

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2005/CLE/gen/FP/00274

BETWEEN

CARIBBEAN CONSTRUCTION COMPANY LTD.

Plaintiff

AND

JACQUES LEBAZ

Defendant

BEFORE The Honourable Mrs Justice Estelle G. Gray Evans

APPEARANCES: Mr Edwin Knowles for the plaintiff
 Mr Norwood Rolle for the defendant

Hearing Dates: 2013: 18 and 19 February; 18 April

Plaintiff's Additional
Closing Submissions: 2013: 3 May

JUDGMENT

Gray Evans, J.

1. The plaintiff is and was at all material times a construction company doing business in The Bahamas. The defendant is and was at all material times a French National residing in Coral Gables in the State of Florida one of the United States of America and the owner of a parcel of land on Stocking Island, Exuma in The Bahamas ("the said property").

2. The plaintiff commenced this action on 11 November 2005 by a generally indorsed writ of summons in which it stated its claim against the defendant as follows:

The defendant is in breach of contract between the plaintiff and the defendant dated the 19th April 2005. The defendant failed to comply with the terms of the Application and Certificate for payment in compliance with the mobilization schedule. The amount of one million three hundred and eighty seven thousand three hundred and eighty dollars was the amount of loss to the plaintiff as a result of the defendant's breach of contract. The defendant by his conduct and or omission caused damages to the plaintiff. Further the plaintiff claim damages for negligence and or breach of contract and or alternatively breach of statutory duty on the part of the defendant. Further resulting and expectation loss and reliance loss together with interest, costs and such further or other relief deemed appropriate by the court.

3. In its statement of claim filed on 1 December 2005 the plaintiff pleaded its case as follows:

- (1) The plaintiff was at all material times a company incorporated under the laws of the Commonwealth of The Bahamas and doing business in The Bahamas as a construction building company. That the plaintiff was all material times a Bahamian Company.
- (2) The defendant was at all material times a customer of the plaintiff who engaged the services of the plaintiff and who is of French Nationality. That the defendant entered into a contract with the plaintiff dated the 20th April 2005 for the sum of \$1,220,000.00 to build a house on the island of Great Exuma one of the Islands of the said Commonwealth.
- (3) That in accordance with the mobilization schedule certain purchases should have been conducted by the defendant as he had requested to ensure commencement of works in September 2005.
- (4) That on or about the 16th June 2005 the defendant had instructed the plaintiff to continue to proceed with the preparation for the building of the client's house.
- (5) That as a result of the defendant's failure to provide such materials and to order and deliver the same in George Town, Great Exuma, of the said Commonwealth, the plaintiff has suffered damages and loss. Such as a result of not being able to commence the said construction as scheduled.
- (6) As a result of the defendant's breach of contract and or negligence, the plaintiff has suffered loss and incurred expenses and foreseeable expectation and resulting damages and expenses in excess of \$1,220,000.00.
- (7) That the plaintiff will claim that the defendant was negligent in his conduct towards the plaintiff. Further, the plaintiff will claim that the defendant was negligent as a result of the defendant's actions whether intentional or by omission.

4. The plaintiff claimed damages for the alleged breaches, interest, costs and further relief as the court may deem just.

5. In his defence and counterclaim filed 12 April 2006 the defendant denies the plaintiff's claim and counterclaims for damages for breach of contract and interest pursuant to the Civil Procedure (Award of Interest) Act, chapter 80 Statute Laws of The Bahamas, at such rate from 3 November A.D. 2005.

6. Evidence at the trial was given by Mr Norman Marcotte and Mrs Beverly Marcotte on behalf of the plaintiff. The defendant gave evidence on his own behalf. Each of the witnesses provided a witness statement which was adopted as his/her evidence in chief.

7. The evidence is that sometime in March 2005 the defendant visited the plaintiff's office looking to engage the plaintiff's services in the construction of two houses on the defendant's property on Stocking Island, across George Town's Bay in Great Exuma. Access to the island from the mainland is by boat and there are no utilities on the island.

