IN THE SUPREME COURT OF BELIZE, A.D. 2018

CLAIM NO. 306 of 2012

ALAN GRAHAM	**CLAIMANT**
AND	
THOMAS WEIRUM	**DEFENDANT**
(dba PRIME BUILDERS)	

BEFORE the Honourable Madam Justice Sonya Young

Decision
19.10.2018

Mr. Andrew Bennett for the Claimant
Mr. Kareem Musa for the Defendant

Keywords: Building Contract – Variation - Breach – Defective Work – Compliance with Building Codes - Delay – Time at Large – Misrepresentation – Quality of Work – Concurrent Liability in Tort – Negligence - Hedley Byrne Principle – Repudiation and Termination - Damages

JUDGMENT

1. This is an old matter. It was filed while the parties pursued resolution through arbitration as had been agreed in the building contract. For various reasons, which no longer hold importance, there was no arbitration hearing. The parties then, understandably frustrated, decided to have the Court determine the matter. This therefore was not an appeal or a case stated from

an arbitration for determination of a narrow question. It was highly complexed and the evidence was difficult to analyse. Accordingly, this judgment too has been inordinately delayed partly through the court's own inadvertence for which I humbly and profusely apologize to all involved. I pray that it does not cause the parties to feel they have thereby been denied justice.

2. Alan Graham, a retired photographer, decided to build his dream home on a slight slope on the scenic Coastal Road in the Belize District. He said he intended to construct an ultra-modern, three storey, concrete residence and so he retained a reputable architect and a structural engineer to prepare his plans. These were duly approved by the Belize Building Authority. He also had his electrical and other schematics professionally prepared. The building project was put to tender and bids were received and considered. The Defendant responded and was selected. A contract, (the Contract), which was not professionally drafted was executed between the parties and the dream home apparently morphed unceremoniously into Mr. Graham's nightmare.

3. Mr. Graham says that the parties agreed to make changes to the professionally prepared and the Central Building Authority (CBA) approved plans. These changes were expected to reduce the overall costs of the construction and were made on Mr. Weirum's advice, which he trusted implicitly. However, Mr. Weirum had misrepresented his qualifications, experience and expertise. He had also misrepresented the qualification of the plumber/electrician he engaged as well as that person's ability to meet code requirements. The result was works which neither ahdered to standard building regulation codes nor accorded with industry practices. Quality was

neither in compliance with the terms of the Contract nor the representations made.

4. According to Mr. Graham, the extremely poor workmanship was evident in the many structural, electrical and plumbing irregularities. Although he made repeated requests for these deficiencies to be rectified they were not addressed and the matter remained unresolved. Additionally, the location of the house was changed by agreement of the parties from that on the original plan. This required excavation which exposed a cliff side. Mr. Graham insisted that Mr. Weirum's failure to construct an obviously necessary retaining wall, as requested, caused the cliff side to collapse. This incurred an additional cost to restore and secure.

5. Further, Mr. Graham alleges that Mr. Weirum demanded payment outside the specific, contracted schedule. When he refused to pay, Mr. Weirum ceased to work leaving the house in an unfinished state. He, Mr. Graham then terminated the Contract. He subsequently secured reports relating to the inspection of the building, its electricals and plumbing. He now claims damages in excess of $1.5 million, not only for breach of contract and misrepresentation but also for professional negligence. As well as consequential damages for loss of use, discomfort and inconvenience and special damages in the amount of $65,500.00.

6. In his defence, Mr. Weirum states that the changes to the plan were made by Mr. Graham himself as he wished to cut cost and those changes were the genesis of Mr. Graham's problems.

7. He admits that he is a qualified and reputable building contractor with eighteen years experience in Belize. He agreed to construct the home in

accordance with the plans, but Mr. Graham changed those plans before he gave his final price and before they executed the Contract. He, therefore, constructed a home from plans which had not been revised by architects. He is steadfast that any changes to the original building plan were occasioned either by Mr. Graham's request or to enhance the construction.

8. Mr Weirum denied ever making any representation relating to the qualification of the electrician/plumber and maintains that all works were carried out in accordance with the building plan and that he, at all times, conducted himself with reasonable skill and care.

9. When specifically addressing the excavation and erosion of the cliff side, he explained that the erosion posed no threat to the structure. The retaining wall was never in the Contract and therefore did not fall within the scope of the Contract. Mr. Graham refused to pay for the construction of the retaining wall although he had informed him (Mr. Weirum) that he wanted it built and had asked him for estimates (which he had provided). Even when he, Mr. Weirum, offered to construct it at cost, Mr. Graham opted to pay another contractor instead.

10. Mr. Weirum acknowledges that there were some electrical pulls to be redone and repairs to be effected to the honey comb. He says he could have done all this before he closed up the ceiling on the first floor. There were also plumbing works which required completion. In his estimation, these were not serious or substantial structural defects, only minor repairs and unfinished works which could have been completed had he been paid the balance under the Contract and had Mr. Graham not terminated the Contract unlawfully.

11. He also lays part of the blame on the Grahams' premature move into the house before the completion date and Mr. Graham's refusal to make payments as they became due. He referred to the multitude of constant requests made daily by Mr. Graham and his wife which he tried to accommodate. He says all this delayed the process and disrupted the building schedule. Even so, it was only when he sought payment for the sundry additions and alterations he was making to the building, as per Mr. Graham's request, that Mr. Graham raised the issue of breach. Mr. Graham then refused to pay and he understood this to be his repudiation of the Contract so he felt himself no longer bound to complete. He stopped all works at the site.

12. He concluded that not only was the claim inflated, it was vexatious and ought to be dismissed. He then counter claimed for damages for breach of contract and special damages of $19,425 for work carried out which was not provided for in the Contract, but had been orally agreed.

Note:

13. Although Issue 1 is not distinct from Issue 2B the Court has decided to discuss it separately and in full because of its importance to the parties and the Belizean society in general. Due to the nature of the matter the Court has also found it more effective in certain instances to discuss issues relating to both the Claim and the Counter Claim together.

The Issues as the court finds them are:

On the Claim:

14. 1. Did the Defendant breach the Contract by

A. Failing to secure the excavated hillside from caving in.

B. Failing to complete construction within the time period stipulated by the Contract and

On the Counter Claim

Did the Claimant breach the Contract by causing delaying.

2. Was the Claimant entitled to terminate the Contract

A. As a result of the Defendant's refusal to perform services under the Contract and

On the Counter Claim:

Did the Claimant repudiate the Contract by refusing to pay the Defendant $55,000.00 for work completed.

and/or

B. As a result of the deficiencies in the construction

3. Did the Defendant make any misrepresentations to the Claimant to induce the Contract.

4. Was the Defendant liable in tort for negligently advising the Claimant to remove the ground beams save for the perimeter beams and reduce the thickness of the cistern floor.

On the Counter Claim:

5. Did the Claimant breach an oral contract made with the defendant for completion of additional works by failing to pay for the additional works.

Both the Claim and the Counter Claim

6. Other issues between the parties and what remedies, if any, are they entitled to.

1. Did the Defendant breach the Contract by

A. Failing to secure the excavation from caving in:

15. It is Mr. Graham's evidence that after the house had been repositioned (at his request and with Mr. Weirum's agreement), there was need for further excavation into the mountain side. This created a cliff face which needed shoring up. When Mr. Weirum had agreed to the position change he never spoke of or explained how the hillside was to be contained and Mr. Graham assumed he would attend to it as necessary. But he did not.

