COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2019/CLE/gen/01594

BETWEEN

HNR COMPANY LIMITED

Plaintiff

AND

PALM CAY DEVELOPMENT COMPANY LIMITED

Defendant

Before Hon. Chief Justice Sir Ian Winder

Appearances: Eugeina T. Butler and Nadia Wright for the Plaintiff
Dion Smith for the Defendant

4 October 2021, 5 October 2021, 24 November 2021, 30 June 2022 (written closing submissions) and 24 October 2022

JUDGMENT

WINDER, CJ

This is a claim by the Plaintiff ("HNR") for alleged breaches of two construction contracts entered into with the Defendant ("PCDL") in connection with the "Anchorage Phase 4" project ("A4" or the "A4 project") and the "One Marina" project ("OM" or the "OM project") (collectively, "the projects"). PCDL counterclaims for alleged breaches of the contracts on the part of HNR.

Background

[1.] Basic background facts can be stated at the outset. The projects are developments located within the "Palm Cay" gated community ("Palm Cay"). Palm Cay is located in the Eastern district of New Providence. PCDL is Palm Cay's developer. In 2018, HNR, a company founded by Sean Wright ("Wright"), was engaged by PCDL to commence and/or continue construction on the projects. The relationship between the parties soured before HNR could complete the projects. CGCL Limited took over and completed the projects.

The A4 project

[2.] The A4 project, which formed part of a wider Anchorage project at Palm Cay, involved the construction of 3 blocks of 6 condominium units and consisted of (i) masonry construction with asphalt roofing and impact windows, (ii) the construction of a swimming pool and (iii) associated landscaping. PCDL was issued building permit no. 116257 by the Ministry of Works ("MOW") in connection with the Anchorage project. HNR secured the tender from PCDL to continue the A4 project from another contractor in February 2018.

[3.] As part of the pre-contractual documentation, HNR prepared a "Tender Summary" for the A4 project dated 23 July 2018 which recorded *inter alia* that the project was already an estimated 11% complete with an estimated $162,940 in value completed. In the Tender Summary, HNR provided a tender price of $1,535,477 before cash allowances and contingencies of $65,000. The tender price excluded utility tie-in fees, cable, water, sewage, BPL fees, permit fees and consultant fees. Overhead and profit for the project were fixed at line 28 at the rate of 5% (i.e., $65,284 before VAT).

[4.] In September 2018, the parties entered into a contract for the A4 project in the form of the American Institute of Architect's Standard Short Form of Agreement between Owner and Contractor (Document A105™-2017) with minor modifications (the "A4 contract"). The parties executed the A4 contract on 17 September 2018. The A4 contract's express terms are excerpted in the appendix to this judgment. The date for Substantial Completion specified under the A4 contract was 18 September 2019 and the Contract Sum was $1,535,477.08 (the same as the tender total in the Tender Summary).

The OM project

[5.] HNR secured the tender from PCDL to commence construction on the OM project after it secured the tender to continue the A4 project. The OM project was a more substantial project than the A4 project and involved the construction of a block of 10 condominium units. PCDL was issued building permit no. 124075 by the MOW in connection with the OM project. The permit was subject to the conditions that (i) the OM project was structurally approved subject to details for all staircases being submitted prior to construction, (ii) structural work was to be supervised by the relevant engineer, (iii) the building permit was to be posted at the commencement of construction and (iv) construction was to comply with the regulations of the MOW.

[6.] As part of the pre-contractual documentation, HNR prepared an "Estimate Summary" for the OM project dated 24 July 2018 which recorded *inter alia* that the project was an estimated 1% complete. In the Estimate Summary, HNR provided a tender price of $5,992,530 before cash allowances and contingencies of $100,000. The tender price excluded utility tie-in fees, cable, water, sewage, BPL fees, permit fees and consultant fees. Overhead and profit for the project was fixed at line 26 at the rate of 5% (i.e., $254,784 before VAT).

[7.] In October 2018, the parties entered into a contract for the OM project in the form of the American Institute of Architect's Standard Short Form of Agreement between Owner and Contractor (Document A105™-2017) with minor modifications (the "OM contract"). The OM contract was in substantially the same terms as the A4 contract save for the particulars of the project and the lack of any mention of layout drawings. The date for Substantial Completion specified under the OM contract was 22 November 2019 and the Contract Sum was $5,992,530 (the same as the tender total given in the Estimate Summary).

PCDL's consultants

[8.] Both projects shared the same architect, structural engineer, mechanical and electrical engineer and quantity surveyor. Winston Jones & Associates Architects Ltd acted as Architect of Record for both projects. Certified Consultants & Technicians supervised the structural work on both projects. Graphite Engineering Ltd did the mechanical and electrical engineering work on both projects. Dean Hapgood ("Hapgood"), a quantity surveyor, was consulted by PCDL on HNR's payment applications.

Events preceding the commencement of proceedings

[9.] It is undisputed that work on the projects proceeded after execution of the contracts until shortly after the submission by HNR on 21 October 2019 of payment application no. 9 in relation to the A4 project and payment application no. 7 in relation to the OM project. Both payment applications related to work done by HNR between 14 September 2019 and 18 October 2019. Both projects were behind schedule at this point in time.

