

[87] It was agreed by Susan Williams in cross-examination, that there was an email from herself to Dr Li on May 20, 2016, which contained a progress report. She qualified her response by saying the email also spoke about the deposit payments that would be required. The references to "us," or "our," in that email meant between herself and the owners. She was asked whether the proposals and understandings in the email were ones to which she was a party and she agreed.

[88] It was the defendants who sought to establish a link between ownership of the villa and the second and third defendants by way of questions put to the first claimant in cross-examination. Interestingly, while the word "*owners"* was liberally used in questions put to Susan Williams in cross-examination, there was no distinction made between the defendants, particularly since it is the case of the defendant that it is the first defendant that owns the villa. This raises the question for whom were the second and third defendants agents if they are the owners of the villa and what evidence supports the assertion that they contracted as agents for the first defendant given the case put to the first claimant in cross-examination, and the evidence of Dr Li that he did not know of the first defendant company.

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[24] Bundle 10, page 11 email dd May 7, 2016, Dr Li to Sue Williams
[25] Bundle 10, page 17 email dd May 8, 2016, Sue Williams to Dr Li

[89] Dr Li, representative of the defendants, maintained in cross examination that he only dealt with Susan Williams; the second and third defendants were the owners of the villa, and he had nothing to do with the first defendant company which he himself knew nothing about other than that it was owned by the previous owners of the villa. His intransigence and refusal to answer clear questions about the first defendant were not lost on the court. There is no doubt in my mind that Dr Li knew perfectly well that the second and third defendants were the owners of the villa and that the contract was signed by them without qualification.

[90] There was no suggestion that the name of the first defendant was withheld from the claimants, though its identity was unknown. The identity of the principal was undisclosed. In respect of the undisclosed principal, in Chitty on Contracts[26] the learned authors state that *"it has been long established that an undisclosed principal can sue or be sued on the contract of his agent, though the juristic basis of the rule, and therefore the full scope of its application is still uncertain."*

[91] Who is the undisclosed principal, it would seem to mean in general, a principal who is not known by the third party to be connected with the particular transaction. In the case of **Siu Yin Kwan and Another v Eastern Insurance Co Ltd**[27] it was held that insurers are liable to undisclosed principals on an indemnity policy, provided it was made within the range of their authority. The claim arose out of the death of two seamen on their employers' vessel, but the employers were not named in the relevant policy. Lord Lloyd of Berwick in summarizing the applicable principles said:

> *"For present purposes, the law can be summarised shortly. (1) An undisclosed principal may sue and be sued on a contract made by an agent on his behalf, acting within the scope of his actual authority. (2) In entering into the contract, the agent must intend to act on the principal's behalf. (3) The agent of an undisclosed principal may also sue and be sued on the contract. (4) Any defence which the third party may have against the agent is available against his principal. (5) The*

[26] Specific Contracts, Volume 2, 2seventh ed. Para 31-058
[27] [1994] 2 AC 199, [1994] 1 All ER 213, [1994] 2 WLR 370 (PC)

terms of the contract may, expressly or by implication, exclude the principal's right to sue, and his liability to be sued. ***The contract itself, or the circumstances surrounding the contract, may show that the agent is the true and only principal."***

[92] The Privy Council said that it was generally accepted that while the development of this branch of the law may have been anomalous since it runs counter to fundamental principles of privity of contract, it is justified on the grounds of commercial convenience.

[93] There was no evidence of the exclusion of the undisclosed principal in the contract on the part of the second and third defendants, the contract was entered into by the second and third defendants in their own names and this evidence was bolstered by the oral evidence of Dr Li and the undisputed evidence showing that the second and third defendants were also the owners of the villa.

[94] Further, while Susan Williams was in the witness box, there was no indication that the cross-examiner intended to rely upon the conclusion that the words: *"1) To consult with yourselves and your principals…"* in the written contract, meant that the court was to infer that Susan Williams knew that there was a principal.

[95] The defendants raise that it is settled that the parties to a contract have to be identified before the tribunal can find that a contract is in existence.

[96] It has been submitted by the defendants that the written contract sets out the position of the second and third defendants as distinct from the principals. The submission, as I understand it, is that the use of the words "*yourselves and your principals"* addresses the position of the second and third defendants as agents of the first defendant and also the first defendant as principal. They argue that the evidence discloses that the identity of the principal was not given to the first claimant but the fact of there being a principal was known to her. The defendants though making this submission did not put this point to Susan Williams at trial.

[97] It was not put to her in cross-examination that which has now been submitted, namely, that she knew the principal existed. If it was proposed to rely on this conclusion and to submit that this is a contradiction to her testimony, and further, to base that conclusion on inferences to be drawn from other evidence in the case, then she was not given the opportunity to deal with that other evidence, or the inferences to be drawn from it, nor was the claimant's counsel allowed the opportunity to deal with either the conclusion or any of these inferences sought to be drawn.

[98] In the absence of any evidence from Susan Williams as to the meaning of the quoted phrase *to consult with yourselves and your principals in the written contract*, that unilateral assertion was not challenged by any evidence from the second and third defendants as to its accuracy. The submission that she knew there was a principal at the time she drafted the contract is unsubstantiated.

[99] Finally, the assertion that Susan Williams knew that there was a principal, did not obviate the need for the second and third defendants to represent themselves in their capacity as agents of the principal, were that the actual position.

[100] I find based on the foregoing that on a balance of probabilities, the second and third defendants, though submitting that they contracted as representatives of the first defendant, did not do so solely in that capacity, but that they contracted in such a way as to also be personally liable. Further, I find that, the second and third defendants having signed the contract without qualification intended that any other party to the contract could correctly assume that they intended to be contractually bound.

[101] The findings of the court on this issue are based on the principle that the contract is binding on those whom on the face of it, it purports to bind. To interpret the evidence to mean that the second and third defendants who have signed the contract as a contracting party on the face of it are not so bound, runs contrary to the evidence in this trial. I find that the claim has been properly brought against the second and third defendants.

[102] The first claimant has a written agreement with the second and third defendants who entered into that said agreement using their own names without any qualification. The latter are personally responsible for fulfilling the terms of the contract. Their self-identification as owners was bolstered by the statements made by their servant and/or agent, Dr Li. The second and third defendants have not only contracted such as to be personally liable but they can be sued on contract. However, I do not find that this position applies to the first defendant.

Issue 3: Who are the parties to the contract with the defendants

[103] The pleaded case of the claimants in sum is that there is a written contract between the first claimant and the second and third defendants. The contract between the third to eighth claimants is by course of conduct.

[104] The pleaded case of the defendants in sum is that the company contracted with the first claimant and second claimants. The finding of this court is that, only the second and third defendants are parties to the contract and they say that neither of them has ever contracted with the third to eighth claimants.

[105] The second and third defendants state that the first and second claimants engaged the other claimants as their subcontractors to whom deposits were paid. They paid sums to the first claimant in respect of invoices she submitted. The eighth claimant carried out the majority of the defective work. The defendants contend by virtue of the evidence that the third to eighth claimants have no contractual relationship with any of them.

The Contract

[106] The contract before the court was in writing. The defendants' pleaded case incorporates into the contract what they have termed as further and better details of the work and specifications as set out in two documents created by the first claimant entitled "Create Abundance For Quotation to Achieve and Complete Estimated Cost and Budget dated

May 24, 2016 " (“the quotation”)[28] and the "Master Purchasing List," (“the master list).There was no demur from the claimants on this point. This will be discussed later.

[107] It was the evidence of Susan Williams that based on the contract, her company created a design portfolio to achieve a complete estimate of cost and budget dated May 4, 2016 which detailed the works to be done at the villa based on the discussions with the second and third defendants. Mr. Campbell, Head of House and from her own examination and/or research at the villa. Susan Williams said that this portfolio also listed the items to be supplied and installed by the proposed vendors which her company consulted as part of her obligations under the contract.

[108] The evidence was that on June 15, 2016, Susan Williams sent an email to Dr Li attaching a revised design portfolio and master listing. The agreed evidence was that the revision was based on a reduced budget. Additionally, there were further master purchasing lists dated June 14, 2016[29], September 22, 2016[30], December 2, 2016.[31]

The Course of Dealing

[109] The parties course of dealing with each other during the execution of the project was:

1) Susan Williams initially sent out a revised master budget with a proposal outlining the scope of the work to be done, it does not name any claimant or supplier.

2) She marshalled the supply of goods and services. Orders for goods, and for work to be done on the villa were placed solely by Susan Williams.

3) Invoices from suppliers were addressed to the villa and submitted to Susan Williams for further submission to the defendants.

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[28] Bundle 9 page 1
[29] Bundle 9, page 33
[30] Page 64
[31] Page 120

4) Susan Williams made no payments on any of the invoices submitted by her.

5) Susan Williams did not ask, and the defendants did not request that estimates or quotations for goods and services be submitted for approval first with supply and invoices after.

6) Goods and services supplied on order by Susan Williams went to the villa.

7) Susan Williams had to get approval from Dr Li for each invoice submitted to him.

8) The defendants paid invoices by way of their Tryall account, via wire transfer directly to the vendor or by credit card directly to some suppliers through the first claimant.

9) Goods supplied for the project were addressed to the Create Abundance villa, not to any of the defendants. It was the Create Abundance villa that was entered as the customer on the invoices sent to Susan Williams by all claimants and suppliers as well as by Susan Williams herself on her own account, as addressed in her own invoice to the villa, not to the signatories on the contract, c/o the villa or by any overseas address.

10) The Master Purchase Listing created by the first claimant on her letterhead is addressed to the villa.[32]

11) Specifically, there is no evidence of any statement or document from Susan Williams to any of the claimants directing that the names of the second and third defendants should be inserted on their respective invoices as the customer. The noted exceptions are vendors who were paid by credit card, for example, The Carpet Boutique, 3452 North Miami Avenue, Miami, Florida was one of the vendors. It listed its customer as Create Abundance,

[32] Bundle 13, page 45

c/o Guo Zhong, that company was paid by credit card. The name on the credit card in evidence is that of Guo Zhong.

12) Despite having the credit card imprint of Guo Zhang for use in the purchase of goods, Susan Williams ensured that vendors invoiced the second defendant for goods purchased by credit card.

13) The third to seventh claimants did not know for whom they were working; they only knew the first claimant. There is no evidence that Susan Williams disclosed with whom she had signed the contract.

14) She submitted the first master budget dated May 4, 2016 containing all the items intended to be supplied, their suppliers and by whom the goods would be installed to the defendants.[33] None of the claimants are named in that master budget.

15) There is no evidence that any of the defendants had ever met the second claimant who is the business partner of Susan Williams and there is similarly no evidence that any of the defendants had met the third to seventh claimants.

16) The first claimant sent invoices submitted to her by the other claimants to Dr Li for approval. The invoices once approved by Dr Li with Susan Williams had to be approved again with Tryall before Tryall would release funds for payment to the claimants.

17) The evidence from Susan Williams was twofold in that in her witness statement at paragraph 34 she testified that: "*I made reference to this initial scope of work in an email dated May 15, 2016 to the Managing Director of Tryall, Mr Aram Zerunian to coordinate with them that the payments would be made through their accounting, and that it was a matter of necessity that*

[33] Para 37

such payments be made urgently to facilitate the desired timeline of September 2016."[34]

18) Further on in the same witness statement there is this: "We also gave Dr Li the option of either sending payments to the companies for things to be bought for the project by obtaining the wire information for same, or we would be able to make purchases on their behalf if they provided us with their credit card."[35]This is despite the contract which was drafted by the first claimant which under the heading "*Remuneration*" states: "It is noted that all invoices will be submitted for payment on your behalf via Tryall accounting." The "option" given to Dr Li as was the evidence, was not originally agreed by the parties, however as the project went on all three methods of payment were used and became a more convenient way of doing things, establishing this agreed method of payments over the period.

19) There is no evidence that a representation of any kind was made by any of the defendants to any of the third to seventh claimants. There was no contract between any of the defendants and the third to seventh claimants.

20) Any conduct in performance of the project on the part of the third to seventh claimants was predicated upon statements and correspondence from Susan Williams and not from any of the defendants.

[110] The view I take of all of this evidence is that the parties expressly accepted this course of dealing. There was no demur on either side. The scope of work and method of payment was altered more than once.

[111] In December of 2016, there was the inspection visit of Dr Li. The relationship between the parties continued. When the September deadline was missed, the work continued, as did some of the payments.

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[34] Para 34, Supplemental witness statement of first claimant
[35] Para 91, Supplemental witness statement of first claimant

[112] In addition to the evidence above, the extension of the deadline was a variable thrown into the agreed and unrefined course of dealing. The course of dealing was different than the written agreement and subject to a different arrangement. There was no objection and a clear waiver by both sides of the strict terms of the contract as written by the parties. There was a lack of precision in the contract and the course of dealings became fraught with correspondence back and forth in order to get things done. At no point in the evidence did any of the parties call for a less cumbersome manner of proceeding and so this is how things were done.

[113] This went on until a breakdown in communication and delays in approvals of the invoices began, ending in their non-payment. The parties now wish the court to construe the written document. However, the course of dealings is highly relevant and determinative of the various issues raised in this trial.

[114] The court finds that the stark commercial reality is that it was Susan Williams who collected and submitted all the invoices from the other claimants. The defendants never met nor had any contact with any of the other claimants. The payments made by the defendants were made via Tryall or by credit card and not directly to any other claimant. There is no contract between the defendants and the third to seventh claimants based on the written contract or on the evidence. The only contract between the defendants is with the first and second claimant. The third to seventh claimants had no dealings with any of the defendants of any kind and therefore cannot claim in contract against them. The evidence presented by the claimants does not establish that the defendants made any representations to them which caused them to act to their detriment in some way. The only evidence is that the third to seventh claimants worked on the project at the behest of Susan Williams. Therefore, the only contract in this claim is the one between the first and second claimants and the second and third defendants.

The Eighth Claimant

[115] Whether the claimants have established the main ingredients of a contract, namely offer, acceptance, consideration and intention to create legal relations between the eighth claimant and the defendants has to be examined.

[116] The evidence of Mr Daley /the eighth claimant was that it was at a meeting held on April 29, 2016 between himself, the owners, Dr Li, Susan Williams and David Barber that the services of the eighth claimant were engaged by way of an oral contract. He was directly contracted by the owners and advised to use Dr Li's email address to contact them. His initial deposit for commencement of the work was paid as requested. His invoices were submitted through the first claimant as project manager for ease of communication and no work was done by him without first receiving approval from the defendants through Dr Li. Approvals of his estimates were communicated to him by the first claimant or he was copied on emails from Dr Li to this effect.