16. In December, 2009 when Mr. Graham considered the progression of the excavation process he enquired of Mr. Weirum how the hillside was to be stabilized. There was no response or shoring up and a month later the cliff face partially collapsed. He expected then that Mr. Weirum would secure the hillside so he mentioned a retaining wall to him by email that very January. He followed up with monthly reminders. The kitchen foundation and footings were eventually undermined dangerously. Mr. Weirum did nothing to mitigate their collapse. Eventually, Mr. Graham secured the collapsed hillside with an excavator at a cost of $3,500.00 and later had a retaining wall constructed by another contractor at a cost of Bz$36,807.13. He claims these sums as part of his special damages.

17. Mr. Graham says that Note 6:10 of the drawings supplied by Vividarch Co. Ltd which falls under the rubric 'Earthworks' is critical. It provides that: *"The contractor shall be responsible for securing all excavations with any necessary shoring to prevent caving-in. The contractor shall make good at his own expense any damage that may result from his failure to secure excavations from caving-in."* He adds that, by virtue of this note, Mr. Weirum was obligated to prevent a cave-in such as occurred with the cliff side. His failure to do so was a clear breach of

the Contract. He ought therefore to cover the cost of remedying ie the construction of the retaining wall.

18. Mr. Weirum, on the other hand, submits that the original drawings had no retaining wall. Mr. Graham's own expert witness, Carlton Young of the firm of Young's Engineering Consultancy Ltd. confirmed this at paragraph 3.1 of his report: *"The inspection team observed a large retaining wall along the back of the building, and which was not originally included in the building plans…"*

19. The scope of the Contract clearly did not contemplate such a construct. Further, the excavation was done because Mr. Graham wished to change the location of the house and Mr. Weirum had informed Mr. Graham that the repositioning may result in erosion. Mr. Weirum was of the view that Mr. Graham required the retaining wall as a preventative measure only. However, since no damage had been done to the building, there was nothing to remedy pursuant to the Contact. In short, the building of the retaining wall falls outside the four corners of the Contract and ought not to be his responsibility.

Discussion:

20. There is a written contract under consideration. It was not drafted by an attorney but by Mr. Weirum with amendments made by both parties before it was finally executed. Although badly drafted, it is the record of the agreement made between the parties. The presumption is that the written document includes all the terms. Although this strong presumption could be rebutted it is the Court which must determine and interpret those terms.

21. The Contract defines the scope of work by reference to certain documents. In its first and second paragraphs it is stated: *"As per plans submitted by your*

architect and engineer, with accompanying notes provided by you. Drawings supplied by Vividarch Co. Ltd. With the following pages CP, C-1, C-1, A 1-15, F1-6, S1-15, P1-5, E1-11. This proposal is solely based on the drawings provided and the information described therein, as well as the general specifications provided on the cover sheet from the engineer."

22. The court finds that the specifically stated pages of the Vividarch drawings have certainly been incorporated into the Contract. Although the draftsman took pains to list every other page, there is no reference at all to the Vividarch notes or the page on which they are contained. The notes did not even form part of the exhibit AG4 (The Vividarch drawings) filed with Mr. Graham's witness statement.

23. On counsel's request, and with no objection from the defence, it was provided one hour after trial begun. No explanation was offered to the Court as to why this omitted page ought now to be incorporated as a term of the Contract. Consequently, it is arguable that it does not in fact form part of the Contract. This would mean that a failure to adhere to its contents could not constitute a breach. However, this issue was not raised by the defence, so I venture no further.

24. More importantly, though, is the fact that the drawings themselves never contemplated a retaining wall of any kind and shoring up is not the building of a retaining wall. Shoring, as defined by the Encyclopedia Britannica is a *"form of prop or support, usually temporary, that is used during the repair or original construction of buildings and in excavations."* This is definitely not a retaining wall which is a permanent and substantial structure. It is clear from Mr. Graham's email (above) that shoring was never a concern. Rather, it was the permanent retention and stabilization of the mountainside which was.

25. While Mr. Weirum's expert was totally silent on the issue, Mr. Graham's expert opined: *"The excavation in the hillside, made to accommodate the foundations cast in that area, was neither shored nor backfilled properly, resulting in a precarious situation that had to be rectified by use of a retaining wall, which was observed during the inspection. Movement of the shear sides of the excavation, however, present a possible future danger to the laundry room foundation. At the time of the inspection, no signs of laundry room foundation distress were observed, however this could be a problem in the future."*

26. The expert's use of the word 'properly' causes me pause. He did not say that the shoring or backfilling was not done at all and one is simply not sure how he was able to determine what had not been done 'properly' considering his inspection occurred after the hillside had partially collapsed, Mr. Graham had had an excavator work on the cliff side and a back wall had been built. All this must have changed the face of the hillside from what it originally was.

27. Earlier in his report it states *" The inspection team observed a large retaining wall along the back of the building, and which was not originally included in the building plans. This structure was <u>apparently</u> made necessary, and observation concur, due to instability in the excavations into the hillside to construct the building foundations. The retaining wall, which is meant to secure the face of the excavation from collapsing onto the building through a slope-stability failure, was found to be complete at the time of the inspection."* (Emphasis mine). If indeed this is so, then shoring up could not be the solution even if it had been properly done.

28. But while his findings may or may not be speculative or acceptable, it still remains that neither the repositioning of the house, the extensive excavating, the consequential shoring and backfilling or the building of a back wall

formed any part of the Contract and Mr. Graham was well aware of this. The repositioning of the house created work of a different nature under very different conditions. It required the excavation of a significant part of the hillside, while the Contract called only for minor excavation to set the footings.

29. This Court finds that this was a significant change to the scope of work that was required under the Contract and it may not necessarily meet the threshold of an enforceable variation agreement either. In simple terms a variation is an agreement supported by consideration to alter a term in a contract. Variations are not at all unusual in building contracts but ought to be treated with a requisite level of seriousness particularly when the variation is significant. A level of seriousness which, I dare say, was alarmingly lacking in this case.

30. The Contract itself contains no variation clause, therefore as a minimum a change is only valid if it is agreed by both parties. The repositioning of the house was agreed, but unfortunately, the details of the change were never put in writing and signed off by both parties. There is nothing presented as to an agreement on the consequent responsibility. There is no testimony of questions being asked or information being provided relating to the full impact of the repositioning prior to the agreement. Save perhaps where Mr. Weirum offers that he informed Mr. Graham that there might be some erosion.

31. From what has transpired there were definitely serious implications. But beyond what excavation had to be done, it was never made clear as to what was and was not included. There was no mention of other expenses that may

result and both parties forged ahead on the assumption that the other had it covered or the Contract had it covered.

32. Far worse is that there seems to have been no consideration supporting this particular alteration. Mr. Weirum undertook an additional obligation but Mr. Graham's position remained unaltered. In other words, Mr. Weirum received no benefit. For example neither party spoke to agreeing its cost or agreeing to extra time to complete for that matter. Mr. Weirum testified only that he had informed Mr. Graham that there may be an extra cost involved for the excavation. That bit of evidence was never controverted but there was no agreement. The change was clearly for the convenience of the client and not the contractor. At best, the excavation was a mere concession given by Mr. Weirum at Mr. Graham's request and made solely for Mr. Graham's benefit. It formed no part of the Contract and could not effectively vary it.

33. In all the evidence he, Mr. Graham, presented he never once said that it was agreed that this new arrangement would be governed by the terms of the Contract. He assumed this, but I could find no meeting of the minds on it. I fully agree with the submissions made by Counsel for the Defendant that this repositioning of the house, extensive excavation, additional shoring or a retaining wall was never part of the Contract. The new agreement failed to deal with any other expenses that may result from the change and they have therefore not been covered. They fall to the client as the change was at his request and for his convenience.

