COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Equity Side

2001/CLE/gen/FP336

BETWEEN

CHARLES MOSS
Plaintiff

AND

BAHAMA REEF CONDOMINIUM ASSOCIATION
Defendant

BEFORE: The Honourable Mrs Justice Estelle Gray Evans

APPEARANCES: Mr Harvey O. Tynes, Q.C., Mr Christopher Sam
Miss Tanesha Tynes and Miss Ntshonda Tynes
for the plaintiff

Mrs Gail Lockhart Charles for the defendant

2008: 2 and 3 June

2010: 19 April; 18 May

JUDGMENT

Gray Evans, J

1. The plaintiff is an architect/real estate broker and the defendant is the owner of condominium property known as Bahama Reef Condominium situated at Royal Palm Way, Freeport, Grand Bahama.

2. The plaintiff commenced this action on 29 November 2001, by a generally indorsed writ of summons in which he claims the sum of $71,537.47 together with interest thereon at such rate and for such period as the Court may think fit. The writ was followed by a statement of claim filed on 27 December 2001 in which the plaintiff gave the following particulars of his claim:

Particulars

Fee at 12 ½ % of construction costs $76,621.68
Less payments received on account $ 5,084.21

Balance **$71,537.47**

3. In the further and better particulars of his claim filed on 19 June 2002, the plaintiff alleges that the total of the construction costs should have been $612,973.50, made up as shown hereunder, and that 12.5% of that sum is $76,621.68:

Physical removal of roofing and other storm debris		$ 1,500.00
Total paid to Gilbert Landscaping		$ 1,442.50
Machine and truck removal of debris already completed		
Total B & B Trucking		$ 186,217.00
To install a new standing seam 5 and 12 over the entire roof. Not done (see 6/28/01)		
Cost of roof - $170,000.00		
Work done to date - $ 16,217.00		
	$ 8,600.00	$ 394,022.00
Estimates on other renovations for the condominium :		
To re-surface entire tennis court	$ 2,717.00	
To repair tennis court fencing and fencing damaged by roof materials	$ 1,205.00	
To replace/repair fencing damaged by fallen trees and replace 2 extensions on both sides of the property towards the beach		
Duty paid for the renovations	$381,500.00	
Total = Marlin Design-Build Limited		

Estimates on replacing twenty-three (23) existing condensing units on the roof:

Not included: Customs duties, equipment

foundations, disposal of materials removed from roof and Bahamas Customs attention to the same repairs other than those mentioned. One (1) year warranty on labor and materials, hoisting and cleanup Total - Central Mechanic, Ltd.	$ 29,792.00
Total cost of contract	**$612,973.50**

4. In its defence and counterclaim filed 11 January 2002, the defendant denies the plaintiff's claim and counterclaims for the sum of $800.00.

5. The evidence at the trial was given by the plaintiff on his own behalf and by Mr Bruce Silvera of Freeport Construction Company Limited (FreCon) and Mr Jerry Tims, a member of the Board of Directors (the Board) of the defendant association, on behalf of the defendant.

6. On or about 29 March 2001, Grand Bahama was hit by a (severe/freak) storm which caused damage to several areas of the aforesaid condominium complex, including the penthouse roof, several of the penthouse apartments, the air-conditions, the tennis court and the fence.

7. Shortly thereafter, on or about 1 April 2001, the defendant orally engaged the services of the plaintiff to assist it in restoring the condominium property to its pre-storm condition. Those oral instructions were confirmed in a letter dated 5 April 2001 from Mr Jerry Tims to the plaintiff and his partner, Richard Roth, as follows:

> "Gentlemen:
>
> This letter will serve to authorize you to work on the behalf of the Bahama Reef Condominium Association in the position of Surveyor. As we understand this capacity, you will be responsible for reviewing and listing all property damage and reporting this to the Insurance Company in written form. Additionally, you will represent us for contracting out the jobs necessary to restore our property and you will supervise such work during its progress.
>
> We have been advised that this position is covered by our current insurance policy and will be paid according to the policy parameters."

8. Then, on 6 April 2001, the plaintiff wrote the following letter to the defendant, for the attention of Mr. Tims:

> "Re: Roofing of Bahamas Reef Condominium
>
> 1.1. We would like to confirm our agreed brief terms of reference and professional responsibilities as follows:
>
> 1.2 Based on the writer's recent meeting with you we are to redesign the roof at the above project.
>
> 1.3 The fee for this project is 12.5% of the total construction cost.

1.4 The phase of payments is as follows:

10% upon execution of the owner/architect agreement
15% @ Schematic Design Phase
35% @ Design Development Phase
75% @ Construction Document Phase
80% @ Negotiation Phase
100% @ Construction Phase

All out of pocket expenses for long distance telephone calls or faxes, travel transportation and other similar charges would be reimbursed to Charles Moss & Associates.

Your signature on the second copy of this letter along with $800.00 will serve as notice for us to proceed with the above project."

9. The signature of Mr Jerry L. Tims and the date "7 April 2001" at the bottom of the letter indicate the defendant having "agreed & understood" the terms thereof and under cover of a letter dated 7 April 2001 Mr Tims, on behalf of the defendant, forwarded the signed agreement and the $800.00 retainer fee to the plaintiff.