[10.] HNR's payment applications were certified by the Architect of Record on 30 October 2019 (i.e. "Certificates for Payment" were issued in the full amount of the applications), but, despite this, PCDL did not pay HNR the amounts that HNR applied for and the Architect of Record certified. More particularly:

(i) with respect to the A4 project, PCDL disagreed with certain figures claimed by HNR based on comments it received from Hapgood based on the progress observed on site; and

(ii) with respect to the OM project, PCDL disputed the amount applied for by HNR on the basis of comments received from Hapgood and on the basis that PCDL intended to reduce the scope of work assigned to HNR. PCDL also had queries relating to some of HNR's subcontracts.

[11.] PCDL's delay in settling HNR's payment applications notwithstanding the Architect of Record's certifications of them and the various issues that PCDL had taken up with HNR around the same time formed the subject of meetings and correspondence between the parties in late October 2019 and early November 2019.

[12.] On 7 November 2019, HNR sent an email (the "HNR Stop Work Email") to PCDL to respond to queries from PCDL about OM and to attempt to secure full payment of the payment applications certified by the Architect of Record. HNR advised PCDL that, if payment of the Architect of Record's certificates was not made, work would be stopped on both projects on 15 November 2019 until payment of the amounts owed was received. No reference was made to any of the specific provisions of the contracts justifying HNR's proposed course of action.

[13.] PCDL did not engage with the HNR Stop Work Email substantively insofar as it related to the A4 project. Instead, on Tuesday, 12 November 2019, PCDL sent an email ("PCDL's Substantial Completion Enquiry") enquiring when "Substantial Completion" of the A4 project would take place, as HNR had promised that it would be substantially complete on A4 by the end of the prior weekend yet it still had men working in all units at the A4 jobsite. HNR did not respond to PCDL's Substantial Completion Enquiry.

[14.] Unlike the position that obtained in relation to the A4 project, PCDL did engage with the HNR Stop Work Email substantively, to the extent that it related to the OM project. On Tuesday, 12 November 2019, PCDL sent an email ("PCDL's OM Rejection Email") purporting to "reject" HNR's notice of intention to cease works. PCDL's OM Rejection Email, sent by Robert Batchelor ("Batchelor"), PCDL's then-CEO, relevantly stated:

> With regard to your reference to the draft payment certificate issued by the Architect of Record we provide notice as required. That said failure to provide the above substantiation [of payments to subcontractors] has left us with no option but to invoke our entitlement as per Article 7.3. It is our conclusion that you have not provided the necessary documentation to support your payment application and as such your notice of intention to cease works is rejected. If you choose to take this course we hereby reserve the right to take action as per the contract.
>
> [Emphasis added]

[15.] On 13 November 2019, HNR requested an extension of time of 14 days from the Architect of Record in order to complete on the A4 contract ("the HNR A4 EOT Request"). The extension of time was said by HNR to be required because of the following matters:

> a. Client Variations (kitchen cabinet incomplete)
> b. Outstanding MOW approvals required in conjunction with completed works for the application for final inspections.
> c. Timing of variation information affecting both completion of inspections and subcontractor scheduling.

[16.] On 15 November 2019, in response to the HNR A4 EOT Request, the Architect of Record issued a letter (the "A4 Termination Letter") purporting to terminate the A4 contract on behalf of PCDL. Relevant portions of the A4 Termination Letter stated:

> Dear Mr. Wright,
> ...
> We write on behalf of our clients, who have communicated with their clients who unfortunately are not prepared to allow any further time extension due to the fact that this build programme should have been completed by 18th September, as per the current contract.
> Also, you have made a number of verbal commitments at the weekly construction meetings confirming that 'substantial completion' would have been achieved, firstly by the end of October, and then more recently at the meeting I attended on the 6th November, you confirmed substantial completion would be by 11th November. These dates have come and gone and there has been no real evidence of any activity to actually set realistic timeframes and then achieve them.
> Palm Cay has contracted and made promises to its clients and also has legal responsibilities and committed closing dates that need to be maintained.
> Palm Cay, therefore, deny your time extension request and will be providing their own contractors to take on the role of finishing the Anchorage Phase 4 project effective Monday 18th November, as per contract clause 7.4.
> This email also serves as seven days' notice to Terminate the contract for Cause, as per contract clause 16.2.1.4, given the ongoing time delays being experienced.

> If it would be preferable to you to cease operations at the end of today, handover all materials/equipment/keys belonging to Palm Cay, that would be acceptable.
> Please advise.

[17.] The Architect of Record also issued a separate letter (the "OM Acceptance Letter") on the same day purporting to "accept" HNR's "offer" extended by the HNR Stop Work Email on behalf of PCDL. The Architect of Record asked HNR to "terminate works" on the OM project and to "exit from the site" until "matters [could] be resolved to the satisfaction of both parties to the contract". Relevant portions of the OM Acceptance Letter relevantly stated:

> Dear Mr. Wright,
> ...
> On behalf of our clients, we write to acknowledge receipt of your email of 7th November, 2019 stating your intentions to cease operations at the end of today until payments owed are received.
> Given that there are disagreements on these, our clients regretfully accept your offer and you are asked to terminate works and exit from the site leaving all unfixed materials and equipment, the property of Palm Cay, until matters can be resolved to the satisfaction of both parties to the contract. Until that time, all payments are on hold.
> As per contract clause 7.3, Owners Right to Carry Out the Work, Palm Cay will be deploying a work force from Monday, 18th November to continue to progress work, until such times as the payment/contractual issues are resolved.
> A complete record of work completed as at end of today will be documented for future reference as we resolve the outstanding contractual issues.
> Accordingly, we will contact you in the near future to progress discussions.