34. It has become so plain to me that these parties acted like friends when they were conducting serious business. They operated in such a way that they made assumptions about changes without getting a definitive word from the

other. But a contract cannot be varied unilaterally. This court is unable to find that failure to shore up the hillside or shore it up properly was a breach of the Contract which ought to be remedied by the building of a retaining wall at Mr. Weirum's expense. This ground fails.

B. Failing to complete construction in time period stipulated by the Contract and

On the Counter Claim

Did the Claimant breach the Contract by causing delay:

35. There is no disputing that there is no commencement date stated in the Contract. The Contract simply states: *"In the event the Builder does not complete all work as stipulated in this contract within 90 days of the time specified, being 14 months from the commencement of work on the project*…." It is not, in my humble view, the most ideal way of addressing commencement and so it has created a problem for the contracting parties. A commencement date ought to have been clearly defined.

36. Mr. Graham says, for him, the Contract commenced on the 13th November, 2009 when it was signed. Mr. Weirum does not seem to take issue with this interpretation but informs that the request to reposition the house was made after the 13th November, 2009. This required additional work which resulted in a delay. The hillside had to be excavated before they were able to 'break ground'. They 'broke ground' around mid-December 2009. As far as he was concerned, that is the commencement date. He gives no testimony as to when the excavation actually begun. Mr. Graham stated that this was on the 17th November, 2009.

Discussion:

37 The subject matter of the Contract was the construction of the residence. Excavation must have been contemplated as the Contract speaks to the first phase as *"…completion of all ground works…."* The tender bid in clause 1 states: *"….. The house will be situated up against a hill, and some minor excavation will be required to prepare the site"*. This Court is unable to distinguish between excavation and breaking ground and no distinction whatsoever has been proferred by Mr. Weirum. Breaking ground is not a technical term or a term used or defined in the Contract. It simply means to dig into the ground. What is excavation if not digging into the ground. Further, how has Mr. Weirum unilaterally decided that this 'breaking ground' is the commencement of the project. He, Mr. Weirum stated under cross examination that he started mobilization soon after they signed the Contract. David Trolley, his own witness testified that work in general begun in November.

38. It appears that Mr. Weirum wishes a clause to be added to the Contract but there is no proper parole evidence provided which would allow the court to rebut the presumption that the written document contains all the terms. He has offered no mutuality of agreement whatsoever on this new clause which places the commencement of the Contract at 'breaking ground', which seeks to exclude excavation from ground works and which distinguishes ground work from 'breaking ground'. Where Mr. Weirum agreed to take on additional excavation without agreeing the implications of doing so, that is a matter for him. It does not affect the commencement date of the Contact. Moreover, it is quite settled that where a contract does not expressly state a commencement date, the date of execution is accepted as such.

39. This court therefore finds that the 13th November 2009, the date of execution was the date of commencement and any delays in completion beyond what is stipulated by the Contract, ought to be dealt with in accordance with the expressed terms of the Contract.

Contractual date of completion:

40. The relevant sections of the Contract read: *"It is estimated that the time to complete the residence 14 months barring any delay do (sic) to weather, delays of materials provided by owner.*

In the event the Builder does not complete all work as stipulated in this contract within 90 days of the time specified, being 14 months from the commencement of work on the project and if there is inclement weather, unavailability of certain materials or supplies, then a claim will be lodged at the time in writing stating the reasons, be it weather, lack of certain materials with reasons etc. for non-supply, then the professional arbitrator will be brought in to can(sic) resolve the matter."

41. Mr. Graham submits that the project ought to have been completed within 14 months of the commencement date. Whereas Mr. Weirum is adamant that he had 90 days beyond those 14 months in which to complete. He says the 14 month period was expressed to be a mere estimate and ought to be treated as nothing more.

Discussion:

42. This court is minded to agree with Mr. Weirum. There really is no ambiguity. The Contract says what it means. The project was to be completed within 14 months and 90 days (17 months) of the commencement date which would be mid April, 2011.

43. I am of the view that Mr. Graham was well aware of this because he purportedly terminated the Contract after that date (by email on May 11th 2011) and stated repeatedly to this Court that the Contract terminated itself. More telling is his email of April 20, 2011 which states: *"We believe we should*

be informed about the date of completion now that your 90 days extension (as per contract) is about to expire, or has expired if you consider as we do that breaking ground is a standard definition for building to start. Please give us your revised estimate for completion."

44. What is important to note is that time is not expressed to be of the essence in the Contract. So late performance would not give a right to terminate, it may give rise to a right to damages. In fact, the parties agreed on a process by which a delayed completion could be resolved and it was not simply to terminate. According to the Contract where the Owner deemed the contractor's actions (including non-performance) unsatisfactory, he is to inform the contractor in writing and give him fourteen days to remedy. If it persists then he is to proceed to arbitration.

45. Additionally, where the delay persisted beyond the completion date the reason was to be stated in writing as a claim and presented for resolution by the mutually agreed arbitrator. The Contract recognized only two reasons for delay, inclement weather and unavailability of materials. There is no procedure outlined for extending time where either party is at fault. Another glaring flaw in the drafting. Therefore any extension beyond the completion date would either have to be done with the agreement of both parties or though a claim before the arbitrator.

46. When Mr Graham purported to terminate the Contract, the time specified for completion had certainly expired and the work, from the experts' reports and the testimony of the parties themselves, was incomplete. While such a delay may constitute a breach, the Court is allowed to look at the reasons for the

delay, determine who is at fault and whether or not damages ought to be awarded.

Who caused the delay:

47. Mr. Graham insists that the delay was caused by Mr. Weirum's own behaviour. He says Mr. Weirum often did defective or unacceptable work which had to be redone. The site lacked supervision so mistakes were made in interpreting the drawings and using special products. Those mistakes took time to be corrected. He also drew attention to concrete provided by a third party sub contractor that was defective or was rendered defective and had to be removed and repoured causing a three week delay.

48. Mr. Weirum was of a different view. He says inefficiency was created by undertaking work outside of the planned schedule and the plan. It began with the excavation of the hillside to reposition the house and continued with a three week delay when the concrete had to be repoured. Worst of all, was Mr. Graham's decision to move into the building with his wife before it was completed. This was against Mr. Weirum's own advice. He said this disrupted the work, slowed construction and affected the time for completion.

49. To accommodate the move and house guests expected in January and February, Mr. Graham diverted his work crew to do finishing work in two bedrooms, tiling work which according to the schedule was not to have been done before the plastering was completed, remedial works to windows, plumbing, honeycombing and other 'punch list items' were addressed. Mr. Graham and his wife also interrupted and interfered with the crew and their scheduled work. There was also a quantity of additional work which he Mr.

Weirum executed at Mr. Graham's behest. He says Mr. Graham was well aware that he was disrupting the work schedule as he paid Mr. Weirum $40,000.00 ahead of the contracted milestone.

Discussion:

50. This court finds that both Mr. Weirum and Mr. Graham are responsible in part for the delay. It has been proven that Mr. Weirum is at fault for the three to four week delay occasioned by the defective cement. That third party supplier was his responsibility. He can not attribute blame for the delay occasioned by what he refers to as attending to punch list items at Mr Graham's request. As the contractor, his basic obligation is to comply with the Contract. The Contract clearly gives him 14 days to fix any problems of poor workmanship or non performance which are deemed unacceptable by the owner and which have been brought to his attention by the owner. The Contract does not refer to a punch list period.

