



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2015: No. 114

**BETWEEN:**

**SHEILA THOMAS**

**Plaintiff**

**-v-**

**HAILE MASKAL**

**(Trading as WEST SIDE CONSTRUCTION MANAGEMENT)**

**Defendant**

*Construction dispute, scope of works, breach of contract, innominate term,  
repudiation and acceptance, calculation of loss*

## JUDGMENT

**Date of Hearing:** 27, 28 April, 2, 19 May 2023

**Date of Ruling:** 20 October 2023

**Appearances:** Craig Rothwell, Cox Hallett Wilkinson Limited, for Plaintiff

Angelita Dill, AAA Law Company Ltd., for Defendant

**Judgment of Mussenden J**

## **Introduction**

1. The Plaintiff (“**Ms. Thomas**”) is the owner of 13 Orchard Grove, Pembroke Parish (the “**Property**”).
2. The Defendant (“**Mr. Maskal**”) is a building contractor, trading as West Side Construction Management (“**WSCM**”).
3. The dispute revolves around the construction and renovation of the Property which had as a final aim to turn a one-storey dwelling into a two-storey dwelling. The lower level (“**Lower Level**”) would be renovated into two apartments and the upper level (“**Upper Level**”) would be newly constructed and a part of one of the Lower Level Apartments. This case centers mainly around the Lower Level renovation but some aspects of the Upper Level new construction are involved.

## **Background**

4. Ms. Thomas caused a Specially Endorsed Writ of Summons dated 17 March 2015 (the “**Writ**”) and Statement of Claim (the “**SOC**”) to be issued against Mr. Maskal in respect of a dispute about the construction work performed by him at her Property.
5. The Writ set out the claim that the parties entered into a contract in writing dated 22 April 2014 (the “**Contract**”) wherein Mr. Maskal agreed, subject to terms in the Contract, to carry out certain construction and renovation work to the Property (the “**Project**”), in accordance with all existing building codes and specifications.
6. It was an express term of the Contract that Mr. Maskal would complete the Project, inclusive of all labour, materials, equipment and trucking, for \$207,700.00, based on an Architectural Drawing ST 15/10. The Project was forecast by Mr. Maskal to be completed within 4 months weather permitting.

7. The SOC set out that Mr. Maskal started the work on 5 May 2014 and work continued at an intermittent and slow pace which drew complaints from Ms. Thomas. Mr. Maskal demanded the payments and by 29 July 2014 Ms. Thomas had paid Mr. Maskal \$155,542.50 of the total set out in the section entitled “Proposed Payment Schedule” of the Contract (the “**Payment Schedule**”). There were a number of events that took place during the course of the Project including further work, further payments, change orders, withholding of a portion of the final payment and complaints. Change orders were for work not included in the original Scope of Works and were charged as an extra cost over the Contract Price (“**Extras**”). On 5 November 2014 Mr. Maskal abandoned the Project in an incomplete state.
8. Lawyers and experts became involved. Canterbury Law Firm, for Ms. Thomas, wrote to Mr. Maskal to request that he return to the Project and complete it. However, he did not return. Ms. Thomas consulted Atlantic Building Consultants (“**ABC**”) which estimated the costs of completing the Project to be \$300,000 to \$325,000. ABC estimated the total value of the work completed by Mr. Maskal to be 21% of the Contract price. Thus, Ms. Thomas claimed to be entitled to 79% of the \$180,7000 paid to Mr. Maskal, that is, \$142,753.00. There were smaller claims for expenses including for ABC, some sub-contractors or service providers who were left unpaid and for rent that Ms. Thomas was paying to live somewhere else as she could not move into her home at the expected completion date at the end of September 2014.
9. Thus, Ms. Thomas claimed that Mr. Maskal has breached or repudiated the Contract and consequently she has suffered loss and damage. She claims: (i) a refund of \$142,753.00; (ii) the difference between the said sum of \$142,753.00 and \$325,000.00 estimated cost of completing the Project; (iii) the various smaller expenses; and (iv) interest, damages, and costs.
10. The Defence set out that any change orders would lead to price structure changes. Also, it set out that work progressed diligently and on schedule although there were delays caused by change orders and by Ms. Thomas’ failure to pay on schedule. The Defence pointed to Ms. Thomas’ representative, a Mr. John Holdipp (now deceased), who had

pre-approved work subject to additional billing. The Defence claimed that Ms. Thomas breached the Contract by not making payments on schedule therefore he left the Project. As a result, Ms. Thomas repudiated the Contract which Mr. Maskal accepted. Further, the Defence set out that all subcontractors were paid except for some extra work.

### The Evidence

11. For the Plaintiff's case, Ms. Thomas gave evidence and the evidence of Mr. Holdipp (deceased) was presented by way of a notice of hearsay. Ms. Thomas' temporary landlord Andre Thomas' witness statement evidence was accepted of her short-term accommodation at a rent of \$1,100 per month for the period May 2014 to November 2014 and \$1,300 per month for the period December 2014 to September 2015. Mr. Alex Adelsberg of Bermuda Project Managements Limited ("BPML") gave evidence and was cross-examined on his reports dated December 2020 and his second report dated April 2023 (together the "BPML Report").
12. For the Defendant, Mr. Maskal gave evidence along with: Christopher Mouchette, a former banking officer for Ms. Thomas at HSBC; Corey Brown, a city planner and architect; Craig Laws, of Brilliant Solutions, an electrical sub-contractor who worked on the Project; and Dennis Smith, foreman on the Project, who is Mr. Maskal's brother. There was also an expert report dated 16 September 2022 prepared by Mr. Patrick Topley, a professional licensed Quantity Surveyor of Trent Construction Consulting (the "TCC Report").

### Expert Evidence

13. Ms. Thomas' expert Mr. Adelsberg's conclusions were that:
  - a. Mr. Maskal underbid the Project. He considered that the proper range was \$275,000 to \$300,000 with the actual value of the Project being \$298,000.
  - b. 41% of the Lower Level was complete amounting to work worth \$123,000 which was rounded up to \$130,000. This included all work by Mr. Maskal including the

Slab but excluding the Additional Billing. This resulted in an assessment of an overpayment of \$88,000 to Mr. Maskal.

14. Mr. Maskal's expert Mr. Topley's conclusions were that:
  - a. Mr. Maskal underbid the Project. He considered that the true value of the Project was between \$300,000 to \$350,000.
  - b. 47% to 54% of the Lower Level had been completed together with works carried out on the Upper Level (Slab, plumbing, electrical and other works) worth \$174,000. This resulted in an overpayment of \$43,000 to Mr. Maskal.

Evidence not in dispute

15. There was evidence that generally was not in dispute as set out below.
16. During the period between 2012 and 2013, Ms. Thomas obtained various bids based on plans drafted by Hegni Architectural Design Services dated 28 June 2010 for the Property (the "**Hegni Plans**") stamped approved by the Department of Planning dated 20 July 2010. There were some approved revised Hegni Plans in respect of several areas of the Project.
17. Ms. Thomas applied for a loan to renovate the Lower Level only. She received an HSBC "Offer to Finance" letter dated 20 February 2014 in respect of a home equity loan in the sum of \$230,000 to assist with renovations to the Property. Mr. Mouchette, an HSBC official at the time of the grant of loan, stated that HSBC was clear from the beginning that it could not finance construction work on the Upper Level of the Property because Ms. Thomas could not support a loan to that extent due to her income, debt-to-equity ratio and age. Thus, he advised her to change the plans to reflect only renovations to the Lower Level.
18. Ms. Thomas met Mr. Maskal through her domestic partner Mr. Holdipp who had recommended him for the Project.