10. The plaintiff says that on the basis of the oral agreement he began, on or about 2 April 2001, performing the tasks requested by the defendant by visiting the site to discuss storm damages and making recommendations for remedial work to provide a temporary roof; securing a roofer, FreCon, to erect a temporary roof covering ("the band-aid"); and preparing a field report and scope of work on the damages. The plaintiff says he also prepared drawings and specifications for the purpose of obtaining tenders; that he obtained several bids for various aspects of the work and acted with dispatch in attempting to effect the repairs on an urgent basis.

11. The plaintiff says that he obtained two written quotations, Options 1 and 2, each dated 19 April 2001, from FreCon with respect to the permanent solution to the damaged penthouse roof. However, he was having some difficulty obtaining a written estimate for the 5:12 roof (Option 3)which he had recommended would solve the defendant's "roof-leaking problem", and which, according to the letter of 6 April 2001, he was to design. He says, this was because Mr Silvera was, at the time, busy with the installation of the "band-aid". However, at a meeting with Mr Silvera, Mr Silvera "highlighted" to him that the roof of the nature the plaintiff was proposing could be done at $15 per square foot, based on FreCon "providing the engineering". The plaintiff said that on the basis of that information, he calculated the cost of constructing a roof with an estimated 12,883.115 square feet and arrived at the amount of $193,246.66, which he gave to the defendant, attributing the same to FreCon.

12. As it turns out when FreCon did provide a written estimate, it was for $296,700.00 and not $193,246.66 as advised by the plaintiff.

13. Additionally, from a letter included in the agreed bundle of documents, Juan Tondelli, the structural engineer contacted by both the plaintiff and Mr Silvera, suggested a 8-9:12 slope instead of the 5:12 slope recommended by the plaintiff and indicated that his firm could do the "engineering and design" once they were given the "existing as-built conditions for the roof, for an upset fee of $16,000.00." According to Mr Silvera, the 8:12

slope would have provided a more uniform look than the 5:12 slope proposed by Mr Moss.

14. It is unclear from the evidence exactly when the Board became aware of FreCon's written estimate for Option 3. According to the plaintiff, immediately he received the estimate he faxed it to the defendant and the adjusters indicating that they needed to meet with Mr Silvera to discuss the same. However, he says that Mr Silvera had left the island shortly after he provided the written estimate, and the evidence is that Board members may also have been off the island at various times between the date of the estimate, 4 May 2001, and the date of the meeting sometime between 19 and 21 June 2001. In any event, the plaintiff says it was at that meeting that his services were terminated, orally by Mr Tims, which termination was later confirmed by Crawford Investments Ltd, the adjusters, in their letter of 26 June 2001, in which Mr Jason Thorns wrote to the plaintiff: "Further to our meeting last week I am writing to confirm that following discussions with Bahama Reef Condominium Association it has been agreed that your assistance in this matter is no longer required." Mr Thorns also requested an invoice "for services rendered to date, broken down between time and expense" for the adjusters' consideration.

15. The plaintiff says that notwithstanding those were not the terms on which it was agreed he was to be paid, in response to the request by the adjusters, he sent an invoice for architectural services totaling $28,653.84. The plaintiff had previously tendered an invoice for $4,284.21 dated 18 June 2001, to the adjusters, which invoice was subsequently paid by cheque dated 10 October 2001, forwarded to the plaintiff under cover of a letter dated 24 October 2001. In that letter, the adjusters indicated that they were unable to consider the invoice for $28,653.84 for the following reasons:

> 1. This was not the basis of payment originally agreed upon which was 12.5% of the invoiced work.
>
> 2. Most of the work detailed in the latter invoice, I consider is included in your original invoice.
>
> 3. The additional work which was carried out in relation to redesigning the roof is outside the slope (sic) of the policy coverage and should not be paid by insurers.

16. At the date of the trial that invoice had not been paid.

17. Mr Silvera admits having provided a written estimate for $296,700.00 with respect to Option 3, and denies having given the plaintiff a quote for the said sum of $193,246.66 with respect thereto. He admits, however that he and the plaintiff had "talked budget numbers of $15.00 a square foot", but says that at the time "there was no detail as to what was [to be] done yet" and so he gave his "final quote" when he was provided with the plaintiff's drawing. According to Mr Silvera the $15.00 per square foot was for "typical work", similar to previous jobs which his company had done locally – with lower slopes but "nothing as high or as complicated" as that proposed by the plaintiff's drawings. The estimate of $296,700.00 for a square footage of approximately 12,900 square feet, works out at $23.00 per square feet.

18. The plaintiff says he and Mr Silvera never discussed the sum of $23.00 per square foot for the roof. I note, however, from the documentary evidence in a letter dated 6 June 2001, after the date the aforesaid estimate of $296,700.00 was provided by

FreCon, that Mr Juan Tondelli wrote to Mr Silvera/FreCon that "a new standing seam roof on the building, due to its geometry and configuration would cost $23.00 to $25.00 per square foot here in the U.S." I also note here that Mr Tondelli had recommended an 8:12 or 9:12 pitch instead of the 5:12 slope recommended by the plaintiff.