[18.] By certifying HNR's payment applications, the Architect of Record certified that the projects were approximately 90% complete and approximately 30% complete, respectively, in accordance with the Construction Documents. This was done before the Architect of Record issued the A4 Termination Letter and the OM Acceptance Letter (collectively, the "Architect's 15Nov19 letters").

[19.] The Architect's 15Nov19 letters were followed shortly after by an email from PCDL ("PCDL's No Weekend Working Email") which (i) confirmed the Architect of Record's communications to HNR, (ii) advised HNR that there would be no weekend working at the projects' jobsites because PCDL needed to document HNR's work and (iii) recorded that HNR had stood its men down from the OM project that day and PCDL would be "deploying more men to A4" from 18 November 2019.

These proceedings

[20.] These proceedings were commenced by HNR by a generally indorsed Writ of Summons issued on 15 November 2019. Proceedings were started before HNR

responded to the Architect's 15Nov19 letters. HNR did so by two letters dated 22 November 2019 issued by Munroe & Associates (collectively "HNR's 22Nov19 response letters"). The general indorsement on the Writ of Summons contemplated that the contracts continued in force and this position was mirrored in HNR's 22Nov19 response letters. HNR amended its claim on 26 May 2021 to expand the relief sought by it.

HNR's pleaded claim

[21.] HNR's pleaded claim, as it is set forth in HNR's Amended Statement of Claim, is, in summary, that:

1. PCDL breached the A4 contract by (i) failing to obtain fully approved drawings as required by Article 8.7.1 of the A4 contract; (ii) deducting retention from signed certificates in the amount of $35,388.64 ($31,597 + 12% VAT); (iii) failing to pay payment application no.9 in the amount of $91,375.20 ($81,586 + 12% VAT); (iv) purporting to terminate the contract by the A4 Termination Letter; and (v) excluding HNR from the jobsite and wrongfully taking possession of HNR's materials and tools.

2. PCDL breached the OM contract by (i) failing to obtain fully approved drawings as required by Article 8.7.1 of the OM contract; (ii) deducting retention from signed certificates in the amount of $45,701.60 ($40,805 + 12% VAT); (iii) failing to pay payment application no.7 in the amount of $199,605.28 ($178,219 + 12% VAT); (iv) purporting to terminate the contract for cause by the OM Acceptance Letter; and (v) by excluding HNR from the jobsite and wrongfully taking possession of HNR's materials and tools.

3. HNR complied with its obligations pursuant to the contracts so far as it was able to.

4. As a result of PCDL's breaches of the contracts, HNR has suffered loss and damage. HNR is entitled to recover as damages the loss of profit and overhead for both projects in addition to compensation for works completed for which a payment request was not made or did not result in a certificate signed by the Architect of Record.

5. From 2017, the MOW issued a checklist to PCDL of what needed to be done in relation to the mechanical, electrical and plumbing ("MEP") drawings relative to the projects. When HNR commenced work in 2018, the approvals, which were the responsibility of PCDL's Architect of Record, were still outstanding. The approvals had still not been obtained up to November 2019 when PCDL purported to terminate HNR.

6. PCDL deliberately attempted to frustrate the OM contract after the Architect of Record approved payment application no.7 in relation to OM by (i) engaging Hapgood to re-assess the Architect of Record's certificates to justify withholding payment for OM, (ii) omitting portions of the contracts, (iii) making attempts to renegotiate the contracts' values and (iv) making attempts to vary payments to vendors.

7. The A4 Termination Letter is of no effect as (i) the Architect of Record did not have authority to terminate the contract on behalf of PCDL and PCDL never issued a notice to terminate in its own capacity and (ii) PCDL had no justifiable grounds to terminate the A4 contract for cause, as the delays on the project were caused by PCDL. Therefore, the A4 contract remains in full force and effect.

8. The OM Acceptance Letter is of no effect as it is *ultra vires* the provisions of Article 16 of the OM contract and, therefore, the OM contract remains in full force and effect.

9. PCDL's actions invoke Article 16.3 of the contracts (*Termination by the Owner for Convenience*).

10. HNR is, by virtue of the foregoing, entitled to (i) the retentions withheld with respect to the contracts, (ii) the amounts certified by the Architect of Record on 30th October, 2019 to be due in respect of the projects, (iii) the assessed and unbilled value of work completed on the projects from 18 October 2019 to 15 November 2019, (iv) loss of overhead and profit on the projects from 18 October 2019 to 15 November 2019, (v) structural design and inspection fees paid by HNR in the total amount of $33,480 + 12% VAT, (vi) $31,637.92, being the "full value representing loss of use" of HNR's tools and equipment wrongfully seized by PCDL and (vii) interest on the special damages due, the sums proved as due for work completed, overheads and costs pursuant to the contracts and the *Civil Procedure (Award of Interest) Act*.

[22.] HNR's Reply to Amended Defence and Counterclaim contained inadequately particularized claims for compensation for work on the OM project at paragraphs 12(vi)[1] and 15(iii).[2] To be considered, in addition to providing proper particulars, those claims ought to have been included in HNR's Amended Statement of Claim. A reply should not set up new claims, at least where the defendant is not afforded a chance to respond to the claim by way of a rejoinder: ***Williamson v London & North Western Railway Company [1879] 12 Ch.D 787***. In any event, the claims referred to were not adequately developed at trial.