51. These 'punch list items' were defects which were brought to Mr. Weirum's attention on numerous occasions by Mr Graham, that is not disputed. Mr Weirum was of the view that he needed to address defects only on completion. However, unlike the usual building contract, the Contract did not stipulate that these defects were to be fixed on completion, Again his attempt to introduce something new, fails. Any delay caused by addressing these defects are his own fault.

52. This harkens back to the poor drafting of the Contract which left open an avenue for remedial works to be addressed prior to the usual punch list phase and created early delays which were avoidable. In any event, not all the problems Mr. Weirum was asked to address were ordinary punch list issues.

On reading the Young's expert report and considering Mr Young's evidence under cross examination, it appears that the honey combing and floor slab cracks should really have been remedied immediately. Time would also have been lost by having to redo work which failed to comply with the specifications of the plan.

53. Mr. Weirum on the other hand made changes to the requirements or design after the Contract was executed. He also moved into the building prematurely to save on living expenses. The Court does not believe he moved in because Mr. Weirum was not performing. Allow me to elaborate.

54. Mr. Graham, seemed to be a very meticulous and straight forward man. Some may think him on the more aggressive side of assertive. His evidence is that he was having problems with Mr. Weirum and his standard of work for a long time. He exhibited an email dated June 24th 2010 where he writes to Mr. Weirum about having to redo the lobby entry ways which were squared instead of arched. He says *"……One more hold up which we are not responsible for. We are working very hard to stay on top of every aspect of construction, but this is a job I would expect you to be doing, liaising with the client so they get the house they want…… this job is loosing focus. We are the client not the architect, however we are trying to work with you guys the best we can….."* He then discusses the bad results of the concrete cylinder test and says *"This is not acceptable. One more cylinder like this and I'll ask you to break up the concrete and start again. Your cost! Keep your crew on the ball, I suspect this concrete is crappy wet slop."*

55. This letter does not mince words. Mr. Graham voices his displeasure with no hint of fear. His position is clear. Strangely, there are no other letters of this kind until April 2011. This speaks volumes. If Mr Graham was experiencing the types of problems which required his constant presence on

site why are there no other letters. Furthermore, Mr Graham worked outside the home so he could not constantly supervise. He moved in in December because he did not want to continue paying rent elsewhere. He moved at a time when he knew the house was still under construction and would not be completed for months.

56. Although he attempted to say that, by an email dated 14th December, 2010, Mr. Weirum assured him that construction would be completed in six weeks, this is not so. The email is captioned "Pool & Deck." It states:

> *Alan,*
>
> *Attached is the proposal for the pool and pool deck.*
>
> *I think it will take us about six week total to have everything finished.*
>
> *Tom."*

57. While it is difficult for this Court to believe 'everything' referred to something other than the pool and pool deck, the email which follows confirms the Court's view. It is dated December 21 and offers an option to reduce cost on the pool deck. It continues:

> *"I am requesting that we set an advance on the next payment due when plastering is completed, it would be great if I could pick up a check for $15,000 BZ towards the next stage payment, then the balance when we are complete with plastering. In a couple more weeks. Please let me know …."*

58. If indeed he had projected six weeks to completion. The end of plastering in a couple more weeks certainly does not calculate, as there was finishing work to be attended to thereafter. Finishing work, even to a novice, is known to take a considerable period of time.

59. What is puzzling is that in that same email of 14th December, 2010, Mr. Weirum submits a proposal for the construction of the pool and the pool

deck. He says this was done at Mr Graham's request. It confounds me that Mr. Graham would have been experiencing such serious problems with Mr. Weirum's workmanship that he had to move in to supervise, but he'd still consider him worthy of offering a quote for the construction of his pool. It simply does not ring true.

60. Mr Graham's very presence on the compound with family and friends would have had some impact on progress. Workmen would understandably not be free to move around as they like and would have to consider the needs and desires of the occupants when scheduling or executing work. Further, once Mr Graham moved in, his interference with the crew and the work schedule is well documented in his own emails to Mr. Weirum. These came with such unprecedented swiftness and prolixity from April 2011 (one month before he terminated the Contract) that one wonders whether there was an agenda.

61. On the 12th April, in a three page litany of complaints, carbon copied to the agreed arbitrator, Mr. Graham writes *"In the meantime build time drags on: We have been on site almost daily since Christmas, supervising and observing, we have in fact given advice at times which has helped builders speed up their work and act more efficiently.…… I have now instructed Charlie (Sam's right hand man) to do all of this.…..because there is no one on site to tell him what should be done except us…..These are just some of the many issues we struggle with everyday. Should I call you every five minutes, because that's how many times I get asked what they are supposed to do next or how to proceed?..... It's a good thing we are on site everyday demanding the quality we paid for. Heaven knows what poor craftsmanship and future failures would be hidden in the walls and ceilings if we were not….. The idea as expressed to you and Sam at least eight weeks ago was to get off the second floor with as little damage as possible. Let's proceed with that idea and finish the bedrooms/balconies and the upstairs loft now…..*

Next month we'd be working on the first floor, and there will be just as much scrutiny. Nothing will be covered up by you or overlooked without us knowing! We have had to educate ourselves in building code and regulations because we no longer trust you."

62. His next installment was dated the 20th April. He thanks Mr. Weirum for certain issues he had satisfactorily addressed, makes a complaint about the mouldings and their installation and directs that they be redone before installation in any other room would be allowed. Then he says *"There are many other problem things we could tell the builders, but you don't want us to, so we will wait until you decide when and what to do. There are however a few things which are so dire we feel we must speak up now or you may loose more valuable time and money fixing them later. One is the roof installation."*

63. He then outlines why he believes the roof had not been properly installed, sealed, screwed down or joined to the wall. He raises the matter of building a retaining wall and why Mr. Weirum ought to be responsible for its cost and adds; *"We believe that you have built our house extremely well in most instances, but we have a right to question every aspect of construction. We believe we should be informed about the date of completion now that your ninety days extension (as per contract) is about to expire, or has expired if you consider as we do that breaking ground is a standard definition for building to start. Please give us your revised estimate for completion."*

64. Following this email there is one dated April 30th. He informs *"We DEMAND a professional finish to the marble floor bedrooms, as we have described, by having no painter in after the baseboard smooth finish and tiles are laid….. We have today stopped the plasterers from finishing the baseboards, because apparently nobody told them they were not to finish them until all painting is done. This is what we have been DEMANDING for weeks. But DEMANDING does not seem to work with you and your crew so our only recourse is to supervise the work ourselves."*

65. The next email of May 5th speaks about sloppy paint work and gives a reminder about the moulding. It also states *"You gave me your new estimate on Tuesday of time now to completion, 6 weeks (June 7th – almost 8 week beyond your 90 days extension). This is the third time you have given us an estimated completion date. If all work is not completed by then we will pass this matter to Arbitration for reimbursement."*

66. But, on May 11th Mr Graham terminates citing late completion among other reasons. It appears to me that by agreeing the June 7th completion date proffered by Mr. Weirum, Mr. Graham agreed to vary the completion date. He therefore terminated before the new completion date. Who knows whether Mr. Weirum would have been able to finish on time if he had been allowed to continue.

67. Of greater relevance however is the fact that Mr Graham interfered when he diverted the work crew to finish the bedrooms so that he and his guests could have some level of comfort. He continued to interfere and demanded schedule changes. This Court cannot calculate how much delay was caused by his moving into the house, his interference and all the additional work he requested. The Court must therefore use a common sense approach. A mere one month (April to May) additional time would really only have covered the delay caused by the extra excavation to reposition the house. Consideration does not end here, however.