[117] It is not the subjective state of mind of Dr Li, but a consideration of what was communicated by the parties in words or conduct, and whether that lead objectively to a conclusion that they intended to create legal relations and had agreed upon the terms which the law requires as essential for the formation of a legally binding contract.[36]

> *"[31] How should a court approach the issue of considering whether there is a valid contract in existence? Firstly, if it is in writing, then it is normally not necessary to look beyond the four corners of the document to find the terms of the contract. In the absence of any written document, where the contract is alleged to be oral, the court must look for the intention of the parties in the words said at the time the contract was alleged to have been made, the conduct of the parties to the contract and any evidence of the negotiations at the time of the contract. What the court cannot do is create a contract where none existed. However, as in this case, where one party is asserting that there was an oral contract, it is the duty of the court to thoroughly examine all the circumstances and determine whether or not the parties, by their words, conduct and negotiations, intended their actions to have legal consequences.*
>
> *[32] Where the subject matter of the agreement is commercial rather than domestic, it is not necessary for the person asserting the agreement to prove that there was an intention to create legal relations and for the purpose of this*

[36] CRS GT Limited v McLaren Automotive Limited and Ors [2018] EWHC 3209 at para 125

principle, it is accepted that there can be commercial agreements between members of a family. There is a rebuttable presumption that the parties to a commercial agreement intended that agreement to have legal consequences and the onus is on the party asserting that there was no such intention for the agreement to have legal consequence, to prove it. See ***Edwards v Skyways Ltd*** *[1964] 1 WLR 349 at 355-357 and Chitty on Contract twenty-fifth edition at paragraph 123."*[37]

[118] There was no written contract with Mr Daley, however the evidence disclosed that based on the correspondence and the conduct of the parties, as well as the interaction between Dr Li and Susan Williams regarding Mr Daley, he performed the task of general contractor on the project. To this end, Susan Williams gave evidence that there had been a meeting between Dr Li, herself, the owners and Mr Daley, there was no challenge to this evidence nor the fact that Mr Daley was present at the meeting in his role as the then suggested contractor. Later on, Dr Li by email dated July 13, 2016[38] wrote to Susan Williams to release funds to Daley's Construction.

[119] It was not suggested to Mr Daley in cross-examination that he was a sub-contractor of the first claimant nor that he had not met with the owners as he said he had. Rather he was taxed as to defects in the work he had done. This signalled to the court that his evidence as to the date of the meeting, the engagement by way of oral contract and the approval and payment process described in the witness statement are accepted by the defendants whose main challenge was to the defective manner in which the work was done and against which they claim a set-off for corrective work. His unchallenged evidence as to his role as the general contractor is more consistent with the defendants' pleadings that Mr Daley was responsible for most of the defective work than that Susan Williams was the general contractor as was submitted by the defendants.

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[37] Carlton Williams v Veda Miller [2016] JMCA Civ 58 at para 32

[38] Bundle 10, page 97

[120] The court finds that Susan Williams was not the general contractor. The court finds that the defendants contracted the eighth claimant by way oral contract as the general contractor for the renovation project.

[121] Issue number one has been resolved in that there was also an oral contract between the eighth claimant and the second and third defendants.

Issue 4: Was it an implied term of the contract that the work would be of a standard of high quality

> *"Please note that Susan Williams and the design team of SW Interior Design will make every effort to ensure that services rendered by other parties and items supplied are as per approved specifications and standards."*

[122] The were no documents showing the specifications required by the defendants in order to attain this high standard of quality they desired. This was left up to the first claimant and was a term of the written contract as quoted above. There was neither architect nor quantity surveyor on site at any point during the project to ensure that any specifications were being met.

[123] The defendants in support of this expectation of the receipt of a high standard of quality relied at trial on the design portfolio prepared by Susan Williams. There is no evidence that they relied on this design portfolio so soon as they knew of it.

[124] On June 1, 2016, Dr Li gave his express permission for the work to proceed requesting details about the materials, labour and management costs. He mentioned that *"in Canada, we can build a small house with this money @150 CAD per sq feet." (sic)*

[125] Sue Williams reassured Dr Li on June 2, 2016, that the work would proceed, adding:

> *"I do understand that building costs can vary throughout the world...Jamaican building can tend to be on the higher side as much of the material used is imported. The standard that needs to be achieved for a Villa of Tryall standing must be of a very high quality*

also- and to achieve this for you. We understand that we need to spend wisely and will ensure to maintain caution and accountability throughout."[39]

[126] By June 7, 2016,[40] Dr Li indicated to Susan Williams that the maximum budget after discussing with *"the family*" was US$1.8 million for the project. At this point the highest quality materials were dispensed with by Dr Li.

"Subject: budget

Hi Dear Sue,

After discussing with the family, they would like to have a maximum budget of 1.8 million USD for the project. ***You could use good enough materials (not best ones) and keep best existing furnitures [sic] (not replacement) possible to meet the budget...*** *(my emphasis.)*

Thank you,

Morgan"

[127] There was another indication from Dr Li that costs were to be saved in an email dated June 15, 2016,[41] he said, *"existing good furniture, any usable equipment, any good mattress, including TV…to keep our budget in shape."* He directed the building of a new gym this year. He said he would send the "*family credit card*" to Mr Barber of the Tryall Club to pay for the purchasing of items. This is evidence which shows that while the budget was being reduced, the scope of work was simultaneously being varied.

[128] On June 15, 2016, Susan Williams sent an email to Dr Li attaching a revised design portfolio and master listing. As costs were being reduced she said: *"maintaining the warmth and standard that we understand is needed*." She went on to mention a

[39] Bundle 10, page 65
[40] Bundle 10, page 69
[41] Bundle 10, page 78

September deadline and requested approval to move forward with ordering items included in the estimate and design portfolio to include antique pieces she had located.

[129] The eighth claimant submitted a quotation for windows and doors as the original quotation from Dougall was rejected by Dr Li as being too expensive. In the email which enclosed the quotation from Mr Daley, Susan Williams said that:

> "*Dougall's doors and windows will offer you the highest standard of operation and protection. I believe that Mr Daley's work will give you a very acceptable finish also."*

[130] Regarding the fourth claimant and the manufacturing of custom furniture in an email from Dr Li dated August 3, 2016, it said:

> *"As you said Princes(sic) work is beautiful and highly valued… his lumber is of the best and his craftsmanship excellent…"*

[131] It cannot be gainsaid that it was the defendants through Dr Li who wanted costs to be reduced and that the standard to be used in supplying material for the renovation had been reduced from highest and best to good enough and even acceptable as demonstrated in the emails.

[132] The correspondence shows that by August 15, 2016, Susan Williams via email, submitted an invoice to Dr Li for design and management services completed in May and June of 2016 for approval with payment through the Tryall Club. The response by Dr Li on the same date was that the invoice should be paid. Notably, there was no complaint by the defendants or Dr Li regarding the nature and quality of the work which had been done up to that date or any further discussion as to the standard being reduced from high quality to good enough.

[133] It is clear from the evidence that it was initially the intention and agreement of the parties that work was to be done to a high standard, however this agreement had to be qualified by the budget specified by Dr Li, and his direction that the high standard of quality be

lowered from best to good enough as this governed the conduct of the parties in the performance of the contract.

[134] The email exchange suggests that work commenced while Dr Li indicated that the master budget was still under review. He remarked on the high cost of the project.[42] In the meantime work was ongoing, and estimates were being submitted to Dr Li for approval.

[135] Email dated May 30, 2016, from Sue Williams identified:

> *"Please find attached a quotation from Mr. Daley for work that he has been able to achieve an assessment and quotation for.*
>
> *Please note that the following areas are included*
>
> *SHINGLING OF THE ROOF*
> *PAINTING OF INTERIOR AND EXTERIOR*
> *STRIPPING OUT THE EXISTING DIVIDING WALLS OF THE MASTER BATHROOM AND BACK GUEST BEDROOM*
> *CREATING OF MAHOGANY WOODEN PARQUET FLOORING IN THE MASTER BATHOOM SUITE AND BACK BATRHOOM SUITE.*
> *REMOVAL OF THE RED DRIVEWAY BRICK AND REPLACEMENT WITH WHITE CEMENT DESIGN*
> *REPAIR OF THE POOL, RESURFACE OF THE COPING AND RESURFACE OF THE POOL WITH MATERIAL SUPPLIED BY OTHERS.*
> *NEW MAHOGANY PARQUET ON THE MEETING ROOM FLOOR AND MAINTENANCE UPGRADES TO THIS ROOM*
> *RELOCATE THE LAUNDRY,*
> *REPLACEMENT OF 7 AIR CONDITIONING UNITS.*
>
> *BUILDING OF NEW WALL AND RELOCATION OF SERVICES FOR NEW BAR AND BUTLERS PANTRY AREAS"*

[136] In the cross-examination of Susan Williams, she said that the standard of high quality referred to other villas viewed by the owners such as Point of View at Tryall. The agreed objective was to achieve as high a standard as the other villas. The master budget and design portfolio were not put to her in cross-examination as setting out the required standard. Though the claimants have not submitted on this, there is no evidence that

[42] Bundle 10, pages 63, 65

the estimate and master budget constitute the agreed specification or reflect the standard agreed as part of the contract.

[137] Mr Daley said he was not shown any document that set out an agreed standard, and he had no knowledge of an agreed standard, however, the evidence was that he had worked on several other villas at Tryall.

[138] The contract was for design and project management services. Susan Williams was the person in charge of the project and for the provision of all services as stated in the contract.

[139] On Thursday, August 18, 2016, David Barber of Tryall wrote to Susan Williams and Dr Li indicating:

> *"At this level, the quality and diversity of these items is extremely important. The guests who book the highest category villas have extremely high expectations and are not prepared to compromise."*

[140] In my view, the high standard of quality was not set by either side, it was set by Tryall. The parties all had to maintain the Tryall standard. The uncontradicted evidence was that it was David Barber of Tryall who indicated the standard of quality expected of the project. He advised on works of art, finishes, linen, crockery, cutlery, and the type of experience the owners of the villa were to be prepared to offer to guests of the Tryall property.

[141] The Tryall Club was not expected to give evidence in a matter such as this. The court draws the inference that as Susan Williams and Telford Daley had worked on projects at Tryall in the past, they would have known the standard expected. They were recommended by David Barber of Tryall. The owners would also have had high expectations and similarly would not have been prepared to compromise, however on any objective standard, the only evidence adduced by the defendants to quantify or specify this standard against which the court can weigh the work done is the first

claimant's own master budget and quotation which they failed to put to her as setting out the agreed standard.

[142] The court finds that Susan Williams submitted invoices for work which must have been accepted by her. Given her experience working on other projects at Tryall, her design portfolio, her many discussions with David Barber, her oversight of the project, she gave all the instructions and was the eyes and ears of the owners who relied on her expertise and her professional opinion. She submitted her own invoices for work done in this capacity. This means she was satisfied with the work done and the submission of invoices to Dr Li signified completion to her satisfaction.

[143] While the high standard of quality is subjective, it was the responsibility of the first claimant to deliver the Tryall standard. In my view, it was a reasonable expectation on the part of the owners that Susan Williams whom they contracted to provide the Tryall standard should have done so. She was responsible for delivering what the defendants wanted and ensuring that the contractor did his job, she failed to do so.

Issue 5: Was Susan Williams Interior Design the main contractor and were the other claimants' her subcontractors

[144] In relation to the third to seventh claimants, it was submitted by counsel for the claimants, that the first and second claimants did not subcontract any of them. This was not put to any of the claimants at trial.

[145] It was submitted that the first claimant merely acted as an intermediary on their behalf. This submission was based on a clause in the contract which states that "*the first claimant does not accept personal responsibility or liability for areas of error made by other parties."*

[146] The contra proferentum principle states that ambiguities in documents should be construed against the drafter. This is predicated on the assumption that the person who produced the document has the capacity to avoid ambiguities when drafting it.

"*Contra proferentem"* as a principle is used to describe two related rules of contractual construction[43] that: (i) in case of doubt, a contractual provision is construed against the party which drafted it or put it forward for inclusion in the contract; and (ii) ambiguities in exclusion or limitation clauses are resolved against the party seeking to rely on the clause to diminish or exclude its liability. Susan Williams cannot simply rely on an exemption clause she drafted, as it will be construed against her in the instant case.

[147] The evidence of whether the first claimant was the main contractor was demonstrated by her email dated May 3, 206 to Dr Li enquiring whether the standard contract outlining "our work and fees" had been signed as time was of the essence. She added that any areas of concern or adjustments that require discussion should be unhesitatingly raised. In the same email, she said:

> *"I meet with Mr Telford Daley, the suggested contractor, this week and will move quickly to ensure that a design review and quotation is forwarded for consideration in the shortest time possible."*[44]

[148] There was no cross-examination as to whether Mr Daley was the suggested contractor.

[149] The evidence of Dr Li was that Mr Daley was part of the team. There was the following exchange in relation to Susan Williams:

> "*...but I treat her as the general contractor, they are one team, we didn't deal with different people when we came to Jamaica we didn't know anybody else so we just deal with Susan Williams.*
>
> *Sugg: When you mentioned contractors you were referring to all of the persons engaged to supply products or furniture for the renovation project*
>
> *A:I don't agree, contract was with her, it all come together other people did she doesn't know. My idea is that we just deal with her anybody else is her contract when I say our contractors I mean her Susan Williams team, we bought property we didn't know anybody else. Maybe I misunderstand what Susan Williams mean for the whole project I thought Susan Williams was the contractor."*

[43] Chiitty on Contracts (3second edn 2015) at para 15-012
[44] Bundle 10, page 20

[150] In addition, there was no evidence of any payments by Susan Williams to any of the other claimants or any suppliers for the work done. The pattern of payments was from the defendants to the Tryall account for further disbursement or directly from the second defendant's credit card on file with Susan Williams.

[151] It is therefore difficult to understand the defendant's submission that Susan Williams was the general and main contractor on the project. The email to Dr Li regarding Mr Daley as suggested contractor and the lack of correspondence from the defendants or Dr Li to indicate any disagreement or objection on the suggested contractor settles the issue. There is similarly no evidence of a contract between the first claimant and any other claimant. The court cannot create a contract where there is none.

[152] The court is entitled to have issues of facts that are joined and inexorably opposed in substance brought into direct opposition, if not, these issues have to be resolved as being unchallenged and accepted, having been denied the benefit of cross-examination. Susan Williams was stridently cross-examined, yet the evidence of her role as main contractor who hired the other claimants as sub-contractors was not put to her. This being one of the issues the defendants have asked the court to determine and one of the planks of the defendants' case, the witness ought to have been allowed to give evidence on the issue.

[153] The defendants relied heavily and solely on Susan Williams to direct and manage the course of the project. It was she who communicated that work had been done and submitted invoices to that effect. The defendants paid the invoices on the strength of the agreement between themselves and Susan Williams and the relationship of trust which had developed, the defendants being overseas. In turn, I am satisfied that throughout their dealings with the defendants, the first claimant correctly assumed that the second and third defendants were the owners of the villa and that accounts would be settled by them.

[154] Ms Susan Williams in the written contract offered project management services. This is not in dispute. This role was organisational and the exact relationship with others on

the project was varied by need. There is no evidence that she was the main/general contractor or that she hired subcontractors.

Issue 6: Whether there were substantial defects and material deficiencies in the works done, materials supplied or used at the villa

[155] The Villa is an extensive resort villa, on the main level there are 3 bedrooms each with its own bathroom, a kitchen, dining, living gym area, garage and porch. On the lower level are 6 Bedrooms each with en-suite bath, office and gym area with a bathroom and a balcony; swimming pool and deck; staff area, garage, utility room, generator, laundry room and swimming pool;[45]

[156] Paragraph 24 of the witness statement of Dr Li was not put to Mr Daley and the letter to Ms Pan was neither shown to him nor was it shown to the court:

> **"***24. The Claimants have clearly acknowledged many of the problems and defects with the Works which existed at the end of October 2016 and many of them still exist. For example, in a letter to Ms Pan dated 14th June 2017 from Daley's Construction and Hardware Limited some of the defects to be corrected were clearly acknowledged. The Claimants have also prepared various "punch lists" in which they admit to some of the defects."*

[157] It is undisputed that the owners were to arrive on January 17, 2017. Guests had been booked and David Barber said on January 6, 2017 that: ***"****...A good deal of revenue is on the owners account due to the peak season booking and these guests are still in residence…"*

[158] The evidence from Susan Williams was set out in various emails to contractors and suppliers from:

a. January 8, 2017, Marlon Campbell to David Barber and Dr Li - the old window fell out.

