

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS118/2012

[2018] SCSC 1073

ELLEN ROSENBAUER
Plaintiff

Versus

ANDRE BRISTOL

Heard:

Counsel: Mr Derjacques for plaintiff

Mr Gabriel for defendant

Delivered: 2 November 2018

JUDGMENT

Robinson J

The Pleadings

[1] This suit concerns works undertaken by Defendant for Plaintiff at Baie Lazare, Mahe. Plaintiff and Defendant entered into a written contract, on 5 September 2009, in terms of which Defendant would construct a house for Plaintiff in consideration of the price of 1,455,750/- rupees (hereinafter referred to as the "*Contract*"). Plaintiff alleged that Defendant has breached the Contract in terms of which he was to construct the house by doing the following:

- by failing to construct the house within an agreed time frame;

- by retaining materials supplied by Plaintiff for the said construction in the sum of 23,424/- rupees; and
- by providing defective workmanship.

[2] Plaintiff put in heads of claim as follows:

"i. Material and labour to repair and rectify the defects and deficiencies
SR 489,474.75

ii. Moral damage for distress, anguish and stress. SR 50,000

iii. Plaintiff's materials retained by Defendant. SR23,424.00

Total SR562,898.75"

[3] Plaintiff accordingly prays for a judgment ordering Defendant to pay to Plaintiff the sum of 562,898.75/- rupees with interest, at the commercial rate, from the date of this plaint. Plaintiff is also asking this court for relief in the form of an injunction ordering Defendant to deliver to Plaintiff the keys giving access to the rooms.

[4] In his plea containing a counterclaim, Defendant did not deny the Contract. Defendant denied all the claims of Plaintiff, but admitted that works were delivered late. Defendant alleged that delays were attributable to adverse weather conditions and caused by Plaintiff who continuously asked for changes to be made to the work and failed to give Defendant the appropriate drawings and supply certain materials timeously. Moreover, Defendant admitted *"he will hold in his possession certain items belonging to the Plaintiff, which items he is willing to return and which value is disputed and puts the Plaintiff to proof thereof"*. Defendant also averred that workmanship and quality standards were not express terms of the Contract. Defendant further averred at paragraph 6 of the defence *"6... that any unfinished work was due to the plaintiff preventing the Defendant to complete works by denying the defendant access to the construction site and that the Plaintiff contributed towards late completion of works coupled with the effect of force majeure. The Defendant further states that the Plaintiff breached the agreement in failing to make scheduled payment by instalment in time"*. With respect to the keys, Defendant alleged that they were delivered to a representative of Plaintiff in the presence of a police officer.

[5] Defendant (counterclaimant) averred that Plaintiff gave him a plan approved by the Town and Country Planning Authority (hereinafter referred to as the "TCPA"), but that Plaintiff and Defendant agreed to downsize the plan. The counterclaim also averred that Plaintiff made numerous alterations to the approved plan. Defendant alleged that the costs of construction increased because of construction site problems; and that, because he had to undertake additional works, he failed to complete construction of the house within the agreed time frame. Defendant averred that Plaintiff had kept, in her possession, construction materials, equipment and tools belonging to him.

[6] Defendant stated that Plaintiff has breached the Contract in terms of which he [Defendant] was to construct the house by failing to make payments of instalments timeously, thereby affecting the project and causing serious prejudice to Defendant. The particulars of loss and damages are as follows:

"i. Balance for extra works	SR206,000.00
ii. Cost for additional work and materials	SR 42,300.00
iii. Cost of material	SR 10,000.00
iv. Costs of tools and equipment	SR 80,000.00
v. Planning of wood, cost of bed and transportation	SR 6,000.00
vi. Moral damage	SR 10,000.00"
Total	SR354,000/-".

[7] The Defendant prayed for a judgment dismissing Plaintiff's plaint and ordering Plaintiff to pay to him the sum of 354,000/- rupees with interest and costs.

[8] Plaintiff in her plea denied the claims of Defendant and asked this court to dismiss the counterclaim and to enter judgment in favour of Plaintiff as prayed for in her plaint with interests and costs.