68. Where the employer causes a delay which affects the completion date it is a breach of the contract. This is so because as **Chitty on Contracts, Volume 2, 28th ed at paragraph 37-067** explains, implied in a construction contract is a term that the employer will not hinder or prevent the contractor from

doing and completing the work as provided by the contract *"and from executing the works in a regular and orderly manner."* Further, **paragraph 37-109** introduces the concept of time at large and it implications; *"**Time at large.** Where the wok is delayed by the employer and an appropriate extension of time is not granted, time is said to be "at large" ie the contractual date is no longer binding. The contractual obligation is then replaced by an obligation to complete within a reasonable time."*

69. In the leading case on 'time at large' **Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd [1970] 1BLR 11**, where time becomes at large the employer cannot deduct damages even if part of the delay has been caused by the contractor. He can not insist on compliance where he is partly to blame.

70. This Court finds that the delays were not the sole responsibility of Mr. Weirum. Mr. Graham also caused delays which affected the completion date. He did not grant an appropriate extension and time therefore became at large. He is not entitled to any damages for any delay caused by the contractor.

71. The Defendant has also counterclaimed for what the court interprets to be damages for delay caused by the Claimant. This court finds that when Mr Graham moved into the house there were concurrent delays being caused by both parties. Neither of them is entitled to any damages for delay.

72. Again, I must refer to the bad drafting of the Contract. In a properly drafted contract both parties ought to be able to understand clearly what the completion date is, entitlement to extension of time and who bears the risk

where there is a delay in completion or disruption of work. Also lacking is a provision for liquidated damages in respect of this type of breach.

2. Was the Claimant entitled to terminate the Contract:

A. As a result of the Defendant's refusal to perform services under the Contract

73. The Court finds it tidier and more efficient to deal with this issue and address the counterclaim relating to the Claimant's alleged repudiation of the Contract for non payment at the same time. This is so because Mr. Weirum alleges that he ceased working because he had not been paid.

Did the Claimant repudiate the Contract by refusing to pay the Defendant $55,000.00 for work completed:

74. Mr. Weirum accepts that the contractual payment was structured by milestones and that he had not yet completed the relevant payment milestone. However, he says there were changes to his work schedule, made at Mr. Graham's request, so that he completed work beyond the milestone which he ought to have been paid for. He highlighted finishing work on the two bedrooms, tiling work, remedial work/punch list items and additional work. I state early that the remedial work/punch list items have no relevance in this issue. Those were separate and distinct and ought to have been properly executed in the requisite phase. That they had to be redone, holds no import here.

75. He also referred to delays occasioned by Mr. Graham's actions which should also be considered: *"It got to the point in February of 2011 that we kept pressing the Claimant for a payment, but instead of making payment he would say "just finish this (a particular task) and then I will give you payment", which was completely different from*

the payment terms of the contract. The Claimant simply kept moving the goal posts and withholding payment because he wanted us to complete certain tasks first to his own liking as opposed to in accordance with the work schedule as set out in contract..... I informed the Claimant that our team could not continue with construction without payment particularly given the fact that he kept redirecting our work crew with the promise of payment upon completion of his tasks. We were not asking for much. We were simply asking for small payments as the work progressed."

76. Mr. Weirum valued that completed work at $55,000. He said that in March, 2011, when Mr. Graham withheld payment, he, Mr. Weirum stopped all works at the site.

77. Mr. Graham stands firmly by the contractual arrangements. He says payment was due upon completion of each milestone and he faithfully paid accordingly. He, however, cites a number of occasions when he paid before completion at Mr. Weirum's request. He complained that some of the work he had already paid for were never completed. The impending milestone was completion of plaster work. Mr. Graham said that in his kindness and to keep the work moving, he advanced Mr. Weirum $40,000 before this milestone was met, then he refused to advance anymore. When Mr. Weirum stopped work, the plastering was still not completed and he therefore was not obligated to make that milestone or any payment.

Discussion:

78. The basic facts relating to this issue are not in dispute. The parties agreed payment on the milestone basis. The next payment was to be $125,000.00 on completion of the plaster work. There is evidence that the interior and exterior plastering on the first and second floor had been completed, some priming interior and exterior, some painting on the second floor and the

installation of moulding, closets, doors, bathroom fixtures etc - finishing work, had also been done. The only plastering that the Young report said was unfinished was to the ground floor columns and beams, although Mr. Graham insists that there was considerable plastering work still undone. It appears to the Court that those beams etc were only exposed on the ground floor because the position of the structure had changed.

79. The following payment was to be $50,000.00 upon completion of floor tiling. No floor tiling was seen when the inspection supporting the Young report was done. However, both parties agree that some marble tiles had been laid and removed. Mr Graham says they were not correctly laid.

80. It is clear, however, that work was being done out of sequence and the evidence supports the view that this was all at Mr. Graham's request. Sometimes Mr. Weirum acceded to accommodate Mr. Graham's needs. At other times, he says, Mr. Graham himself instructed the crew even when he had given them specific instructions. Mr. Graham himself testified to giving instructions. This court has considered that evidence in depth during its discussion on delay.

81. In Mr Graham's opinion, he only did this when things were being done incorrectly. Now, whatever the reason for his insertions, the issue of instructing the crew seems to me to have been one which Mr. Weirum should have sorted very early. He was the contractor and Mr. Graham, just like his crew, ought to have been informed as to where the instructions were to come from and how. Instead Mr. Weirum seemed simply to go along. Whether Mr Graham's directions assisted or hindered remains unknown and is not really relevant for this discussion.

82. Be that as it may, I must again state that because there was no power to vary in the Contract it was always open to Mr. Weirum to refuse to alter his schedule without attracting any legal consequence. More so, where there was no offer of consequential adjustments which could benefit him. But I digress.

83. The facts begin to blur, however, on the issue of Mr. Weirum's request for payment out of schedule. Interestingly, Mr Graham discusses it in only one of the 148 paragraphs of his witness statement. He states at paragraph 71: *"And again. Mr. Weirum began asking for money in advance of the next phase, 'on completion of all plasterwork', as early as December 2010, when not even the first floor interior walls had been completed let alone outside. Reluctantly I paid him small portions of the advance over the period 7 January – 1 March 2011, feeling that I was under pressure to comply with his demands or he might simply walk out and leave us without a completed house. His excuse for demanding more money at this stage was because he was having to work on finish work upstairs on the second floor. However, he had always explained to us that this was his work schedule; that while the plasterers continued on down into the first floor other crew members would begin work on finishing upstairs; so we felt his demands for more money were unwarranted."*

84. This really makes no sense to me. How could the Builder not be affected if he had his crew divided and working on two phases when his payment depended on the completion of particular phases. But, again I digress. Under cross examination, Mr. Graham could not explain what grounded his fear that Mr. Weirum would leave. The fact is Mr. Weirum continued to work for months thereafter. Equally, Mr Graham could not justify why he made these payments in small portions.

85. Things gain clarity when one considers Mr. Wierum's evidence that Mr. Graham *"kept moving the goal post"* What seemed to have transpired is that Mr

Graham knew full well that he was requiring Mr. Weirum and his crew to address matters which were not part of the plan or which were not yet scheduled. He was also well aware that they continued to work while the contracted payment milestone moved further and further away. It was an untenable situation. Mr. Weirum was not earning and he could not pay his crew.