[23.] In its written closing submissions, HNR attempted to advance several new allegations of substance which were not pleaded in its Amended Statement of Claim. HNR did not apply before or after trial to amend its Amended Statement of Claim to include and properly frame the new points and to put PCDL on notice that it needed to respond to

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[1] ¶12(vi): "The Plaintiff denies paragraph's 12 (xiii) and (xiv) and avers that the Plaintiff is entitled to compensation for work which constitutes a change in scope further to Article 10.1 of the contract. This includes work that was performed by the Plaintiff that was not included in the construction documents but which were necessary for the completion of the projects. The failure to provide approved construction documents is a failure of the Defendant and not the Plaintiff."

[2] ¶15(iv): "The Plaintiff denies paragraph 23(iv) and avers that it is entitled to compensation for work which constitutes a change in scope. This includes work that was performed by the Plaintiff that was not included in the construction documents but which were necessary for the completion of the projects."

them. A party is, subject to limited exceptions, bound by its pleadings: ***Glendon E Rolle v Scotiabank (Bahamas) Ltd [2022] 1 BHS J. No. 30*** at [42]. It is appropriate to enforce that rule here, despite PCDL's limited attempt to meet the allegations in its undated reply to HNR's written closing submissions sent to the Court under cover of an email dated 16 July 2022.

PCDL's pleaded defence and counterclaim

[24.] PCDL's pleaded case, as set out in its Amended Defence and Counterclaim, is, in summary, that:

1. HNR is required to prove that PCDL was in breach of the contracts as alleged or at all.

2. HNR willingly began construction work on the A4 project having been furnished with only conditionally approved plans. The entire 5 phases of the Anchorage project had been approved by the MOW but the drawings for A4 were considered conditional because a deviation was required with regard to work done by a previous contractor. HNR was aware of this issue and gave an allowance for the same before beginning construction in the amount of $140,155, as set forth in HNR's original cost summary for the A4 project. Having conditionally approved plans did not impact HNR's progress or workmanship. HNR never requested fully permitted construction drawings and Wright was employed by PCDL to assist with the drawings for the A4 project before HNR was hired by PCDL.

3. At the start of construction on OM, PCDL had a MOW permit number and approved foundation drawings which was sufficient for HNR to begin work.

4. HNR did not execute the construction works on the A4 project or the OM project within the constraints of or in conformity with the contracts and/or the conditions outlined by the MOW nor did HNR comply with its obligations pursuant to the contracts so far as legally able. HNR's work was defective as follows:

A4

(a) incorrectly used ½" thick drywall instead of 5/8 thick in all 6 units;
(b) installed single unit windows in the living room overlooking verandahs instead of double unit windows;
(c) failed to install a fixed side lite on the doors leading from the living area onto the verandahs;
(d) failed to install the roof insulation R-19;
(e) failed to correctly align/install recessed light fixtures in the living room;
(f) failed to install smoke detectors in all units;
(g) failed to install mechanical ventilation in each kitchen;
(h) installed inferior ceiling fans in 2 of the 6 units;
(i) failed to install shower stall glazing;
(j) failed to caulk the tubs;
(k) installed substandard tiling in the bathrooms;
(l) poorly finished entry porches railings and ceilings;
(m) stair risers varied in height by more than 3/16" in contravention of the *Bahamas Building Code*;

(n) unevenly pickled upper and verandah ceilings;
(o) failed to trim opening in laundry cupboard walls;
(p) changes were made to the electrical riser/panel schedule without notification to the Architect of Record thereby requiring revision of the same to match "as built" conditions;
(q) missing meter feeder cables;
(r) failed to install main electrical panel covers;
(s) defectively installed pool which was 12" too high above ground level and 9" out of alignment;
(t) inferior sanding and painting of door trims, moldings and shelving;
(u) defectively painted interior and exterior walls and railings;
(v) used different tones on exterior walls; and
(w) incorrectly installed windows across all units.

OM

(a) the concrete beams and structural columns were incorrectly positioned preventing the door aperture from being formed;
(b) the wall blocks were not poured in accordance with approved designs;
(c) the concrete stairs were irregularly spaced with the majority of the concrete stairs and landings condemned as they did not comply with the *Bahamas Building Code*; and
(d) sewer drainpipes on all ground floor units back-fell into the building.

5. PCDL eventually obtained fully approved drawings for the projects.

6. PCDL did not breach Article 4.1 of the contracts because the non-inclusion of a retention clause was an oversight and the issue was corrected when addressed between Wright for HNR and Batchelor for PCDL in January 2019, when it was mutually agreed 2.5% would be deducted from monies already paid to HNR and all future valuations for the remainder of the contracts. HNR voluntarily began deducting retention from payment application no. 4 for A4 dated 13 February 2019 and payment application no. 2 for OM dated 13 February 2019.

7. HNR is required to prove that PCDL owes $35,388.64 ($31,957 + 12% VAT) for retention on A4 and $45,701.60 ($40,805 + 12% VAT) for retention on OM. PCDL relies on the payment applications submitted by HNR.

8. PCDL is not in breach of contract for failing to pay the certificate for payment of $91,375.20 ($81,585.00 + 12% VAT) in relation to A4 or $199,605.28 ($178,219 + 12% VAT) in relation to OM. In relation to OM, the figure of $178,219 was disputed as the sum did not solely represent contract works carried by HNR and PCDL was concerned that HNR had failed to pay subcontractors. The figure of $178,219 included the sum of $72,960 due to Basden Elevator Company Limited, in respect of which discussions had commenced between the parties about PCDL taking over the elevator contract. PCDL eventually directly paid the $72,960 due to Basden Elevator Company Limited.