19. There is a dispute about what kind of price was the figure of \$200,700 and what aspects of the Project it was to cover. I will turn to those disputed facts later, however at this point, Ms. Thomas' position is that it was a fixed price to complete the Project, namely the renovation of the Lower Level. Mr. Maskal's position is that he provided a kind of pricing which he referred to as a price structure (the "**Price Structure**"). He was asked to provide and did provide three Price Structures as follows: (i) a total Price Structure for both the Upper Level and Lower Level in the amount of \$485,000 (the "**Total PS**"); (ii) a Price Structure for the Lower Level only in the amount of \$200,700 (the "**Lower Level PS**"); and (iii) a Price Structure for the Upper Level only in the amount of \$284,300 (the "**Upper Level PS**").
20. Ms. Thomas' position was that the price provided by Mr. Maskal in the Contract was a price to complete the Project, that is the renovation of the Lower Level subject to extra charges for any changes to the Hegni Plans. Thus, she selected him from a list of contractors who had bid for the job. Mr. Maskal states that Ms. Thomas selected and signed off on the Lower Level PS.
21. On 21 April 2014 Mr. Maskal presented Ms. Thomas with the Project Description setting out the Lower Level PS of the Project at \$200,700 as well as a Scope of Works to be performed. On 22 April 2014 the parties signed the Contract for \$200,700 with the Payment Schedule, which Mr. Maskal said had a little flexibility, as set out below along with the actual payments made:

Payment	Amount Due	Date Due	Amount Paid	Date Paid
Initial Payment	\$20,070.00	2 May 2014	\$20,700.00	2 May 2014
2 <sup>nd</sup> Payment	\$44,527.50	26 May 2014	\$44,527.50	27 May 2014
3 <sup>rd</sup> Payment	\$45,157.50	23 Jun 2014	\$45,157.50	26 Jun 2014
4 <sup>th</sup> Payment	\$45,157.50	28 Jul 2014	\$45,157.50	29 Jul 2014
<i>August 2014 - Period of work stoppage</i>				

5 <sup>th</sup> Payment	\$45,157.50	Aug 2014 23 Sep 2014	\$25,157.50 (withheld \$20,000)	2 Oct 2014
	_____		_____	
Totals	\$200,700.00		\$180,700.00	

22. Ms. Thomas rented other accommodation as stated above for the duration of the Project and after Mr. Maskal left the Project.

23. On 20 May 2014 there was a change order in relation to a pre-existing tank (the “**Tank CO**”). This was an Extra for which Ms. Thomas paid \$4,078. In May 2014, there was a change order for a concrete slab (the “**Slab**”) that was cast and poured as the ceiling of the Lower Level and the floor of the Upper Level (the “**Slab CO**”). This was an Extra for which Ms. Thomas paid \$33,000 on its completion in August 2014. Ms. Thomas’ evidence was that the Slab was poured because she had discussed with Mr. Maskal that since she was not having the Upper Level built, it would be necessary to seal the Lower Level by pouring the Slab. The parties agreed that the \$33,000 would be paid out of existing loan funds but Mr. Maskal stressed that he needed the \$33,000 to be paid as part of the 5<sup>th</sup> and final payment, his understanding being that Ms. Thomas would seek such further finding from a bank. Additionally, the \$33,000 would be deducted from the Upper Level PS as it would no longer be a task for the Upper Level phase. Throughout the proceedings, Mr. Maskal reiterated that he was not aware of Ms. Thomas’ financial position.

24. Ms. Thomas became unsatisfied with the work and made complaints whilst Mr. Maskal demanded payments pursuant to the Payment Schedule. Mr. Holdipp sent an email dated 16 August 2014 to Mr. Maskal setting out that Ms. Thomas was concerned because Mr. Maskal had exhausted over \$150,000 out of \$200,000 and wondering how the shell of the house was going to become a home. It listed various concerns. Thus, there was a request by Ms. Thomas for a work stoppage (the “**Work Stoppage**”) which lasted about 2 – 3 weeks. The construction re-started in the first week of September 2014 and during that month Mr. Maskal performed some work.

25. During the period August to October 2014, Ms. Thomas sought additional funding from HSBC. She states that the additional funding was for the Lower Level as she had realised that the funds were being quickly used up but progress was not matching the expenditure. She denied Mr. Maskal's assertion that she was seeking additional funding for the Upper Level. The Bank denied the requests for additional funding.
26. Ms. Thomas met with a Butterfield Bank representative, along with Mr. Maskal, as she sought to secure funding. She states that it was for the Lower Level once she realised that HSBC was not going to offer further funds.
27. On 2 October 2014, in respect of the 5<sup>th</sup> and final payment per the Payment Schedule, Ms. Thomas paid Mr. Maskal \$25,157.50 which she stated was in the hopes that Mr. Maskal would be enticed to complete the Project so that she could move in. However, she withheld \$20,000 until Mr. Maskal completed the Project, such withholding causing Mr. Maskal to be unhappy. In the same month, Hurricanes Fay and Gonzalo struck Bermuda within one week causing some damage to a pre-existing part of the Property. Ms. Thomas paid for another contractor to fix that damage. Mr. Maskal performed some more work on the Property.
28. Mr. Mouchette of HSBC and a bank colleague attended the Property in late October 2014. By this time \$180,700 towards the Contract price had been paid to Mr. Maskal and \$37,078 had been paid to him for the two change orders for a total of \$217,778. Mr. Mouchette stated he told Ms. Thomas that he was impressed with the amount of work completed by WSCM with the loans funded by HSBC. Ms. Thomas states that she does not recall Mr. Mouchette saying this as she was fairly upset at that time with the lack of progress. Further, he stated that he was surprised to see the Slab and other Upper Level works as the Bank's position was that she should change the plans to eliminate the Upper Level.
29. Ms. Thomas rejected a bill from Mr. Maskal dated 3 November 2014 entitled Additional Billing for \$15,370 ("**Additional Billing**"). She claimed that she had never authorized Mr. Holdipp to act on her behalf in any manner in any issue in relation to the Contract.



Mr. Maskal disputes this as he maintains that Mr. Holdipp was Ms. Thomas' representative at all material times.

30. On 5 November 2014 Mr. Maskal and his crew reported to the Property but left shortly thereafter, without having done any work, going to another project nearby to the Property. He left tools which were collected later. He left debris which Ms. Thomas paid someone to clear up.
31. In November 2014 Ms. Thomas approached HSBC Bank of Bermuda (“**HSBC**”) to secure funding to complete the Project, that is the Lower Level. HSBC advised that she obtain the services of a quantity surveyor to assess the cost of completing the Project. She secured the services of Mr. Berry of ABC who produced a report (the “**ABC Report**”) showing that the work completed was no more than \$78,100 with a further cost to complete of \$294,819.
32. Ms. Thomas was able to return to live in one Lower Level apartment in October 2015 having succeeded in making that part inhabitable.
33. There were a number of relevant documents in the case which I set out as follows:
  - a. Photographs of the Project taken by Ms. Thomas after Mr. Maskal finished working at the Property;
  - b. The Contract, a WSCM<sup>1</sup> document dated 21 April 2014, signed by both parties, which includes the following sections:
    - i. Project Description - “*Lower level Renovation and Addition*”. The language used in the Project Description section is “Price Structure” and the section concludes with the words “*The following is the price structure for our proposed project: Lower level, all inclusive \$200,700. Total Price Structure: \$200,700.*”
    - ii. Scope of Works – sets out the detail for excavation, plumbing, electrical, carpentry, cabinetry and masonry. It included at paragraph 4 wording “*Any change to order shall lead to Price Structure changes.*” ... and at

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<sup>1</sup> Some documents from Mr. Maskal are entitled “Construction Management Services”. I take that to mean “WSCM”. As nothing turns on this, I will use “WSCM” to refer to all documents produced by Mr. Maskal.

paragraph 5 “*Contractor must be given 4 – 5 days notice before any changes or additions required.*”

- iii. Proposed Payment Schedule – as set out above;
- iv. Project Forecast – “*4 months weather permitting*”.
- c. Payment request letters;
- d. WSCM Slab CO. It noted that the \$33,000 would be subtracted from the Upper Level PS figure previously submitted.
- e. WSCM 2-month Progress Report dated 27 July 2014 in respect of the “*lower level renovation and addition*” setting out several Items and Notations. Notation (ii) indicated that some roof sections had to be removed in order to continue the Lower Level addition and renovation. It stated that the Project was on schedule.
- f. An email dated 16 August 2014 about Ms. Thomas’ concerns and the Work Stoppage.
- g. WSCM letter dated 22 August 2014 and a WSCM note dated around 21 August 2014 to Ms. Thomas about the road to completion. It makes comments about the \$33,000 for the Slab being taken out of the final payment whilst efforts were being made to secure funding to reimburse the final payment amount by the \$33,000, noting there have been concerns about funding since the submission of the original price on 21 April 2014. The \$33,000 was paid on 27 August 2014.
- h. WSCM Additional Works Billing letter dated 3 November 2014.
- i. Mr. Holdipp’s email dated 5 November 2014 to Mr. Maskal setting out concerns.
- j. Ms. Thomas letter dated 9 November 2014 to Mr. Maskal setting out concerns.
- k. Mr. Holdipp’s email dated 15 November 2014 to Mr. Maskal about attending the Property to remove his tools and equipment. He signs it “*Respica Finem – Keep the end in view*”.
- l. A batch of invoices and receipts.

### Evidence in Dispute

34. There was evidence in dispute on several areas as follows which I deal with in turn.

- a. The role of Mr. Holdipp.