8. Mr Marcotte said that on 20 March 2005 the parties came to an agreement "on a price, craftsmanship, quality of the material, no ambiguity, a balanced budget" based on the defendant's drawings and his statement that he wanted "something simple, not expensive, but well built".

9. That agreement was embodied in a document dated 19 April 2005, and signed by the parties on 20 April 2005, the terms of which are set out hereunder:

"April 19, 2005:

To: Mr Jacques Lebaz
Coral Gables, Florida

Re: Revision #3, Building Agreement for 2 Houses on Stocking Island

Dear Mr Lebaz:

We hereby send you a summary proposal of all included "Turnkey Construction Project" for 2 houses on your property [located] on Stocking Island, Exuma, in the Bahamas, pursuant to plans of February 2005. Our price amounts to \$1,220,000.00.

Agreement: Page #1

The price shall include the following services:

- All costs to complete the contract of 2 houses.
- All costs to demobilize, cleaning the site and beach. (Take apart landing pier and take away gravels and particles exceeding ½" – 5mm)
- Including, \$210,000.00 of material per houses.
- Including, structure in Styrofoam form blocks (R30 Isolation) injected with reinforced concrete.
- Including, Exterior Finish by James Hardy, (Hardy Board siding, moldings, Soffit & Fascia), sealed and painted 3 coats.
- Including, Exterior Doors & Windows aluminum framed. "Impact Resistant glass".
- Including, Interior doors and wood moldings.
- Including, Bathroom accessories (Soap dish, Towel holder, Toilet paper, Closet pole & shelves.

- Including, Interior wall finishes, wood, ceramic & drywall finished 3 coats, painted.
- Including, Kitchen Cabinets, vanities & superior quality counter tops.
- Including, 3 coats fiberglass roof colored faux metal roof.
- Including, insulated roof joists (R30 Insulation), Drywall + T&G "V" false beam on Canvas (Palm Leaves, Rattan etc.).
- Including, hard wood floors on all floor surfaces including wood substructure.
- Including, Exposed wood decks first quality as per drawings, framing, deck boards, posts, 2" x 6" T&G "V" Roof deck on framing, railings & Stairs.
- Including, Electric distribution as per code and specification (Outlets 110v, Variable Switches 12v, Ceiling fans, Ceiling lights and recessed).
- Including, Generator house & battery.
- Including, Water desalinization unit, pump, storage & distribution.
- Including, Kitchen sinks, Bathtub & showers, Toilettes, faucets warranty for no less than 20 years.
- Including, drainage & septic tank.
- Including, Central Air Conditioning.
- Including, Transportation fees, Custom brokerage, Customs, George Town fees.
- Including, inspection fees.
- Including all worked hours for the duration of the project.
- 6 month completion time schedule, from arrival of material in George Town.
- This document consists in an approval principle.

We are asking for an initial sum of \$40,000.00 US.

Sincerely,

[signature]
Normand Marcotte
Vice President

(20 April 2005)

[signature]
Jacky Lebaz
Owner"

10. In his witness statement filed 18 February 2013 the defendant avers at paragraphs 3 through 9 as follows:

- (3) "On April 19, 2005, after numerous conversations with Norman Marcotte of Caribbean Construction Co., Ltd., I signed an agreement for the construction of 2 private homes on a property owned by me on Stocking Island, Exuma, Bahamas. The agreement called for an "all inclusive, Turnkey Construction project". The agreed upon value of the project was US\$1,220,000.00 and included all labor and the equivalent of \$210,000.00 per home for construction materials to be supplied by Caribbean Construction Co, Ltd. Finally, an initial deposit of \$40,000.00 was also required.
- (4) Pursuant to our agreement, I paid two deposits to Caribbean Construction Co., Ltd. the first was a check for US\$10,000.00 made out to Norman Marcotte's wife, Beverly Marcotte, and was sent on April 21, 2005. The second deposit was a wire transfer for US\$30,000.00 and sent on April 22, 2005 from my company account (576 Investments, LLC) to Beverly Marcotte's bank account located at Scotia Bank, NA, Account #22504-2.
- (5) These two deposits constituted the total down payment of \$40,000.00, which was agreed to in our April 19, 2005 agreement.
- (6) On April 20, 2005, Mr. Marcotte sent me an initial Application and Certificate for Payment which outlined the costs and payments for the project and which confirmed

receipt of the \$40,000.00 deposit. As confirmed therein, the agreement was for a "COMPLETE PACKAGE".