9. PCDL undertook a review of previous payment requests to ensure that HNR complied with Article 16.2.1.2 of the OM contract and found:

(a) That payment request no. 4 dated 6 April 2019 included a mobilization sum of $52,500 for Basden Elevator Company Limited but Basden confirmed that they were only paid $36,480 when contacted by PCDL. No explanation or rationale was ever provided for this difference when requested by PCDL.

(b) The figure of $52,500 for Basden Elevator Company Limited given by HNR, which had been paid by PCDL, was revised to $42,000 on payment application no.6 dated 16 September 2019. No explanation or rationale was ever provided for lowering the amount when requested by PCDL.

(c) The sum of $195,112.40 was paid by PCDL to HNR on 20 September 2019 for payment to Ultimate Windows in connection with payment application no.6 dated 16 September 2019. Ultimate Windows advised when contacted by PCDL that they had only been paid $100,000 on 23 September 2019, $20,000 on 18 October 2019 and $20,000 on 12 November 2019. HNR provided no explanation or rationale for the $55,112.14 difference between the sums paid to HNR and the sums paid to Ultimate Windows.

(d) The sum of $22,624.50 was paid by PCDL to HNR on 20 September 2019 as part of the mobilization sum requested by payment application no. 6 for payment to Thermoset Roofing. Thermoset Roofing confirmed when contacted by PCDL that they had not issued an invoice for that amount to HNR and had not received any payment from HNR.

10. PCDL does not owe HNR structural design and inspection fees in the sum of $33,049. That amount was never included in any payment application or invoice submitted by HNR and was never addressed during weekly construction meetings. PCDL paid the Architect of Record and, by extension, Certified Consultants and Technicians, the fees for the preparation and submission of their original drawings to the MOW. HNR requested to vary the original plans to save time and costs based on the original bill of quantities by value engineering substituting the steel beams for concrete breams in the structure. PCDL agreed to this so long as it had no impact on the structural integrity of the building, the cost and timeframe for completion. Wright then consulted with Certified Consultants and Technicians and changed the construction method and paid Certified Consultants and Technicians for new drawings. PCDL never agreed to pay HNR any additional fees for any revisions to Certified Consultants and Technicians' original drawings.

11. The Architect's 15Nov19 letters were each effective and neither contract continues in effect:

(a) With respect to A4, in accordance with Article 16.2.2, after consultation with the Architect of Record, PCDL instructed the Architect of Record on 15 November 2019 to give HNR 7 days' written notice of PCDL's intention to terminate the A4 contract on PCDL's behalf.

(b) With respect to OM, after several unanswered requests for information substantiating payments made from mobilization payments to HNR, PCDL instructed the Architect of Record on 15 November 2019 to reply to the HNR Stop Work Email to advise that PCDL accepted HNR's position to terminate

work until the disagreements and queries made regarding payments owed could be resolved to the parties' mutual satisfaction.

12. PCDL did not frustrate (or attempt to frustrate) the contracts, seek to omit portions of the contracts, or attempt to renegotiate contract values or the payments to vendors.

13. PCDL did not exclude HNR from the A4 or OM jobsites or wrongfully take possession of HNR's materials and tools in furtherance of the Architect's 15Nov19 letters. The Architect's 15Nov19 letters invited HNR to meet to resolve the outstanding issues, but HNR did not respond to correspondence, never returned or attempted to return to the project jobsites, refused to meet with PCDL any further and instructed counsel. PCDL accordingly took possession of both sites on 22 November 2019.

14. HNR must prove the alleged loss and damage and, specifically, the actual value of special damages alleged. HNR is also required to prove it is entitled to loss of profits and overheads, in addition to works completed, for which payment requests were not made or have not resulted in a certificate signed by the Architect of Record. HNR must prove its entitlement to interest.

15. HNR breached Article 2.3 of the A4 contract by failing to complete the A4 project on the date of substantial completion, 18 September 2019, or on the agreed extended date of 11 November 2019.

16. HNR breached Article 5.1 of the contracts by not maintaining the Commercial General Liability insurance required for the projects.

17. HNR breached Article 12.2.1 of the OM contract by failing to provide supporting data substantiating HNR's right to payment when requested by PCDL, such as payments made to subcontractors and suppliers.

18. HNR breached Article 12.4.2 of the OM contract by not paying suppliers and/or subcontractors upon receipt of payment from PCDL.

19. HNR breached Article 8.4 of the OM contract by not paying for materials and other facilities and services necessary for the proper execution and completion of the contract works.

20. HNR breached Article 8.5 of the contracts by providing works which were not free from defects and which did not conform with the requirements of the respective contract documents for the projects (as identified in defence of HNR's claim).

21. By virtue of HNR's breaches of contract, PCDL suffered loss and damage and is entitled to recover damages for its loss of profit and the cost of the correction of defective works.

22. PDCL seeks damages, special damages in the amount of $980,669.37, interest and costs by way of counterclaim. PCDL's alleged special damages comprise: (i) $51,112.14, being the amount allegedly overpaid for windows on OM; (ii) $22,624.50, being the amount paid for Thermoset Roofing on OM; (iii) $16,020, being the amount overpaid for Basden Elevator; (iv) $360,386 being the amount

paid to correct defects at A4 and (v) $526,527 being the amount paid to correct defects at OM.