- b. Mr. Maskal's inability to review the Property before submitting a price for the Project.
  - c. Was the price in the Contract a fixed price quotation or something else.
  - d. Did Mr. Maskal underbid the cost of the Project.
  - e. Did Ms. Thomas make misrepresentations to Mr. Maskal in respect of the scope of work of the Project.
35. Upon my observations of Ms. Thomas giving evidence, I found that she was a credible witness who gave her evidence in a forthright and honest manner. Her evidence about the level of funding that she had available and her considerations in selecting Mr. Maskal as her contractor, as well as her concerns about the lack of progress as compared to her payments to Mr. Maskal, had sound reasoning to it and a resounding ring of truth to it. I found her to be credible and straightforward in her evidence about the material matters such that I preferred her evidence over Mr. Maskal's evidence.
36. I have considered the evidence of Mr. Maskal and my observations are that he seemed to be passionate and committed about his methods and reasoning. However, I found Mr. Maskal to be defensive if not evasive when giving his evidence on various issues and when confronted by matters that might seem clear objectively. On such issues, I did not find him to be credible. An example of this is when he insisted that he was not allowed entry into the interior of the Property although it seemed to me that he could have sought such inspection of the interior. Another example is when, in the face of the Contract that he drafted setting out that the Project was for the Lower Level, he continuously maintained that his understanding of the project was the Lower Level followed on by the Upper Level.

#### The role of Mr. Holdipp

37. I have considered the role of Mr. Holdipp in this matter.
38. Ms. Thomas's and Mr. Holdipp's evidence is that she met Mr. Maskal through her domestic partner Mr. Holdipp who had recommended Mr. Maskal as contractor for the

Project. Mr. Holdipp was present when she signed the Contract with Mr. Maskal. Mr. Holdipp then became a paid labourer on the Project working for Mr. Maskal. On cross-examination, Ms. Thomas stated that while she was at work, Mr. Holdipp was onsite when he and Mr. Maskal discussed matters about the Project.

39. The documentary evidence shows that Ms. Thomas referred to Mr. Holdipp as her representative several times, including: (i) her undated letter to Mr. Maskal about ceasing work when she stated that Mr. Holdipp would continue to be her representative; and (ii) her letter dated 9 November 2014 when she stated that Mr. Holdipp was her representative on the job.
40. Mr. Maskal's position is that Mr. Holdipp was a representative of Ms. Thomas and neither of them were experienced in construction management and Mr. Holdipp was not an experienced contractor, mason or skilled labourer. He was included on the work crew as a labourer to enable some savings. Further, Mr. Maskal or the foreman explained to him about situational change requirements and Mr. Holdipp made decisions on the spot and reported back to Ms. Thomas. Thus, the works in the Additional Billing were approved by Mr. Holdipp and reported to Ms. Thomas, thus they fell to be paid.
41. Mr. Laws of Brilliant Solutions stated that Mr. Holdipp conducted himself as Ms. Thomas' representative during the Project. He noted that Mr. Holdipp exercised his authority to make decisions onsite often even though he was a paid labourer of Mr. Maskal. Also, Mr. Holdipp asked for things to be done that were not on the Hegni Plans, discussing them with Mr. Maskal. Mr. Dennis Smith stated that Mr. Holdipp was a representative of Ms. Thomas and he was made aware of necessary changes which he assisted with and later informed Ms. Thomas about and was a part of their decision making process.
42. In my view, I am satisfied on the evidence of the contemporaneous documents and the evidence of the witnesses as set out above that Mr. Holdipp was a representative of Ms. Thomas. In respect of Ms. Thomas' and Mr. Holdipp's assertions that he was not her representative in light of the Additional Billing, I reject them as clearly he was her

representative. To that point, it follows that Mr. Holdipp as representative was authorized to make decisions on behalf of Ms. Thomas including if any were works for the Additional Billing.

Mr. Maskal's inability to review the Property before submitting a price for the Project.

43. Mr. Maskal complained that he did not have the opportunity to view the interior of the Property before he submitted the Lower Level PS although he visited the site on 2 occasions but Mr. Holdipp told him that Ms. Thomas was at work. As a result, he submitted the Lower Level PS based on the Hegni Plans. The reason for this is because he asserts that Mr. Holdipp was adamant that he submit his price based on the Hegni Plans as Mr. Maskal could not enter the interior of the Property because it was locked. On cross-examination he stated that sometimes contractors are urged to provide a price without entering the premises. He stated that for that reason, he used the wording "*Price Structure*" as opposed to "*Quotation*", informing Mr. Holdipp that any changes, errors, or omissions or structural deficiencies would lead to a price change. He stated that he also informed Ms. Thomas about costs increases as a result of any change orders.
44. Ms. Thomas' evidence was that she was living at the Property and would have had no issue with Mr. Maskal viewing the Property had she been asked. I note that Mr. Maskal admitted that he met Ms. Thomas at the Property on 22 April 2014 to sign the Contract in the dining room. He made no request to view the Property and he raised no concerns. She stated that all the other contractors who bid on the Project visited it in order to prepare their bids and thus she fully expected Mr. Maskal to do the same.
45. On cross-examination, Mr. Adelsberg stated that Mr. Maskal would not be able to get a complete valuation based on the plans, as there would be variances that he would not be able to see without going inside the Lower Level and that it was unusual to not visit the site. Mr. Brown stated that a site visit would certainly be a requirement to review the conditions of the Property for verification of actual built structures and any topographical changes relating to building levels. Without this information it is difficult at best to confirm the scope of works for building that is required. Also, Mr. Laws stated that he

had worked with Mr. Maskal on previous projects. Their practice would be that Mr. Maskal would have sub-contractors review the plans and they would visit the jobsite if necessary and then give a price to Mr. Maskal. For this Project, they met on site as the Project began. Mr. Smith stated that it was vital to see the Property before determining a price, but if you did not have access then you could quote from the plans.

46. In my view, Mr. Maskal did have the opportunity to view the interior of the Lower Level before providing the Price Structures just as the other contractors who bid did so. One opportunity was to ask Ms. Thomas directly for access. The other opportunity arises out of the ability to be in the kitchen to sign the Contract. It seems to me, that if they were present to sign the Contract then Mr. Maskal could have had access to inspect the interior against the Hegni Plans to settle his prices.

Was the price in the Contract a Fixed Price Quotation or something else

47. Ms. Thomas case is that the price of \$200,700 was a fixed quotation for the Project works set out in the Contract based on the Hegni Plans. It was lower than the other bids she had received and she was impressed by Mr. Maskal when he assured her that he could complete the Project in 4 months for \$200,700. On cross-examination Mr. Maskal did not recall such assurances. He also denied the assertion by Ms. Thomas that he said to her that if she failed to make the scheduled payments then he would take her to court, on the basis that no contractor would say that to a client.

48. Mr. Maskal case is that it was a Price Structure which in essence allowed for changes in the price if there were errors, omissions or structural deficiencies in the Hegni Plans. He stated that a Price Structure was not a quote but it is a price that has elasticity in which it could be amended or extended. Further, it would be incorrect to treat the price of \$200,700 as a conclusive quote or the Contract price because the Price Structure consisted of known works taken from the Hegni Plans and unknown works on a costs and charge basis. Thus, the contractual cost/price would be unknown until Mr. Maskal completed the Project.

49. Upon my review of the terms of the Contract, it set a value of \$200,700 for the renovation of the Lower Level which was inclusive of all labour, materials , equipment, tools and trucking. The Contract states that the price structure was based upon the Hegni Plans. Under the Scope of Works, it provided a clause that change orders would lead to price structure changes.

50. In my view, the Contract was for a quotation of a fixed price for \$200,700. Further, it allowed for Extras, at a cost, if Ms. Thomas requested a change from the works that were set out in the Hegni Plans. Thus, if Ms. Thomas did not request any changes, then she was entitled to the Project being completed for a price of \$200,700 according to the Hegni Plans within the 4 month time estimate. For this case, there were 2 change orders that were charged over and above the Contract price without issue. I note that Mr. Maskal states that he informed Mr. Holdipp that “any changes, errors, or omissions or structural deficiencies would lead to a price change”. However, although the Contract provides for changes in work at cost, crucially and significantly, it does not include any such term about errors, omissions or structural deficiencies in the Hegni Plans. Consequently, I am not satisfied of Mr. Maskal’s assertion that the Contract allowed for the flexibility of the price based on his concept of a Price Structure. If that is what Mr. Maskal meant, then such terms should have been expressly set out in the Contract. Further, I reject Mr. Maskal’s contention that the contractual costs/price using the Price Structure method is unknown until he completes the Project. In my view, that makes a mockery of the process whereby a potential client asks contractors for bids in order to secure funding from a lender or a bank or in using their own funds for a project. What use is a cost or price at the end of a Project. Clearly, in my view, the intention of all parties was to secure a contractual price before the Project began for obvious reasons, in particular, to assist in securing funding and to lock down the obligations of each party to each other in respect of the Project.