- (7) Notwithstanding the fact that I had already paid him the agreed upon \$40,000.00 deposit, Mr. Marcoote then asked me for an additional deposit of \$155,000.00. As part of that additional deposit, Mr. Marcoote demanded that I purchase a Caterpillar, Inc. brand backhoe to be used for the project.
- (8) On May 5, 2005, I issued a cashier's check for \$54,500.00 to Kelly Tractor for the purchase of the abovementioned backhoe S/N BLN07157. As instructed by Caribbean Construction Company, Ltd. and Mr. Marcoote, the backhoe was forwarded to Trans Atlantic Auto Sales USA for export to the Bahamas. (Exhibit "D"). At this point in time, I do not know where the backhoe is located or who has possession of it.
- (9) On May 13, 2005, I authorized an additional wire transfer for \$100,000.00 as payment of the additional deposit demanded by Caribbean Construction Co., Ltd."

11. In his supplemental witness statement filed 15 February 2013, Mr Marcotte stated at paragraph 7 that he agreed with paragraphs (3) through (9) of Mr Lebaz's affidavit.

12. Consequently I make the following findings of fact.

- (1) The parties hereto on or about 20 April 2005 executed an agreement dated 19 April 2005 ("the said agreement") for an all-inclusive "turnkey construction project" whereby the plaintiff agreed to construct for the defendant two houses on the defendant's property on Stocking Island, Exuma, at a total cost of \$1,220,000.00 ("the contract price").
- (2) The contract price included all labor and the equivalent of \$210,000.00 per home for construction materials.
- (3) That the constructions materials were to be supplied by the plaintiff.
- (4) The said agreement provided for a 6 month completion time schedule, from arrival of materials in George Town.
- (5) The said agreement called for an initial payment of \$40,000.00, which was paid by the defendant.
- (6) An initial Application and Certificate for Payment document dated 20 April, 2005, outlining the costs and payments for the project, was sent by the plaintiff to the defendant, whereby the plaintiff acknowledged receipt of the deposit and confirmed that the agreement was for a "complete package".
- (7) In addition to the agreed deposit of \$40,000.00, the plaintiff requested and was paid an additional deposit of \$194,500.00 on account of the contract price - \$54,500.00 being the cost of the backhoe and \$100,000.00 in cash.

13. According to the defendant, upon payment of the aforesaid sum of \$100,000.00 to the plaintiff, Mr. Marcotte guaranteed him that the plaintiff would immediately begin work on the Island by clearing the land in preparation for construction, installing necessary foundations, and purchasing and bringing necessary construction materials on-site; that between May and July 2005, Mr Marcotte kept promising to begin work on the project, but by September 2005 no work had begun.

14. Mr Marcotte denies having made such a promise and says that in any event, the plaintiff was not able to commence construction in July 2005 for several reasons, namely: (i) the defendant had been making changes to the drawings up to the end of July 2005 when he finally

decided to use the original drawings, notwithstanding the many changes made theretoat his request; (ii) the defendanthad not taken him (Mr Marcotte) to see the site until August 2005; (iii) although he sent the Time Schedule to “lock in place the beginning of the work and hiring the workforce” to the defendant on 28 August 2005, the defendant did not reply with the signed Time Schedule until 5 September 2005, at which date, the defendant was also still trying to get better prices for the materials.