86. I am of the view that the small payments were made to lead Mr. Weirum to believe that he would be paid off schedule once certain jobs, of Mr Graham's specification, were attended to. By attending to those jobs Mr. Weirum in fact accepted Mr. Graham's offer for payment off schedule and a new agreement for payment was made. It was therefore no longer open to Mr Graham to hold on steadfastly to the original payment schedule. It would be wholly unfair for him to attempt to enforce it now.

87. I am strengthened in this view by the pattern of behaviour which seems to have developed between the parties in relation to payment. It was being done regularly off schedule. By Mr Graham's own admission he made a number of payments before the scheduled milestones had been reached. He said these were all made at Mr. Weirum's request which he obliged so as *"not to cause any grievance between myself and Mr. Weirum."* When this court considers the tone of Mr Graham's emails to Mr. Weirum and even his demeanour in the box it can not but conclude that 'not causing a grievance' was not particularly high on Mr Graham's agenda. Mr Graham paid because he knew the schedule was not being earnestly followed.

88. Having so found, it becomes clear that Mr Graham's refusal to pay Mr. Weirum for the work completed as agreed was a repudiation of the

agreement. Chitty on Contracts, Volume 2, 28th ed at paragraph 37-208 defines a repudiatory breach as *"Where one party so acts or expresses himself as to show that he does not mean to accept the obligations of the contract any further, then this may, depending on the circumstances, amount to a repudiatory breach of contract. Generally, a breach of contract will only give rise to a claim for damages, and the innocent party will be obliged to continue its outstanding performance of the contract notwithstanding the breach. However, where there is a breach of a condition which amounts to a refusal to perform going to the root of the contract, then there will be a repudiatory breach entitling the innocent party, on acceptance of the repudiation, to treat the contract as at an end."*

89. I therefore agree with Counsel for the Defendant that *"(b)y refusing to pay the defendant any further sums owing under the contract, the Claimant committed a breach that went to the root of the contract…."* Mr. Weirum then had the option of treating the Contract as at an end or letting it continue. He says he accepted that repudiation in March 2011. But this could not be so, since he continued to work notwithstanding. It was not until the 9th May 2011 that all work at the site ceased. That is the evidence provided by Mr. Graham which I accept. I also see emails in relation to the works on site going from Mr. Graham to Mr. Weirum through April and as late as 5th May 2011.

90. The acceptance of a repudiation must be unequivocal and done within a reasonable time. Mr. Weirum continued to work for two months after the repudiation which contradicted acceptance and seems to me to be an affirmation of the Contract. So the Contract continued and all its terms remained effective. When his workers did not turn up to work on the 9th May, 2011 the Contract was still in effect. It appears that they did not go on the 10th either. Mr. Weirum actually insisted that when they stopped working it was intended to be only a suspension of work. He expected that

when Mr Graham was ready or able to pay them, he would inform them and they would return to business as usual.

91. The Courts have consistently refused to recognize any general right of a contractor to suspend work. Any such right must be contractual. The Contract contains no such clause. This means that Mr. Weirum could not legally suspend work. He, in reality, stopped performing his obligations under the mistaken belief that he had accepted the repudiatory breach.

92. According to the Contract, it was now for Mr Graham to notify Mr. Weirum in writing of his concerns and give him two weeks in which to rectify the problem. If it persisted then he was to go to the arbitrator. No such notice was given and instead Mr. Weirum proceeded to terminate the Contract. Termination on this ground was therefore, wrongful. Wrongful termination will be discussed in more detail below.

B. As a result of poor workmanship:

93. There can be no dispute that there were numerous deficiencies in the construction. One need only consider the expert reports to understand that there were issues. The Young report gives a comprehensive list which include the electrical and plumbing, severe honey combing some with inadequate repair and wide spread cracking in a patio floor and slabs over the kitchen and laundry area, inadequate drainage screed of the second floor patio and utility loft decks, the growth of algae on the utility loft deck which could compromise the water catchment, jack hammering the structure to lay pipes thereby weakening the structure, sagging gullam girders, awnings not properly installed, no guttering for the gable roof, no chamfer along the edges of exposed reinforced concrete beams and columns. Mr. Graham

submits this all occurred because Mr. Weirum mismanaged the construction from start to termination.

94. The Moody report also found deficiencies including cracks and honey combing, rotting and deteriorating awnings (leaks), leaks over the second floor patio as well as improperly placed plumbing which could cause structural problems. But he concluded: *"From our inspection of the building we found no major problems which could affect the building in the future. Since it was observed that the building was under construction at the time, a lot that were seen were normal construction problems and would have been corrected during the construction time. Holes caused by pipes penetrating floor slab would have been sealed properly in time. Honeycombing should have been properly repaired. Beams and columns not plastered would have been done during the construction period. Concern would be for the pipes that were penetration beams that could cause some structural problem and the cracks in the floor slab. Most of the problems encountered would have been part of the defects liability period had the works continued and would have been the responsibility of the Contractor to correct/made good these problems. One must understand that this was a work in progress and rough work are* (sic) *part of the construction process. If the Contractor was given the time, these works would have been corrected as part of his contract. In our inspection several areas of incomplete works would have been corrected as part of his contract. In our inspection serveral areas of incomplete works were seen and this was due to the stoppage of the works at that time. Therefore, from our visual inspection it is our opinion that the building being at the stage of construction at the time of our inspection is structurally sound."*

95. Mr Graham, in his evidence, spoke to a multitude of defects. But as he easily admits, when it is most convenient, he is no expert. I shall therefore rely on the experts. He continued that he consulted with the appointed arbitrator and was given permission to terminate the Contract. He then terminated in writing.

96. In his defence Mr. Weirum says he was never invited to and never went to any arbitration session. He was never invited to or requested to make any submissions to an arbitrator. He insists that there was no poor workmanship and Mr. Graham's continued payment, of up to $1,236,414.71 of the $1,366,414.71 contracted for, is a clear indication that he found his general workmanship to be acceptable. He maintained that if the Contract had not been terminated prematurely he would have completed all the works and addressed all the defects.

Discussion:

97. Terminating a building contract is complicated. The result is usually quite severe with serious implications for both parties. Any rights which have accrued at the time of the termination remain enforceable. But future obligations end. It therefore affects the completion of the project and one or both parties may lose money. If termination is being done pursuant to a contractually agreed process, that process must be strictly followed. It therefore, really ought to be a last resort after serious consideration and exploration of options.

98. The right to terminate could be grounded on specific terms in a contract and/or common law. Mr Graham makes it clear that he had terminated in accordance with the Contract in the very first sentence of his termination email; *"This email is to inform you that we the Owners have terminated the contract between us and you Tom Weirum (Prime Builders) for the construction of a house on the property known as Witzoo mile 15 Coastal Road, as per the contract."* His letter also barred Mr. Weirum from the site. There could be no doubt that he intended to terminate the Contract and would rely upon a specific contractual right to do so.

99. To determine whether the termination was lawful we must now consider the specific terms of the Contract relating to termination. The relevant terms read: *"The Owners reserve the right to terminate this contract if it is deemed by professional arbitration that the builder is not complying with the terms of this contract. The mutually agreed upon arbitrator is Paul Martin….*

In the event that the Owner deems either non-performance, poor workmanship or whatever other reasons unacceptable, Owner will notify Builder in writing about his concerns and allow Builder 14 days in which to rectify the problems. If the Owner then feels the Builder is still in breach of contract, he shall proceed to arbitration."