Did Mr. Maskal underbid the Project

51. Mr. Maskal stated that he explained what a Price Structure was to Ms. Thomas. Mr. Maskal stated that, based on his discussions with Ms. Thomas and Mr. Holdipp, he understood that the Upper Level and Lower Level were part of one project and that Ms. Thomas was seeking funding from the bank for both levels, although he understood she had funds for the Lower Level but was going to seek funds for the Upper Level. On cross-examination, when presented with the TCC Report finding that the Lower Level would be priced more than the Upper Level, he maintained that he did not mix them up, standing by his prices of \$200,700 for the Lower Level PS and \$284,300 for the Upper Level PS.
52. On cross-examination, Mr. Maskal stated that it was important for a home-owner to know the contractor's quote in order to secure funding, noting that different things happen to affect the price. He denied that he underbid the Project to get the job leading Ms. Thomas to believe that she had the funds to complete the Project.
53. In my view, I find that Mr. Maskal severely underbid the price of the Project of completing the Lower Level only. The BPML Report stated that he did so pointing out that the Total PS included the Lower Level cost of \$200,700 and the Upper Level cost of \$284,300 for an overall total of \$485,000. BPML asserted that the underbidding arose because Mr. Maskal offered to complete the Lower Level at the same price of \$200,700, even though the Upper Level was not included, failing to take into account that if the Upper Level was not included, additional work was required to ensure a complete and watertight structure for the Lower Level. Also, BPML asserted that based on Mr. Maskal's own pricing, the value of the contracted works, if correctly bid, ought to have been \$245,500. I note here that Ms. Thomas' case is that Mr. Maskal tried to correct this mistake by including the Tank CO, the Slab CO and the Additional Billing in the Lower Level phase. The BPML Report considered that even \$245,500 was an underbid and concluded that the range was \$275,000 to \$300,000 with the actual value of the contracted work being \$298,000.



54. Mr. Topley for the Defence stated that the true value of the Project was between \$300,000 to \$350,000. He explained that the WSCM Total PS of \$485,000 was similar to the TCC total price of \$498,000. However, the price to complete the Lower Level only was not just a matter of using the Lower Level PS of \$200,700 because other works would be required to complete the Lower Level only, thus increasing the cost. Mr. Topley agreed with the statement of BMPL that “... *the lower floor work was undervalued due, almost entirely, to poor definition of the contract work arising from the adoption of a sum for the lower floor*”. Mr. Topley made reference to the ABC Report which provided an estimate of between \$300,000 and \$350,000 for completing the Project. Thus, he concluded that all three professional surveyors were in agreement that the true value of works for the Lower Level stood at between \$300,000 and \$350,000.

55. I have also given consideration to the evidence of Mr. Brown for the Defence. He stated that in respect of the Hegni Plans, the scope of work was entirely unclear and they did not delineate what is existing and/or proposed. He added that without a clear outline on all elevations and floor plans it is nearly impossible to verify what is being proposed and the quantity of material or supplies that would be necessary. He stated that in his professional opinion, a site visit would certainly be a requirement to review the conditions of the Property for verification of actual built structures and any topographical changes relating to building levels. Without that information it would be difficult at best to confirm the scope of works for building that is required. Mr. Brown considered that it was reasonable and necessary for the contractor to put a base price with a caveat stating that any works not included in the plans be considered as extras and change requests, and to be charged by the cost and charge method. The reason for this was because based on the information provided on the plans to ensure that further adjustments are to be reflected in the cost and would be necessary upon receipt of more detailed information. On cross-examination he stated that he would not be able to give a contractual price based on the Hegni Plans.

56. I have already found that Mr. Maskal had the opportunity to inspect the interior of the Property and that the Contract was for a fixed price of \$200,700.

57. In light of the reasoning in the reports by the three professional quantity surveyors that conclude that the value of works for the Lower Level is in the range of \$300,000, I find that the price of \$200,700 was an underbid by Mr. Maskal for the Project. Thus, it follows that I reject Mr. Maskal's position that he did not underbid the Lower Level of the Project.

Did Ms. Thomas make misrepresentations to Mr. Maskal in respect of the scope of work of the Project

58. Mr. Maskal's position is that Ms. Thomas and/or Mr. Holdipp misrepresented to him critical attributes of the work at the property as follows:

- a. That some information shared by Mr. Holdipp to Mr. Maskal was not true.
- b. That the 'project' was going to be completed in phases. I note here that I have defined the term "Project" to be the renovation of the Lower Level. However, I take it that what Mr. Maskal means by "project" is that the property was going to be renovated in phases, that is, the Lower Level and then the Upper Level. He points to the facts that he was asked to provide a contract for the both the Upper Level and Lower Level, then asked to provide a contract for the Lower Level, then asked to provide a contract for the Upper Level, then he was told that the preference was to do the work in a phased manner because the funding will be received from HSBC. He further makes the point that there was no discussion of not proceeding with the Upper Level or that there were limited funds or that there were to be design changes to reflect the limitations. On cross-examination he stated that only when there were discussions about the Slab, did discussions take place about proceeding with only the Lower Level.

59. Ms. Dill submitted that these were important omissions by the couple, at the time of contracting, which served to deceive Mr. Maskal into entering the Contract, when he believed that the renovation of the Lower Level and Upper Level was to proceed in phases and that Ms. Thomas had sufficient approved funding to complete. Thus, vital information was concealed.

60. On cross-examination, when asked about when did Ms. Thomas ever tell him that she was proceeding with both the Lower Level and the Upper Level, Mr. Maskal maintained that Ms. Thomas had always said that she was going to the bank for funding for both levels. When pressed that the Contract only set out work for the Lower Level, Mr. Maskal steadfastly maintained his position, asking rhetorically why did she have interior stairs to go upstairs, adding that Ms. Thomas even took him to the bank with her to secure funding for both levels.
61. On cross-examination, Mr. Laws' evidence in essence was that at first he thought they were going to do the Lower Level and then proceed on to do the Upper Level. In May 2104 Ms. Thomas directed that work be done on the Slab and to move a bathroom and laundry to the Lower Level. This indicated to him that they would not be working on the Upper Level. On cross-examination, Mr. Maskal stated that such a change was not a clear indication that they were only to be working on the Lower Level. Mr. Laws stated that at first the Upper Level was closed off temporarily and then closed off permanently.
62. Mr. Rothwell submitted that only the quote for the Lower Level was accepted. Thus, Mr. Maskal should not have been under any doubt as to the scope of his instructions as the other quotes were clearly not accepted. He pointed to the evidence wherein there was a difference in recollection between Ms. Thomas and Mr. Maskal at the meeting on 22 April 2014 when they signed the Contract. Ms. Thomas position is that: (i) she knew she did not have the funds to build the Upper Level and told Mr. Maskal that she only wanted the Lower Level built; and (ii) Mr. Maskal assured her that he could complete the Lower Level within 4 months and that he was confident that he could do it for \$200,700. Mr. Maskal's position was that he denied that the requirement of only building the Lower Level was made clear to him or that he provided such reassurance.
63. In my view, I do not accept that there was misrepresentation about the work that was to be completed at the property. First, the parties only proceeded with the Contract which was for the Lower Level renovation. The other contracts were not proceeded with. Thus, it seems to me that from the date of signing the Contract which Mr. Maskal drafted, Mr. Maskal knew that the scope of works was for the Lower Level.