15. In any event, on 5 September 2005, the plaintiff (Mr Marcotte) sent an email to the defendant informing him that he had redone the schedule of payments for the start of construction in September and requested a further payment of \$20,000.00 on account of the “mobilization fee”.The schedule of payments to which Mr Marcotte referred was included amongst the documentary evidence and shows, inter alia, the following:

Description of work:	Scheduled value	Work completed		Total completed to date	Balance to finish
		From previous applications	(this period)		
Mobilization	\$244,000.00	\$195,500.00	\$ 20,000.00	\$215,500.00	\$ 28,500.00

16. In another email dated 8 September 2005, Mr Marcotte, on behalf of the plaintiff, asked the defendant to “proceed immediately with the payment of \$20,000.00”. He also indicated that the remaining \$28,500.00 of the plaintiff’s 20% mobilization would become payable “when the material and equipment [began] to arrive on Stocking Island”.

17. The following day, 9 September 2005, Mr Marcotte requested from the defendant color codes for the interior and exterior of the houses as well as receipts for various materials to enable him, he says, to organize pickups and processing of paperwork for shipping and Customs clearing.On that same date, the defendant by email, requested “to finally receive the list of prices with all the material that I must buy” to which Mr Marcotte responded with an email in French, the English translation of which is shown hereunder:

“Good day Jacky:

As you specified at your last visit in George Town the 22 and the 23 of August 2005, that you wanted to shop the prices yourself, I sent you on the 5th of September 2005 the list of material that we will need for the project. As for the accessories to the plumbing, the color code for the interior paint & exterior.....in the drawings to be chosen by owner (yourself) or your architect. I already transmitted to you on 15th of August 2005 an electronic copy of the price from Mikro Corporation “Quote #13181” for the windows and exterior doors. Also, I asked you the invoices of your appliances to make sure of the connections & allocated dimensions. Our usual supplier volunteer themselves to supply us with prices for the material lists that you received, the prices are presently retransmitted to you in the order that they come. In yesterday’s email (September 8, 2005) I asked you the paid receipts of the already purchased material. I am repeating you that I have to organize the maritime transportation these paid invoices are the only recognized document for exportation.

I still haven’t received the prices for the 2 diesel generators of 25KW.

Note: I had to make researches in my message data bank that were sent to you. This will not happen again without fees.

Have a nice day.

Friendly.

Normand Marcotte”

18. Mr Marcotte’s evidence is that as he received invoices for materials he forwarded them to the defendant for payment, but he noticed that the defendant was not paying for the supplies; that by 12 September 2005, he began receiving re-calculated prices from the plaintiff’s suppliers as a result of “normal price fluctuation” so he sent an email to the defendant explaining that the cost of the delay would be approximately \$27,000.00 per week; that because the defendant took a week to sign the time schedule, coupled with the fact that the businesses in Florida had been affected by a hurricane, the purchasing of the materials would be delayed for about two weeks.

19. By 14 September 2005 the plaintiff had not commenced construction and the defendant had not paid the sum of \$20,000.00 requested by the plaintiff as part of a mobilization fee. On that date, counsel for the plaintiff wrote to the defendant demanding the same and threatening legal action if the defendant failed to make the payment within seven days of the date of the letter. In that letter, counsel for the plaintiff noted that the plaintiff had “requested 20% of the mobilization rather than 25% on the basis that [the defendant] would purchase the materials, shipping, etc.”

20. That letter was not immediately responded to by the defendant. However, on 18 September 2005 he sent the following email to Mr Marcotte:

“I would really like to have the total amount before I purchase. We concluded \$420,000.00 for all the houses material and as we already talked, it is out of question to exceed the established budget as our contract dated April 19, 2005. I don’t understand either you asking me for funds, you already received more than \$200,000.00 which represent more than 20% on the houses scope of work to realize the scope of work being \$1,220,000.00, including \$420,000.00 of material and so \$800,000.00 for the rest, the 20% represent \$160,000.00...”

21. In response to that email Mr Marcotte wrote, inter alia:

“It is imperative that you resume yourself to proceed with the purchases. We have been informed by our attorneys, that they will proceed as planned as indicated in the letter dated September 14, 2005”.