[45] Witness statement of Collin Mitchell, para 10

b. January 9, 2017, from David Barber to Susan Williams indicating that Marlon Campbell reported to Mr Daley that “the villa does not hold up well in fierce winds and fear that more of this is to come.”

c. January 15, 2017, to Mr Daley, water feature works.... but leaks.

d. Email on January 16, 2017, to ATL: ice makers had become disconnected, drain hose fell out on January 17, 2017 –replaced by Marlon Campbell –email from Marlon Campbell on January 18, 2017 confirms repair.

e. January 24, 2017, to Felicity Crosswell-Brandt, piano - chip on the piano, the bloom on the surface and scratches on the legs - to be repaired/polished.

f. January 27, 2017, to Moore by Design counters to be installed, master closet to be completed, concrete not polished – Mr Daley to complete.

g. January 27, 2017, to Benson Lighting – lights removed to be re-installed.

h. January 30, 2017, to Moore by Design, shelves fixed and sanded, to be waxed that day.

i. February 6, 2017, to Benson Lighting – fountain has terrible leak.

j. On Thu, Feb 23. 2017, Marlon Campbell wrote: The room in front of the pool right between the meeting room roof is leaking, The main door entry lock is not functioning properly, The support for drapes track(sic) in dining room need to fill out.

k. February 24, 2017- Mr Daley, fed up with the pace of progress payments, acknowledges that there are corrections to be made but refuses to return

l. March 8, 2017 – to Ricky Vaz - a light appeared on the top left corner of one of the TV screens and AC in the kitchen is dripping on the TV mounted below it, TV to be relocated

[159] This was the list sent to the first claimant by Dr Li after his inspection with Mr Daley:

"07 December, 2016 11:29

plugs and switch cover needs to potty out, master bathroom baththtub ,and-face: basin-leaking, bidet faucet need changing, dining room floor sinking, commercial iron in the laundry need to be remove because it is going to make our utility bill get high, Drain pipe in the pool room needs to move up more to the pool water heater, all the bulbs need to change to LED to bring down our utility bill, meeting room need more paint, kitchen recessed lighting need changing, powder room hole in the ceiling need to fill out properly, book shelves hole need to fill out, bedside table rocking downstairs, Dining room drapes rod not level, chandelier outside Rusting already, mesh cover edge at the main door need to be spray."

Mahogany items

[160] In the supplemental witness statement of Susan Williams, she testified that the Mr Daley had originally quoted mahogany laminate parquet despite the approved change of wood to oak wood parquet.[46] She also said that, Mr Daley had ordered shingles for the roof and the mahogany for the parquet floor.[47]

[161] On May 23, 2016, at 8:50 AM, Susan Williams wrote:

"CONTRACTOR

Mr Daley will have a quotation for us by Tuesday of next week — he has already ordered the shingles needed and also the mahogany for the parquet floor. He will require a mobilisation fee for his site work…

…. TELFORD DALEY — CONTRACTOR $400,000.00"

[162] Susan Williams in an internal email dated May 23, 2016, confirmed that she had located antique Jamaican mahogany beds for all beds in the villa, dining tables, pineapple back chairs, chaises and carved sofas.

[163] Susan Williams sent an email on May 26, 2016 to Dr Li:

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[46] Para 57, Supplemental witness statement of first claimant
[47] Para 56, original witness statement of first claimant

> *"Please note that the mahogany furniture will be made in Jamaica - many of them original old antiques that we will purchase and refinish where necessary…."*

[164] Though Susan Williams said that Mr Daley had an original quote for mahogany laminate which was rejected by all parties and to be changed to oak wood parquet,[48] her description in correspondence to Dr Li was "*never adjusted from mahogany wood this was in part because the finish requested of a mahogany colour never changed*."[49]

[165] In the second witness statement of Dr Li,[50] he outlines emails of May 20,[51] & 30,[52] 2016, from Susan Williams to himself; the email from Telford Daley to Dr Li on June 11, 2016, and the email from Susan Williams to Dr Li on December 11, 2016, regarding mahogany furniture. Susan Williams admitted that she was referring to mahogany wooden parquet flooring in these emails. She said mahogany furniture could be finish or wood as the email did not specify which.

[166] In another email from Susan Williams dated September 13, 2016, she said *"the mahogany floor is now finished – so we need to be very careful."*

[167] There was then an email from Susan Williams to Dr Li sent on October 23, 2016, which spoke to the work being done by Mr Daley as well as requesting a progress payment. She said:

> *"There are some items not completed by Mr Daley – these are not needed at this time and include - The living room floor of wood."*

[168] Mr Daley said that the living room floor was not done, and this is reflected in his bill dated October 20, 2016. The reason was that he was instructed that the floor should be delayed to another phase of the project.[53]

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[48] Para 57
[49] Para 58
[50] Bundle 4 page 308 para 7
[51] Bundle 10, page 26
[52] Bundle 10, pages 50 - 52
[53] Bundle 4 page 41

[169] The evidence of Susan Williams was that a wooden floor was requested and the owners approved an oak floor at a meeting between the owners, herself, Mr Daley and Dr Li on May 2, 2016.[54] At that meeting, Mr Daley showed the owners a sample of oak parquet which he would import and install throughout the villa. She said it would be stained with a mahogany finish. The reason she gave was that mahogany was not available. This was the evidence unearthed in cross-examination as there is no such evidence in her witness statement. What she did say was that if there was time they would "re-*floor the entire upstairs with mahogany parquet.*[55]" Further that: *Mr Daley has already ordered the shingles needed as also the mahogany for the parquet floor.*[56] This was before the creation of the design portfolio. Susan Williams also said that the quotation and master budget included the quotes from Mr Daley for removing the shingle roof and installing the parquet floor.[57] The budget was revised from USD$1.8Million dollars to USD$1.5 Million and another master listing followed in September 2016.

[170] It was suggested to Mr Daley that he did not have a conversation with Dr Li regarding changing the parquet floor from mahogany to oak which he responded that he must have had it with Dr Li's ghost if that was not so. He gave evidence of a meeting between himself and the second and third defendants at which he was contracted as the main contractor to carry out specified structural and electrical work at the villa. Present at that meeting on April 29, 2016, with Dr Li and the owners were David Barber and Susan Williams.[58] He said in cross-examination that he showed Dr Li a picture of a laminate mahogany floor at the meeting, and American oak was substituted, mahogany being unavailable.

[171] Mr Daley said in his witness statement that the defendants originally wanted a mahogany parquet floor before he had submitted his quotation for approval. He met with the second defendant who had Dr Li as interpreter. At this meeting, Mr Daley said that based on his checks, he would only be able to source a mahogany veneer which

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[54] page 137, para 20
[55] page 142, bullet #2
[56] page 147, para 46
[57] page 152, para 75
[58] Para 4

would not be long-lasting. He suggested the use of American oak parquet instead and showed the second defendant a picture. The second defendant was satisfied and as a result, oak parquet was quoted and installed on the floor of the villa. In cross-examination he said Dr Li had said that the American oak should be used as it looks nice. This is not evidence which I could find in Mr Daley's witness statement.

[172] On this point of the oak floor, Dr Li could neither recall the date of the meeting, nor the identity of Mr Daley, he only recalled being the translator for the owners once.

[173] Susan Williams and Telford Daley in their evidence each failed to agree on the date of the meeting, on who instructed the change from mahogany to oak, who was present at the meeting and by what means, whether a sample or picture of oak was introduced by Mr Daley. The attention of the court was not adverted to any correspondence signalling the agreement for such a change either before or after the purported meeting.

[174] This matter of this change from mahogany to oak constitutes a major discrepancy as between the two with the greatest responsibility for executing the project, Susan Williams and Telford Daley. The floor that was installed was not made from mahogany lumber, it only looked like mahogany. I am supported in this view by the cross examination of Susan Williams in which she admitted that a mahogany stain is different than mahogany wood.

[175] This is against the backdrop of the several thousand emails that flowed in relation to this project. The expert witness Martin Lyn gave evidence of being shown a document relating to the owners making this change, this document was not shown to him while he testified in court and it is not before the court. He gave evidence in court that on the day he went to the villa he was shown a document when Susan Williams, Mr Masterton, Mr Daley, an engineer, Desmond Flowers, another gentleman and a client's representative were all there. He said the document was shown to him by Mr Daley or Ms Williams. The content of such a document would constitute inadmissible hearsay.

[176] The witness statement of Susan Williams and its subsequent amplification was that the change was approved, however, no correspondence was referred to which showed that

this was ever documented, despite the claimants' heavy reliance on details and documentary evidence. The first claimant admitted in cross- examination that she continued to refer to mahogany wood in the correspondence with Dr Li despite the evidence that there had been this agreed change to oak. The evidence was that this was an oral agreement.

[177] The court can attach no weight to the assertion that there was an oral agreement with Dr Li for a change from a mahogany floor to an oak floor. Rather, it is open on the facts to find that the reduced budget was the impetus for the change by Susan Williams from a mahogany floor to an oak floor stained with a mahogany stain to give it a mahogany finish.

[178] The defendants rely on an email from Susan Williams to Emily Zhang on May 30, 2016 regarding the installation of mahogany parquet flooring in the meeting room and the quotation from Mr Daley which referred to the installation of mahogany parquet on the meeting room floor. They also rely on an email from Susan Williams to Telford Daley dated June 11, 2016 in which she speaks to replacing the floor with mahogany parquet within the first phase.

[179] In the revised design quotation from Susan Williams, there is no mention of a mahogany floor contemplated for the meeting room. This room was also omitted from the defendant's pleadings in respect of mahogany items not supplied. The defendants pursuant to rule 10.7 of the Civil Procedure Rules ("CPR") cannot rely on this factual argument not set out in the defence, but which could have been set out there as the permission of the court was not sought. The court makes no finding on the meeting room floor as it has not been proven.

Mahogany Furniture

[180] In the evidence of Susan Williams, it was made plain that in respect of the furniture to be supplied by Prince Palmer the lumber to be used was mahogany. In cross examination she said: "*The quotations from Prince Palmer described in his quotation,*

he uses hardwoods, it does potentially refer to mahogany, but it does refer to the finish on the furniture."[59]

[181] The defendants rely on an email dated December 11, 2016, between Susan Williams and Dr Li regarding invoice numbered 1129 requesting a progress payment to Prince Palmer for mahogany furniture supplied to the villa.[60]

[182] The evidence from Susan Williams in her witness statement,[61] which addresses the defendants' assertions under this head, states that antique furniture was ordered for the villa, with restoration to be done on the pieces to be re-used as Dr Li had instructed.

[183] In respect of the furniture to be supplied to the villa this was the first claimant's explanation for the use of mahogany tones:

> *"The description of Mahogany is stated for many of the wood items within the respective Claimants' descriptions for the proposed design work discussed with Dr. Morgan Li for Create Abundance however, there is no description that Mahogany wood, or only mahogany wood would be used. That is why the respective Claimants where applicable, based on their description and the understanding of Dr. Li, indicated that the items were finished in the traditional Jamaican mahogany tones that set the palette for the design project.*
>
> *I must state also that the Defendant's requirement for a limited budget, we the first and second claimants were guided by that, in using mahogany tones instead of mahogany wood and the proformas and invoices from suppliers and/or the Claimants described each item specifically that was being quoted on or invoiced for."*

[184] It is plain on the evidence that the first and second claimants at their election, varied the choice of lumber for mahogany items to fit the revised budget they had been given without communicating this to the defendants. The usual course of dealing was for the first claimant to notify Dr Li of every detail. There was no correspondence about this change, if there was then the attention of the court was not adverted to it, neither was it shown to the witness during her testimony by her counsel. While the high standard of

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[59] Witness statement
[60] Bundle 12, page 712
[61] page 180 Bundle 4

quality had been reduced to good enough, there was no credible or reliable evidence of any agreement for this variation.

[185] In the witness statement of Prince Palmer[62], he said:

> "*In the further revised estimate numbered E146, though we did not specify the type of wood to be used, the items listed and provided to the Defendants were made of mahogany wood save and except item numbered 5, namely the Whaite[sic] Vanity in the Master Bathroom, and item numbered 9, namely the Built in closet with drawers in middle below TV in the Upper South Queen Bedroom. It should be noted that the latter item is not in issue for the Defendants."*

In cross examination, Mr. Palmer said the pieces he made were taken from a portfolio of items, some were his, some he did not recognize. He did not believe that the type of material had been specified to him, however, where stain was specified he used mahogany, where it indicated a painted item he used cedar. He used mahogany for the mirror frames in the bathrooms and all the pieces except those he listed.

Expert Witnesses

[186] It is the duty of the expert witness to: "*…furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the Judge or Jury to form their own independent judgment by the application of those criteria to the facts proved in evidence.[63]"*

[187] Cresswell J in **National Justice Compania Naviera SA Prudential Assurance Co Ltd ("the Ikarian Reefer")[64]** for the principles below:

> *"1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to the form or content by the exigencies of litigation (Whitehouse v Jordan [1981] 1 WLR 246, HL, at 256, per Lord Wilberforce).*
>
> *2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise (see Pollivitte Ltd v Commercial Union Assurance Company plc (1987) 1 Lloyd's Rep 379 at 386, per Garland J, and Re J (1990) FCR 193, per Cazalet J. An expert*

[62] Bundle 4, page 120
[63] Davie v Edinburgh Magistrates [1953] SC 34 at 40.
[64] [1993] 2 Lloyd's Rep 68, [1993] FSR 563, [1993] 2 EGLR 183

witness in the High Court should never assume the role of an advocate . . .” Toth v Jarman [2006] EWCA Civ 1028.”

[188] Ultimately, the question of how much weight to attach to the evidence of an expert is a matter for the court. In **Price Waterhouse (A Firm) v. Caribbean Steel Co. Ltd.**, [2011] JMCA Civ 29, Panton, P delivering the judgment of the Court of Appeal stated:

> *“The learned judge had a determination to make as to whether the valuation exercise had been properly done. He had the evidence of three persons – two of them with expertise in the particular area, and one definitely without. That he preferred the evidence of the one without is surprising….*
>
> *“Given Mr. Holland’s qualifications and vast experience as well as his chairmanship of the disciplinary committee of the ICAJ, it is difficult to understand how the learned judge could have rejected his evidence virtually out of hand.”*

[189] At paragraph 45 the learned President found that the judge said in his judgment that that he had employed a common sense approach:

> *“It is clear, however, that by placing so little value on the need for expertise, the learned judge’s assessment resulted in the elevation and acceptance of Mr. Greenland’s evidence above, and in place of, that of the professionals in the specific field. In doing so, the learned judge fell into error. Had he given due value and weight to the evidence of the witnesses called on behalf of Price, he would have concluded that Price had indeed fulfilled the terms of its contract with Steel.”*

[190] At paragraph 47, Panton, P continued by saying:

> *“In Sansom v Metcalfe Hambleton & Co. [1998] PNLR 542, Butler-Sloss, LJ in giving the judgment of the English Court of Appeal said:*
>
> *‘In my judgment, it is clear… that a court should be slow to find a professionally qualified man guilty of a breach of his duty of skill and care towards a client (or third party), without evidence from those within the same profession as to the standard expected on the facts of the case and the failure of the professionally qualified man to measure up to that standard. It is not an absolute rule … but, it is less in an obvious case, in the absence of the relevant expert evidence the claim will not be proved.”*

[191] The reasoning of the Court of Appeal in **Price** was upheld on appeal to the Privy Council and specifically, the learned President’s dictum regarding the weight to be given to the experts’ evidence as follows:

> *"The Privy Council agrees with the Court of Appeal that the judge was wrong to regard it as a matter of obvious common sense that PW was negligent, not requiring any expertise in share valuation. The fact that the defendant called an independent expert to testify that in his opinion there was no negligence did not, of course, preclude the court from rejecting the expert's view and finding that there was negligence. But it was essential that the reasons given by the expert for reaching his opinion were carefully scrutinised; for unless there was sound reason for rejecting it, the judge could not properly find that professional negligence had been established. In this case Mr Holland advanced reasoned grounds in support of his conclusion, and the Privy Council agrees with the Court of Appeal that if the trial judge had given due weight to that evidence he would not have concluded that PW was negligent."*

[192] There is therefore, a duty on this court to scrutinize the viva voce evidence as well as the reports produced by the expert witnesses. A judge or a jury is not obliged to accept the views of an expert. The duty of the experts called by either side is to furnish credible information in order that the court can make an independent assessment by applying the information presented by the expert to the facts found in the case. Part 32 of the CPR sets out a number of principles including, that the expert must be independent and that there is no property in an expert witness.