The evidence

- [9] *The testimony of Ellen Astrid Corina Rosenbauer.* This court found Plaintiff to be straightforward and truthful. This court has set its assessment of the impression made by the oral evidence of Plaintiff against the conclusions to be drawn from the miscellaneous documents and by using those documents in particular as the best guide to what happened.
- [10] Plaintiff is a 55-year-old German national working as a doctor. She lives in Val D'en Dor, Baie Lazare, and produced the title deed for title T2927 (P1). She purchased the said parcel to build a dwelling house for her retirement. Mr Nadim Accouche drew the plans for her house (P3); and that he submitted the same to the TCPA on 22 April 2009. She produced the certificate of approval from TCPA dated 30 June 2009 (P2). The Contract is before this court as P4. On the basis of a quotation dated 16 June 2009, she agreed to the Contract P5. The sum for the construction for the house was 1,455,750/- rupees.
- [11] The quotation included two parts: the house plan (1,455,750/- rupees) and a smaller plan (1 million rupees). Plaintiff found the larger plans too expensive, so they agreed on the smaller plan (P3). The contract signed on 5 September 2009, pertained only to the smaller plan and the agreed time period for the construction was fourteen months, to be completed by November 2010. The construction works commenced in October 2009, and that progress was very slow.
- [12] Plaintiff provided evidence in relation to sums she paid to Defendant in advance¹. After the final payment on 23 March 2012, Defendant stopped working. He did not show up for

¹ 149,600/- rupees (5 September 2009); 220,000/- rupees (8 November 2009); 198,240/- rupees (2 February 2010); 32,160/- rupees (6 February 2010); 171,485/- rupees (31 May 2010); 130,000/- rupees (6 June 2010); 112,050/- rupees (24 July 2010); 350,000/- rupees (23 October 2010); 150,000/- rupees (29 January 2011); 90,000/- rupees (7 May 2011); 10,000/- rupees (4 June 2011); 5,488/- rupees (19 August 2011); 80,000/- rupees (11 November 2011); 11,023/- rupees (25 January 2012); as well as 100,000/- rupees (24 August 2011) for extra works, which were never specified by Defendant; 10,000/- rupees (22 March 2012) for a roof extension, which was not completed; 12,000/- rupees (22 March 2012) for a concrete platform, which was not completed; 19,000/- (23 March 2012) for a gravel bed, which was not completed; 8,000/- rupees (23 March 2012) for gas storage construction; 4000/- rupees (23 March 2012) for a poorly constructed

work and was not responding to her. Plaintiff terminated the Contract on 21 July 2012, because of the lack of progress (P29). She paid Defendant "165 percent" over his contracted sum, after eighteen months' delay, for a dwelling which was not completed, full of faults, insecure installations and poor quality workmanship.

[13] Plaintiff then enlisted the services of Mr. Valentin to evaluate the workmanship of Defendant. Plaintiff gave evidence that she did not have the opportunity to point out all the deficiencies in the workmanship to Defendant, as highlighted in Mr. Valentin's report. However, she stated that she had previously shown Defendant the deficiencies with the electricity and the paintwork in the interior and exterior of the house. Moreover, she had informed Defendant of the problems with the access road, which Defendant had promised to improve once the construction was completed.

[14] Photographs, taken by the Plaintiff on her camera and printed using her color printer, were marked as P30 to P53 and produced into evidence. Plaintiff's photographs revealed the unfinished concrete water tank, the damaged concrete road with incomplete rain gutter pipe, piping for outside plumbing remained uncovered and some of it leaked, pipes which were left unconnected, kitchen soak away which had to be redone, hole in the rain gutter, unsafe electrical work throughout the house, no glass covering a lamp, poorly installed step lights, poor workmanship of the door frame, a hole in the door, faulty installation of safety locks, rust from the roof (which manifested within a 12-month period), and roof extension which was never completed.