22. Then on 20 September 2005, Mr Marcotte inquired by email whether the defendant had sent the \$20,000.00 payment requested on 5 September and stated, inter alia:

“We are not interested in receiving any communication that does not mention a wire transfer in our accounts and receipt of payment of bills.”

23. According to Mr Marcotte, by 20 September 2005, it was clear that the defendant had not paid for any of the materials and that he had no intention of doing so. He said he never heard from the defendant again.

24. Thereafter counsel for the plaintiff communicated with the defendant and or his attorney.

25. In that regard, on 21 September 2005, counsel for the plaintiff wrote to the defendant, demanding that the defendant “supply our client with the agreed sum of \$20,000.00 by way of wire transfer immediately” and threatening, inter alia, legal action if he failed to do so.

26. That letter was responded to by counsel for the defendant on 7 October 2005, when he wrote, inter alia:

"With respect to the subject contract, we are instructed that your client is in breach. On this issue, we are taking further instructions and will revert to you in due course as to our client's claim in this regard. In the meantime, the construction having not commenced, your client would be well advised not to proceed to do so at this time or at all."

27. The defendant says that notwithstanding having paid the plaintiff some \$204,500.00 in a good faith attempt to have the plaintiff begin the project, the construction never begun. Consequently he instructed his attorneys to terminate the contract, which was done by letter dated 3 November 2005 to counsel for the plaintiff. In addition to terminating the contract, counsel for the defendant in that letter also demanded repayment of the sum of \$204,500.00 by 11 November 2005, and threatened to commence legal proceedings if such funds were not received by that date.

28. I note here that, notwithstanding Mr Lebaz's defence and his viva voce evidence that he paid \$204,500.00, the documentary evidence on which he relies reveals that he only paid \$194,500.00 as set out above.

29. In any event, the funds were not refunded as demanded. Instead the plaintiff commenced this action in November 2005.

30. The parties during the case management conference agreed that the trial before me would be on the issue of liability alone and, if necessary, the matter would be referred to the Registrar for assessment of damages.

31. The plaintiff in his writ of summons alleges that the defendant breached the contract dated 19 April 2005 between the parties by failing "to comply with the terms of the application and certificate for payment in compliance with the mobilization schedule" and in its statement of claim, the plaintiff alleges "that in accordance with the mobilization schedule certain purchases should have been conducted by the defendant" and "that as a result of the defendant's failure to provide such materials and to order and deliver the same in George Town, Great Exuma...the plaintiff has suffered damages and loss".

32. As I understand the plaintiff's case as pleaded:

- (1) The parties hereto had a contract dated 19 April 2005 and signed on 20 April 2005 for the plaintiff to construct two houses for the defendant on the defendant's property on Stocking Island, Exuma, for a total contract price of cost of \$1,220,000.00
- (2) The said contract included a mobilization schedule;
- (3) The mobilization schedule provided for an application and certificate for payment;
- (4) The mobilization schedule also provided for certain purchases of materials to have been made by the defendant and delivered by him to George Town, Exuma;
- (5) The defendant failed to make the purchases and the delivery;
- (6) The plaintiff suffered damages and loss as a result of the defendant's failure to make the said purchases and deliver them to George Town, Exuma.

33. The defendant denies the plaintiff's case as pleaded.

34. In my view, the issues that arise on the plaintiff's case as pleaded are:

(1) Whether or not the parties had a "mobilization agreement"; and if so,

(2) What were its terms?

(3) Whether or not the defendant is guilty of having breached such an agreement?

35. It is common ground that in addition to the said agreement, the defendant also signed a "time schedule" dated 28 August 2005. The document is written in French and no English translation was provided. However, it appears to be a schedule (estimated time frame) for the various contract works from commencement to completion of the project. Under cross examination, Mr Marcotte said that other than those two documents, the plaintiff had no other signed documents with the defendant.

36. I note here that nowhere in the April 2005 agreement was any mention made of mobilization schedule or fee, and although the plaintiff provided the defendant with an application and certificate for payment outlining the costs and payments for the property on 20 April 2005, nowhere in that document was any mention made of a mobilization schedule or fee. Further, the April 2005 agreement specifically provided, and the plaintiff admitted, that the plaintiff was responsible for the purchase of the materials for construction.