HNR's pleaded reply

[25.] HNR's pleaded reply, as set forth in its Reply to Amended Defence and Counterclaim, is, in summary, that:

1. Prior to the contracts being executed by the parties, HNR in a meeting held on 16 May 2018 and in numerous other meetings stressed to PCDL the importance of getting fully permitted drawings issued by the MOW before HNR commenced construction as the same was statutorily required under Bahamian law in order to have a fully completed building. Nevertheless, PCDL breached Article 8.7.1 of the A4 contract and breached the *Building Regulation Act* by failing to obtain fully approved and permitted drawings for the A4 project. PCDL unreasonably withheld the fully permitted approved drawings even up to the time HNR stopped work for non-payment under the Architect of Record's certificates for payment, thereby frustrating HNR's ability to properly perform its obligations under the A4 contract.

2. HNR executed the construction works as far as possible given the constraints of working without fully approved permitted drawings and, in the case of OM, the conditions outlined by the MOW in the conditionally approved drawings approved by the MOW. In relation to the A4 project, HNR complied with its obligations pursuant to the contracts and, if it had not, the Architect of Record would not have signed off on the certificates for payment and previous certificates for payment would not have been paid.

3. PCDL is put to strict proof of the existence of the alleged defects in HNR's construction works and of PCDL putting HNR on notice of any defects or any persistent failure to carry out works in accordance with the contracts. There is no record of HNR ever being put on notice of any defects or persistent failure to carry out works in accordance with the contracts. On A4, PCDL approved all works completed by HNR by the time of 15 November 2019. PCDL disingenuously sought to identify defects only after HNR commenced its claim.

4. HNR complied with its obligation under Article 5.1 of the contracts by maintaining full Contractor's All Risk insurance coverage between 1 December 2018 to 1 December 2019.

5. In relation to OM, HNR denies the allegations regarding the non-payment of subcontractors. HNR had no obligation to substantiate payments after the Architect of Record approved HNR's application for payment. Further, Article 12.2 of the OM contract only required HNR to pay subcontractors "upon receipt of payment from the owner". HNR had not yet received payment for work that was completed further to the payment applications being certified by the Architect of Record.

6. PCDL purported to terminate the A4 contract by the A4 Termination Letter and in furtherance of the A4 Termination Letter excluded HNR from the job sites and wrongfully took possession of HNR's materials and tools. However, the Architect of Record did not have authority under the contracts to terminate the

same and PCDL did not issue its own notice and had no justifiable grounds to terminate the contracts for cause. The A4 Termination Letter sought to unjustifiably level blame on HNR for delays on the project which were caused by PCDL However, the project was a continuation of construction which PCDL had started and stopped and PCDL delayed the A4 project because of its failure to make timely payments to HNR and unreasonably withheld the fully permitted and approved drawings. The A4 contract therefore remains in full force and effect.

Evidence at Trial

[26.] Trial took place over three separate days, following which the Court reserved judgment. The only witness of fact evidence on behalf of HNR came from Wright. The fact evidence on behalf of PCDL came from 5 witnesses, namely: (i) Batchelor, (ii) the proprietor of CGCL, Dwayne Heastie ("Heastie"), (iii) the current Managing Director of PCDL, Jak Hannaby ("Hannaby"), (iv) the contractor that completed the pool at A4, Steve Beneby ("Beneby"), and (v) the principal of Winston Jones & Associates Architects Ltd, Winston Jones ("Jones").

[27.] Commenting briefly on the witnesses:

(i) Wright was a combative witness who gave inconsistent evidence on more than one occasion. The Court formed the view that his evidence needed to be approached with caution. Nonetheless, the Court did not wholly reject his evidence.

(ii) Batchelor was likewise an unimpressive witness, albeit a far more courteous one than Wright. Some of Batchelor's evidence contradicted the documentary record and appeared self-serving. The Court formed the view that Batchelor's evidence also needed to be approached with caution. Nonetheless, the Court also did not wholly reject his evidence.

(iii) Hannaby was a more impressive witness than Batchelor but he was intimately connected with PCDL and less involved in the matters in issue and that needed to be taken into account when assessing his evidence. The Court accepted some, but not all of Hannaby's evidence.

(iv) Jones, Heastie and Beneby impressed the Court as reasonably fair witnesses although none of their evidence was accepted without critical scrutiny. The Court accepted some, but not all of Heastie's and Jones' evidence. The Court accepted Beneby's evidence.

Documentary evidence

[28.] The documentary evidence at the commencement of trial consisted of separate bundles of documents lodged by the parties. The parties unhelpfully did not agree a bundle of documents before trial notwithstanding the requirements of *Practice Direction No. 2 (1974 – 1978)*. HNR filed a bundle of documents on 27 September 2021. PCDL filed several volumes of documents on 10 September 2021 and a supplemental bundle

of documents filed on 4 October 2021. It is proper to record that HNR did not seek an adjournment of trial on the basis of the late disclosure of PCDL's supplemental bundle.

[29.] In the ordinary course of the trial of a writ, documentary evidence is normally adduced either through an agreed bundle of documents or through witnesses who testify about the documents: ***Colco Electric Co. v. Gold Circle Co. [2003] BHS J. No. 53***. Documents in an agreed bundle are admissible at trial as evidence of their contents unless objection is taken. Documents not agreed and not contained in the agreed bundle are not in evidence and must be admitted into evidence: ***Colina Insurance Limited v Enos Gardiner SCCivApp & CAIS No. 117 of 2015***.