64. Second, there were some changes that indicated that only the Lower Level was to be completed. The Slab CO dated 23 May 2014 and the discussion about it was clear evidence that only the Lower Level was to be proceeded with. Thus, even if Mr. Maskal was not clear about the scope of works when he signed the Contract then the Slab CO would have made it clear to him that only the Lower Level was to be completed. He did record that the \$33,000 would be removed from the Upper Level PS. Also, Ms. Thomas asked for the laundry to be relocated to the Lower Level from the Upper Level.
65. Third, Mr. Maskal was referred to his own letter dated 18 August 2014 to Ms. Thomas where he stated “*On the 15<sup>th</sup> August 2014, you once again informed me that you are not, at this time, able to complete the upper phase, just lower level phase*”. Although Mr. Maskal refused to accept that the reference to “*once again*” meant that Ms. Thomas had informed him of this before, in my view, again it was clear that Mr. Maskal knew that only the Lower Level was to be completed when he was working at the property.
66. Fourth, Ms. Dill submitted that Mr. Holdipp and Ms. Thomas knew that Ms. Thomas had maximized her borrowing but enticed Mr. Maskal to complete the works cheaply, fix him into a bid that would be lower than bids already submitted and disallow him to be fully informed about the property. I do not agree with Ms. Dill on this point. In my view, Mr. Maskal was free to bid whatever price he wanted as well as he could have requested to see the interior of the Lower Level before signing the Contract. Further, the amount of funds known and available to Ms. Thomas was not a relevant factor to Mr. Maskal’s calculations to arrive at the price for the Lower Level. Thus, he arrived at his own price without regard to how much funds Ms. Thomas had at her disposal. It seems clear to me that once Mr. Maskal arrived at his price of \$200,700, then Ms. Thomas was in a position to accept the price as she knew she had obtained a loan in the amount of \$230,000.
67. In light of these reasons, I find that Ms. Thomas did not misrepresent to Mr. Maskal any facts about what was the scope of works for the Project and Contract. In my view, she did what a prudent client would do, namely establish what funds she had available for a

project, seek bids on approved plans, consider the bids and any recommendations and then select a contractor who had bid within her available budget.

### **The Issues**

68. There were several issues in the case as follows:

- a. Which party caused a repudiatory breach of the Contract.
  - i. Was it Ms. Thomas when she failed to pay the full 5<sup>th</sup> and final payment and the Additional Billing;
  - ii. Was it Mr. Maskal when he walked away from the Project and refused to return to complete it.
- b. Was the breach of not completing the Project within 4 months a breach so serious as to justify Ms. Thomas repudiating the Contract.
- c. If Ms. Thomas was right to accept the purported repudiation by Mr. Maskal, then what is her loss.

### **Issue 1 – Which party caused a repudiatory breach of the Contract**

#### **The Law**

69. In *Emden's Construction Law by Crown Office Chambers Chapter 16 Termination/Discharge by Breach/Repudiation* it stated as follows:

*“[16.20] Repudiation can arise in three situations:*

*“(i) Where one party breached a condition of the contract (it should be understood that in this context ‘a condition’ bears its technical legal meaning, being a term which the parties have expressly or impliedly made a condition).*

*“(ii) Where one party breaches a term of the contract which is not a condition, if his breach is sufficiently serious;*

*“(iii) Where one party evinces an intention not to perform his essential obligations under the contract.*

*Repudiation by breach of contract*

*[16.21] A condition is a term of a contract where breach of the term entitles the innocent party to treat the contract as repudiated. Like any other term of the contract, a condition may be express, or implied into the contract. Whether a particular term has the effect of a condition or not depends on interpretation of the contract,*

*including the words used by the parties, and the context of the term in the contract as a whole. In some cases the law will itself imply terms as conditions.*

*Repudiation not involving breach of condition*

*[16.23] Breach of a term which has not been made a condition of the contract may, in some circumstances, entitle the innocent party to treat the contract as having been repudiated. ... Indeed, most terms in building contracts are likely to be classified as innominate terms and as such the court will look at the character and seriousness of the breach and its consequences to see whether it justifies the contract being treated as repudiated.*

*[16.24] In the case of innominate terms, the contract will be treated as repudiated for breach, if the breach is sufficiently serious, or fundamental. If one party commits a serious breach of contract, which deprives the other party of substantially the whole benefit of the contract, that will amount to a repudiation of the contract:*

*“Where there is a contract in which there are two parties, each side having to do something, if you see that a failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say: ‘I am not going to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.’”  
*Mersey Steel and Iron Co v Naylor Benzon & Co (1884) 9 APP Cas 434, HL, per Lord Blackburn at 443**

*[16.30] ... Prolonged abandonment of the work, or persistent seriously defective work coupled with refusal to rectify could amount to repudiation but under the JCT contract it is doubtful whether the contract commits a breach of contract by executing defective work per se, provided this is remedied before practical completion. Generally, slow progress will not be treated as repudiatory unless time is, exceptionally, made of the essence of the contract as set out above. Where a contractor suspends the works, whether that amounts to a repudiatory breach will depend on the terms of the contract, the breaches of contract and the facts and circumstances of the case.*

*[16.31] In *Sutcliff v Chippendale and Edmonson (1971) 18 BLR 149* the employer complained about the slow progress of works on a house. Some months later, the employer reluctantly agreed to an extension in the date for completion, but that date was not adhered to, and many defects in the work became apparent. It was held that the employer was justified in treating the contract as wrongfully repudiated. The judge considered that the interaction of all of the circumstances, including the defendants apparent inability to comply with the completion date requirements, the nature and number of complaints from subcontractors, and the defendant's own admission that the quality of work was deteriorating and the number of defects was multiplying, justified the claimant's view that the defendants had neither the ability, the competence nor the will to complete the work in a manner required by the contract. Similarly, in *Multiplex Constructions (UK) Ltd v Cleveland Bridge (UK) Ltd [2007] EWCA Civ 1372*, a subcontractor which stopped work when it (wrongly)*

*considered it had performed its obligations under the contract was found to have repudiated the contract.*

70. In *Mayhaven Healthcare Ltd v Bothma and another* [2009] EWHC 2634 the court considered the question if a contractor under a construction contract breaches that contract by wrongfully suspending the works, does such conduct amount to a repudiatory breach of contract. Ramsey J stated as follows:

*“[13] It was accepted by [the defendant] that there was an improper suspension of the works on 20 July 2006 based on grounds of non-payment because [the defendant] had, in fact, been paid the relevant sums. The question was whether that improper suspension amounted to a repudiatory breach.*

*[24] Mr. Pennicott refers to a passage in Keating on Construction Contracts (8<sup>th</sup> ed) at para 6-070 where it states:*

*“Refusal or Abandonment. An absolute refusal to carry out the work or an abandonment of the work before it is substantially completed, without any lawful excuse, is a repudiation.”*

*[28] I accept Mr. Steed’s submission that the award could take into account the effect of the defendant’s conduct on Mayhaven. He referred to the passage in the speech of Lord Scarman in Woodar v Wimpy where he said at 299 C-D:*

*“The law requires that there be assessed not only the party’s conduct but also, ‘objectively considered,’ its impact on the other party.”*

*[34] The answer to that question whether a contractor’s wrongful suspension of the works amounts to a repudiatory breach will depend on the terms of the contract, the breach or breaches of contract and all the facts and circumstances of the case. The question is not capable of a simple answer, as a matter of general principle.”*

71. In *Bunge Corporation v Tradax Export SA* [1980] 1 Lloyd’s Rep 294 in respect of innominate terms, Lord Scarman stated:

*“Unless the contract makes it clear, either by express provision or by necessary implication arising from its nature, purpose, and circumstances (“the factual matrix” as spelt out, for example, by Lord Wilberforce in his speech in the Reardon Smith case [1976] 1 W.L.R. 989, at pp.995), that a particular stipulation is a condition or only a warranty, it is an innominate term, the remedy for a breach of which depends upon the nature, consequences, and effect of the breach.*

### Ms. Thomas’ Position

72. Ms. Thomas claims that Mr. Maskal breached or repudiated the Contract when he abandoned the Project on 5 November 2014. He demanded from her the payments according to the timing of the Payment Schedule whilst not matching this with progress

of the work in accordance with the Contract. Thus, the realization that he had underbid the Project together with his knowledge that he had received payments that had far outstripped his progress so leaving little outstanding funds left due to him to complete, were the obvious reasons why Mr. Maskal abandoned the work site on 5 November 2014 and thereafter refused to complete the Project.

73. Ms. Thomas' primary case is that the abandonment and refusal to return demonstrated a clear intention by Mr. Maskal not to perform his essential obligations under the Contract. This amounted to a repudiation of the Contract by Mr. Maskal that Ms. Thomas accepted.

74. Further, the breach by Ms. Maskal in not progressing the Project in accordance with the scheduled payments received or completing on schedule were sufficiently serious or fundamental to enable Ms. Thomas to treat the Contract as repudiated for breach.

#### Mr. Maskal's Position

75. Mr. Maskal's position is that Ms. Thomas breached the Contract by failing to comply with the Payment Schedule, in particular, she refused to pay the full amount of the 5<sup>th</sup> and final payment due 23 September 2014. His case is that the payment was originally delayed with his consent which he agreed to be paid temporarily, \$33,000 from the 4<sup>th</sup> Payment to install the Slab. Mr. Maskal stated that the Payment Schedule was not based on work completed but rather it was based on monthly payments.