[193] Rule 32.3 (1) of the CPR governs the duty of an expert witness to render assistance to the court, in an impartial manner on the matters relevant to his or her expertise. This duty overrides any obligations to the party by whom the expert has been retained. In **Cala Homes (South) Limited and others v. Alfred McAlpine Homes East Limited**[65], Laddie, J. said and I fully agree with the following:

> *"The function of a court of law is to discover the truth relating to the issues before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth: That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in the pursuit of victory is a fact of life. The court tries to discover it when it happens. But in the case of expert witnesses the court is likely to lower its guard. Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider*

[65] [1995] EWHC 7

that it is his job to stand shoulder to shoulder through thick and thin with the side which is paying his bill…"

[194] In the case at bar, bearing the dicta cited above in mind, I reviewed and assessed the evidence of all the experts which have been appointed by the court. I will not refer to all of their evidence only those which are necessary to resolve the issues.

[195] The claimants called William Masterton, BSc, Wood Science graduate, University College North Wales-Bangor. He serves as the Chairman of the Advisory Board to the Jamaica Forestry Department and was certified by the court as an expert in wood science. He said he was instructed by the first claimant and not by counsel. Mr Masterton did not identify the tables he examined nor the room in which they were located when he saw them, he did not comply with the instructions he had been given which rendered his testimony of little assistance to the court. His evidence lacked detail and may have been influenced by the first claimant, a party to the matter before the court, accordingly it was rejected.

[196] The defendants called Dr Simon Ellis, a PhD and Associate Professor, Department of Wood Science, Faculty of Forestry, University of British Columbia, BC, Canada. He was certified as an expert in wood science, whose methodology and handling of the twelve samples sent to him was detailed in his expert report. He examined the samples he had thinly sliced using hand-held single-edged razor blades with the naked eye, a 10 X hand lens and under a cover slip on a glass slide using a transmitted light microscope. He made contemporaneous notes of his observations. He used the Inside Wood database, a web resource for hardwood anatomy, IAWA Journal 32(2):119-211 as his information source. The database contains over 42,000 wood images of nearly 7000 woods.

[197] He used the term mahogany to refer to the genus *Swietenia* and considered the two most common members of the genus which are the *Swietenia macrophylla (Bigleaf mahogany, Honduras mahogany)* and *Swietenia mahogani (Caribbean mahogany.)* The difference between these two species is negligible.

[198] He printed the database lists of the anatomical features of these two species and compared the anatomical features of each of the 12 samples he had been sent to those

of mahogany. He referred to ten separate textbooks and a reputable website to support his identification. He compared each of the samples to each of the six authentic samples of *Swietenia macrophylla* and four authentic samples of *Swietenia mahogani* from his university's department of wood science wood sample collection. He attached photographs to his report of some of the anatomical features of the samples he had examined.

[199] The three characteristics he identified were not the only ones upon which he based his opinion. They were included in his report as examples of the types of anatomical features used in such determinations. There are other more complex anatomical features. He considered features which would eliminate wood as being mahogany such as the feature of longitudinal parenchyma, (figures 1 and 3.) Ripple marks (figure 2) are found on the tangential surfaces of true mahogany samples and are absent in woods referred to as mahogany but which are not of the true botanical classification of mahogany.

[200] Based on the samples sent to Dr Ellis, he drew the following conclusions:

i. The dining room side board base is not mahogany.

ii. The dining room side board under top is not mahogany, but cedar.

iii. The underside of the dining table is not mahogany. The witness was limited by sample size and his degree of certainty is not as great as the others one sample but was certain in regard to the other sample from the same table.

iv. Meeting room floor was oak.

v. The underside of the veranda dining table is not mahogany.

vi. The book shelf – the interior shelf sampled is plywood.

vii. The master vanity – the side interior is not mahogany.

viii. The bar cabinet base is not mahogany.

ix. The master bed frame is not mahogany.

x. The game table is mahogany.

[201] Termite infestation of the villa is undisputed in the evidence. Dr Ellis stated that Caribbean mahogany, based on the literature which he identified in his report is described as resistant to highly resistant and ranks in the first – sixth percentile range of 19 species of wood having good or high resistance to termites of the one hundred and fifty-one tropical woods of the Americas.

[202] Dr Ellis was asked to comment on the report of William Masterton. He outlined Mr Masterton's reference to the wood he examined as Philippine mahogany as widely considered to be one of the false mahoganies which use the name mahogany in an attempt to elevate the standing and value of the wood. He decried the examination by naked eye and 10X lens of the wood in the two dining tables and cited the textbook relied on by Mr Masterton for the proposition that visual features may not be a sufficiently reliable identification for the majority of woods. Greater powered magnification observation of a sample of wood permits greater accuracy and precision in the identification of a wood sample.

[203] The grain of the wood stated in the report of Mr Masterton was said to be unhelpful in identification as all woods have longitudinal grain. The use of the term vasicentric also does not apply as they are associated with longitudinal parenchyma. Resin canals are features of softwoods and are not found in any hardwood species. Mr Masterton carried out no tests and made no reference to the presence or absence of the ripple marks such as those in figure 2 which are usually found in mahogany. The identifying features found in mahogany reported by Mr Masterton are shared by many wood species. He concluded that the observations performed and the characteristics reported by Mr Masterton were not extensive enough to determine positive identifications of the samples observed as mahogany or any other wood species.

[204] The court accepts the evidence adduced in the expert opinion of Dr Ellis in its entirety and attaches much weight to it as being the reliable and conclusive, based on his report and having seen and heard his evidence.

[205] I find that the evidence of Dr Ellis provided the tribunal with comprehensive material from which the court may properly and independently apply the information contained within

his expertise to the facts found proved in this case. The court finds that the only item made of mahogany in the list of samples examined by Dr Ellis was the game table.

[206] The evidence was that termites were a prevailing issue at the villa. Susan Williams was cross-examined about this termite issue:

> *Q: did you in the designs you provided take into account the risk of infestation by termites*
> *A: yes*
> *Q: what specifically did you provide to minimize that risk*
> *A: solutions for preventative treatments recommending of pest control as needed*
> *Q: one of the effective ways of preventing or minimizing such infestation is the use of mahogany wood*
> *A: yes, the use of hardwoods*

[207] In addition, the dining table supplied to the villa by JN Restoration was found to contain termites. An email from Susan Williams to Doria Pan on June 14, 2017 confirmed this. This table was ostensibly an antique sourced by the first claimant, the expert witness has found that the underside of the dining table was not made of mahogany, and this may well account for the presence of termites, the presence of which the vendor acknowledged, pledged to treat and for which there was no bill.

[208] The master purchasing list referred to in the witness statement of Dr Li and attached to the particulars of claim in this trial contains twenty pages of intended purchases for the villa. The scope of the project undertaken by the parties was identified in that document as well as in the quotation to achieve the estimated cost and budget. Both were prepared by the first claimant and sent to Dr Li. The revised design portfolio and master listing were emailed to Dr Li by Susan Williams on June 15, 2016. The only items removed from this revised document were:

i. *The new gym*

ii. *The new furniture and umbrellas for the pool deck, work on the bathrooms of all bedrooms other than the master and upstairs back bedroom.*

iii. *New kitchen appliances and cupboards,*

iv. *Landscaping for areas north of the pool and house.*

v. Principal's fees (designer, architect and surveyor.)

[209] In my view, the items in the revised document constitute the items agreed to be supplied and the specifications for them. The evidence shows that JN Restoration was paid by way of the second defendant's credit card for antique Jamaican furniture. This was confirmed in an email between the second claimant and the vendor on November 22, 2016.

[210] The listing of mahogany furniture relied on by the defendants in their further amended defence and counterclaim states that the items reproduced from the quotation should have been made of mahogany. The items not made by Prince Palmer on that list were supplied by JN Restoration Ltd.

[211] The court finds that the furniture said to be antique pieces were not made from mahogany as was quoted. Those pieces had been fully paid for as confirmed in an email from Susan Williams to Dr Li on November 21, 2016 and in an email from Rebecca Wates to Wayne Nasralla dated November 22, 2016. The total purchase price of J$11,576,880.00 was set out in an email from Susan Williams to Dr Li on September 2, 2016.

[212] The master bath was the only bathroom which would have new furniture, the other bathrooms had been removed from the revised quotation. The pieces in the defendants' list were not supplied.

[213] The samples shown to Dr Ellis do not match up with all the pieces made by Prince Palmer. He made no pieces for the dining room. He made the bookshelf – the interior shelf sampled is plywood, he made the master vanity – the side interior is not mahogany, the bar cabinet base is not mahogany. There is no evidence that the other items of furniture supplied by Prince Palmer were not made of mahogany. The evidence of Prince Palmer in his witness statement was that:

> *"We did not indicate that the other items in the further revised estimate were mahogany on the basis that there were other pieces of woods used as support and in areas not visible which is the norm in the business and does not change the character of the pieces. We however specified the dimensions of each item and all the furniture provided*

to the Defendants was constructed in accordance with the dimensions specified except where the Defendants requested a modification."[66]

[214] The evidence of Prince Palmer was not contradicted on the point that in the industry, inferior woods are used in the supporting parts of an item of furniture. He admitted that the back of the bookcases was made from ply and that this was part of the construction, he supplied the mirror frames for the master bedroom, but not the bed frames, he admitted that the vanity was made of cedar as had been dictated to him by the portfolio he was given. The furniture he made was based on a request by the first and second claimants. I find that the furniture supplied by the fourth to sixth claimants was made from mahogany.

[215] The court finds that the failure to install a mahogany floor in the specified areas of the quotation was a breach of contract done with the knowledge of the first and eighth claimant and without the consent of the defendants. The failure to install a mahogany floor as quoted constitutes a breach of contract on the part of the first and eighth claimant.

The Third Claimant

[216] The mirrors supplied by the third claimant were requested by the first claimant. Mr Kurt Chin gave evidence that he supplied and installed mirrors in the master dressing room and the gym. His invoices dated October 22, 2016, in the amount of $176,347.00JMD were submitted to the first claimant. By email dated November 3, 2016, Dr Li approved payment of this invoice.[67] The invoice was settled by way of a cheque drawn on the National Commercial Bank from the defendants' account at the Tryall Club. There has been no payment for the mirrors installed in the gym.

[217] The defendants do not dispute that no payment has been made, they base their position on defects in the mirrors in the gym, namely that they became tarnished. The cross-

[66] Bundle 4 page 224 para 19
[67] Bundle 12, page 635

examination of Dr Li revealed that on his site visit there was no tarnishing to the mirrors in the gym:

> *Q: there were no problems with the mirrors in the master dressing room*
>
> *A: when I was on site from December 3-6 I checked I didn't find any problems with the mirrors but I don't know if the other people found problems*
>
> *Q: when you checked mirrors in the gym in December you didn't find any problems.*
>
> *A: no problem*

[218] Counsel for the claimant decided he was not content with the clear answer of the witness but ventured further and elicited the following:

> *Q: did you visit in 2017*
> *A: yes I visited sometime in 2017 but I can't recall the exact time*
> *Q: on that visit you found no issue with mirrors in the gym*
> *A: I didn't check details when I visited in 2017 like mirrors but maybe the other people found some problems*

[219] The upshot is there were no defects to be remedied based on the evidence of Dr Li any tarnishing came about after that inspection.

Issue 7: Delay

[220] In the written contract under the heading *"Client Responsibility"* at item 1) it reads: *"Approval of payments of all vendors, decorators, general contractors bills etc. on a timely basis."*

[221] At item 3) it reads: *"the parties agreed that "Responsibility for ensuring that the sites are clear and available for sufficient time needed to complete all projects relating to those areas. Working time frames will be detailed by us to the client. Availability of the site for the completion of this work will be requested of the client."*

[222] Delay is raised as a breach of contract by the defendants. The court views this issue against the backdrop of the evidence of delays in approvals and payments on their part.

While the evidence is clear that Susan Williams referred in many emails to the need to move quickly, the project could not be completed as she had hoped as a result of the defendants' persistent refusal to communicate and to approve the many invoices submitted to them. The numerous emails sent by Susan Williams to Dr Li asking for approvals is proof of this.

[223] In the evidence in chief of Susan Williams, in amplification of paragraph 8 of her witness statement, she said*:*

> *"the wish for the project was for the work to be completed as early as possible, the owners were always anxious to ensure completion as there was an upcoming season. A wish date was for the end of September it was clearly documented to the owners and Dr Li delays created by a lack of payments, approvals, weather conditions, additional work that they the owners approved by Dr Li. I don't think I ever received a direct email, it was all via Dr Li on their behalf. As additional work was suggested, described and agreed by Dr Li it was shown that the desired completion time of September could not be met, further work was agreed in October and there was an ongoing process as happens with design and construction it is a collaboration between all parties to achieve solutions, to achieve better results and to agree on new areas that owners wished completed. Delays were created by a lack of changing of minds by the owners as to what they wished to do and did not wish to do, when a scope was agreed it was then reduced so they could achieve a quotation. Once we verified their wishes we moved forward."*

[224] In the evidence of Dr Li at paragraph 15 he said *"This deadline for completion of the Works was* ***later agreed to be extended to the end of October 2016*** *due to variations and other considerations. This is reflected in emails, such as Ms Williams' email to me on 23rd October 2016. The parties did not agree any change to this firm deadline which was not merely aspirational but was critical so that the Villa would be available for rental in the busy winter tourist season which annually runs from 15th December to 30th April*

with lead time for marketing and bookings and preparatory activities for receiving guests."

[225] In cross examination of Susan Williams, there was the following exchange:

> *"Q: when in your opinion was the work practically completed*
> *A: There were various phases agreed, the initial phase 1 was practically completed by the end of October*
> *…*
> *[Refer to Bundle 4, page 87 and para 15]*
> *Q:When was the deadline agreed to be extended to October 2016.68*
> *A: End of October"*

[226] There was evidence of the suspension of the work and wet weather which were also contributing factors to the delay.

[227] After Dr Li had visited the villa on December 3, 2016, and seen first-hand the work that had been done, he had been pressed in several emails both before and after his visit to ensure approvals were made and funds were on hand for three containers which needed to be cleared and had been at the port for almost a month.