19. In the end, Mr Silvera says, neither Mr Moss' 5:12, nor Mr Tondelli's 8-9:12, slope roof was built. Instead FreCon provided the defendant with another proposal dated 26 June 2001, the date of Crawford's letter terminating the plaintiff's services, and eventually replaced the flat roof over the penthouse with better materials at a cost of $170,000.00.

20. Mr Tims, on behalf of the defendant, gave evidence as to how the plaintiff came to be terminated, or, as he says, relieved of his responsibilities.

21. Mr Tims' evidence is that subsequent to the plaintiff's engagement, he was called by one of the insurance adjusters who asked that the adjusters be permitted to relieve the plaintiff of his duties and when the Board members inquired as to "what was the problem" they were told that the adjusters could not work with the plaintiff and that unless they were allowed by the Board to relieve the plaintiff of his duties, the defendant might not get the roof or the apartments repaired. He says that at the time Board members were exasperated because they were not getting anywhere with the proposal they had made and because there were "no plans or drawings which the roofing companies needed to go by"; that they were concerned that if they did not accede to the adjusters' request they might not get the repairs completed.

22. Under cross examination, Mr Tims, in answer to counsel for the plaintiff's question in relation to the plaintiff's termination as to whether the adjusters "put the gun to your head?", responded: "I could remember being extremely nervous about that." He said that having discussed the matter with some of the other Directors, he called the adjuster and told him to "go ahead, we want our roof fixed." By that, he said he meant: "release Mr Moss of his responsibility", and he was.

23. The main issues of dispute between the parties are as follows:

(1) What were the terms of the contract or as stated by counsel for the plaintiff, the scope of work for which the plaintiff was contracted to perform?

(2) Which, if either, of the parties was guilty of a breach of contract which entitled the innocent party to treat the contract as having come to an end? and

(3) If the defendant is guilty of breach, is the plaintiff entitled to damages and, if so, in what amount?

24. It is common ground that the defendant orally engaged the services of the plaintiff as surveyor to assist the defendant with the work necessary to restore the condominium property to its pre-storm condition; that by the above-mentioned letter dated 5 April 2001, Mr Tims, on behalf of the defendant, confirmed that oral engagement and according to that letter, the plaintiff was to be paid "according to the policy parameters".

25. Further, it is not disputed that part of those services involved the repair of the roof over the penthouse which had been damaged during the aforesaid storm. The architect's field report prepared by the plaintiff, in addition to listing the observed damage to the property also included the note: "Freeport Construction to look into new standing seam

roof over upper flat area." Indeed, shortly after his engagement the plaintiff, as part of his duties, had FreCon provide a temporary solution, referred to during the course of the trial as "the band-aid", and subsequently obtained two estimates for the permanent roof over the penthouse.

26. However, the original penthouse roof was flat and the evidence is that it was the plaintiff who recommended the installation of a new sloped roof over the entire building. It appears that everyone involved, including the structural engineer, agreed that a sloped roof was a good thing and it seems that the defendant's Board members were either persuaded, or hoped, that they could have the new sloped roof installed as a part of, or at the same time as, the restoration work. As a result, the plaintiff was, in addition to his supervising duties, also engaged to re-design the roof over the entire building. The terms of that engagement were set out in the plaintiff's letter of 6 April 2001 and confirmed by Mr Tims in his letter of 7 April 2001. According to the letter of 6 April 2001, the plaintiff was to be paid a "fee for this project [of] 12.5% of the total construction cost".

27. The plaintiff contends, therefore, that his entire contract with the defendant was contained in the above-mentioned letters dated 5, 6 and 7 April 2001. In the submission of Mr Tynes QC, the oral agreement between the parties was evidenced in writing in those letters. He argues, as I understand him, that there was a single contract for the work of restoration to be performed by the plaintiff, which included the re-design of the roof at the said premises and he submits that the agreement was that the plaintiff would receive a fee for the project amounting to 12.5% of the total construction cost, which was to be paid, in phases, by the defendant's insurers. In counsel's further submission, it is clear when one reads the aforesaid field report along with the aforesaid letters that the 12.5% was to cover the entire project, not just the roof.

28. On the other hand, the defendant contends that there were two separate contracts: one for supervising the work necessary to restore the condominium property to its pre-storm condition, in which it was agreed that the plaintiff would be paid "according to the policy parameters" and for which the plaintiff had submitted his invoice and was paid; and the other for the re-design of the roof over the entire building for which the plaintiff was to be paid 12.5% of the total construction costs.

29. In that regard, counsel for the defendant points out that the reference in the 6 April 2001 letter to: "Roofing at Bahamas Reef Condominium"; the statement: "Based on the writer's recent meeting with you we are to re-design the roof"; and the phased payment schedule set out therein, all indicate that that contract was clearly in relation only to the re-design of the roof and not to the restoration work. Consequently, counsel submits, the words "total construction cost" in that letter relate only to the roofing work and the plaintiff's allegation in his statement of claim that the fee of 12.5% relates to anything other than the roof re-design job was not supported by the facts.