[15] Plaintiff gave evidence that Defendant was paid the following additional sums:

- 12,000/- rupees (23 March 2012) for the water tank (drinking water) which was never completed by the Defendant (P127);
- 10,500/- rupees (3 May 2013);
- 16,500/- rupees (3 May, 2013);

pavement; and 100,000.00/- rupees (23 March 2012) for extra works, which were never specified by Defendant. (Listing receipts exhibited as P6-P27).

- 1000/- rupees (3 May 2013) to pay a third party to remedy Defendant's defective works (P128-P130); and
- 23,424.00/- rupees for certain items that were kept in the possession of Defendant and not returned to the witness (P131).

[16] Plaintiff was informed by Defendant that windows were not included under the Contract price. She believed that they should have been included, but nevertheless paid for the windows (P132) on 22 May 2011. This was repeated for the painting of the walls and the varnish for the wooden ceiling. She also had to pay for the wood and for the varnish for the construction of steps, shelves and balustrades, despite them being part of the main Contract price (receipts for cement, plywood, pipes and plastering dust valued at 87,190/- rupees; receipts produced and marked as P133).

[17] Similarly, she testified that she had to pay for switches, sockets, a ceiling fan, adaptors and pipes (valued at 82,183/- rupees), despite them being part of the main Contract price. She was told by Defendant that she would have to pay for these items otherwise he would not proceed with the work (P134). She contended that the electrical work carried out by Defendant was faulty. For Defendant's claim for concrete slabs and beacons, she stated he never accounted for the use of her money, so she is not aware whether he indeed build the said slabs.

[18] Plaintiff had to purchase materials valued at 107,244/- rupees otherwise Defendant would not carry out the work, despite these items forming part of the Contract price (P135). She made three additional payments, which Defendant acknowledged receipt of by signing on the receipts: 100,000/- rupees (24 August 2011 – P137); 100,000/- rupees (23 March 2012 – P138); and 350,000/- rupees (23 October 2010 – P136). Defendant never accounted for the usage of the above payments. She produced into evidence a book with her personal notes and the signatures of Defendant, whereby he acknowledged receipt of payment (P139).

- [19] She stated that Defendant never showed her the extra beams or produced any receipt to that effect. Furthermore, the beams were in the plan that they had agreed upon. Similarly, a solar heater was in the agreed plan, and the plumbing and insulation material were part of their Contract as well. She does not understand why Defendant is claiming the above as extra works. She gave evidence that there was never any written agreement for extra works.
- [20] Regarding Defendant's claim for the fixing of the windows, she stated that they had to be fixed as a result of Defendant's own error in installing a window where there should not have been one, and Defendant had assured her that *"it is not a big work and [I] can do it for free."* The door to the laundry was also incorrectly installed.
- [21] She disagreed that she should pay for any of Defendant's counterclaims, given that the work was either incomplete or faulty, and most had to be improved upon later.
- [22] Plaintiff justified her claim for moral damages by stating that Defendant abandoned his work without notice, constantly demanded advance payments while threatening to abandon work, and the work he did carry out was either incomplete or faulty. She testified that she paid a considerable sum over and above the agreed Contract price, with no accountability as to what the money was used for. She gave further evidence that he withheld her keys until she resorted to police intervention.
- [23] She did not terminate Defendant's services earlier as she recognised the difficulty in securing a contractor in Seychelles, and she did not want to have the trouble in a foreign country.
- [24] On cross-examination, Plaintiff gave evidence that she had *"cut down"* the initial plans for her house because she did not have money to build such a big house.
- [25] She stated that the delays in construction were due to Defendant's own fault and that she was at fault for only three months of delays. When asked to confirm whether the importation of windows had been delayed past the agreed period of construction, she

replied that she was unable to order them as the house was not ready and they would have been destroyed because there was no storage facility.