> "*From: Sue Williams*
>
> *Date: Tue, Mar 7, 2017 at 1:18 PM*
> *Subject: Fwd: Create Abundance*
> *To: Yang Pan, morgan*
>
> *Cc: nicholas wates, David Barber, Patricia Henry*
> *Dear Doria and Morgan,*
> *This request has been with you since January - your urgent attention is requested - these items are at high risk now with customs removing them to the auction house.*
> *Thank you as ever*
> *Sue"*

[228] When the funds finally arrived, the sum fell short of the amount required to clear all three containers.[69] This was communicated to Dr Li who offered to pay the sum by credit

[68] Witness statement of Dr Li
[69] Email dated December 19, 2016, Bundle 12 pages 199-201

card; this was not an acceptable method of payment to the customs broker. Tryall Club itself paid for two of the three containers.

[229] A further glaring example of delay is the fact that not only were the defendants failing to pay on time, they were also failing to pay for goods supplied for the project. In so doing, the suppliers were out of pocket as was explained by one supplier, Julian Benson of Benson Lights, whose lighting design for the villa was installed and whose invoices were dated November 26, 2016.[70] As at Jan 23, February 6, and March 6, 2017, the invoices had not been paid for and emails were sent to Susan Williams by Julian Benson to this effect. He indicated that interest would be added to the charges.

[230] The view I have formed from the correspondence on this issue is that the defendants failed to appreciate the need to give due regard to the high standard of quality set by Tryall of which the villa they owned was expected to conform. The delayed approvals and payments demonstrated this. The property which the defendants knew and have submitted was a renowned luxury venue, was being put to great inconvenience by the conduct of the defendants.

> *"David Barber Mon, Feb 27, 2017 at 1:54 PM*
>
> *To: "Sue Williams*
>
> *Dear Sue*
>
> *I have sent a strongly worded but polite email to Dr. Li insisting that the invoices be settled this week. I also alluded to the fact that their debt is delaying agreed work at other villas at Tryall."*

[231] There is evidence that Tryall Club also had to advance money for the renovation work. The failure to fund the approvals naturally led to the work being delayed. It could not have been pleasant for other property owners/occupiers to endure the ongoing construction. In many of the emails, Susan Williams stopped just short of begging for funds to be sent for the renovation to continue. Further, a dispute about the sums to be paid on an invoice does not explain the failure to indicate a disagreement about that

[70] Bundle 9, pages 111-116

sum until months after the invoice has been submitted. It is with this conduct plain on the evidence that the defendants submit that this issue should be decided in their favour.

[232] In an email from David Barber to Susan Williams as early as September 12, 2016 he advised her to let him know if she "*struggled to hear back from Dr Li*." He again referred to another prolonged hold up in respect of funds being sent to the Tryall account in an email with Susan Williams on November 1, 2016. On November 14, 2016, Mr Barber cited anxiety at clearing the invoice submitted by Mr Daley. It was not until November 16, 2016 that the first claimant was able to confirm two credit cards from the owners then on record for payments being purchased for the villa.

[233] On November 21, 2016, David Barber wrote to Susan Williams stating that Tryall was unable to pay for containers on the wharf which contained items of furnishing for the villa with guests arriving "this Sunday."

[234] This pattern of delayed transfers continued with an email from David Barber directly to Dr Li regarding payment for the customs broker and enquiring when invoices submitted would be paid given that Dr Li was requesting an advance from Tryall to cover invoices if there was not enough in the account. Dr Li visited the villa between December 3 and 6, 2016 and guests were in residence for Christmas day of the same year.

[235] In the face of this evidence from David Barber who was an independent third party, it could not be said that the claimants were responsible for delaying the project, particularly as it was an express term of the contract that the defendants were responsible for "approval of payments of all vendors, decorators, general contractors etc. on a timely basis."

> *"From: David Barber Sent: 13 December, 2016*
>
> *To: Susan Williams*
>
> *Subject: Morgan Li*
>
> *Dear Sue*

I replied to him —we have advanced so much already that any more is not possible. I asked him to tell Mr. Guo to expedite the wire and that we will treat the containers as a priority given the imminent booking. As soon as it is on the account I shall let you know."

[236] The transfer to pay for customs did not cover all three containers despite the invoice for three containers being sent to Dr Li. Tryall could not cover these, a wire transfer was promised but did not come in. Dr Li was alerted to this fact and he was sent various emails, nevertheless, a response from him did not come until December 19, 2016 when he asked whether customs fees could be charged to Mr Guo's credit card on record.

[237] Variations in the scope of work, particularly the work of Mr Daley was also a factor which contributed to delay in the completion of the villa. The defendants have not accounted for this in their evidence. They submit that the project was to be completed by the end of October in order to benefit from the upcoming winter tourist season. This submission is not one which I will accept based on the foregoing review of the correspondence under this head.

[238] In my view, and I so find, that the delay in the completion of the villa was largely due to the failure of the defendants and Dr Li to communicate with the first claimant, with Tryall Club and to approve invoices submitted by the first claimant for payment.

Issue 8: Whether the defendants were overcharged

[239] The defendants' contention under this head was regarded by the court as being the cost of increases in the cost of the project over and above the original contract price. At the trial no supporting oral or documentary proof was forthcoming to advance this issue. This issue requires strict proof of any particulars of special damages pleaded and it fails for lack of sufficiency of proof. (see dictum of Lord Goddard, C.J. in **Bonham-Carter v. Hyde Park Hotels Ltd** [1948] T.L.R. 177).

Variations in the work

[240] In determining the issues arising in respect of the several items alleged in the claim and traversed in the defence, and the facts found in relation to variations from the original

written agreement, I find that as there was no specific provision in the written agreement for alterations, additions, or omissions from the contract, the first claimant was under no obligation to make any of them. The defendants could only recover payment to the extent that they adduced evidence to show that the work was extra, falling outside the oral contract with Mr Daley and was not expressly or impliedly included in the work contracted for or necessary for its completion. Mr Daley would also have to show that it was not his own voluntary actions which led to his performing the additional work but in fact was work authorized or ratified by the owner for which there was consideration.

Issue 9: Unjust Enrichment or Contract

[241] The general rule is that a court will uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy, which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation. Compensation for unjust enrichment for the claimants' services is calculated by reference to the value of the services (generally at the date of their receipt), which may or may not be the same as the contractual rate.

[242] The principle of unjust enrichment requires:

1) That the defendant has been "enriched by the receipt of a "benefit."

2) That this enrichment is at the expense of the claimant.

3) That the retention of the enrichment is "unjust."

[243] In the case of rendering services, as opposed to the payment of money, "the identity and value of the resulting benefit to the recipient may be debatable.[71] Services may take many forms and while some result in an indirect accretion to the defendant's wealth,

[71] B.P. Exploration Co (Libya) Ltd v Hunt (No 2) [1979] 1 W.L.R. 783 at 799

for instance by improving his property, other "pure" services do not. There are cases which treat the services by themselves as a benefit.[72]

[244] There is also authority that treats a service as beneficial where it results in an "incontrovertible benefit" to the defendant.[73] In **Sherrie Grant v Charles McLaughlin and Collin Smith**, Morrison P stated:

> *"[32] The claim for restitution based on unjust enrichment is made at common law and is similar in status to that of a claim for monies had and received (see Lipkin Gorman (a firm) v Karpnale Ltd [1991] 2 AC 548, [1992] 4 All ER 512). The learned editors of Halsbury's Laws of England Vol 88 (2012) at paragraph 401 explain the roots of the principle: "The path to recognition. The law of restitution is that part of the law which is concerned with reversing a defendant's unjust enrichment at the claimant's expense. English law was slow to recognise the existence of an independent law of restitution. For many years the rules which today are recognised as component parts of the law of restitution were either labelled as quasi contract, and thus treated as an appendage of the law of contract, or they were scattered around the textbooks on equity. This was to change in 1991 when the House of Lords stated [in Lipkin Gorman (a firm) v Karpnale Ltd] that the law of restitution was not based upon implied contract and recognised the existence of an independent law of restitution based upon the principle that unjust enrichments must be reversed. The independence of the law of restitution and its foundation in the principle that unjust enrichment must be reversed is now clearly established and has been repeatedly affirmed in the appellate courts. The need to distinguish clearly between the law of contract and the law of restitution has been affirmed by the judiciary." The Caribbean Court of Justice in SM Jaleel & Co Ltd and another v Co-operative Republic of Guyana (2017) 91 WIR 276 impliedly recognised the common law nature of the claim for*

[72] William Lacey (Hounslow) Ltd v Davis [1957] 1 W.L.R. 932; Sabemo v n. Sydney M.C. [1977] 2 N.S.W.L.R. 880
[73] Craven-Ellis v Canons Ltd [1936] 2 K.B. 403; Greenwood v Bennett [1973] 1 Q.B. 195, 202; Procter & Gamble Corp v Peter Cremer GmbH & Co. [1988] 33 All E.R. 843, 855-856; Re Berkeley Applegate Ltd. [1989] Ch.32, 50-51

unjust enrichment. The court said at paragraph [34] of its judgment: "…In these circumstances, Guyana appears to have no legal basis whatsoever for retaining any of the ultra vires tax collected by it from the Claimants, affirmative answers having been given to the standard common law unjust enrichment questions: Was the defendant enriched? Was this at the expense of the claimants? Was the defendant's enrichment unjust?..." (Emphasis supplied)

[33] As a further indication that the claim is one founded on common law principles, it is important to note that the general view, derived from both academic writings and case law, is that claims for unjust enrichment should be subject to a limitation defence. That would not be a defence available to a claim in equity..."

[245] In relation to "an unjust enrichment claim" at paragraph 525, the learned authors of Halsbury's Laws of England, Volume 88, state:

"Where work has been done and it is necessary to ascertain the rights and obligations of the parties, the party who has done the work may be able to bring an unjust enrichment claim against the recipient. In order to do so, the claimant must show that the defendant was enriched at the claimant's expense as a result of the work which has been done.

[246] The third to seventh claimants are in a distinct position from that of the first and second claimants. The test appears to be whether there is a sufficiently close causal connection between the detriment to these claimants and the gain to the defendants. The presence of injustice is a separate consideration.

[247] In order to resolve this issue, a determination of the surrounding circumstances is necessary. The main surrounding circumstance, in my view, is that the second and third defendants were at all material times the owners of the villa and that the first claimant dealt with them either in this knowledge or on the correct assumption that this was so. The consequence of this is that as owners of the villa the second and third defendants had a personal interest in the project in addition to their interest as directors of the

company, in that, the effect of the renovation work was to preserve and improve their own property.

[248] In terms of causation, on the one hand, the second and third defendant's enrichment can be said to have been at the expense of the claimants, for it was they who provided the services which benefited the second and third defendants and for which they expected to be paid, but claim they have not been paid.

[249] On the other hand, the services provided by the claimants were solely pursuant to a contract between the first and second claimants and the second and third defendants and the eighth claimant and the second and third defendants. I make the following findings on this issue:

1) First, the second and third defendants accepted no benefit at the expense of the third to seventh claimants which it would be unconscionable to retain. The second and third defendants made a contract with the first and second claimants which either has been fully performed by both sides or has not.

2) The first and second claimants made an arrangement or agreement with the third to seventh claimants which they have either fully performed or they have not.

3) If the contract between the first and second claimants and the second and third defendants has not been fully performed because all that is owed by one party to the other has not been paid, that is a matter between the parties to the relevant agreement.

4) A failure of performance of either agreement is no reason to conclude that the third to seventh claimants should then have some claim against the second and third defendants, parties with whom the third to seventh claimants have no contract.

5) The third to seventh claimants had no dealings with the second and third defendants, therefore the third to seventh claimants have no claim against the

second and third defendants for the price of any work and labour they performed or for any money that they may have paid in relation to the construction.

6) The third to seventh claimants have no such claim because it can point to no evidence that the second and third defendants directed them to do any work or to expend any of the money that the third to seventh claimants spent.

7) Reference to whether the second and third defendants 'accepted' any work that the third to seventh claimants did or 'accepted' the benefit of any money they expended is irrelevant. It is irrelevant because it diverts attention from the essential legal relationships between the four parties: the second and third defendants, the first and second claimants, the eighth claimant and the third to seventh claimants.

8) To now impose on the second and third defendants an obligation to pay the third to seventh claimants would constitute a material alteration of the bargains that the various parties struck and of the rights and obligations which each party thus assumed. There is no basis for doing that.

[250] The claim for unjust enrichment fails, it is the contract to which the claimants must look for a remedy.

Issue 10: Whether there was an acknowledgement of debt by the defendants

[251] This issue has to be pleaded in the claim or reply. The claimants plead in their further amended particulars of claim at paragraph 29, that Ms. Doria Pan acknowledged the outstanding debts by way of an email dated June 26, 2017, to the first claimant when she said that a transfer would be made so that payments could be received by the respective claimants.

"From: Doria Pan
Date: Mon, Jun 26, 2017 at 3:12 PM
Subject: Re: FW: Create Abundance Outstanding Invoice
To: Sue Williams

Hi Sue,
I contacted Tryall Club to see if they can do a quick transfer, will get back to you soon. Thanks so much,

Doria

Fwd: FW: Create Abundance Outstanding invoice

Sue Williams Mon, Jun 26, 2017 at 7:17 P

To: Yana Pan

Cc: morgan li, zhanghanwen, David Barber, Patricia Henry, Aram Zerunian, Wayne Silvera

Dear Doria,

We thank you for this immediate and positive response.

We include Tryall in our response to your email herewith, confirming our understanding that all invoices attached have been approved in full and that Tryall have the homeowners authorisation to make full payments of these invoices from the Create Abundance Tryall account.

If this is NOT the case, I ask you to clarify.

We look forward to ensuring that Mr Daley completes the items for his attention that remain outstanding and note that this will take place upon his receipt of the payment he has requested...this leaves a balance on account of US$10,000.00 payable when all is fully and satisfactorily completed by his team.

Once again Doria, we thank you for this positive response, and ask Tryall to now act upon it and make all payments noted' in the shortest order.

Sincerely Sue Williams"

[252] The defendants submit that Doria Pan is not a contracting party and had no authority to approve invoices. However, Susan Williams asked for clarification, from which I can draw the reasonable inference that she was seeking confirmation whether the invoices which had been submitted in the usual manner had been approved for payment in full as this was required by Tryall.

[253] The witness statement of Doria Pan states:

"11. In an email to me dated 26th June 2016 Ms Williams enquired of payment of invoices from Claimants. I replied that day stating, "I contacted Tryall to see if they can do a quick transfer, will get back to you soon" which was by no manner of means an acknowledgement that the sums in the invoices were due or payable. In fact, precisely because I did not so acknowledge, on the same day Ms Williams sent to me an email asking me to clarify whether or not my said reply meant that all the invoices had been approved.

12. I can therefore confirm categorically that I made no such acknowledgment and gave no such approval. My only reasons for sending that email was to inform Ms Williams that I had contacted The Tryall Club, which I had done, to see if the Tryall Club would be able to do a funds transfer which would later be requested if and when the invoices were approved which approval I was awaiting from the Owner through the Directors and has never been received.

13. Having never received the approval of the Owner through the Directors in respect of those invoices or their payment, I would not have and so did not communicate in any way any acknowledgement as alleged or at all by the Claimants in respect of any sums they claim in these proceedings, and which remain disputed."