30. In my view, the aforesaid letter dated 5 April 2001 clearly confirmed the plaintiff's oral engagement as surveyor in which capacity he was expected to be "responsible for reviewing and listing all property damage and reporting this to the Insurance Company in written form" and for representing the defendant in "contracting out the jobs necessary to restore" their property and to "supervise such work during its progress." It is also clear from the field report that a part of those duties included the repair of the roof over the penthouse or the "upper flat area".

31. Also in my view, the aforesaid letter dated 6 April 2001, clearly identifies "Roofing at Bahamas Reef Condominium" as "the above project" and confirms the plaintiff's "agreed brief terms of reference and professional responsibilities", as: "to re-design the

roof at the above project"; and, as I understand the evidence, the plaintiff was to re-design the roof over the entire building, not just the penthouse.

32. It seems to me, therefore, that there were two separate contracts or more specifically, in my judgment, two scopes of work for which the defendant engaged the services of the plaintiff: one as surveyor responsible for organizing and supervising the restoration of the premises to their pre-storm condition, which, to my mind would have included the repair or replacement of the penthouse roof, evidenced by the oral agreement and the letter dated 5 April 2001; and the other for the re-design of a new pitched roof over the entire building as an alternative to the repair or replacement of the penthouse roof, as evidenced by the letters of 6 and 7 April 2001.

33. The question then is whether or not the plaintiff was to be paid the same fee for both scopes of work.

34. There is no dispute that the letter of 6 April 2001 expressly stated that the plaintiff was to be paid a fee "for this project" of 12.5% of the total construction cost, and that such fee was payable in phases. There is also no dispute that the letter of 5 April 2001 expressly stated that the plaintiff would be paid "according to the policy parameters." Both the plaintiff and Mr Tims understood that expression simply to mean that the plaintiff would be paid for his professional services by the defendant's insurers.

35. However, the plaintiff's evidence, which I accept, is that although a formula for payment of his fees was not agreed at the time of his oral engagement, a day or two later he told Mr Tims that he had "a 12.5% of the damages as a scale fee for a project of that nature."

36. Further, the plaintiff's invoice dated 18 June 2001 for the sum of $4,284.21, issued prior to his termination, and which was subsequently paid, clearly states that that sum represented 12.5% of invoices totaling $34,273.70 from various contractors for work done to that date with respect to the repair and restoration of the said premises, including "the band-aid". That invoice also included the note: "fee for this project at 12.5% of the total construction cost", and obviously did not include any reference to the roof re-design work.

37. Additionally, in their letter dated 24 October 2001, Crawford Bahamas Ltd, as regards a further invoice tendered by the plaintiff for fees in relation to the restoration work, and notwithstanding their request for a final bill from the plaintiff, indicated that the "basis of payment originally agreed upon...was 12.5% of the invoiced work."

38. In my view, therefore, the combined effect of that evidence is that, on a balance of probability, the agreement between the parties was that the plaintiff would be paid 12.5% of the total construction cost with respect to the roof re-design as well as with respect to the restoration work, and I so find.

39. Each side says the other is guilty of a fundamental breach of the contract.

40. The Court draws a distinction between those terms of a contract which are conditions and those terms which are warranties. Breach of a warranty gives rise to an obligation to pay damages but does not entitle the non-breaching party to treat the contract as repudiated (Bettini v Gye (1876) 1 Q.B.D. 183) whereas breach of a condition entitles the innocent party to treat the contract as repudiated (Poussard v Spiers (1876) 1 Q.B.D. 410) and in Suisse Atlantique Societe d'Armement Maritime S.A. v N.V. Rotterdamsche Kolen Centrale [1967] 1 A.C. 361, relied on by the defendant, Lord Reid defined fundamental breach as a "well-known type of breach which entitles

the innocent party to treat it as repudiatory and to rescind the contract". Lord Upjohn in that case, opined: "Whether such breach or breaches do constitute a fundamental breach depends on the construction of the contract and on all the facts and circumstances of the case." (421-422).

41. The defendant alleges at paragraph 4 of its defence that the design produced by the plaintiff pursuant to his contract with the defendant to re-design the aforesaid roof was unsuitable for the defendant's premises and that the plaintiff proved incompetent in calculating the construction cost and arranging the construction thereof. The defendant contends that by advancing quotations that were incompetently calculated by him and passing them off as estimates of FreCon, the plaintiff committed a fundamental breach of the contract for re-designing the roof at the defendant's property.

42. In the submission of counsel for the defendant, the price for the construction of the sloped roof was a fundamental term of the contract and the plaintiff's failure or inability to obtain accurate pricing for the proposed new roof and his misrepresentation of the facts in relation thereto constituted a breach of a fundamental term and, therefore, a fundamental breach of the said contract and that, given the urgency of the situation, the defendant was entitled to discharge the plaintiff and proceed without him to get the job done.The plaintiff, on the other hand, contends that by terminating his services, which he was ready and willing to perform, it is the defendant who is guilty of repudiatory breach of the contract, which breach the plaintiff says he accepted. Counsel for the plaintiff, therefore, submits that the plaintiff, having been discharged from his duties, was entitled to treat the contract as rescinded. For that proposition counsel relies on the cases of Cort and Gee v The Ambergate etc Railway Company (1851) 117 ER 1229 and Lodder v Slowey [1904] A.C. 442.