37. The plaintiff, nevertheless, contends that the defendant's breach of the agreement with the plaintiff was his failure to make payment and purchase materials "in accordance with the mobilization schedule".

38. According to the plaintiff (Mr Marcotte), the mobilization schedule was the period prior to commencement of construction when the plaintiff mobilized its work force and purchased the materials required for construction; that during that period, the defendant was responsible for paying a mobilization fee of \$244,000.00, being 20% of the contract price, and for either purchasing the construction materials for the two houses or providing the necessary funds therefor, prior to the commencement of the construction.

39. However, under cross examination, Mr Marcotte not only acknowledged that the mobilization schedule or fee was not reflected in the said agreement but when pressed by counsel for the defendant to show him a "document that says mobilization", Mr Marcotte responded: "It doesn't exist". He also admitted under cross examination that the defendant never agreed a mobilization schedule with the plaintiff. Further, he agreed with counsel for the defendant that the first time the issue of a mobilization fee "showed up" was in September 2005 and that the "purpose of the plaintiff calculating a mobilization fee of \$244,000.00 was so that it could calculate 20% of the contract price". When counsel for the defendant asked Mr Marcotte if the defendant ever agreed with him a schedule of payments, Mr Marcotte responded: "I never seen any signed paper on that". Counsel repeated the question and Mr Marcotte said: "No."

40. As indicated, under the said agreement the plaintiff was responsible for purchasing the materials for the construction of the two houses. However, Mr Marcotte said that at some point after the execution of the said agreement, the defendant said he wanted to purchase the materials himself. The defendant denies this and maintains that the responsibility to purchase the materials was the plaintiff's.

41. As evidence of the defendant's alleged agreement to pay the said invoices or purchase the said materials, Mr Marcotte referred to several emails passing between him and the defendant culminating in an email dated 12 September 2005 in which he, Mr Marcotte, wrote:

"Jacky

As for the man camp, we have to purchase the material now because we need to complete it. Do you desire to purchase everything yourself or you just want to deposit sums of money to our account. Note the \$146,000.00 price includes all the material,

accessories, beds, appliances, etc. We are ready to proceed with the purchasing. Thank you and have a nice day.”

42. Counsel then referred Mr Marcotte to the defendant’s email,also dated 12 September 2005, in response, in which the defendant wrote:

“But the men camp was supposed to be paid with the \$100,000.00 that you already received about three to four months ago.”

43. Thereafter the following exchange occurred between counsel for the defendant (Q) and Mr Marcotte (A) in cross examination:

Q: You see you were sending him emails and asking for the invoices. Is that correct?

A: Asking him to pay the invoices, yes.

Q: But I see nowhere where he agreed that was the position.

A: Yes, that is a problem.

Q: That is not a problem, because you are asking him in the email you have just read.

A: Yes.

Q: Do you desire to purchase everything? Isn’t that what you are asking him?

A: Yes.

Q: You didn’t indicate to him that he had agreed to do these things?

A: He did ask.

Q: I asked you a question. Did you indicate in all of the documents that you have just read that he had agreed to do these things?

A: Why should I? He asked.

Q: You don’t ask the question; you answer the question.

A: Okay.

Q: Did you ask him?

A: No.

Q: Or did you tell him in any of these that you agreed to do this, why aren’t you doing it? Did you do that?

A: Repeat again.

Q: You didn’t say in any of these documents that you have just read, pointing out to him that he had agreed to make these purchases, did you?

A: No.

Q: Because he had not agreed. I am putting it to you that he did not agree.

A: ...

Q: He did not agree to purchase the material as you are now stating. Yes or no?

A: No, he did not agree.

44. It appears from the emails passing between Mr Marcotte and the defendant that the parties had had discussions regarding the purchase of the materials. However, the defendant said that he never agreed to purchase any materials. He maintains that that was the plaintiff's responsibility and, as I understand his evidence, he was merely trying to get better prices because he was of the view that the prices obtained by the plaintiff were too high.