- [26] She denied knowing about any problems regarding the foundation as she was not an engineer and testified that she could not recall whether Defendant had written to her about having to make changes to the foundation. However, she testified that Defendant had asked her for additional money for the foundation and that she paid him. With respect to the payment for the foundation, she indicated that it may have been late. She did not recall receiving a letter from Defendant dated 24 May 2010, wherein he made references to necessary changes to the foundation. She could not recall receiving an email advising her that because of heavy rainfall Defendant had encountered certain delays.
- [27] Regarding Defendant's counsel's suggestion that he had difficulties conducting his work because he was not being paid, she testified that she always paid him. She reiterated that the one payment that had been delayed was the one involving Mr. Pillay.
- [28] She noticed the progress of the work was not on time when she came back to the country. She came to the Seychelles, around March or April 2012, she stayed in the house, but that the electric connection had not been done. Two weeks after going to PUC, PUC made the connection. She indicated that the electricity in the house was faulty and she referred to the report of Mr Valentin. She confirmed that after PUC had set up the connection, she needed to redo the electrical work. She paid a person by the name of Marc Jupiter for electrical works. She reiterated that there are certain things that she would have to redo in the future. After Defendant had allegedly abandoned the work, she stated that she had bought several items in order to rectify certain faults like defective pipes and wires. She agreed that as far as certain electrical matters, namely electrical sockets, were concerned she had made changes to the plan at the beginning of the construction, which she had communicated to Defendant.
- [29] When asked whether the structure of her roof was similar to the architectural plan, she testified that she did not think so. She indicated that Defendant was not finished when he left the site and that there were some additional works to do as well.

[30] When asked whether she was aware that any external changes to her plan had to be re-submitted for approval by the TCPA, she replied that she did not make any changes but that she gave Defendant sketches to help him because he send her an email stating that he was not able to do the work.

[31] She testified that after Mr Prea stopped working at the construction site, Defendant recruited Mrs Lisette Joseph. She had no other choice but to approve of this recruitment. She testified that Mrs Joseph had some difficulties with the plan, so she gave her some sketches to assist her. She testified that:

"The problem with the roof was the following: the engineer was abandoning his work and I had to search somebody who could help Mr Bristol because he was not able to read the plan properly and to build the roof. So I instructed my contractor in Germany that he should sign something for him that he can understand how the wood [of the roof] should be built in accordance to the plan."

[32] Defendant never built the roof wrong. However, she gave evidence that the roofing sheets were faulty and that Mr Valentin had told her to remove all the sheets. She denied that she had removed the roofing sheets because they were not the color scheme she wanted.

[33] She had hired a Mr. Barbe to fix the balustrade after the roof had been put in place by the Defendant. When asked whether the people she had hired to do the welding of the balustrade had caused the rust, she replied: *"No that could not be because the welding of the balustrade was done in the yard and then they brought it up and brought it into the cement of the wall. They did not weld anything at the terrace."*

[34] She had asked Defendant to change four large windows to doors. She denied that she had asked Defendant to install a door from the living room to what would have been the kitchenette. Instead, she stated that Defendant had built a big window in that area in a faulty manner that she did not like, so she told him to remove it and leave a door in its place. She

testified that they had agreed that Defendant would build the doors with *calice du pape* wood.

- [35] She confirmed that concerns she had with the construction included the exposure of a pipe at the entrance of her house, though she indicated that her plan did not provide for that; and installation of a water pump, which she stated she had to redo because of faulty plumbing.
- [36] Regarding the scope of the Contract, Plaintiff testified that she did not require Defendant to rebuild the road or the soak-away pit. She confirmed that she had had an initial house plan approved but that she had subsequently downsized the plan. She only instructed to change some windows.
- [37] She requested changes outside the scope of the Contract when she asked that she wanted fascia board with varnishing rather than plywood for the ceiling. During the construction of the house, she visited the site four times. She denied preventing him from taking his construction materials from the site, but indicated that she still had his scaffolding and ladder. She gave evidence that Defendant still had construction materials in his possession: lamps, vents, and motion detectors. She added that she prevented him from entering the site because he abandoned the job and had a lot of her money.
- [38] With respect to Defendant's Counterclaim, she denied that some work had to be demolished because of the change of plans and she denied breaching the Contract.
- [39] She denied that she had taken months to pay Defendant after receiving his invoices. She maintained that Defendant knew when she would return to Seychelles and that every time she returned, she brought the money he had invoiced.
- [40] When re-examined, she testified that the roofing was faulty and because some of the flashing was not properly installed; that they had no protection against the rain and the sheets were very rusty. She wanted fascia boards because plywood was not a very good material. With respect to the electrical work, she had to do a lot of electrical work after he left the site. She paid Defendant 1,321,497.50/- rupees (P28) on a Contract quotation of

1,623,750/- rupees (P5). But she added that they agreed on a lower sum of SR 1,455,750/- (P4).