43. In Cort and Gee v The Ambergate etc Railway Company, Lord Campbell, at pages 1237, said:

> "Upon the whole, we think we are justified, on principle and without trenching on any former decision, in holding that, when there is an executory contract for the manufacturing and supply of goods from time to time, to be paid for after delivery, if the purchaser having accepted and paid for a portion of the goods contracted for, gives notice to the vendor not to manufacture any more as he has no occasion for them and will not accept or pay for them, the vendor having been desirous and able to complete the contract, he may, without manufacturing and tendering the rest of the goods, maintain an action against the purchaser for breach of contract; and that he is entitled to a verdict on pleas traversing allegations that he was ready and willing to perform the contract, that the defendant refused to accept the residue of the goods and that he prevented and discharged the plaintiff from manufacturing and delivering them."

44. The plaintiff says immediately upon his engagement as aforesaid he began to carry out the tasks for which he was engaged, including obtaining bids and securing the services of, and supervising, contractors for the repair work. He says in cases where he received more than one bid for the same work he accepted the lower or lowest bid. He applied for a building permit from The Grand Bahama Port Authority Limited for the repair of the roof, and in addition to obtaining an estimate for the "band-aid", he also obtained two estimates (Options 1 and 2) for the permanent roof over the penthouse.

45. With respect to Option 3, which called for a 5:12 sloped roof which he had recommended and had been engaged to design, the evidence is that the plaintiff was being pressed by the defendants to progress the work, which included getting estimates/prices into the adjusters for approval and/or payment; there were complaints that the "band-aid" was not working as expected; it was leaking every time it rained (according to Mr Tims' letter of 11 June 2001 to the plaintiff).

46. The plaintiff's evidence is that he met with Mr Silvera at his office to discuss pricing and Mr Silvera orally represented to him that a roof of the nature the plaintiff was proposing could be done at $15.00 per square foot. Mr Silvera admits having HAD the discussion with the plaintiff, but, as I understood his testimony, that was before he knew how complicated the new roof would be. He says when he and the plaintiff talked "budget numbers of $15.00 per square foot...just as" the plaintiff had said, that was on the basis of a lower sloped roof – more in line with the then-existing penthouse roof.

47. In any event, the plaintiff's evidence is that on the basis of Mr Silvera's aforesaid representation, he simply multiplied the square footage of 12,883.115 square feet of roof space by $15.00 and gave the resulting figure, $193,246.66, to the defendant and subsequently to the adjusters, who approved it. There is also evidence that the structural engineer had indicated there was likely to be an additional $16,000.00 for engineering work and that sum had, apparently, been approved as well.

48. However, Mr Silvera said his "final quote", that is the written estimate for $296,700.00, came after he received the plaintiff's drawings or "concept for solution."

49. Although the estimate is dated 4 May 2001, it is unclear from the evidence when it was received by the plaintiff or, for that matter, when the Board first became aware of the difference in estimates. In his evidence-in-chief the plaintiff said that he sent the proposal to members of the Board prior to the meeting with Mr Silvera in June 2001, and indicated to them the need to meet and discuss the roof issue with Mr Silvera upon his return to the island. During cross examination the plaintiff says he believed he faxed the estimate to "everyone involved in this project" and "kept them in the loop."

50. It seems, however, from a letter dated 18 June 2001 from Mr Tims to the plaintiff that the Board was, at that date, still under the impression that the new roof could be constructed for $193,246.66 plus the additional charge of $16,000.00 for engineering. In that letter Mr Tims requested a status report of the work to be done at the said premises, including, inter alia, the new roof, tennis court, fences, air-conditioning units and damaged lights to which the plaintiff responded by letter also dated 18 June 2001 as follows:

> "Bahamas Reef Condominium Association
> Etc.
>
> In answer to your letter of today's date, please note that we are unable to request work to begin with any of the contractors as we have yet to receive the funds needed to begin.
>
> Mr Martin Taylor is still off island as of today's date, therefore has not received any correspondences from us for the past two or more weeks.
>
> To answer you in the order of your questions:-

1. Wide World Forwarding is prepared to move apartment #403 – Mr Gouthro's belongings to the container.

2. Mr Bruce Silvera of Freeport Construction is presently off the island, however, once he has returned we will arrange a meeting between everyone concerned to discuss the roof.

3. The air condition units have been ordered and we now await their arrival on the island.

4. Items 4, 5, 6 and 7 as you may note from your last letter of June 12th, 2001, where I faxed you a copy of our letter dated June 7th, 2001, to Mr Taylor requesting the funds. (Please see attached copy for your quick reference).

Sincerely,
C. J. Moss & Associates
(sgd) Charles J. Moss"

51. The meeting to which Mr Moss referred in the above letter was eventually held on or about 21 June 2001 and under cross examination the plaintiff says the reason for the time lapse between the date Mr Silvera produced the written estimate for Option 3 and the date of the meeting with the parties to discuss the same was because "people were traveling" and "people were all over the place. The Board was not here, Bruce was not here." Indeed, in his 18 June 2001 letter the plaintiff indicated that Mr Silvera and Mr Taylor, one of the adjusters, were off the island at that time; and in a letter dated 5 May 2001 to the plaintiff, Mr Tims also indicated that Board members were likely to be away at various times after that date.