76. Mr. Maskal claims that Ms. Thomas further repudiated the Contract when she rejected and refused to pay the Additional Billing in accordance with paragraph 4 of the Contract under Scope of Works. The Additional Billing works was for work already completed which Mr. Holdipp agreed to as WSCM encountered them on the Project. Mr. Maskal asserts that Ms. Thomas was aware of and accepted these works being done per the evidence of Dennis Smith and the sub-contractor Mr. Law.

#### Analysis



77. In my view, Mr. Maskal breached the Contract such that Ms. Thomas was entitled to treat the Contract as repudiated which she accepted for several reasons.

Failure by Ms. Thomas to pay is not a repudiatory breach

78. In my judgment, Ms. Thomas did not breach the Contract by failing to pay pursuant to the Payment Schedule. The Initial Payment, the 2<sup>nd</sup> Payment, 3<sup>rd</sup> Payment and 4<sup>th</sup> Payment were made on time and are not in issue. The Work Stoppage is not an issue either as the parties agreed to restart the Project.

79. Thus, I have considered the evidence concerning the partial payment of the 5<sup>th</sup> and final payment and the refusal to pay the Additional Billing. When Ms. Thomas had concerns that most of the Contract price had been paid to Mr. Maskal but that the work performed was not on par with the payments, she raised the concerns, but also on 2 October 2014, she made the monthly payment less \$20,000. Her evidence was that she hoped that this would entice Mr. Maskal to complete the Project. Later on, Ms. Thomas rejected the Additional Billing dated 3 November 2014 for which Mr. Maskal maintains was for work approved by Mr. Holdipp and already completed.

80. I note that the Contract set a "Proposed Payment Schedule". In my view, following *Bunge Corporation*, the Payment Schedule was not expressed as a condition and thus I find that it was an innominate term, also applying the principle in *Emden's Construction Law* paragraph 16.23 as set out above, that most terms in building contracts are likely to be classified as innominate terms. In my view, applying the principle set out above in *Mersey Steel and Iron Co*, when Ms. Thomas did not pay the withheld \$20,000 or the Additional Billing that was not a breach that was sufficiently serious or fundamental for the reasons set out below, in essence in that Mr. Thomas was overpaid.

81. First, Ms. Thomas was not a quantity surveyor but it seems to me she was a prudent homeowner focused on the funds and the work rate. She had serious concerns that most of the Contract price had been paid to Mr. Maskal but that the work performed was not on

par with the payments. She raised her concerns, but she also made the 5th payment less \$20,000 on 2 October 2014. Earlier on, Mr. Holdipp, in his email dated 16 August 2014, also expressed his concerns about the lack of progress beyond a “shell of a house” in exchange for \$150,000 (which was actually \$155,000 paid by that time). On cross-examination in response to that email, Mr. Maskal explained that he told her the Project was on schedule at the time it was actually on schedule. He agreed with the contents of the email that the walls still needed plastering, windows and doors had to be positioned and some columns had to be positioned. In my view, by the time of October 2014, it was proper in all the circumstances for Ms. Thomas to be seriously concerned about the completion of the Project having practically paid over all of the Contract price to Mr. Maskal.

82. I have also considered the evidence that work was progressing well. On cross-examination, Mr. Laws stated that the Project was progressing well. On cross-examination, Mr. Smith stated that the team was working on the Project for 9 to 10 hours per day for 6 days a week and he thought that the team was moving along smoothly and efficiently. In respect of the Slab, initially it was going to be a hollow rib slab but then it changed to a steel rod and plywood formed slab. He noted that there were a few rain days, they moved a shed and there was delay due to the hurricanes. He denied that in September 2014 and October 2014 they were working on another jobsite, noting that other than the delays mentioned, work continued until it halted in November. In his view, he estimated that the Lower Level was 70% completed. Mr. Maskal explained that change in the Slab construction took some time. He also stated that he worked on various changes to the plans but did not issue change orders for such work, noting that not every change gets a change order.

83. Despite the views held by workmen on the site about the Project progressing well subject to some delays, upon review of the expert's evidence it is clear that the work completed fell way behind the amount paid by Ms. Thomas. As a starting point, I reject Mr. Smith's estimation that the Project was 70% complete as it is unsupported by any of the experts. Mr. Berry's view was that only 21% of the Lower Level had been completed or \$78,100 worth of work completed. Mr. Adelsberg conclusion was that 41% of the Lower Level

was completed amounting to work worth \$123,000 which was rounded up to \$130,000. This included all the work by Mr. Maskal including the Slab with the exception of the Additional Work of \$11,798.66 identified in Mr. Topley's report. Thus, according to Mr. Adelsberg, there was an overpayment of \$88,000 to Mr. Maskal. Mr. Maskal's expert Mr. Topley assessed that 47% to 54% of the Lower Level had been completed together with work carried out on the Upper Level worth \$174,000. This resulted in an overpayment of \$43,000 to Mr. Maskal. In light of these expert findings, I am satisfied that there was an overpayment of funds by Ms. Thomas to Mr. Maskal. Further, I am satisfied that Mr. Maskal created the situation whereby Ms. Thomas was running out of funds with the Project far from completion.

84. Second, I have considered the prevailing circumstances leading up to 5 November 2014 when Mr. Maskal walked away from the Project. On cross-examination, Ms. Thomas stated that she was very frustrated with Mr. Maskal and that she thought the decent thing to do was for him to call her rather than leave her Project to go work on another jobsite. She stated that: (i) her biggest concern was that the majority of funds were gone although Mr. Maskal was supposed to be finished in August 2014; (ii) the completion date had been extended; (iii) her construction account at HSBC had only approximately \$25,000; and (iv) there had already been the Work Stoppage. She later set these matters out in the 9 November 2014 letter pointing out that by that time she had paid him \$213,000 and the Project was nowhere near completion.

85. In my view, Ms. Thomas, who I accept had lost confidence in the ability of Mr. Maskal to complete the Project, was justified to withhold \$20,000 from Mr. Maskal. His position was that a withholding of funds was never part of their agreement. However, significantly, the overpayment was far in excess of the withheld \$20,000 or the Additional Billing amount of \$15,370. Thus, on the basis of the expert calculations, I do not consider the failure to pay the full 5<sup>th</sup> payment to be a repudiatory breach of the Contract in light of the substantial overpayment already made to Mr. Maskal at that time in the circumstances where he caused the problem. I take the same approach to the refusal to pay for the Additional Billing for the works approved by Mr. Holdipp. Thus, I reject

Mr. Maskal's contention that Ms. Thomas breached the Contract because of a lack of payment.

86. Third, I have considered the assertions by Mr. Maskal that the reports he was sending in writing to Ms. Thomas were not progress reports tied to the payment schedule. In my view, the two go hand in hand, 4 payments matched with progress on a 4 month Project – and it is extremely incredible to find otherwise. It is clear to me that the written report dated 22 August 2014 spoke of the “road to completion” of the Project with various implications that the Project would be completed within the Contract price and with any approved Extras. Therefore, it was entirely appropriate for Ms. Thomas to seek to match final progress and completion with final payments, albeit that was not possible due to the lack of renovation progress. In any event, even if Ms. Thomas had paid any and all outstanding amounts to Mr. Maskal, he still would not have been able to complete the Project due to his significant underbid. In light of these reasons, in my judgment, Ms. Thomas did not cause a repudiatory breach the Contract and subsequently it was not open to Mr. Maskal to accept it as such.

Mr. Maskal walking away from the Project is a repudiatory breach

87. In my view, Mr. Maskal breached the Contract, by walking off the jobsite and refusing to return, for several reasons as set out below.
88. First, the starting point is that, as found above, Mr. Maskal had been overpaid by the time he walked off the jobsite. After the Work Stoppage was over, little work was carried out in September or October. The Final Payment on 27 October 2014 was intended by Ms. Thomas to be an enticement but it appears it resulted in the Additional Billing.
89. I must state that I got the impression from Mr. Maskal that he was desperate for an excuse to walk off the jobsite. Based on all the facts and documents, I can infer that Mr. Maskal was conducting his own assessment as well of payments against performance. He knew

from the outset that he was calling for 4 monthly payments for a 4 month job. He would have been using those funds to get him through the Project month by month. By the time the last payment was made, there would be no further funding due to him although there were still job tasks to be completed based on the Scope of Works, several more months were required according to the experts.