[30.] On a strict view of the matter, the parties' bundles of documents should not be taken into consideration because neither party asked the Court to admit their bundles into evidence and the documents were not put into evidence through a witness. However, it would be inequitable, and artificial, to exclude them. Neither party required the other to prove their documents and each party sought to rely on their own documents without regard to the provisions of the *Evidence Act*. The Court has therefore proceeded on the basis that the documents contained in the bundles of documents lodged by the parties on or before 4 October 2021 are in evidence and are to be taken as evidence of the truth of their contents by implied agreement, waiver or estoppel. The Court, of course, ultimately determines what weight to give to these documents.

[31.] While the Court has proceeded on the basis that the documents contained in the bundles of documents lodged by the parties on or before 4 October 2021 are in evidence, much of the documentary evidence was not put to or explained by a witness. It is worthy of emphasis that the relevance and proper weight to be given to a document will usually only become apparent when contextual evidence is given by a witness or relevant context may be gleaned from the face of the document itself or other documents before the Court. Descriptions of the documents were given by the parties in tables of contents and/or in manuscript annotations, but those were of limited assistance for obvious reason.

[32.] HNR tendered two volumes of documentary evidence with its written closing submissions dated 30 June 2022 much of which was not before the Court at the commencement of trial. PCDL objected to the admission into evidence of approximately 72 emails contained in those bundles of documents. PCDL's objection formed the subject of a directions hearing on 24 October 2022. Submissions on the issue were lodged by the parties. Having considered the parties' written submissions, the Court accepts PCDL's submissions and declares that the documentary evidence objected to by PCDL is

inadmissible on the basis of the rule against hearsay.[3] References to the contents of the emails in HNR's expert evidence were disregarded by the Court for this reason.

[33.] The new documentary evidence tendered by HNR with its written closing submissions has been disregarded for a broader reason, and that is that it would be procedurally unfair for the Court to consider the material in circumstances where PCDL has had no opportunity to meet and test the documentary evidence. A similar point was made by the English High Court in ***Bates et al v Post Office Limited [2019] EWHC 3408 (QB)*** in the context of evidence being given in closing submissions at [71]. The documentary evidence was not disclosed to PCDL until it was included with HNR's written closing submissions. No formal application was made by HNR to reopen its case to introduce the new evidence.

Expert evidence

[34.] At trial, HNR relied on the expert evidence of David Del Vecchio ("Del Vecchio"), an American architect with almost 31 years' experience, whose evidence was contained in his witness statement filed on 7 July 2021. That witness statement exhibited a report prepared by him dated 24 June 2021. PCDL relied on the expert evidence of Peter McLeod (McLeod"), a quantity surveyor with over 25 years of quantity surveying experience, whose evidence was contained in his witness statement filed on 27 August 2021. No issue was taken with either expert's qualifications. Del Vecchio was deemed an expert in architecture while McLeod was deemed an expert in quantity surveying.

[35.] The exercise conducted by the experts in this case consisted of a review of documents based upon which the experts opined on the contractual and financial disputes between the parties. No objection was taken on the basis of the so-called "ultimate issue rule", which was noted in ***Cotton Bay Villas, Eleuthera Limited v Firstcaribbean International Bank (Bahamas) Limited [2012] 1 BHS J. No. 66***, to have limited vitality in modern civil proceedings. However, unhelpfully, the experts did not review the same documents, not all of the material that the experts reviewed was before the Court, and the experts did not confine themselves to expressing opinions based on primary facts proven before this Court by admissible evidence. This required the Court to treat their evidence with real caution and to exclude hearsay evidence of primary facts.

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[3] As to which, in the context of expert evidence, see ***Blue Sky Belize Limited v Belize Aquaculture Limited Civil Appeal No 8 of 2012***, a decision of the Court of Appeal of Belize, at [40] et seq, and ***Myers v R [2016] AC 314***, a decision of the Judicial Committee of the Privy Council, at [63] et seq.

The Issues

[36.] There was no agreement between the parties on the issues to be decided by the Court. Drawing the parties' competing positions together, and adopting PCDL's approach of analyzing the projects separately, the issues raised by the parties by their pleadings may be consolidated into the following general questions:

A4

1. Did PCDL breach the A4 contract prior to the A4 Termination Letter?
2. Did HNR breach the A4 contract prior to the A4 Termination Letter?
3. Was the A4 contract validly terminated by PCDL?
4. Were HNR's tools and equipment wrongfully withheld by PCDL and was HNR wrongly excluded from the A4 jobsite?
5. To what remedies, if any, is HNR entitled on its claim so far as it relates to A4?
6. To what remedies, if any, is PCDL entitled on its counterclaim so far as it relates to A4?

OM

7. Did PCDL breach the OM contract prior to the OM Acceptance Letter?
8. Did HNR breach the OM contract prior to the OM Acceptance Letter?
9. Was the OM contract validly terminated and if so, how?
10. Were HNR's tools and equipment wrongfully withheld by PCDL and was HNR wrongly excluded from the OM jobsite?
11. To what remedies, if any, is HNR entitled on its claim so far as it relates to OM?
12. To what remedies, if any, is PCDL entitled on its counterclaim so far as it relates to OM?