52. In any event, according to the plaintiff, it was at that meeting that his services were orally terminated by the Board, which termination was later confirmed in writing by Crawford Bahamas Ltd, the adjusters.

53. Further, although the plaintiff says he was not given, orally or in writing, any explanation for his termination, under cross examination, in response to counsel for the defendant's question as to the defendant's reaction when it was discovered that the actual quote for Option 3 was over a hundred thousand dollars more than he had indicated, the plaintiff said members of the Board were "disappointed that they could not get the roof at that price and in fact they fired (him) because of that."

54. On the other hand, the evidence of the defendant's witness, Mr Tims, is that the plaintiff's services were terminated at the request of the adjusters. According to Mr Tims, when the adjusters made the request, members of the Board inquired as to "what was the problem" and they were told that they were not going to be able to finish their roof or finish the apartments unless the plaintiff's services were terminated. Mr Tims says he remembered being "extremely nervous" about that, but because the Board wanted their roof fixed, they authorized the adjusters to "release Mr Moss of his responsibility."

55. It is also unclear as to whether the adjuster's request to be permitted to discontinue the plaintiff's services was made prior to or after the meeting on 21 June 2001. Additionally, Mr Tims could not recall whether Mr Moss' letter of 22 June 2001 was written before or after the defendant's Board had received the adjuster's request. In

his letter of 22 June 2001, the plaintiff explained to the defendant how he arrived at the sum of $193,206.66 and sought to assure the defendant that he never "misrepresented, misled or deceived the Board, the contractors or any agency on this project".

56. Whatever may have been the plaintiff's views about the reason he was terminated, I agree with counsel for the plaintiff that the evidence of the defendant's witness, Mr Tims, describing the circumstances in which the plaintiff's services were terminated, which I accept as the real reason for the plaintiff's termination, does not support the defendant's case as pleaded.

57. Further, it is clear on the evidence that the plaintiff did not just pull "$15.00 per square foot" out of the proverbial hat and give it to the defendant. Although Mr Silvera denies providing an estimate of $193,246.66 for the proposed new roof, or that he would have calculated the cost of constructing the roof in the same manner as the plaintiff, he admits having discussed "budget" amounts of $15.00 per square foot as a price for building a roof. Although he says that that sum was on the basis of a lower slope, there is no evidence that that distinction was made at the time and in the circumstances where everyone agreed there was some urgency to get estimates approved and the roof repaired, I do not see how the plaintiff, in using information admittedly given to him by the same roofing company that had installed the band-aid without having provided a written estimate, and who subsequently installed the permanent penthouse roof, could be said to be incompetent or that he was guilty of misrepresentation. Indeed, it occurs to me that as the plaintiff was to be paid a fee of 12.5% of the total construction cost for the roof, it would certainly have been more profitable to him to quote the higher figure.

58. Moreover, as pointed out by counsel for the plaintiff, the defendant did not give the plaintiff an opportunity to try to find another roofer who might have been prepared to build the roof for the price quoted by the plaintiff.

59. As indicated, the plaintiff was initially engaged as surveyor with responsibility for supervising the restoration work. The evidence is that at the time of his termination, that aspect of the work had not yet been completed. Certainly the apartments had not yet been restored to their pre-storm condition; neither had the tennis court or the fence been repaired. However, according to Mr Tim's evidence, the adjusters expressed the view that the work on the defendant's property was in jeopardy unless the plaintiff's services were terminated.

60. In those circumstances, I accept counsel for the plaintiff's submission that the defendant, having terminated the plaintiff in the manner in which it did, committed a repudiatory breach of the contract between the parties and the letter from Crawford Investments Ltd dated 26 June 2001 was sufficient to discharge the plaintiff from further performance of his obligations as surveyor as well as with respect to the re-design of the roof, and that the plaintiff was entitled to treat the contract as rescinded.

61. Moreover, even if I am wrong and the defendant was entitled to terminate the plaintiff's services for incompetence and/or misrepresentation in respect to the contract for the re-design of the roof as contended by the defendant, there is still the matter of the plaintiff's duties as surveyor.

62. The plaintiff's evidence, which I accept, is that at the time of his termination he was ready and willing to perform his obligations under the contract; that he was in fact

"on the job." Indeed, in his said letter dated 18 June 2001, written shortly before he was terminated, the plaintiff wrote, inter alia, to Mr Tims: "In answer to your letter of today's date, please note that we are unable to request work to begin with any of the contractors as we have yet to receive the funds needed to begin."

63. And as noted by Lord Davey in Lodder v Slowey [1904] A.C. 442: "a party to a contract for execution of works cannot justify the exercise of a power of re-entry and seizure of the works in progress when the alleged default or delay of the contract has been brought about by the acts or default of the party himself or his agent."

64. In any event, it is, in my view, clear that the intention was to relieve the plaintiff of all duties related to the defendant's property. The threat, according to Mr Tims, was that the defendant was not likely to get the apartments or roof repaired unless the adjusters were permitted to terminate the plaintiff's services and according to the plaintiff's field report, those were the two major items for repair/restoration.