90. To my mind, an astute contractor such as Mr. Maskell, at the stage of walking off the job, well knew that: (i) all funds would be exhausted soon; (ii) there was still 50% to 60% of the job to be completed; (iii) he had to engage workmen and subcontractors to perform the works and he would not be able to pay them; (iv) the amount of the Additional Billing and the withheld \$20,000 was hardly going to make a dent in the funds he needed to complete the Project. Significantly, I can infer that Mr. Maskal had realized that he had unfortunately underbid the Contract. I am supported in this view in that even if there were no more Extras, or on his case, no more 'omissions' from the Hegni Plans, Mr. Maskal had clearly run out of funds to complete the Project. To my mind, he was driving an out of control car towards a cliff edge and decided he needed to bail before he went over the edge.
91. Second, I rely on the extract from *Emden's Construction Law* where one party evinces an intention not to perform his essential obligations under the contract. When Mr. Maskal walked off the jobsite and then refused to return he clearly evinced an intention not to perform his essential obligation of completing the Project. I refer to *Mayhaven Healthcare Ltd* where it referred to *Keating on Construction Contracts (8<sup>th</sup> Ed)* that an absolute refusal to carry out the work or an abandonment of the whole before it is substantially completed, without any lawful excuse, is a repudiation. To my mind, the experts having found that only a portion of work was completed compared to the price quoted, Mr. Maskal abandoned the Project before it was substantially completed. He later refused to return to the jobsite, thus solidifying the abandonment. I note here that I found above that Ms. Thomas had not breached the Contract, and thus, Mr. Maskal did not have a lawful excuse to abandon the Project.

92. Third, I have considered all the facts and circumstances in this matter. I have already found that the Contract was for a fixed-price, that Mr. Maskal could have inspected the interior of the Lower Level before submitting his quotation, that he underbid the price for the Contract, that he was overpaid for the work completed by the time he walked off the jobsite and that there was no misrepresentation by Ms. Thomas to Mr. Maskal in respect of the scope of work leading to the execution of the Contract. I have also found that Mr. Maskal breached the Contract by abandoning the work before it was substantially completed without any lawful excuse. In light of my findings, I am satisfied that Mr. Maskal breached the Contract such that he repudiated it. Further, I find that Ms. Thomas was entitled to accept the repudiation as she did.

**Issue 2 – Was the breach of not completing the Project within 4 months a breach so serious as to justify Ms. Thomas repudiating the Contract**

93. Ms. Thomas' alternate case is that Ms. Maskal failed to complete in accordance with the agreed time forecast of 4 months and ensure that work was progressed in accordance with the schedule payments made. By the start of November, the project had been underway for over six months and all but \$20,000 of the last scheduled payment was made. Thus, an express condition was breached. If it was not a condition, then it was an innominate term which the Court should consider the character and seriousness of the breach and its consequences to see whether it justifies the Contract being treated as repudiated.

94. Mr. Maskal's position is also that he did not breach the Contract as it relates to the completion date as the Contract did not include a provision that time was of the essence. The time prediction of 4 months (17.5 weeks) was not fundamental to the Contract which did not call for completion by a specific date and time. Thus, there were delays of 8 weeks and 5 days which was spent on the construction of the Slab (weeks and three days), the Work Stoppage and preparation and mobilization before and after the two hurricanes. Such delays should not be counted in the 17.5 weeks as the completion date should be extended by 8 weeks and 5 days.

95. I am not satisfied that the Defendant breached the Contract by failing to complete the Project within the 4 month time frame. I have taken into account a minor late start, the Work Stoppage and the delay caused by the hurricanes such that it is appropriate to extend the four months by another 5 to 8 weeks. Mr. Maskal also stated that completion of the Slab and repairs to the tank took some time. However, the Contract did not specify that time was of the essence and as set out in *Emden's Construction Law* generally, slow progress will not be treated as a repudiatory unless time is essentially made of the essence of a contract. In any event, putting slow progress aside, Mr. Maskal was going to exhaust the \$200,700 Contract price by the 5<sup>th</sup> and final payment leaving the Project substantially uncompleted.

### **Issue 3 – The Loss of Ms. Thomas**

#### **The Law**

96. In *Emden's Construction Law* it stated as follows:

*“[13.21] A defendant will not be able to escape liability for losses which are attributable to claimants impecuniosity. [Footnote 1] This is consistent with general principle of mitigation that the claimant need take only those steps to minimize his loss that would have been taken by a reasonable person in his position. A neat illustration of the principle is provided by the Court of Appeal case Dodd Properties (Kent) Ltd v Canterbury City Council [1980] 1 ALL ER 928, CA. In that case, a building was damaged in 1968. The owners delayed the repair works until the question of liability was established in 1980, by which time the cost of repair had increased significantly. The Court of Appeal held that, even if the delay were attributable to the owners lack of ready money, it could not amount to an unreasonable failure to mitigate, and thus damages were awarded at the 1980 figure. (See also Alcoa Minerals of Jamaica Inc v Broderick [2000] 3 WLR 23, PC, a Privy Council Decision to the same effect.*

*[Footnote 1 – In Lagden v O'Conner [2004] 1 All ER 277 the owner of a car damaged in a collision could not afford to hire a replacement at normal rates and so was forced instead to rent at higher rates from a credit hire company. The House of Lords held that the owner could recover at the higher rate, and in doing so were of the view that the earlier House of Lords decision Dredger Liesbosch (Owners) v SS Edison (Owners) [1933] AC 449, HL was no longer good law insofar as it suggested that damage resulting from the claimant's pre-existing impecuniosity is irrecoverable.]*

*[13.41] As discussed above, damages for breach of contract generally aim to put the innocent party in the position he would have occupied if the promise had not been*

*broken: effectively, to simulate performance. Where the contractor's breach has led to justified termination of the contract, therefore, the normal measure of assessment is the additional cost to the employer of completing the works, together with any further loss he has suffered. Assessment is generally done after the work has actually been completed, when it can be judged how much extra - if any - the employer has had to pay. Two accounts are compared. On the one hand is the 'actual account', or what the employer has actually paid, to both the original and replacement contractors. On the other is the 'notional account', the amount which would have been paid to the original contractor if he had properly completed the works. [Footnote: It would seem that this notional account should allow for any adjustments - for example, for variations - which would have been made to the original contractor's payment had he completed the works. Otherwise, the comparison is not of like with like.] The amounts by which the former exceeds the latter is the measure of the employer's damages. [Footnote: If the employer can have the remaining work carried out more cheaply than he would have done under the original contract, or even for the same price, his loss will be nil and - if he claims - he will recover only nominal damages. See eg D O Ferguson & Associates (a firm) v M Sohl (1992) 62 BLR 95, CA, where the employer also recovered (apparently as a claim in restitution) the amount by which he had overpaid the contractor for work done."*

97. In considering the principle of foreseeability, in *Hadley v Baxendale* (1854) 9 Ex 341 Alderson B stated:

*"Now we think the proper rule in such a case as the present is this:- Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."*

98. In *Attorney-General of the Virgin Islands v Global Water Associates Ltd (British Virgin Islands)* [2020] UKPC 18 Lord Hodge stated:

*"31. First, in principle the purpose of damages for breach of contract is to put the party whose rights have been breached in the same position, so far as money can do so, as if his or her rights had been observed.*

*32. But secondly, the party in a breach of contract is entitled to recover only such part of the loss actually resulting as was, at the time the contract was made, reasonably contemplated as liable to result from the breach. To be recoverable, the type of loss must have been reasonably contemplated as a serious possibility, in the sense discussed in paras 27 and 28 above.*

*33. Thirdly, what was reasonably contemplated depends upon the knowledge which the parties possessed at that time or, in any event, which the party, who later commits the breach, then possessed.*

*34. Fourthly, the test to be applied is an objective one. One asks what the defendant must be taken to have had in his or her contemplation rather than only what he or she*



*actually contemplated. In other words, one assumes that the defendant at the time the contract was made had thought about the consequences of its breach.*

*35. Fifthly, the criterion for deciding what the defendant must be taken to have had in his or her contemplation as a result of a breach of their contract is a factual one.”*

#### Ms. Thomas' Submissions

99. Mr. Rothwell submitted that where Ms. Maskal' breach has led to justified termination of the Contract, the normal measure of assessment is the additional cost to Ms. Thomas of completing the Project, together with any further loss suffered. Further, assessment is generally done after the Project is completed, where it can be judged how much extra – if any – Ms. Thomas has had to pay. As she has been left without any funds to complete the Project she cannot do so. However, she intends to complete the Project as she has been living in a home which is only half inhabitable for over 7 years.

100. Mr. Rothwell submitted that after taking the various calculations into account, Ms. Thomas seeks compensation in the amount of \$141,790 to complete the Project and \$15,200 for the rent that she had to pay beyond her intended 5 months of being in rental accommodation for a total of \$156,990.

#### Mr. Maskal's Submissions

101. Ms. Dill submitted that due to the right of repudiation for non-payment and due to Ms. Thomas's misrepresentation, that she forfeited any damage that she seeks. The reason is because Mr. Maskal was placed in a position that he could not do anything about other than to repudiate the Contract.