100. Notably, the builder is given no right to or process whereby he could terminate. The clause is clearly solely for the benefit of the Owners. The Contract does not exclude the common law right to terminate and so that right subsists, for both the owner and the contractor, along with any contractual right.

101. When one seeks to terminate a contract, whether for fundamental breach or repudiation, the process outlined in the contract must be strictly followed. So as I understand it, the combined effect of the two clauses in the Contract is that there must be some ground on which to terminate, which the Owner must inform the Builder of in writing, while giving him 14 days notice to correct. If the issue remains unresolved, it would then be ventilated before the agreed arbitrator who would determine whether the builder is in fundamental breach. Based on a positive finding from the arbitrator, the Owner then has the reserved right to terminate the Contract.

102. Whether the formal process has been strictly followed now stands to be determined. To answer this question we must consider the evidence. In his termination letter Mr Graham cites non-performance and poor workmanship

as the reason. Those are the grounds. He then lists some examples of the issues: *"1. The Retaining Wall… 2. The two flat roofs…. 3. Electrical wiring…. 4. Roof and awning installation ….. 5. Plumbing irregularities ….. 6. Late completion….. 7. Disregarding Building Inspector's recommendations on fixing bad joints in slab……"*

103. He explained that Mr. Weirum had been given 14 days to rectify the faults to his satisfaction and had not done so. The evidence reveals a number of emails to Mr. Weirum relating to issues on the list above. They remained unresolved for more than 14 days. That is not in dispute. In fact Mr. Weirum testified that he had fixed some honey combing. He had every intention of fixing the remainder by importing some special material for that purpose. He, however, did not do so within the two weeks given. He also accepted that there were issues with the wiring to which he also intended to attend, seemingly in his own time.

104. At this juncture it was then for the arbitrator to consider the alleged breaches - whether they justified terminating the Contract. This is of paramount importance to the process. It is the arbitrator, who, on listening to both sides would make a determination on the particular activity or inactivity. To my mind, it is here that the parties are given a shield. The builder, from a hasty, premature or even unnecessary termination. The owner, from a wrongful termination.

105. In paragraph 17 of his amended Statement of Claim Mr. Graham acknowledges that he reserved the right to terminate once the arbitrator (Paul Martin) deemed there was noncompliance on the part of the builder. He then pleads at paragraph 34 that *"In or around the 9th May 2011, the Claimant met with Mr Martin who determined that the defendants were in breach of the contract. By e-mail*

dated the 11th May, 2011, …….. the Claimant terminated the contract with the Defendant."

106. He later testified that it was on Tuesday the 10th May, 2011 that he visited Mr Martin who informed him that he was well within his right to terminate the Contract. Other than this being inadmissible hearsay evidence, nothing further was provided to corroborate this allegation. The arbitration process is not arbitrary, one would at the very least expect something being issued in writing from the arbitrator. Particularly when Mr Graham's own testimony was that weeks earlier the arbitrator informed both parties in writing that they should try to settle their differences between them. Would the arbitrator then make only a verbal finding to one party on a matter as serious as a fundamental breach which allowed for termination of the entire contract!

107. Furthermore, in response to this allegation Mr. Weirum pleads that he has never been asked by either the Claimant or the arbitrator to attend any arbitration hearing or to make submissions regarding this dispute. He repeats this in his evidence. It is highly unusual if not improper for an arbitrator to make a determination without at least inviting the other side to convey their views. There is a fairness which is demanded of that system that Mr Graham's testimony offers no acknowledgement of. For all these reasons, I can not find on a balance of probability that Mr Graham received any determination from the arbitrator that there had in fact been a breach or breaches worthy of termination.

108. This is fatal to the process, as it means that there was not full compliance with the procedural requirements for termination of the Contract. Mr. Graham's attempt at termination under the Contract fails and could constitute a repudiation, which, if accepted unequivocally by Mr. Weirum,

will bring the Contract to an end. Both parties would be released from their respective unperformed obligations and damages will be payable by the party at fault.

109. Mr. Graham's own testimony was that Mr. Weirum accepted the termination and wrote asking only for his items back. In fact the termination letter sent by Mr. Graham instructed that Mr. Weirum should provide a list of all items on the property which belonged to him (Mr. Weirum). By responding as he did, with his list of items, that was as clear an indication that the repudiation had been accepted. Further, Mr. Weirum himself pleads that Mr Graham terminated the Contract prematurely without allowing him an opportunity to complete. He said he has never been allowed back on the property and he wishes only to be paid what he is owed.

110. Having wrongfully terminated the Contract Mr Graham can not now say that the works were incomplete or defective at the date of termination. As Mr. Weirum maintained, if the Contract had not been prematurely terminated he would have been able to complete the works. It goes beyond being able however, Mr. Weirum would have been bound to complete but he has been relieved of any such obligation because of the wrongful termination. Mr Graham's claim for damages for breaches of the Contract will accordingly be dismissed.

3. Did the Defendant make any misrepresentations to the Claimant to induce the Contract

111. Although this issue was pleaded and referred to the qualification of the plumber, electrician and Mr. Weirum mainly, there was no submission

made by Counsel for the Claimant in this regard The Court assumes that it has been abandoned and will discuss it no further.

4. Was the Defendant liable in tort for negligently advising the Claimant to remove the ground beams save for the perimeter beams and reduce the thickness of the cistern floor

112. Mr. Graham referred to his tendering process and that the tender document required work of medium to high standard. He says the Defendants were accepted because Mr. Weirum assured him that *"he could reduce his original quote substantially and make changes to the plans which would not affect the integrity and strength of the building."* He seeks support for this statement through an email sent to him by Mr. Weirum dated September 11th, 2009. The pertinent part states: *"If I am successful in working out a deal with you I am sure I can save you a considerable sum by changing some of the items as per the drawings."*

113. He said he understood that to mean that as a building contractor, Mr. Weirum would not only hire the necessary professionals to work on his client's projects but he would also use due care and consideration when deviating from the original plans. He therefore assumed that all the changes would have been acceptable by the CBA and expected that Mr. Weirum would know what changes required the CBA's approval.

114. He submits that when Mr. Weirum undertook to alter the professionally prepared and board approved plan, he not only did so against standard practice but he omitted vital structural specifications. The ground beams were all excluded except for the perimeter beams and the cistern floor was reduced from 16 inches to 8 inches. Both of these items were critical to strengthening the foundation of the building.

115. Mr. Weirum admits making these changes in an effort to save Mr. Graham some money. He maintained that what he did, did not affect the integrity of the foundation and he points to the evidence of both experts to support his view.

Discussion:

116. The relationship between a builder and his client is primarily contractual. In that contract they are free to allocate risk as they please. That is the basis of freedom to contract. The contract will also most often determine each parties obligations and remedies. So usually a builder will not owe a duty of care in tort to the client against pure economic loss as a consequence of building defects. However, in principle it is possible. But there must exist certain circumstances which prove an assumption of responsibility, special relationship or reliance. This is based on what is referred to as the Hedley Byrne principle - see ***Hedley Bryne v Heller [1904] AC 465***. Counsel for the Claimant quite succinctly outlined this principle at paragraph C.1.e) of his submissions: *"… a person who makes a negligent statement could owe a duty of care to a person who relies on such statement and suffers loss."*

117. The result could be concurrent remedies in tort and contract but the law of tort ought never to usurp the proper place of the law of contract (see **Cheshire, Fifoot & Furmston's Law of Contract 16th ed pg 33)**. In fact, the nature of the contractual arrangement between the parties may lead to the conclusion that no special relationship existed.