65. In light of the foregoing, I find that in terminating the plaintiff's services as aforesaid, the defendant committed a fundamental breach of the contract between the parties thereby effectively depriving the plaintiff of the whole benefit which it was the intention of the parties that the plaintiff should have obtained as consideration for performing his duties thereunder; which breach was accepted by the plaintiff by letter dated 3 July 2001 and later confirmed by his attorney in a letter dated 22 November 2001, and that the defendant is liable to the plaintiff in damages for such breach.

66. The evidence is that the plaintiff on 18 June 2001, a few days before he was terminated, tendered a bill to the defendant for the sum of $4,824.21, being 12.5% of $34,273.70, made up by the following amounts:

Gilbert landscaping	$ 1,500.00
B & B Trucking	$ 1,442.00
Chris Gouthro Apt #403	$ 4,800.00
Central Mechanical Deposit	$ 2,979.20
Frecon Roofing ("band-aid")	$ 16,217.00
Wide World Forwarding	$ 5,500.00
Kermit Wallace	$ 1,500.00
Town and Country	$ 335.00

67. As indicated, a note on that bill stated that it represented 12.5% of the total construction costs.

68. On 3 July 2001, subsequent to his termination, the plaintiff, in response to the adjuster's request for an invoice for his services "rendered to date, broken down between time and expense" for their consideration, submitted an invoice for architectural service in the sum of $28,653.84. There is no indication as to how that sum was calculated, but it refers to the "project" as "Bahama Reef Condominium, Storm damages..." and notes the "present status of the account" as "Professional service rendered with reference to the above project from April 2nd, 2001 to June 25th, 2001." The invoice includes an item "re-design roof (April 6, 2001)." An itemized list

of the details of the work done by the plaintiff with respect to the said property includes a reference to "June 30, 2001 – prepare final bill".

69. Notwithstanding that invoice being dubbed the final bill, the plaintiff says he is entitled to $76,621.68, that is, 12.5% of $612,973.50, being the minimum amount, he says, based on the bids obtained by him and/or the cost of work actually done, for which the defendant would have had its property restored to its pre-storm condition and, therefore, the minimum amount of the contract between the parties.

70. As I understand the plaintiff's case, had he been permitted to complete the work for which he was contracted, he would have been paid 12.5% of the total construction cost to restore the said premises, which would have included at a minimum the permanent roof over the penthouse or could have included the re-designed roof over the entire building; that the defendant having repudiated the contract by terminating the plaintiff's services, thus preventing the plaintiff from completing the contract, the plaintiff is entitled to be paid what he would have earned had he been permitted to complete the job.

71. In that regard, counsel for the plaintiff points out that as the plaintiff accepted either the lower or lowest of the bids that he received for the aforesaid work, unless the defendant was contending either that the repair work, including the installation of the roof, had not been done or that the work was done for more than the lowest bids which the plaintiff had obtained, then the plaintiff is entitled to be compensated on the basis of those bids as, in his submission, the plaintiff is entitled so far as money can do so, to be put in the position that he would have been in had the contract been performed (Robinson v Harman vol. 154 ER at page 363).

72. The aforesaid sum of $612,973.50 included an estimate of $170,000.00, not obtained by the plaintiff, for the installation of a new penthouse roof, not designed by the plaintiff, and provided by FreCon after the plaintiff's contract was terminated, as well as the sum of $381,500.00 for an estimate provided by Marlin Design-Build Ltd for general contracting work necessary to restore other parts of the premises to their pre-storm condition.

73. In addition to obtaining a copy of the aforesaid estimate for $170,000.00 from Mr Silvera, the evidence is that the plaintiff also obtained from Mr Silvera a copy of a payment schedule from Marlin Design-Build Ltd with respect to the aforesaid sum of $381,500.00. The plaintiff says he had obtained and approved the estimate from Marlin Design-Build Ltd prior to his termination and according to the documentary evidence, he forwarded a copy of the pay schedule to the defendant by fax on 13 June 2001, prior to his termination. In the plaintiff's view, the only reason for preparing a payment schedule was because the work was to be done.

74. However, there is no other evidence that Marlin Design-Build Ltd's proposal was accepted by the defendant or its insurers, or that they were engaged to do the work for which the proposal was provided. Indeed, Mr Silvera's evidence is that the proposal was not accepted and that Marlin Design-Build Ltd, which is no longer in business, was not engaged by the defendant to do the work.

75. Counsel for the defendant submits, therefore, that there is no basis in law for the plaintiff to contend that he is entitled to 12.5% of those sums or any estimates received after he was terminated or for work not done at all or not done through him. She submits further that when the plain language of the contract is considered along with the

evidence, it is obvious that the plaintiff's claim for $71,321.47 together with interest cannot succeed.

76. Parke, B, in Robinson v Harman supra stated what has become the general rule at common law, that: "where a party sustains loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same position with respect to damages as if the contract had been performed" and Alderson B opined: "where a person makes a contract and breaks it, he must pay the whole damage sustained." (365).