[254] On this issue, I tend to agree with the claimants. The inference the claimants are asking the court to draw is based on the course of dealing established on the evidence which was that the second and third defendants had to approve the invoices submitted to Dr Li. Doria Pan herself had to rely on the same approval process.

[255] It seems to me that what is being called a debt by the claimants in those emails between Ms Pan and Ms Williams refers to invoices which had been submitted for approval to the owners. Approval from the owners to Tryall was needed as usual before funds would be released.

[256] The course of payments through the Tryall account has been established on the evidence, Susan Williams could not compel approval from the owners on Tryall's behalf.

Susan Williams was not a party to any agreement between the owners and Tryall. The owners had to specifically approve the release of funds from Tryall by separate written authorizations. Doria Pan was the accountant; she was not merely an interpreter as was Dr Li. She spoke English well and did not require an interpreter at trial. She could have said that she needed the owner's approval however she did not, rather she spoke to an action she had already taken which was that she had already contacted Tryall to ask for the release of funds from the owners' Tryall account. The reasonable inference is that she had obtained the necessary authorization before she contacted Tryall. The actions of Doria Pan buttress the assertion that there was an acknowledgement of debt by the defendants.

Issue 11: Whether the defendants breached their contract with the eighth claimant

[257] The court has made a finding that there were two contracts in existence. The first was written and the second with the eighth claimant was oral. The scope of work in the oral contract was varied by the second and third defendants.

[258] The eighth claimant took on the project with cracks in the walls of the building. He was informed on May 7, 2016 after a walk through with the first claimant on May 3, 2016 that the defendants wished to suspend some of the work discussed at the initial meeting as there were concerns about cracks in the walls of the building. There was no engineer's report during the entire project regarding the extent of the cracks though the first claimant had recommended this.

[259] After the walk through, Mr Daley was informed by the first claimant that the defendants wanted to focus on painting the interior and exterior of the villa, to fix the roof, however the nature and extent of the work evolved as they went along. This was the invoice prepared by Mr Daley:

May 13, 2016 *Estimate for work to be done at Create Abundance Villa Tryall* *Shingle roof*	
Removed shingle and installed taper-sawn 5/8" ties shakes *22438sf @ 10*	*$ 224,380.00*

Hip and valley 956' @ 17	*$ 16,252.00*
Capping 253' @ 15	*$ 3,795.00*
Removed lath at open roof, installed t & g carking and new lathing 5513 sf @ 5	*$ 27,565.00*
Valley gutter bed 160' @ 7	*$1,120.00*
Replace membrane roof	*$3,420.00*
Repair eaves guttering	*$850.00*
Painting to area of roofs	*$5,660.00*
Total	*$ 283,042.00US*
Floor at first floor	
Removed tile and setting material cart-away	*$5,051.00*
Joycing (sic) and sub floor 1968sf @ 6.60	*$12,988.80*
Parquet floor include baseboard 2829sf	*$50,264.00*
Finish 315sy	*$4,595.00*
Allowed for cutting doors and raise lintels	*$3,500.00*
Grand Total	***$359,440.801.15***

[260] Additions were made to the identified work and Mr Daley sent additional estimates and invoices. The following estimates were approved: that of May 24, 2016 sent to Dr Li by email on May 30, 2016; estimate of June 18, 2016 approved by Dr Li in an email dated June 18, 2016; estimate of August 16, approved on August 23, 2016; estimate of October 19 & 20, 2016 approved on October 26, 2016.

Estimate dated May 24, 2016	
Swimming pool	$ 40,189.00US
Game room	$ 23,354.00
Bar area	$ 1,445.00
Back Bedroom	$2,025.00
A/C	$ 23,205.00
Laundry area at staff building	$ 31,379.00
Paint building	$ 65,158.00
Paint (exterior main building)	$ 45,925.00
Paint (staff building)	$ 14,669.00

[261] Throughout the engagement, the following estimates/invoices were prepared, sent and approved by the Defendants:

1) Estimate dated May 13, 2016 — For work to be done on Shingle Roof and Floor at the first Floor.

2) Estimate dated May 24, 2016 — For work to be done on swimming pool, game room, bar area, back bedroom, removal and replacement of A/C units, laundry area at staff building, painting of interior of building, painting of exterior of main building, painting of staff building.

3) Estimate dated June 9, 2016 — For work to be done on the game room and exterior and driveway

4) Estimate dated June 15, 2016 — For work to be done on the powder room, 2 bathrooms and the stairs.

5) Estimate dated June 16, 2016 — For work to be done on electrical in main building.

6) Estimate dated August 16, 2016 — For work to be done to in the alteration to the garage for gym, main entrance gable, entry of previous laundry, veranda gable, waterfall and landscape and proposed pool bar.

7) Estimate dated September 21, 2016- For electrical corrections at main and sub-panels.

8) Estimate dated October 19, 2016 — For electrical corrections at main and sub-panels, additional work miscellaneous on entrance Patio, storm water drain, interior stair area, entry way between old laundry, entry way between old laundry, drying area, waterfall excavation, making of pond, dimmer light switch and fan switch.

9) Bill dated October 19, 2016 — For work done at Create Abundance, work done on water tank and deduction for work not done on living room flooring, game room, living room carving to doors and roof laths.

10) Bill dated October 20, 2016.

11) Bill dated December 5, 2016 — For extra work at Create Abundance, work done on general area and electrical work

12) Bill dated December 5, 2016 — For work in progress at Create Abundance Villa, less work not done and amounts paid up to December 5, 2016 and including bill for extra work dated December 5, 2016.

13) Bill dated January 24, 2017 — For additional work at Create Abundance

14) Bill dated January 24, 2017 — For work in progress at Create Abundance Villa as per estimates dated June 16, 2016, estimate dated August 16, 2016, estimate dated October 19, 2016, Bill dated October 20, 2016, bill for extra work dated December 5, 2016 and bill dated January 24, 2017 less amounts for work not done and amount paid up to January 24, 2017.

[262] Additions to the work of the eighth claimant included the floor on the first floor; the swimming pool, game room, bar area, back bedroom, removal and replacement of A/C units, laundry area at staff building, painting staff building, powder room, two bathrooms, stairs, electrical work in main building, alteration of the garage to a gym, main entrance gable, entry of previous laundry, veranda gable, waterfall and landscaping, proposed pool bar, electrical corrections at main and sub panels, entrance patio, storm water drain, interior stair area, entry way between old laundry, drying area, waterfall excavation, create pond, dimmer light and fan switch, water tank, living room carving of doors and roof lathes.

[263] Work done in good faith at the instruction of the defendants was done as set out in the estimates of December 5, 2016 and January 24, 2017 and the eighth claimant claimed payment for invoices submitted for work done as per those estimates. Neither party to the oral agreement set any terms for additional work. The pricing was agreed by way of estimates from Mr Daley, no time frame was established for each of the variations or cumulatively how that would affect the project. The agreement was that the work would be carried out and then invoiced. This was established on the evidence. The invoices

were approved and payment was to flow to the Tryall account for Mr Daley as was the course of business. He said in his witness statement:

> *"That the construction work that the eighth Claimant was originally contracted to perform were completed long before October 2016. The additionally[sic] works which the eighth Claimant was asked to perform and which it provided quotation for was substantially completed December 2016. In fact, the property was taken over by the Tryall Management and I am aware that the property has been successfully rented by the Tryall Management several times with positive reviews from guests. On August 23, 2021, I conducted a search on the TripAdvisor website for reviews of Create Abundance at the Tryall Club and almost all the reviews were five-star reviews. I printed the reviews and will rely on them at the trial of the matter herein."*[74]

[264] This evidence was not challenged in cross-examination. The additional work constituted a material change to the original contract with Susan Williams and to the oral agreement with the eighth claimant.

[265] The evidence of Mr Daley in his witness statement[75] was:

> *"During the course of the project, there were however several delays to the work to be done as a result of bad weather such as the passage of Hurricane Matthew and delayed payments on the part of the Defendants. These delays compounded with the change in scope and extent of work resulted in the desired date, referred to above, not being met. However, the eighth Claimant invested a great deal of time and effort and was able to successfully complete the majority of the works in December 2016."*
>
> *The eighth Claimant did all the work done as outlined in the estimates and bills identified above, save and except work valuing approximately US$45,209.00 which was not done because the eighth Claimant was instructed that these works*

[74] Bundle 4, page 18
[75] Bundle 4, page 18 paras 12-14

should be delayed to another phase of the project. The value of the work not done was deducted from the original invoices and the amount claimed by the eighth Claimant does not include the value of the work not done. The work not done are(sic) as follows:

Living room flooring. Game room, Cut opening at exist bay window to new height, Provide French window, Living room carving to doors, Roof lathes and install sarking, The work not done is reflected in the eighth Claimant's bill for work done at Create Abundance dated October 20, 2016 which shows that the work not done is to be deducted from the amounts being claimed."

[266] These additions affected and were a factor in the delay alleged by the defendants. Given that there was no challenge by the defendants as to how the additional work would affect any timeframe said to have been agreed between the parties, the court finds that the evidence of Mr Daley is cogent on this point and the court relies on it to find on the issue of delay as well as whether time was of the essence.

[267] Both Susan Williams and Mr Daley gave evidence of being denied access to the villa which resulted in their being unable to complete the work. This was denied by Dr Li and Marlon Campbell.

[268] The difficulty here is that some of the items on the list were not supplied by Mr Daley, others are not defects and others were not within the scope of work nor the additional work. There was no agreed timeline for the completion or the provision of additional supplies with which to address the defects or to finish the incomplete parts of the project. There was no pricing or cost for repairing the defective items listed at the time.

[269] In the cross-examination of Susan Williams, she said the claimants had permission in February and a short time in Jan to do some minor work as no work is allowed by Tryall during the high season. After high season, there were corrections to the work which were listed on a punch list and February 2017 was the last time the claimants were allowed access to the villa.

Defective Work

[270] In relation to the claim by the defendants for breach of contract and the duty of care for defective work, the second and third defendants are liable to pay the invoices supplied however, they 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.

[271] The first claimant in an email to Dr Li on February 15, 2017:

> *"A great deal of work was completed prior to the arrival of your guests at Create Abundance. However due to time constraints, some areas of refinishing and completion were not fully addressed. We attach herewith a punch listing of items that remain in need of attention, these the team will return to complete as soon as occupancy allows. This listing was compiled during a walk through with Marlond."*

[272] The court finds that incomplete work is not the same as defective work.

[273] In Keating on Building Contracts it states:

> *"The works carried out by a contractor in the typical sense involves estimating the cost of works on the basis of the amount of work and materials shown on the plans, specifications of documents. When the employer notifies the contractor of his unqualified acceptance then a binding contract comes into existence. The works are carried out by the contractor, and it is usual for interim payments of the contract sum to be made from time to time as the architect who is the supervisor certifies that work of a certain value has been carried out. Such payments are subject to the retention of a percentage of the value of the work carried out being held by way of security until completion of the work. After the completion of the works it is usual for the contractor to be under an express obligation to make good defects which appear during a certain period often termed the defects liability or "maintenance" period*.[76]

[274] Mr Daley's witness statement[77] details the walk through he did with the owners on December 6, 2016 I find that there were items of defective work on the list sent to him by Dr Li on December 7, 2016 after that walk through. It was his responsibility to remedy defects during the defects liability period. Mr Daley did not explain why after his walk-

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[77] paragraphs 17-21

through with Dr Li and the owners on December 6, 2016, having in hand a list of defects by December 7, 2016, he did not correct the defects before this alleged lock out.

[275] The second claimant created a punch list which was emailed to Marlon Campbell on December 12, 2016 and shared with Telford Daley. The evidence was that the guests stayed at the villa between December 25 to 31, 2016.[78]

[276] Dr Li and Marlon Campbell both deny locking out the claimants. However, Marlon Campbell explained that while guests are in residence, disruptive activities and work would not be carried out at the villa unless urgent and unavoidable:

> *"and so The Tryall Club and the Owner limited such activities by the Claimants during such specific periods."*

[277] The missing bit of evidence is the period of lock out attributable to the owners given the evidence that the owners did not lock the claimants out at all. The claimants could not work while guests were in residence and this constitutes a period of lock out for which the defendants provided no dates. I therefore reject the evidence from Dr Li and Marlon Campbell that the claimants were not locked out and find that they were as Susan Williams has said.

[278] While Mr Daley gave evidence that he was denied access to the villa and this was why he could not complete his work, there was no evidence from Mr Daley as to why he did not correct the defects on that list between the date the list was sent to him which was December 7, 2016 and the date he was denied access to the villa. The evidence from Susan Williams was that access was no longer granted to the villa after February 2017.

[279] On May 7, 2016, Dr Li wrote to Susan Williams stating that work regarding the redesigning of the villa was to be suspended. He said, the family was in the villa, and they had found cracks/fractures on the wall in the hall. They were concerned about the foundation of the villa. He requested a bill.[79]

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[78] Witness statement of Marlon Campbell, page 70, para 14
[79] Bundle 10, page 19

[280] On May 8, 2016, Susan Williams responded to Dr Li agreeing to pause the work and to await instructions. She advised that Mr Daley had assessed the cracks to be superficial, however the report from a structural engineer could be obtained should the family wish one.[80] They chose not to. Any defects arising from these cracks are not attributable to Mr Daley.

Quantum Meruit

[281] In Hudson's Building and Engineering Contracts,81 under the heading "Liability Apart From Contract," the learned author states:

> "*Quantum meruit is a right to be paid a reasonable remuneration for work done... True quantum meruit arises in a number of situations where for one reason or another no contract exists... They said at pages 62-63: "Very importantly, quantum meruit is also available as an alternative remedy to damages to a party who has done work before accepting a fundamental breach by the other as discharging the contract. This may be of great practical importance in building cases, since if the contract rates turn out to have been highly uneconomical a builder who is in a position to prove a fundamental breach by the employer and thus to treat the contract as at an end may find reasonable remuneration for the work done by him a considerably more valuable remedy than damages...."*

[282] The defendants had no contract with the third to seventh claimants. There was no term in the written contract for when and how sums would be payable for the work done, there was no provision for pricing variations or when sums payable on any variation were to be paid. There was no timeline for payment once an invoice was approved. The work was done in good faith that invoices submitted would be paid.

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[80] Bundle 10, page 19
[81] by Duncan Wallace 10th edn. at page 62

[283] The eighth claimant submitted estimates and had his deposit paid and invoices approved for initial work and additional work. The contract with him was altered and there was no agreement on specifics but that the work was to be done.

[284] In **Equillibrio**, the learned judge said:

> *"[43] The situation where a professional may commence working without there having been a contract is not that unusual. It is addressed in Wilmot-Smith on Construction Contracts, third edition follows:*
>
> *What happens when work is done and there is no contract*
>
> *1.64 Every request for work done (be it for work and materials or professional work by an architect or an engineer) will normally have implied within it a promise to pay for the work. So if an architect is asked to draw up plans and no agreement is made but the architect does so, then the request carries within it the implied promise to pay for the work, and the law will therefore require payment to be made if the work is done.*
>
> *1.65 This is a very common situation. If a builder is asked to do work in an emergency and no agreement is made, for example, then the builder will be entitled to payment. With professionals, like architects, engineers, or surveyors, the legal solution is the same. However, the situation is normally less likely to be prompted by an emergency and more likely to be brought about by inattention to the formalities of an agreement or indeed their essentials (particularly price). A surveyor may be asked to carry out work with no price mentioned in situations where the employer is not focused on the essentials of an agreement because the project is still in its infancy. In that situation the professional is entitled to be paid for the work done.*
>
> *1.66 Given that there is no contract price agreed, the law implies or infers that there is an obligation to pay a reasonable price for the work. This is frequently referred to (even though that Latin is unfashionable) as quantum meruit."*

[285] The claimants are entitled by law to be compensated on a quantum meruit basis for the completed work. This compensation flows from the estimates and invoices approved by Dr Li for the completed work.