- [41] *The testimony of Nigel Stanley Valentin.* Mr Valentin, a quantity surveyor and expert witness, confirmed that he was instructed by Plaintiff to prepare an evaluation report for parcel T2927 (P253) to identify any deficiencies and defects in the building. He went on site on 18 July 2012. He testified that he requested that the contractor be present during his evaluation, however, the contractor was not there. Mr. Valentin gave detailed testimony about the deficiencies and defects in the building which are contained in P253. His estimate of the quantifiable damages caused by the various defects is 489, 474.75/-.
- [42] On cross-examination, Mr. Valentin stated that when he went on site, he had asked the contractor to be present. However, the contractor told him that he was not available. P253 was not seriously challenged by Defendant, who did not have a counter report.
- [43] Regarding the roofing, Mr. Valentin reiterated that the rust was due to grinding of the roofing sheet and that it was not due to welders, as there was no welding done in that area. While the roof was new, the problem was due to poor workmanship, which in his opinion had to be changed otherwise there would be a roof with two different colors. He explained that another option was to clean the rust. However, he stated that this would still result in two different colors. He testified that the quotation of 176, 475.00/- rupees was within the normal range for such repairs and could be even more expensive.
- [44] Counsel put to Mr. Valentin that the figure quoted in P253 is highly exaggerated and not supported by the evidence and his site visit. His response was that *"realistically on the basis of the quantities and the work has to be performed the rates is a build-up rate it is not just figures put in place there... "*.
- [45] This court interjects to state that the contents of the report of Mr. Valentin have been barely contested by Defendant in a material respect. This court finds the evidence of Mr. Valentin to be satisfactory and has no difficulty in accepting as correct and reliable the contents of the report, which established conclusively that the *"cost for the remedial action work required to make good the identified deficiencies and/or defects on the house and external*

work" is estimated to be 489,474.75/- rupees, subject to the item "Road access concrete surface... 1440.00", which this court did not award Plaintiff.

- [46] ***The testimony of Fernand Laporte.*** Mr Laporte, a carpenter for forty years who had done work on Plaintiff's property, testified that he redid the roofing. He gave evidence that the corrugated iron sheets were spoiled and not in good condition and that he removed them. He explained that the spoiling was due to the fact that the iron sheet had been cut with a grinder and that the chips from the grinder had burnt the paint of the corrugated iron sheet. He testified that he had to remove some wood from the roof to fix the roof because it was leaking. He gave evidence that had he not repaired the roof it would not have been fine. He testified that it took one month to replace the roof and that he employed three persons. He received 35,000/- rupees to 40,000/- rupees for his work.
- [47] Plaintiff had asked him to check the ceiling but he determined that the ceiling was fine. He testified that he also replaced the fascia board with pine imported wood.
- [48] ***The evidence of Andre Bristol.*** This court's impression of Defendant is that his approach to business as indicated by this case is disorganized. His record keeping was almost non-existent. This court concludes that he is an unimpressive witness.
- [49] Defendant contracted with Plaintiff to build her house for a price of 1,455,750/-. He started construction on the house in October 2009. He wrote a letter to Plaintiff on 26 October, regarding a revised quotation and to sign the Contract agreed upon (D4).
- [50] He made her aware that there would be extra costs given the landscape. When he started he found that there was a bit of difficulty because there were rocks that had to be removed and other jobs not included in the Contract that he had to perform.
- [51] Plaintiff introduced him to Mr. Prea, an engineer, who was there to oversee the work and who regularly came on site. Mr Prea worked for about a year, then was fired. After he started the work and was putting the blocks, he testified that Plaintiff told him to remove a door and put windows and where there were windows to put a door.