77. The rule in Robinson v Harman supra has been approved and re-stated in several cases, some of which were cited by counsel for the plaintiff, including Johnson v Agnew [1979] 1 All E.R. 883 where the Court at page 896 opined that "the general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed so far as money can do so, in the same position as if the contract had been performed" and in British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673, where Viscount Haldane, L.C., at page 689, after stating that the quantum of damages is a question of fact and that the only guidance the law can give is to lay down general principles said,:

> "Subject to these observations I think there are certain broad principles which are quite well settled. The first is that as far as possible, he who has proved a breach of a bargain to supply what he contracted to get is to be placed, as far as money can do it, in as good a situation as if the contract had been performed. The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach.

78. It is, of course, for the plaintiff to prove both the fact, and the amount, of the damage (McGregor on Damages, 16th Ed. Para 357) and, as I understand the authorities, he is not to be placed in a better or worse position than he would have been in had he been permitted to fulfill his part of the contract. Further, the plaintiff must prove, on a balance of probabilities, that his expectation of a certain outcome, as a result of performance of the contract, had a likelihood of attainment rather than being mere expectation. (Commonwealth v Amann Aviation Pty Limited (1991) 174 CLR 64).

79. In Lodder & Anor v Slowey (1904) A.C. 442. on an action for the recovery on a quantum meruit on a breach of building contract, the House of Lords, confirming the decision of the Court of Appeal, said that:

> "The measure of damage in such an action is the actual value of work, labor, and materials and it is immaterial whether the contractor would have made a profit or a loss."

80. So, in what position would the plaintiff have been had the contract been performed?

81. Unfortunately, although it is agreed that the work to be performed under the contract was of an urgent nature, there was no time frame placed on it nor was time made of the essence and there was no specified contract price.

82. In my judgment, however, had the contract been performed, at a minimum, the defendant's property would have been restored to its pre-storm condition; that is, with the then-existing penthouse roof repaired, all of the penthouse apartments repaired; the tennis court resurfaced and the fence repaired. Alternatively, instead of the flat roof, the defendant's premises would have been placed in a better-than-pre-storm state as it

would, in addition to the aforesaid repair to the apartments, tennis court and fence, also have a new sloped roof over the entire building. In either case, as I have found, the plaintiff would have been entitled to compensation at the rate of 12.5% of the total cost of the construction – that is had the contract been performed.

83. The evidence is that instead of the flat roof over the penthouse or the 5:12 sloped roof over the entire building recommended by the plaintiff, the defendant opted to install a "tapered modified flat roof" over the penthouse. It is not disputed that this was done by FreCon at a cost of $170,000.00.

84. It is also not disputed that Central Mechanical Ltd's proposal for $29,792.00, instead of C & G Airconditioning's proposal for $33,490.00, for replacing twenty-three condensing units had been accepted. The plaintiff has already been paid a fee of 12.5% of the 10% deposit paid to Central Mechanical as evidenced by his aforesaid invoice dated 18 June 2001. In that same invoice the plaintiff had also billed and was paid 12.5% of the invoices to Gilbert Landscaping ($1,500.00), B & B Trucking ($1,442.50) and FreCon ($16,217.00) for the "band-aid".

85. Additionally, amongst the documentary evidence is a letter dated 7 June 2001 from the plaintiff to the adjusters, in which the plaintiff forwarded estimates from Marlin Design-Build Ltd totaling $12,522.00 with respect to the resurfacing and fencing of the tennis court and the replacement and repair of the fence on both sides of the property. There is no evidence that those estimates had been approved or the work done by Marlin Design-Build Ltd.

86. There is also no evidence that the Marlin Design-Build Ltd's proposal for $381,500.00 (duty paid price) for repairs to the six penthouse units had been approved by the defendant or the adjusters. However, I note from the documentary evidence that it is the lower of two bids obtained by the plaintiff for the same work. The other bidder, Reef Construction Limited, gave an estimate of $399,000.00 (bonded price), which was likely to be increased by the customs duty.

87. The way I see it, whether or not the plaintiff and/or the defendants were able to persuade the insurers to approve the re-designed roof over the entire building, was a matter separate and apart from the restoration work and whether or not the defendant and/or the insurers accepted and/or approved the re-designed roof, the roof over the penthouse still had to be repaired, as well as the apartments, the fencing and the tennis court, and it is in respect of the latter work that the plaintiff had been engaged as surveyor and which he was prevented from completing because his contract was terminated by the defendant's agent.

88. The defendant does not say that the restoration work was not done and, except for the penthouse roof, the best estimate of the total construction costs, on the evidence (both oral and documentary), were the estimates obtained by the plaintiff prior to his termination. So, in the absence of any evidence to the contrary, it seems reasonable to me to take the lower or lowest of those bids obtained by the plaintiff plus the actual cost of the permanent penthouse roof as representing the total construction costs upon which the plaintiff was to have been compensated at the rate of 12.5%.

89. It is therefore ordered that judgment be entered for the plaintiff in the sum of $71,537.47, being 12.5% of $612,000.00 ($76,621.68) less the sum of $5,084.21 received by the plaintiff on account, together with interest thereon at the rate of 5% per annum from the date of filing of the writ herein, 29 November 2001, until payment.

90. The defendant's counterclaim is dismissed.

91. Costs shall be paid by the defendant to the plaintiff, to be taxed if not agreed.

Delivered this 28th day of January A.D. 2011

Estelle G. Gray Evans
Justice