118. Although Mr. Graham does not deny agreeing these changes to the foundation with Mr. Weirum, he says he is but an ordinary man while Mr. Weirum is an experienced building contractor. He relied entirely on Mr. Weirum's advice because he was the only person who could advise him to

reach a quotation which was within his budget. This Court finds that difficult to believe. Firstly, Mr. Graham had professionally drawn plans, if the structure was proving too expensive to build he could always have sought the engineer's and architect's advice in reducing costs. They were the professionals whom he had engaged for very specific purposes.

119. Secondly, the building construction business is competitive and price is the basis of that competition. This Court could find nothing wrong with Mr. Weirum being somewhat involved in the design process. More than likely, as a contractor, he would have some knowledge of construction materials and methods which could make the project design more efficient and the construction less costly. Offering his insight in this way seems quite normal, even natural.

120. However, it must be made clear that Mr. Weirum was not engaged for his design and engineering expertise. There is no evidence that he ever held himself out to be anything more than an experienced builder. It also confounds me why Mr. Graham had the original plans approved but seeks to lay blame on Mr. Weirum for not having the amended plans approved by the CBA. It appears that it was always Mr. Graham's intention to cut costs and he endeavored to do so where and how he could, including relying on the advice given by Mr. Weirum.

121. Mr. Graham also submits that Mr. Weirum never made it clear that he was not undertaking a duty of care towards him as his client or that he was not assuming responsibility for advising certain changes. I repeat that Mr. Weirum was not an architect or an engineer. Moreover, I do not know this to be the test. As stated in **paragraph 82-83** of **Robinson and P E Jones**

(Contractors Limited) [2011]EWCA Civ 9 it is *"… necessary to look at the relationship and the dealings between the parties, in order to ascertain whether the contractor or sub-contractor "assumed responsibility" to its counter-parties, so as to give rise to Hedley Byrne duties.*

In the present case I see nothing to suggest that the defendant "assumed responsibility" to the claimant in the Hedley Byrne sense. The parties entered into a normal contract whereby the defendant would complete the construction of a house for the claimant to an agreed specification and the claimant would pay the purchase price. The defendant's warranties of quality were set out and the claimant's remedies in the event of breach of warranty were also set out. The parties were not in a professional relationship whereby, for example, the claimant was paying the defendant to give advice or to prepare reports or plans upon which the claimant would act. "

122. Mr. Lord Justice Jackson went on to say that even if the contract did not contain any clauses restricting liability he doubts that his findings would have been any different. The court's finding in the case at bar is certainly no different. I can not find reason to impose a duty of care beyond what was contracted for.

123. Mr. Graham is also obligated to prove loss to be awarded damages. Although he submits that in accepting Mr. Weirum's advise, the integrity of the foundation is weakened, he has brought no proof of this. He testifies to something he was apparently told by his engineers. I do not know who said these things and whatever was said, amounts to inadmissible hearsay. He also presented photographs which were of no assistance whatsoever.

124. Moreover, the very comprehensive report from his expert Carlton Young states at paragraph 3.1: *"The inspection team could not inspect the foundation since it is already covered by earth; however, it is reasonable to assume the foundation has been*

duly completed, as the building structure is already in place and furthermore there are no signs of settlement of the building.

The owner has inspected photos taken during construction, and which were provided by the owner, and which show foundation pads and columns at various stages of construction".

125. Similarly, Mr. George Moody, the expert witness for the defence observed at paragraph 3.1 of his report: *"The inspection team could not inspect the foundation as it was covered up, but we can assume that it was completed as the building showed no signs of settlement".* It must be noted that Mr. Moody's report was done some seven years after the building was erected and there continues to be no sign of settlement. As counsel for the defendant stated *"(t)herefore it could only be assumed that the foundation is solid."* When Mr. Moody took the stand he revealed under cross examination that even without the beams the foundation could have been appropriately strengthened otherwise. Mr. Graham has offered no proof that this has not been done. Consequently, even if the Claimant could possibly make a claim in tort, which to my mind he could not, he has not proven any loss. His claim here must therefore be dismissed.

COUNTERCLAIM

5. Did the Claimant breach an oral contract made with the defendant for completion of additional works by failing to pay for the additional works:

126. Mr. Weirum says that, at Mr. Graham's request, he executed additional works and alterations to the tune of $19,425.00 for which he had not been paid. He exhibits his estimate for these additional works. Under cross examination Mr. Graham agreed that he owed Mr. Weirum this sum but said

he had not been paid because he, Mr. Weirum, never provided him with a bill.

Discussion:

127. The Contract states that: *"Payment to Builder should be effected no later than 7 days after claim is submitted to owner. Failure to pay on time will be deemed to have cost and time implications pertinent to the contract."*
Submit, as defined by the Cambridge online dictionary is *"To formally send a document, plan, etc. to a person or group in authority so that they can make a decision about it."*

128. It is clear, therefore, that all claims for payment must be made in writing. Mr. Weirum could not demand payment otherwise than in writing and he provided no proof that he had done so. Having presented a bill dated 16th May 2011 that was clearly after the Contract ended. Upon termination only rights which had accrued at the time of termination remain enforceable. This claim fails and will be dismissed.

6. Other issues between the parties and what remedies, if any are they entitled to:

Mr. Graham:

129. Mr. Graham's Claim for damages will be dismissed in its entirety. According to the Contract, on termination of the Contract *"for whatever reason…..any and all materials purchased by the Builder or the owner for the construction of the project whether installed or not, remain the property of the Owners."* So too *"any and all monies given to the Builder by the owners in the construction of this property that has not been spent on materials or labour by the Builder must be returned immediately to the Owners."* This was an existing right which survives. The Claimant is therefore entitled to an order for accounting and refund of sums

not spent on materials and labour. That sum is to be set off against what the Defendant is owed in damages. The Defendant is also to deliver up all building supplies which he has for the project including but not limited to a fold up staircase, railings and water pump.

Mr. Weirum:

130. When the Contract was wrongfully terminated, Mr. Weirum already had the existing right to be paid $55,000.00 for work he had executed. He shall have this sum in damages with interest. He made no claim for damages for loss of contract, so that can not be recovered. His claim for damages for breach of contract for entering the premises prematurely is dismissed. The Claimant admitted to having building equipment and tools for Mr. Weirum. I do not know what condition those are currently in but an order will be made for them to be delivered up.

131. The Court will not order prescribed cost to the Defendant since he has only been partially successful on his counterclaim and in defending the claim. Instead the Court will summarily assess his cost taking into account the Claimant's own partial, though comparably limited, success.

Determination:

On the Claim

1. The Claim is dismissed save that
2. Leave is granted for an accounting and refund to be made of sums not spent by the Defendant on materials and labour.
3. Any sum found to be due to the Claimant is to be set off against what the Defendant is owed in damages, any excess is to be paid over to the Claimant.

4. The Defendant must forthwith deliver up to the Claimant all building supplies which he has for the project including but not limited to a fold up staircase, railings and water pump.

On the Counter Claim:

1. The Defendant is awarded damages for breach of contract in the sum of $55,000.00
2. That sum will bear interest at the rate of 3% per annum from the 11th May, 2011 to the date of the judgment herein. Thereafter at the statutory rate of 6% per annum.
3. The Claimant is to forthwith deliver up the Defendant's tools, scaffolding, bodega, water tank, pipes and shed roof.
4. The Counter Claim for damages in the sum of $19,425.00 is dismissed.
5. Costs to the Defendant in the sum of $80,000.00 on the Claim and the Counter Claim.

SONYA YOUNG
JUDGE OF THE SUPREME COURT