- [52] They agreed that she would supply all the louvers; and that he would put the door frame, window frame, shutters and *calice du pape*. There was no ceiling on the plan and that she was supposed to provide the timber; and that he would polish and varnish them.
- [53] Regarding electrical wiring, he testified that because of the way it was, Plaintiff had to change all the electrical wiring. When he finished doing the electrical wiring, she asked him to do some changes, but he did not do them. He explained that when he left the site all the circuit lights were all positioned, wiring was already done, and electricity connected. He testified that PUC checked everything in front of him.
- [54] He wrote a letter to Plaintiff dated 25 April 2012. She did not accept his letter. In his letter he explained that he was working very well with her previous engineer, but that since firing him things had not gone well.
- [55] Mr Daeter, Plaintiff's uncle, oversaw the work starting from 2011. He explained that Mr Daeter would give him instructions, which he complied with, and would come on site regularly. After receiving a letter from Plaintiff's Counsel, dated 11 June 2012, (D13), he went to the Fair Trading Commission to explain what had happened.
- [56] Defendant indicated that Mr Lowsec and other workers were cutting steel with a grinder to make the banister; they did all their work under the veranda and the roof was close by. Regarding rust on the roof, he indicated that there was rust on some of the roof photographs shown to him (P53A). He explained that this was normally caused by sparks from cutting steel with a grinder falling on top of the roof.
- [57] He was not paid on time. He finished the foundation job in May and gave Plaintiff an invoice in May, and was not paid by September. He eventually was paid. In total there was an outstanding balance of 140,250/- rupees.
- [58] Regarding delays in completing the work, he explained that the house did not fit on the site. When they realized this, the engineer decided to excavate the land where the veranda was supposed to be and had to put the veranda on pillars. They built a concrete wall behind

the house. He also indicated that the weather delayed their work as well. He explained that the rain during November through January prevented them from working because the soil was wet.

[59] Regarding his Counterclaim, he confirmed that he was claiming 206,000/- rupees for extra works performed like having to re-do windows and doors, work done on the ceiling, the electrical wiring and other small jobs. He described the claim as follows:

- 42,300 rupees for cost of additional work;
- 10,000 rupees for cost of material left on site like rock powder, aggregates;
- 80,000 rupees for scaffolding, ladder and wheel barrow left on site;
- 6,000 rupees for making two beds and transporting the bed; and
- 10,000 rupees for moral damages.

[60] On cross-examination, Defendant testified that he visited the site prior to agreeing the Contract and examined its topography with an engineer. He indicated that the gradient was okay and that there were no rocks on the surface. When asked why he had been delayed given that he had been a contractor for twenty years and lived in the Seychelles for fifty four years, he reiterated that it was because of the rain, the fact that he had to build the house and then demolish eighteen partition walls inside the house and because of late payment. He explained that by partition walls he meant works in general like redoing windows and doors.

[61] He testified that he had been paid 350,000/- rupees for extra work in relation to the foundation. He had not received any money for *calice du pape* wood. He was paid for the road. With respect to the electrical work, he testified that perhaps in his absence somebody had tempered with the works that he had done. With respect to the roof, he stated that it had been a year and half since finishing the roof and that Plaintiff had lived in the house since then, but had never said anything about any leaking. He explained that the roofing sheets were bought at Rapid Roof and were cut there, not on site. He added that small adjustments to the sheets are done on the ground. He testified that one worker working on the balustrade, Jimmy, used a grinder to make adjustments. Jimmy worked around February-March 2012. Surely after a year, he would have noticed the rust. With respect to

the fascia board, he agreed that they needed some final touches on the surface, but that he had not had completed his Contract yet. With respect to remedial action on the louvers vent and finishing the specified stain varnishing coating, he testified that there were no designs for louvers vent on the plan. He indicated that plastering the basement wall was not his job as it was not in the Contract. With respect to a gap left between two doors, he explained that a *leaping*, a small piece of wood, could have been placed to hide the gap. With respect to leakage of the wash basin and toilet drainage, he explained that if this was an issue it is because they had not completed hundred percent of the work on the house; this would have been small work to be completed.