#### Analysis

102. In my view, the purpose of damages in this case is to put Ms. Thomas in the same position as if the Contract had been performed. The Contract set out specific details

including the project works, the cost, the Scope of Works for the Project, the time estimate and the payment schedule all designed to complete the Lower Level. I note here that Mr. Maskal drafted the Contract. In my view, taken objectively, at the time the Contract was signed by the parties, I find that Mr. Maskal must be taken to have had in his contemplation that the consequences of a breach by him would have been that Ms. Thomas would have had to have another contractor complete the Project as set out in the Contract.

103. Therefore, the proper comparison for damages is what Ms. Thomas will have to pay to both Mr. Maskal and subsequent contractors less the amount which would have been paid to Mr. Maskal had he properly completed the Project. The amount by which the former exceeds the latter is the measure of Ms. Thomas' damages.

104. I have considered the expert reports of BPML and TCC and I use their findings as set out below to base the calculations necessary to establish the level of damages to be awarded. BPML's assessment is that based on Mr. Maskal's own pricing, and including the Slab CO, the Tank CO and 50% of the Additional Billing, the value of the contracted work, if correctly bid by Mr. Maskal ought to have been \$245,500. However, BPML considered that even this figure was an underbid with their assessment of the actual value of the contracted works being \$298,000 – or more generally in the range of \$275,000 to \$300,000. I note here that Mr. Topley estimated the true total value of the Project was between \$300,000 to \$350,000. As the estimation of the quantity surveyors is not an exact science, I will accept the figure of \$300,000 (being the higher end of BPML's assessment and the lower end of Mr. Topley's assessment) as the actual value of the Contract.

105. BPML agreed with Mr. Berry's assessment that the value of the actual work completed by Mr. Maskal was \$78,100 which was short of the sum of \$217,778 paid to him by Ms. Thomas. After reviewing several reports and witness statements, BPML revised their assessment of actual work completed as little under \$130,000 which is still

short of the amount paid to Mr. Maskal. I accept the figure of \$130,000 as the value of work completed by Mr. Maskal.

106. BPML in their first report assessed that the cost to complete the Project as being in the range of \$194,000 to \$219,000 with an average assessed amount of \$206,147 at 2014 prices. Mr. Topley reached a similar conclusion as he assessed that the balance to complete the Project is \$173,728.29 at 2014 prices and \$208,473.94 at 2022 prices. This was based on his assessment that the proper bid/cost of the Project should have been \$326,114.48 and only \$152,386 (45%) of the Project was completed. In their second report, BPML assessed the proper bid/value as closer to \$300,000 and the value completed as just under \$130,000. I accept that this would mean a balance to complete of at least \$170,000.

107. BPML also assessed the cost of the works that Ms. Thomas carried out after Mr. Maskal ceased work. She paid \$14,644.52 but as she was assisted by free labour and materials from friends, the value of the work was assessed by BPML as \$55,000, which I accept. BPML also clarified that their costs assessed at 2014 prices would need to be increased by 28% to cater for increased costs of construction in 2021. BPML also marked down the Additional Billing by an approximation of 50% as they agreed with some changes and rejected others. In the absence of any detail of what was accepted or rejected I will credit the full 100% of the Additional Billing to Mr. Maskal.

108. In my view, had Mr. Maskal completed the Project, Ms. Thomas would have had to pay the contractual amount of \$200,700, the agreed change orders totaling \$37,078, and the Additional Billing amount of \$15,370 for a total of \$253,148 (the “**Maskal Potential Completion Cost**”).

109. As stated above, the cost to complete the Project when Mr. Maskal ceased work is \$170,000. That cost should be reduced by \$55,000 to \$115,000 by the work provided by Ms. Thomas after Mr. Maskal ceased work on the Project. The \$115,000 should be increased by 28% to \$147,200 to take into account 2021 prices. I rely on *Emden's Construction Law* at paragraph 13.21 and *Dodd Properties (Kent) Ltd and another* in that

Ms. Maskal will not be able to escape liability for losses which are attributable to Ms. Thomas' impecuniosity. Further, I rely on *Emden's Construction Law* at paragraph 13.21 and *Lagden v O'Conner* that as Ms. Thomas was not able to undertake completion works due to lack of money, this should not be considered as an unreasonable failure to mitigate.

110. Thus, in my view, I find that the total costs to complete the Project, together with expenses incurred, amounts to \$382,698.02 (the "Completion Cost after Repudiation") having totaled the sums of:

- a. \$217,778.00 for the total amount paid to Mr. Maskal by Ms. Thomas.
- b. \$14,644.52 paid by Ms. Thomas for work performed by others after Mr. Maskal left the Project, adjusted by BPML's assessment downwards from \$15,009.46, which I accept.
- c. \$2,300.00 to Brilliant Solutions. I accept the evidence that Ms. Thomas paid Brilliant Solutions for work she requested directly from Mr. Laws.
- d. \$338.00 for 2 window frames from Vinyltech, which I accept.
- e. \$437.50 for cleanup and removal of construction debris, which I accept.
- f. \$147,200.00 for the cost to complete the Project at 2021 costs;

111. The difference between the Completion Cost after Repudiation of \$382,698.02 and the Maskal Potential Completion Cost of \$253,148 is \$129,550.02. In my view, an award of damages in this amount would enable Ms. Thomas to be placed in the position she would have been in had the breach not occurred. Further, it will place her in the position of being able to complete the Project. In arriving at this calculation, I note that the full extent of the underbid (\$200,700 compared to \$275,000 to \$300,000) is mitigated by allowing for the variations to the Project made by Mr. Maskal that increased the initial amount proposed of \$200,700 to \$245,500. Thus, the extent of Ms. Thomas gaining any bargain as a result of the underbid is limited to a range of between \$21,852 (\$275,000 - \$253,148) minimum to \$54,500 (\$300,000 - \$245,500) maximum.

112. In my judgment, Ms. Thomas will not be in a better position than she would have enjoyed had Ms. Maskal not breached the Contract. The award does not represent a cash windfall as the incomplete state of the Lower Level indicates that the funds will be used to complete the Project using a different contractor. Also, the award does not fall afoul of the principle of foreseeability in *Hadley v Baxendale* and the case of *Global Water Associates Ltd* in that the loss claimed arises naturally from the breach and was in contemplation of the parties at the time that they made the Contract as a likely consequence of such a breach. The dangers of underbidding a contract are well known in the construction industry in that if a contractor underbids to gain a contract, there is a risk that he will be liable for any failure to complete the contract at the agreed price.

#### Compensation for additional rent paid

113. Ms. Thomas had intended to pay rent for 5 months until the end of September 2014, but paid rent of \$1,100 from May to November 2014 and \$1,300 from December 2014 to September 2015. Instead of paying \$5,500, she paid an additional \$15,200 which Ms. Thomas now claims as a result of Mr. Maskal's breach.

114. Mr. Maskal's position is that he offered Ms. Thomas rent-free accommodation for the duration of the Project, however she refused. Thus, he is not liable for any cost she incurred for rental accommodation as claimed. Ms. Thomas on cross-examination stated that Ms. Maskal offered her accommodation at his residence but she did not think it was rent-free.

115. In my view, I do not accept that Ms. Thomas was obliged to accept the offer to live rent free in Mr. Maskal's accommodation, either before or after the repudiation of the Contract, as she was entitled to find reasonable accommodation of her own choice elsewhere. For reasons set out above, there were delays in 2014 amounting to approximately 8 weeks as a result of hurricane delays, the Work Stoppage and a few rain days. As Mr. Maskal should not be held responsible for these delays, it is appropriate to

deduct \$2,200 (2 months of rent at \$1,100) from the total claimed. Thus, I am satisfied that I should allow the claim for rent in the sum of \$13,000.

**Conclusion**

116. I have found Mr. Maskal liable for a repudiatory breach of the Contract and that Ms. Thomas was entitled to accept such repudiation. I have calculated damages for loss to Ms. Thomas in the sum of \$129,550.02 to complete the Project and \$13,000 for rent paid for a total of \$142,550.02.

117. Mr. Maskal claims damages for misrepresentation and defamation. There was no counterclaim and there were no matters pleaded in relation to the same. Therefore, I will not address or determine any such matters.

118. I grant leave to the parties for a further hearing, if necessary, by summons filed within 7 days of the date of this judgment to be heard on the issue of a variation of the award to be based on 2023 prices of construction.

119. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Ms. Thomas against Mr. Maskal on a standard basis to be taxed by the Registrar if not agreed.

Dated: 20 October 2023

  
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**HON. MR. JUSTICE LARRY MUSSENDEN**