45. In any event, as I understand Mr Marcotte's evidence, whatever may have been the discussions or his understanding on the matter, the fact is that in the end, the defendant did not agree to purchase the materials.

46. It is trite law that he who alleges must prove and in my judgment, based on the foregoing, the plaintiff has failed to prove the allegations as pleaded in his writ of summons and/or statement of claim, namely: that the said agreement included a mobilization schedule, which provided for payment of a mobilization fee by the defendant and for the defendant to purchase the materials for the construction of the two houses on Stocking Island, Exuma.

47. I, therefore, find that the agreement dated 19 April 2005 and signed on 20 April 2005, pleaded by the plaintiff, did not include a mobilization schedule nor did the parties have a separate mobilization schedule agreement. There being no such agreement, there can be no breach by the defendant in not having made a mobilization payment and or not having purchased the said materials.

48. In the result, the plaintiff's claim for breach of contract and or negligence and or breach of statutory duty and or breach of equitable duty against the defendant is dismissed.

49. The defendant counterclaims for breach of contract.

50. The plaintiff did not file a defence to the defendant's counterclaim.

51. Counsel for the defendant points out that in addition to not filing a defence to the counterclaim, Mr Marcotte, under cross examination, also admitted the facts set out in the counterclaim. In those circumstances counsel for the defendant submits that the defendant's counterclaim is deemed admitted by its non-traversal and, therefore, judgment on the counterclaim should be entered in the defendant's favour.

52. What is the defendant's claim?

53. In his defence and counterclaim the defendant states:

(1) Paragraphs 1 and 2 of the statement of claim are admitted.

(2) Paragraph 3 of the statement of claim is denied. The defendant states that pursuant to the said contract he paid to the plaintiff and at the plaintiff's request a total of \$204,500.00, which sums were paid as follows:

(i)	21 st April, 2005 (cheque)	\$20,000.00
(ii)	22 nd April 2005 (wire transfer)	30,000.00
(iii)	5 th May, 2005 (cheque to Kelly Tractor)	54,500.00
(iv)	13 th May, 2005 (wire transfer)	<u>100,000.00</u>
	Total	<u>\$204,500.00</u>

(3) Paragraph 4 of the statement of claim is not admitted. The defendant states that the contract having been executed and the deposits paid, the plaintiff was under a duty to perform it as therein provided.

(4) Paragraphs 5, 6, 7 and 8 of the statement of claim are denied.

- (5) By letter dated the 3rd November 2005, the defendant terminated the said contract and demanded the return of the said sum of \$204,500.00 paid thereunder.
- (6) At the time of such termination, the plaintiff had not commenced any part of the construction works, the subject of the contract.

COUNTERCLAIM

The defendant repeats paragraphs 2, 3, 5 and 6 [of the defence] and counterclaims against the plaintiff for:

- i. Damages for breach of contract with interest thereon pursuant to the Civil Procedure (Award of Interest) Act, Ch 80 at such rate from the 3rd day of November A.D. 2005 as the Court may think just.
- ii. Further or other relief.

54. I accept that none of the facts pleaded by the defendant were disputed by the plaintiff, although as I pointed out earlier, the documentary evidence shows that the defendant paid \$194,500.00 and not \$204,500.00 as claimed.

55. However, although the defendant claims damages for breach of contract, nowhere in the counterclaim does the defendant say how the plaintiff breached the contract or that he suffered any loss or damage as a result of such breach.

56. In my judgment the defendant having alleged no breach against the plaintiff, his counterclaim must be dismissed.

57. In the result, the cases of both parties are dismissed.

58. In light of the decision to which I have arrived each side is to pay its own costs.

59. Further, although they may not have been specifically referred to herein, I confirm having read and considered all of the written submissions of counsel as well as the authorities cited.

DATED this 31st day of July A.D. 2013.

Estelle Gray Evans
Justice