- [62] On re-examination, he testified that the Contract was terminated in July 2012, but that he had already vacated the site in April 2012.
- [63] *Testimony of Vladimir Prea.* Mr Prea, an expert in structural engineering, indicated that he was employed by Plaintiff to do the structural design of her house.
- [64] He was instructed to revise part of the ground floor slab on the terrace, which he did at no charge, but he indicated that he believed Defendant would charge. He consulted with the contractor about it. Plaintiff then came on site and gave instruction to move the position of the staircase, which was built already, because it made her living room too small. Although it was designed according to the approved architect's drawing, he testified that the contractor had to break the staircase and rebuild it. He further gave evidence that there was no storage underneath the staircase.
- [65] He was further instructed to revise the first floor and beams to cater for the small edge cantilever slab, otherwise known as a small balcony. The reinforcements in the beams had to be adjusted accordingly. He consulted with the contractor when making the said adjustments to the plan. He testified that the Plaintiff agreed that he would draw a plan of the new suspended slab over the basement and he proceeded with this verbal instruction. The witness clarified that he was only required to revise the plan of the ground floor.
- [66] He gave evidence that on 25 and 28 May, the Plaintiff called him to the site for a meeting and instructed him to carry out certain changes to the plan. Defendant complied with the

new plan and made the changes. However, he later noted that he only checked to see whether the contractor cut-out the walls, but for the changes to the doors he was not on site. The witness noted down all the changes, and signed and dated them. He asked Plaintiff to countersign them, but she refused.

- [67] Mr. Prea gave evidence that he worked for Plaintiff until July 2010, when he left his employment because the Plaintiff *"did not honour her commitment, her obligation to [him]"*. Other than making the necessary drawings, he monitored the works on site.
- [68] Mr. Prea gave evidence that Plaintiff was not living in the house while he was working there. He stated that no one was representing her at the site.
- [69] Mr. Prea was asked to refer to the QS evaluation of the building for the house and concluded the following:
- The roof truss was not put in place when he left;
 - The staircase was completed;
 - The water tank below the staircase was not in the Contract and he was not aware that this was an issue; and
 - The access road was constructed before he came to the site.
- [70] On cross-examination, the witness agreed that a contractor should do a site visit before giving a quotation and entering into a building construction contract. He added that a contractor would rely on the drawing which has been approved by TCPA when preparing a quotation. He did not know that Defendant received an extra 350,000/- rupees for extra works for the foundation. He denied knowing that Defendant had a sum of 100,000/- rupees for extra-works quoted on 24 August 2011.
- [71] When asked whether he was terminated, he testified that he left the site and wrote a letter to *MLUH*. Finally, when asked to indicate what he knew was defective in the construction, he testified that when he was still on site, there were no defects to his knowledge. He

indicated that he did not visit the site later on, and that when he had previously indicated that there were many defects, he was reading from the report.

Assessment of the respective contentions in the light of the evidence

[72] This court has considered the written submissions of both Counsel in the light of the evidence. At the conclusion of the evidence the following matters were no longer seriously in dispute:

- Defendant's obligation to complete the work within the time stipulated in the Contract, which allegedly amounted to late performance and constituted a breach of the Contract. In the light of the evidence, it is clear that Plaintiff and Defendant must be taken by their conduct to have extended the period in which Defendant was to perform.
- Defendant's refusal to hand over keys giving access to the rooms;
- Plaintiff's obligation to make payments by portions timeously.

[73] This court considers the Plaintiff's heads of claim.

The dispute about defective works in the sum of 489,474.75/- rupees

[74] Defendant admitted that the Contract was terminated in July 2012, but that he had already vacated the site in April 2012. At that stage the house has not yet been completed. It is noteworthy that Defendant did not tender performance of his unfulfilled obligations under the Contract. Moreover, there is no dispute in relation to the termination of the Contract.