Issue 12: Whether there was a proof of mitigation of loss on the part of the defendants

[286] The villa was rented which means it was being used for its intended purpose. The inference can be drawn that it was practically complete or complete to the satisfaction of the owners such that they would be prepared to show it and collect payment. Any incomplete work or defective work did not materially alter the use of the villa or detract from its ability to be income generating. While it has been argued by the defendants that the villa was rented to mitigate losses generated by the failure of the claimants to complete the work to standard and on time, the defendants' actions demonstrate that they accepted that the standard of quality must have been substantially met for it is undisputed that the first rental to guests was on December 25, 2016.

[287] Mitigation was not proven in evidence by rental figures or income earned. The remedying of defective work could not have taken place while the villa was rented. There is no evidence as to income on this issue and it fails for lack of proof.

THE COUNTERCLAIM

The Tort of Deceit

[288] In **Bevad Limited v Oman Limited** (unreported),[82] Harris, JA summarized the law as follows:

> *"…In Derry v Peek [1886-90] All E. R. 1 the locus classicus on the tort of deceit, Lord Herschell, speaking over a hundred years ago, stated that for an action to lie in the tort it must be shown that the statement was not only false but was*

[82] Court of Appeal, SCCA No. 133/2005; delivered July 18, 2008, at page 8

'made knowingly, or without belief in its truth, or recklessly, carelessly, whether it be true or false'…

Four principal elements of the tort must be established:

i. *There must be a false representation of fact. This may be by word or conduct.*

ii. *The representation must be made with the knowledge that it is false, that is, it must be wilfully false or made in the absence of belief in its truth. Derry v Peek (supra); Nocton v Lord Ashburton [1914-1915] All E.R. 45*

iii. *The false statement must be made with the intention that the claimant should act upon it causing him damage.*

iv. *However, it must be shown that the claimant acted upon the false statement and sustained damage in so doing. Derry v Peek (supra); Clarke v Dickson [1859] 6 C.B.N.S. 453; 35 Digest 18, 100."*

[289] The defendants have to adduce evidence to show that all four elements of the tort are made out. The claimants supply of wooden furniture and an oak floor which was not made out of mahogany as well as the failure to supply items which had been paid for constitute a false representation of fact. The evidence of intention was important in establishing this tort. The defendants have not adduced any evidence of intent on the part of the first claimant. This ground fails.

The Tort of Negligence

[290] The incomplete aspects of the work were not capable of being remedied due to the actions of the defendants in renting the villa which was itself a constructive locking out of the claimants. The defects in the work were to be remedied however this was impossible with guests in the villa or during high season at Tryall. The first and second claimants had a duty to supervise the project and to ensure its completion to the satisfaction of the defendants. This duty was made difficult to render with the non-

payment of invoices and bills for goods and services needed to complete the project and delay caused by the defendants. This ground fails.

Issue 13: Whether there was any loss caused to the owners

[291] Causation in contract, like tort, is governed by the sine qua non or 'but for' test. A party must establish that but for the breach of contract he/she would not have suffered the loss. To understand whether or not it can be said that but for the actions of the claimants, the defendant would not have suffered loss, it is important to examine the role of the Quantity Surveyor.

The Quantity Surveyors

[292] *The Quantity Surveyor …advises on the form and preparation of contract documents and contract administration, he measures the Architect's and Engineer's drawings to prepare the Bills of Quantities for the works envisaged which provide a common basis for tendering by contractors; and he undertakes all measurement and accounting procedures during the execution of the contract.*

[293] The evidence under this head is being adduced from expert reports of quantity surveyors who were not involved in the pre-construction or construction phases of the project.

The report of Trevor Morris, Quantity Surveyor

[294] In cross-examination, Trevor Morris said he followed a document which was not exhibited to his report, it was a list of defects not mentioned in his instruction letter from the claimants' counsel. He also said that in preparing his report he received instructions from Susan Williams, the project manager. He told the court that he had not provided a note of those oral instructions.

[295] The court cannot therefore place any weight upon this report which is not independent and the evidence of an expert who was not mindful of his paramount duty which is to the court.

The report of Markland Gordon, Chartered Quantity Surveyor

[296] The reports prepared by Mr Gordon were dated June 14, 2021 pursuant to two visits to the villa on August 27, 2020 and June 10, 2021. The defects he saw and listed in his report have not been identified by date.

[297] His visit to the villa was many years after 2016. I accept his evidence as he gave a fair and independent report of his inspection of the villa which he did without any of the parties present. He could not confirm whether water was seeping under the villa, he observed ponding in the driveway and parking area caused by incorrect levels or improper setting. He found that the cause was that there was no drainage course under the base or there was no perforated drainpipe.

[298] The master bedroom and bathroom floor is bouncy, squeaky and sunken because it was not screed and the floor was not level. The chandelier was rusting but as there were no detailed specifications for the type or quality, the contractor was at liberty to choose.

[299] The owners replaced the window mesh, he saw no invoice. The owners repainted the sliding doors, he saw no invoice. He saw no evidence of the leaking bathtub and face basin. He was given no specifications for the rusting bidet faucet.

[300] The side tables were not in his area of expertise. The sliding doors were on a track which could not accommodate their weight. The dining room floor was sunken and undulating because it was not screed. He saw no evidence of termites on the dining room chairs. He saw no drapery rods which were not level.

[301] Raw lumber and joints could be seen through cracks by the drapery rods due to poor workmanship. The owners replaced the pool lights, he could not say why the pool was leaking. He was not given design specifications for the pool. Mill work needed to be redone, the floor on the pool bar was rough and unfinished. The outdoor pool shower had a defective valve and the showerhead was rusting.

[302] The leak in the meeting room ceiling was repaired by the owners and the wall repainted, no invoices were shown to him. The lock on the meeting room door was of a poor quality

and darker than the handle. The floor in the meeting room was not screed it was squeaky, bouncy and sunken. The owners repaired parts of the floor the invoice for $60,000 was shown to him. This was a reasonable cost inn his opinion.

[303] In the gym, the lock on the door was of poor quality, the six mirrors were all tarnished from poor workmanship, the wall of the gym was “out of square” by reason of poor workmanship and there were cracks in the wall.

[304] The living room floor had a poor main entry door with a broken lock. The sliding doors rubbed together, due to poor workmanship. The AC was not working. He saw no evidence that the kitchen had paint stripping from the walls, the windows were not properly installed, and they had been sprayed by the owners, there was no invoice for that nor for the removal of the TV.

[305] In the Queen Room, cracks under the AC were caused by there not being enough support in the drywall to carry the weight of the AC unit. There were no latches on the windows. The leak from the top balcony was corrected for US$20,000 proof of which was not shown to him. The waterfall needed to be completely redone.

[306] The leaking roof had been repaired, no invoice was shown to him. He did not see numerous cracks in the wall. He saw no invoice for the alleged repairs of these cracks. The hole in the powder room was not filled out properly.

[307] Recessed lights were to be filled out; he could not speak to the quality of the lights as he was not given any specifications. The plug covers and switches were not defective. The shade was subjective and should have been specified. The leak in the laundry room is the result of a design flaw in the roof, the leak occurs at the juncture of two buildings. He saw no invoice for landscaping or termite treatment of the entire property. Many of the electrical units were not working, fans, lights, AC’s, and a water heater were defective.

[308] It is of note that he was not shown specifications for hurricane proof doors and neither doors nor windows are hurricane proof as well as no documentation was shown to him confirming that mahogany was to be used instead of oak for the floors.

[309] He was asked an open-ended question in cross-examination, whereupon the witness seized the opportunity to state:

> *Q:at time of your visit in August 2020 at lot would have changed at the villa*
>
> *A: a lot could have changed what I saw should not have caused the deterioration of the works that I saw*

[310] Mr Gordon was not asked about the figures in his reports. The court accepts the summary of corrective works indicated at a total of $19,259,094.28 and the recommended timeline of four months. I accept the timeline of Markland Gordon over that of Vidal Dowding as Mr Gordon took the report of Vidal Dowding into account when he gave the timeline of four months.

[311] In my view, the first claimant experienced delays in the supply of materials, and so, although work was to be completed by the end of October, 2016, actual completion could not have been effected. The first and eighth claimants testify that they were entitled to an extension of time for the completion of the work and they were given none. They also pleaded that there had been several additions to the work which had been duly carried out and proven on the evidence.

[312] In the view of the court, the work ought to have been measured, assessed, and quantified by a quantity surveyor on the project, who would have acted independently. As a consequence of the failure to assess the work, there was no final certificate issued or agreement as to completion. The claimants cannot dispute the evidence of Markland Gordon as it was the failing of the first claimant not to have engaged the services of a Quantity Surveyor on so large a project as this. The report is accepted as are the sums set out therein.

The report of Prem Lobo

[313] The report and evidence of Chartered Accountant and expert witness Prem Lobo[83] is accepted by the court. In cross examination he said that there was one booking over the Christmas period, December 2016. He was not shown documents for that period or before or after. He based his reports on the assumption that work should have been completed by end of October 2016 based on information from lawyers for the defendants.

[314] The evidence of Prem Lobo discloses that the villa was owner-occupied for three nights in November 2016 and thirteen nights in total of the 120-day period between November 2016 and February 2017. Dr Li also visited the villa from December 3 to 6, 2016. Mr Lobo said that the rental reports he examined indicated that the villa was fully returned to the rental market in its then existing condition from March 2017 onwards. Bookings were made either directly through Tryall Club or the owners themselves. Tryall Club had to be notified of all rentals and owner-stays to avoid double booking.[84]

[315] Mr Lobo said that the claim for pecuniary loss as the owners had to rent out the villa at a lower rate than it could have charged was not capable of quantification. This aspect of the defendant's case is therefore not proven.

[316] A period of four months has been accepted by the court as adequate to remedy the defects in the report of Markland Gordon. Prem Lobo has set out a figure of US$98,000 for potential remediation works for the four-month period when it is expected that the villa would be off the rental market and this is accepted.

Termination

[317] The defendants relied on further and better details of the work and specifications as set out in documents entitled "Create Abundance For Quotation to Achieve and Complete Estimated Cost and Budget" ("Quotation") and "Master Purchasing List" ("Master List".)

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[83] Bundle 15 page 164
[84] Bundle 15 pages 150-151

However, it was the list created by Dr Li after the walk through on December 6, 2016 with Mr Daley, the owners and Susan Williams which is important as that is the inspection date. In the email from Dr Li dated December 7, 2016 in the witness statement of Mr Daley at paras 17 - 21 and the first witness statement of Dr Li at paragraph 49, Dr Li sent a list of items he wanted repaired after the walk through. There was no suggestion put to either first or eighth claimant that the email from Dr Li constituted notice to the first and second claimants that payment would be withheld if these repairs were not completed. This position as to termination was pleaded but not proven by the defendants.

[318] The defendants further rely on the following paragraphs from the witness statement of the Head of House, Marlon Campbell. He cannot speak to many of the defects of which he complains, given that he was not qualified to do so. The court takes note of this.

[319] There has been no accounting by Mr Campbell for what dates these defects occurred, which ones were before or after the claimants began working on the villa, whether they were due to the presence of guests when the villa was rented or wear and tear. The claimants could not have been expected to remedy defects beyond a certain period, this period has not been identified in this witness' evidence.

[320] At paragraph 21, Dr Li said: *Before the works were commenced, I had asked Mr Campbell to identify to Ms Williams any areas of concern at the Villa in respect of items that he felt needed to be repaired or changed. He outlined those items in an email to Ms Williams on 29th April 2016. But Mr Campbell is not an expert in architecture, engineering, carpentry, construction, renovation, building design, wood science, or any similar fields.*

[321] The date of the email Marlon Campbell sent is April 29, 2017[85] even though both himself and Dr Li gave the date of the email as April 29, 2016, this was not so. The email sent by Marlon Campbell was almost one year after the work had begun and did not form part of the agreement between the first claimant and the defendants as it could not have

[85] Bundle 13, page 259

been given as the work had not yet commenced, contrary to what has been given in evidence. The table of corrective work done by the defendants is considerably shorter than the list in the evidence of Marlon Campbell. The evidence of Marlon Campbell as to the work done by the claimants is rejected. The evidence of payment for the work done can be summed up in this exchange with Dr Li in cross-examination.

> *Q: no payments made to any of claimant's in Dec 2016*
>
> *A: I didn't know whether suppliers got paid I only know that Susan Williams did not get the full amount, the payment for the whole project we didn't pay the full amount*

[322] In assessing the reliability of the evidence given by Dr Li, I find that he minimized the role that he played in the conduct of the defendants with regard to the completion of the renovation, he sought to expand the role of the company and to minimize the role of the second and third defendants. He emphasized the high standard of quality that the claimants failed to deliver while omitting altogether the failure to approve invoices and to transfer payments. He expanded the role of the first claimant in the delivery of the agreed renovation while contracting the role of the defendants as her client and their obligations. The evidence of Dr Li confirms that money is owed to the claimants.

[323] This is where the evidence of David Barber is crucial. Dr Li gives no explanation for not funding the Tryall account. The contract with Tryall Club is separate from the contract before the court. It was agreed that payments for the renovation project would flow through the Tryall Club account. This was known to all the parties including David Barber. The court finds that the evidence of Dr Li distancing himself and the defendants from the approvals and payments on the grounds of defective workmanship is simply the second and third defendants failing to perform their part of the contract.

Remedial Work

[324] Marlon Campbell said*: The defendants corrected the following:*

> *"Tiffany's Pest Control for J$23,000 on or about 17th March 2018 as reflected in their invoice numbered 0743;*

Tiffany's Pest Control for US$7,285.71 on or about 10th February 2021 as reflected in their invoice numbered 2136.

The Owner has also incurred expenses arising from termite infestation at the Villa, such as the labour and materials supplied by Mr Leo Riggon in or about third March 2021 for which he submitted itemised invoice(sic) paid by the Owner, acknowledged by my signature on it, for:

To remove termite infested crown molding in hallway: J$425,000.00;

To supply and install 196 running ft. crown molding: J$325,800.00;

To remove termite infested molding in bathroom: J$10,000.00;

To supply and install 96 running ft. molding in bathroom: J$76,800.00;

Remove old rotten jams(sic): J$25,000.00;

Build and install new jams(sic) in bedroom: J$124,000.00;

Supply and install 3 doors: J$150,000.00;

Supply and install French windows in bedroom: J$118,000.00;

Supply and install windows box with jalousie: J$185,000.00. 19. Other persons have carried out corrective works at the Villa, such as:

Courtney Kerr: J$8,000 to adjust 4 sliding doors, and J$2,500 to repair a kitchen door, confirmed in his invoice No. 0049265 paid by the Owner acknowledged by my signature on it;

Courtney Kerr: J$4,500 to adjust 3 doors, confirmed by his invoice No. 0049254 paid by the Owner and acknowledged by my signature on it;

Lee-Vaughn Williams: for US$20,930.00 for works in the Villa's lower northwest bedroom and lower northeast bedroom and elsewhere at the Villa, the details of

which are stated in his invoice dated fifth August 2019 and numbered 00002019003421 and paid by the Owner. This invoice was submitted direct to the Tryall Club management office, and so does not bear my signature.