[75] This court is satisfied that the testimony of Plaintiff and Mr. Laporte coupled with the clear and straightforward evaluation exercise and computations of Mr. Valentin have unquestionably established the value of the defective works undertaken by Defendant. It has thus been proved on a balance of probabilities that Defendant is liable to Plaintiff in the sum of 487,074.75/- rupees. This court did not make any award for "Road access concrete surface... 1440.00". It appears that the road was built before Plaintiff and Defendant executed the Contract. This court awards the sum of 487,074.75/- rupees to

Plaintiff in relation to *"the remedial action work required to make good the identified deficiencies and/or defects on the house and external work"* P253.

Moral damage

[76] In the light of the merits of this case and the evidence of Plaintiff, this court awards Plaintiff the sum of 10,000/- rupees for moral damages.

Items kept in the possession of Defendant in the amount of 23,424/- rupees

[77] Plaintiff claimed that Defendant has kept certain items valued at 23,424/- rupees in his possession. In relation to those items which are in his possession, Defendant stated *"It is with me I agree to return but because the case is before the Court I have not done so"*². Defendant did not dispute the value of the items. This court is satisfied that Plaintiff has established the value of the items which she stated are in the possession of Defendant on a balance of probabilities. This court awards Plaintiff the sum of 23,424/- rupees.

[78] This court considers Defendant's/Counterclaimant's heads of claim.

[79] The heads of claim are contained in paragraph 6 of the counterclaim. This court, having considered the evidence of Defendant with care, is satisfied that there was no reliable evidence about the items claimed in the counterclaim and that Defendant gave no evidence which provided a reliable foundation for a proper assessment of damages. Defendant has not established the value of the heads of claim namely, *"i. Balance for extra works R206,000.00 ii. Cost for additional work and materials SR 42,300.00 iii. Cost of material SR 10,000.00 iv. Costs of tools and equipment SR 80,000.00 v. Planning of wood, cost of bed and transportation R6,000.00"* contained in the said paragraph 6 on a balance of probabilities. For example, in relation to *"balance for extra works"* when asked by Mr. Gabriel *"Q: Why are you asking for Rs206,000/- That is the balance for what?"* Defendant answered *"A: Yes because it is for the job that I did again after I had done in first time, to*

² Proceedings, 20 April 2017, at 9:30 AM. at p. 36.

break them and then to do them again. Like I did the ceiling, there is extra payment to be done for this because it was not part of the quotation". Defendant has clearly failed to establish the precise nature and extent of such works or the reasonable cost of such works. In the final analysis, the oral evidence of Defendant in relation to each head of claim is scant, very unsatisfactory and unreliable. Consequently, it is not possible for this court to make any finding in relation to the heads of claim based on the oral evidence of Defendant. This court also bears in mind that the thinner the documentary evidence, the more sceptical the court is entitled to be about the credibility of oral evidence on the point.

[80] In relation to moral damages Defendant testified *"When I was expected to paid for the job that I have done, so when she did not pay me then this really bothered me and I was not stable, it affected me morally. I expected to complete the job but since I did not complete the job then this also affected me a little bit and then the outstanding amount was left with the lady"*. Having considered the merits of this case, in particular the evidence of Plaintiff and the contents of P253, this court is convinced that Defendant is not entitled to any award for moral damages on the ground that Defendant has clearly breached the Contract in terms of which he was to construct the house by providing defective workmanship. Moreover, it is significant evidence that the Contract was terminated in July 2012, but that Defendant had already vacated the construction site in April 2012 and after having vacated the site kept items belonging to Plaintiff, in the sum of 23,424/- rupees, in his possession and refused to return such items to her.

Decision

[81] In the light of this court's findings above:

- (i) it awards Plaintiff the total sum of 520,498.75/- and interest at the commercial rate from the date of the plaint; and
 - (ii) it dismisses the counterclaim,
- with costs.

Signed, dated and delivered at Ile du Port on 2 November 2018

A handwritten signature in black ink, appearing to read 'F Robinson', written in a cursive style.

F Robinson

Sitting as a Judge of the Supreme Court