Courtney Kerr: J$12,000 to re-shingle section of roof and J$10,000 to repair section of board of flooring, confirmed by his invoice No. 15 dated 2 October 2020 paid by the Owner and acknowledged by my signature on it.

[325] This remedial work was paid for by the owners as itemized. In addition, the owners spent a total of USD$20,930.00 on corrective and repair work in the lower northeast bedroom, on guttering and on the veranda for USD$20,930.00. The defendants also paid for repairs to the spa/pool lights USD$2,038.75, labour for pool/spa J$23,000.00 etc. Some of this work can be viewed as routine maintenance or considered the particular preferences of the owners and all items are disallowed, save $12,000 to re-shingle roof, $10,000 for floorboards.

[326] The evidence of Mr Daley has to be viewed against the evidence of remedial work identified in the experts reports of Markland Gordon, Chartered Quantity Surveyor and Vidal Dowding, Registered Architect both of which I accept.

[327] Markland Gordon called by the defendants indicated in his report that he did not receive invoices for some of the corrective work said to have been done by the owners of the villa, nor did he receive any document which confirmed that mahogany was to be used instead of oak.

[328] I note that the email of October 26, 2016 from Dr Li to Susan Williams approving a progress payment of $150,000.00 to Mr Daley (for his estimate of October 19, 2016) was met with a transfer of funds to Tryall in the sum of only USD$50,000.00 on November 4, 2016. This is against the backdrop of the completion date for the end of October 2016 as stated in the evidence of Dr Li. I recall here that the estimates being provided by Mr Daley were for a variation of the original scope of work.

[329] The estimate of October 19, 2016 was for electrical corrections at main and sub-panels, additional work on entrance patio, storm water drain, interior stair area, entry way between old laundry, entry way between old laundry, drying area, waterfall excavation, making of pond, dimmer light switch, and fan switch."

[330] There are instances for which no invoices were provided to the experts by the defendants for goods supplied or work done, such as, the evidence that the master bathroom had its robe hooks changed free of cost by the manufacturer, and the dining table was treated for termites free of charge by JN Restoration. The items claimed by the defendants are not all owed as is being asserted.

Pecuniary Loss

[331] The defendants instructed its expert accountant, Mr Prem Lobo, that the owners suffered financial loss as a result of the incomplete/defective renovation causing the rental of the villa at a lower rate than it could have charged. Mr Lobo stated that his report was limited in that he could not obtain information about this higher rental rate which could have been charged as asserted, he therefore could not quantify that loss. In addition, he was not provided with the rental figures for years prior to 2016. There was no indication to Mr Lobo what was defective work as distinct from what was incomplete work and as the court has stated above, incomplete work is distinct from defective work.

[332] The report of Mr Lobo which I accept calculated lost gross income accounting for the Christmas booking in 2016 at USD$99,000 and after deductions for variable expenses the lost profits during the delay period of November 2016 to February 2017 was US$73,000. Delay having been found to be the fault of the defendants, the claimants are not liable to pay this sum.

Issue 14: Whether time was of the essence of the agreement between the parties.

[333] In the witness statement of Dr Li [86], he said that it was agreed that time was of the essence and refers to emails from Susan Williams to him of May 15, 23, 30 and June 9, 2023.

[334] In Halsbury's Laws of England, 4th ed. Vol 9 (1974), para 481 it states:

> *"The modern law, in the case of contracts of all types may be summarized as follows. Time will not be considered to be of the essence unless: (1) the parties expressly stipulate that conditions as to time must be strictly complied with; or (2) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence."*

[335] Time was not stated to be of essence in the written contract, there was no provision for liquidated damages for failure to complete on time. There was no notice served by the defendants making time of the essence. Time is not usually of the essence in construction contracts which are subject to notorious delays, without express words in the contract. (See **Charles Rickards Ltd v Oppenheim**.)[87]

[336] In **Alval Limited v The Attorney General of Jamaica**,[88]Edwards, J (as she then was) set out the law on time in construction contracts. At paragraph 17 she said:

> 17 *Usually in construction contracts finishing late does not entitle the employer to dismiss but is a breach of warranty entitling him to damages. An exhaustive review of the authorities reveals that construction contracts are rarely determined for lateness. Damages are usually provided for in the contract calculated as a fixed sum for delay for each day, week or month. This is referred to as liquidated damages. For liquidated damages to be payable*

[86] Bundle 4 para 14
[87] (1950) 1 KB 616
[88] Claim No. 2004/HCV00380 (unrep) delivered October 28, 2011

there must be a fixed date for completion, that is, a definite date from which to act as a starting point in calculating the damages due.

18 *In cases where time has not been made of the essence of the contract, or where although time was originally of the essence of the contract, the time for completion has ceased to be applicable by reason of waiver or otherwise, the employer still has a right, by notice, to fix a reasonable date within which to require completion of the work and in such a case, if the contractor does not complete by that date, the employer may dismiss him. See Taylor v Brown (1839) 9 LJ CH 14; 2 Beav. 180; 48 E.R. 1149.*

19 *A fixed completion date does not necessarily make time of the essence unless the contract so states. The nature of the property and the surrounding circumstances would have to be considered. Time only becomes of the essence if express(sic) to be so, is made so by notice or where the nature of the contract or its subject matter implies that it is so.*

20 *If the completion date passes due to the act or default of the employer and no extension is given, the employer has no right to claim liquidated damages, as there would now be no new completion date. Time then becomes at large. This means that the time for completion must now be within a reasonable time or if notice is given; it must be completed within the time given in the notice.*

21 *In a contract in which time is of the essence and a party fails to perform it by the stipulated time, the innocent party has the right either to rescind the contract or treat it as subsisting. If the innocent party expressly or by conduct affirms the contract, it will continue but time will cease to be of the essence and will become at large. If the innocent party is the employer, the consequence of this is that it cannot claim liquidated damages under the contract unless there is an extension of time clause. If there is an extension clause, liquidated damages can be claimed from the new completion date after the extension is granted.*

22 *If no extension of time is granted the contractor is bound to complete by the completion date. If the date is passed and the employer fails to exercise the right to determine, then time is at large and the contractor is bound to complete within a reasonable time. Where time has ceased to be of the essence it can be restored by notice giving a new date for completion. Where time remains at large the contractor must complete within a reasonable time, otherwise the employer can sue for general damages for any loss sustained as a result of the delay but is not entitled to liquidated damages.*

23 *Where a reasonable time for completion becomes substituted for a time specified in the contract, in consequences of the specified time being no longer applicable, then in order to ascertain what is a reasonable time, the entire circumstances must be taken into consideration and not merely those existing at the time of the making of the contract. The question as to what is a reasonable time is one of fact. All the circumstances of the case should be taken into consideration, such as the nature of the works to perform, the proper use of customary appliances, and the time which a reasonable diligent contractor of the same class would take."*

[337] The evidence of Dr Li in his witness statement was this:

> *"16. During the disclosure process in these proceedings I have seen for the first time an email dated 11th November 2016 (disclosed by the Claimants) from Ms Williams to Rebecca Wates, Nicholas Wates, and Samantha Wates stating that "Our deadline is seriously now 27th November 2016." This purported new deadline beyond the end of October 2016 was never agreed by the Owner."*[89]

[338] What the evidence showed was a clear pattern of delayed approvals from Dr Li on behalf of the defendants coupled with the non-payment or delayed payment of invoices submitted to him. This pattern affected the funding of the account with the Tryall Club

[89] Bundle 4 page 88, para 16 witness statement of Dr Li

as well. This is evident from an email between David Barber and Susan Williams sent on 13 December 2016.

[339] The view I take of the evidence of Dr Li is that despite the invoices of the contractors and suppliers being sent to the defendants' urgent attention, he is unsure of what was actually paid. The owners allowed the invoices of the claimants to remain unpaid while simultaneously expecting the work to continue.

[340] A party cannot benefit from his own wrongdoing. The defendants cannot impose a breach of a time requirement when they have impeded any performance of it: (see Lord Denning in **Amalgamated Building Construction Limited v Waltham Holy Cross Urban District Council (1952) 2 All ER 452**.)

[341] There was no reasonable notice to complete given to the claimants nor any intention clearly stated to repudiate the contract. This was in addition to the defendants' request for additional work to be performed after they said the contract should have been performed and the work completed.

[342] In the witness statement of Kirk Chin he outlined additional work requested of him in December of 2016 at paragraph 3. There was no cross-examination on this point. This point was covered by Lord Denning in **Amalgamated**; he said there is an implied term in a contract by each party that neither will do anything to prevent the other from performing the contract or delaying him in the performance of it. This includes even legitimate conduct such as ordering extra work. The court will imply a duty to do whatever is necessary in order to enable a contract to be carried out.

[343] The court finds that there was no evidence on which to ground a finding that time was of the essence. The court also finds that the defendants breached the contract with the first and second claimants as well as the contract with Mr Daley by their failure to approve and pay for the goods supplied to them in a timely manner and/or at all.

Issue 15: Whether the Seventh Claimant is entitled to the damages claimed

[344] The seventh claimant claimed to have been contracted by the defendants to carry out interior renovation work, specifically, the interior design and decoration of the villa. Estimates for soft furnishings, drapery, bedspreads, and cushions were presented. The first claimant submitted estimate number 54 to the defendants dated August 4, 2016, via email dated August 31, 2016 for US$5,754.78 for work to be done and the cost of materials and transportation. The work was to make and carve a dressing table stool frame with staining, to make and carve a bed bench frame with staining, to make a table frame, to whitewash and seal same.

[345] Dr Li, approved estimate number 54 in an email dated August 31, 2016. The other items were provided with the modification being mahogany stained. This change was made so that the design-feel of the room reflected mahogany finishes. This work was captured in invoice number 41. The seventh claimant was guided by the first and second claimants who had received approval from Dr Li to make design decisions without referring to him. Design elements were changed from the estimate and reflected in the invoice.

[346] In an email dated September 9, 2016, the first claimant submitted estimate number 59 dated August 17, 2016, for drapes in the amount of US$18,826.05 and estimate number 61 dated September 6, 2016, for bedspreads and cushions in the amount of US11,479.91 to the defendants for their approval. The defendants dated September 19, 2016, through Dr Li approved the said estimates via email.

[347] Bedspreads with canopies with lining and Velcro, for four four poster king size beds were cut and stitched by the seventh claimant's team. Bedspreads were quilted and stitched, new pillow shams were inserted with wadding, polyfill and lined, zippers were added. Bolster covers were cut and stitched, throw cushion inserts were made.

[348] Cheque number 24697 for US$2,872.89 was paid to the seventh claimant as a deposit on invoice number 41. The balance of US$5,321.72 remains outstanding on invoice number 41. A deposit of US$14,491.44 was paid as a deposit on invoice number 42, the

balance outstanding is US$4,334.61. A deposit of US$9,758.62 was made on invoice number 43, the balance of US$1,721.29 remains outstanding.

[349] The total sum of US$10,581.70 remains outstanding on invoice number 44 and the total sum of US$9,119.39 remains outstanding on invoice number 50.

[350] The defendants have made a total payment of US$26,363.90 towards the invoices, the total unpaid balance is US$31,078.41 for work completed at the villa. Final invoices were submitted to the defendants for the completed work.

Issue 16: Whether the first claimant is liable for items not supplied by the claimants

[351] The first claimant is liable for items not supplied where there is evidence of payment. She was the project manager and was responsible for the submission of invoices and the delivery of goods sold to the owners.

Conclusion

[352] The first and second claimants' claim in damages for breach of contract in that their invoices were not paid. The court finds that the second and third defendants are liable in breach of contract for the sums claimed by the first and second claimant. In respect of the third to seventh claimants based on the course of dealing, the work done, and the invoices submitted. The sums are due and owing as claimed for each claimant to be compensated based on quantum meruit for the third to seventh claimants.

[353] The eighth claimant was not allowed to remedy defects and was not paid for sums quoted while additions to the work were agreed and completed. The eighth claimant is owed for work done based on the oral contract between himself and the second and third defendants.

[354] There was no evidence of termination of the contract by way of written notice, there was evidence of the presence of guests and evidence of Tryall not allowing construction during the high season. The claimants were both actually and constructively barred from

the villa, thereby the incomplete work could not be finished. As the defendants' claim arose out of the written contract, there is a proper basis for making the award to the claimants.

[355] In McGregor on Damages[90]offers the following guidance when assessing damages: -

> *"...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."*

[356] The defendants have not provided the court with the evidence required to assess damages as pleaded.

[357] The first, second and eighth claimant are liable in breach of contract for substituting the mahogany quoted. The defendants are entitled to damages for defective work. Given the principles of law governing claims and counter claims, the defendants are entitled to set off any sum awarded on the counter claim against that awarded to the claimants on the claim.

[358] The orders below reflect sums in United States dollars, the conversion ordered by the court is at the rate of J$127.00: US$1.00. The rate of interest claimed by each side is the rate which has been claimed by each side in their pleadings.

ORDERS:

[359] The court makes the following orders:

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[90] 16th edition, at paragraph 247

[360] The First Defendant

[361] The claim against the first defendant is dismissed with costs awarded to the first defendant to be agreed or taxed.

[362] The First and Second Claimants are awarded judgment on the claim and damages for breach of contract in the sums below:

a. The sum of US$176,877.61.

b. Balance outstanding US$159,338.42.[91]

c. Costs to be agreed or taxed.

d. Interest on outstanding invoices totalling US$4,434.20 at the rate of 3% per annum and continuing at the said rate until payment is made.

e. The sum of US$59,885.06 has been paid.

[363] The Third Claimant is awarded judgment on the claim and compensation in the sums below:

a. The sum of J$493,000.00.

b. Interest on outstanding invoices totalling J$26,175.92 at the rate of 3% per annum and continuing at the said rate until payment is made.

c. Costs to be agreed or taxed.

d. The sum of J$176,347.00 has been paid.

[364] The Fourth, Fifth and Sixth Claimants are awarded judgment on the claim and compensation in the sums below:

a. The sum of US$31,837.85.

b. Interest on outstanding invoices totalling US$1,199.70 at the rate of 3% per annumm and continuing at the said rate until payment is made.

c. Costs to be agreed or taxed.

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[91] Further amended particulars of claim

[365] The Seventh Claimant is awarded judgment on the claim and compensation in the sums below:

a. The sum of US$31,078.71.

b. Interest on outstanding invoices totalling US$872.41 at the rate of 3% per annum and continuing at the said rate until payment is made.

c. Costs to be agreed or taxed.

d. The sum of US$26,363.90 has been paid.

[366] The Eighth Claimant is awarded judgment on the claim and damages for breach of contract in the sums below:

a. The sum of US$172,416.90.

b. Interest on all outstanding invoices totalling US$4,406.87 at the rate of 3% per annum and continuing at the said rate until payment is made.

c. Costs to be agreed or taxed.

[367] The Second and Third Defendants:

a. The second and third defendants are awarded judgment on the counter-claim against the first and eighth claimants.

b. The second and third defendants are awarded damages in the sums of:

i. J$19,259,094.28 for remediation work with interest at the rate of 6% per annum and continuing until payment is made.

ii. US$98,000.00 for potential lost profits due to expected remediation work calculated at the rate of J$127.00: US$1.00.

c. The second and third defendants are entitled to set-off the awards made by the court against the sums awarded to the first and second claimants.

d. Costs to be agreed or taxed.