[37.] Before entering into the discussion and analysis of the issues identified above, the Court records here that it only makes such findings as it deems necessary to resolve the issues it has identified. In addition, the fact that the Court does not mention a particular submission or piece of evidence should not be taken as an indication that it has not been considered. The Court has considered the material properly before it.

Discussion and analysis

Issue 1: Did PCDL breach the A4 contract prior to the A4 Termination Letter?

[38.] Beginning with the issue of whether PCDL breached the A4 contract prior to the A4 Termination Letter, in order to establish a breach of contract, HNR must demonstrate

(i) that PCDL was under an express or implied obligation under the A4 contract and (ii) that PCDL failed to perform that express or implied obligation: ***Jarvis v Moy, Davies, Smith, Vandervell & Co [1936] 1 KB 399***. This applies to any breach of contract.

Breach #1: Failure to obtain fully stamped and approved drawings

[39.] HNR submitted that PCDL breached the A4 contract by failing to provide fully stamped and approved drawings in accordance with Article 6.3 and Article 8.71 of the A4 contract. HNR submitted that the construction of the A4 project was constrained by conditionally approved drawings and that HNR carried out construction works on the understanding that PCDL would provide fully stamped and approved drawings in order to enable HNR to progress the job in sequence and to complete by the date outlined in the A4 contract but PCDL failed to do this. HNR submitted that it is clear that fully stamped and approved drawings had not been obtained by PCDL up to trial.

[40.] PCDL submitted that neither Article 8.7.1 of the A4 contract nor any other article of the A4 contract required PCDL to provide "fully stamped and approved drawings", placed responsibility on PCDL to obtain drawings, or stipulated that the job could not be started with conditionally approved plans. PCDL further submitted that HNR willingly began construction work on A4 with only conditionally approved plans. PCDL submitted that the entire 5 phases of Anchorage had been approved by the MOW and the drawings for A4 were only considered conditional because a deviation was required with regard to work done by a previous contractor. PCDL submitted that HNR was aware of this issue, having given an allowance before beginning construction in the amount of $140,155. PCDL submitted that there was no evidence to substantiate the claim that fully approved drawings were required to begin construction. PCDL further submitted that having only conditionally approved plans did not impact HNR's progress or workmanship on the job. HNR was nearly finished A4. PCDL submitted that HNR failed to show how having conditionally approved drawings impacted the A4 contract, noting no formal delay claim based on the drawings was made.

[41.] What Article 8.7.1 of the A4 contract obliged PCDL to do is a matter of contractual interpretation. Neither of the parties attempted to assist the Court with the interplay between Articles 7.1.2, 8.7.1 and 15.2.1 of the A4 contract which allocated responsibility for obtaining permits, approvals etc between the parties. Nonetheless, the Court's task is not overly difficult. Applying the principles discussed in ***Gavin Loudon v Stewart Milne Group Limited [2022] CSIH 3*** at [33], a case relied upon by HNR, the Court finds that the A4 contract established a scheme whereby PCDL was responsible for obtaining and paying for the permits, approvals etc. necessary for proper execution and completion of the Work, while HNR was responsible for arranging and bearing the cost of inspections, approvals etc. for completed portions of the Work.

[42.] The Court concurs with Del Vecchio that, under the A4 contract, PCDL was obliged to provide HNR with fully stamped and approved drawings. The Court finds this was a component of the obligation PCDL voluntarily assumed under Article 8.7.1 of the A4 contract, or alternatively, Article 7.1.2 of the A4 contract, for the reasons given by Wright under cross-examination. This is so notwithstanding that neither clause referred to "drawings" explicitly. Such drawings were necessary for the project to be completed in accordance with the *Buildings Regulation Act* and to enable HNR to carry out and complete its obligations under the A4 contract. HNR could not obtain the mandatory inspections required under the *Buildings Regulation Act* without fully approved drawings. Fully stamped and approved drawings needed to be provided within a reasonable time, so as not to frustrate HNR's works and so as to comply with the law. HNR has not shown that they were required before or when construction commenced.

[43.] It was essentially common ground, and the Court finds, that HNR was not furnished with a full suite of fully stamped and approved drawings when HNR began construction. Such was HNR's pleaded case[4], and Wright's evidence. It was also not seriously disputed by PCDL's witnesses. Batchelor's witness statement expressly referred to "conditionally approved plans" and Hannaby conceded under cross-examination that "final approved drawings" had not been obtained from the MOW for A4 by the time construction commenced on the project. According to Hannaby, the project's drawings had only been submitted to the MOW and those drawings were what the parties used to begin construction. The Court accepted Hannaby's evidence that PCDL was only in the process of obtaining fully stamped and approved drawings when HNR began work on A4.

[44.] Batchelor maintained in his evidence that the entire 5 phases of the Anchorage project had been approved by the MOW but the drawings for A4 were considered conditional because of a deviation required with regard to work done by the previous contractor on the project. Batchelor explained in cross-examination that PCDL had a permit number for the full Anchorage programme and they were essentially rebuilding what they had built before, so they had approved drawings, but they knew a deviation request would be required once they got into the build. Batchelor's account was rejected by Wright. In the face of conflicting evidence, the Court did not accept Batchelor's evidence. PCDL made no attempt to put any corroborative documents into evidence.

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[4] Paragraph 7 of HNR's Amended Statement of Claim stated:

"At the time that the Plaintiff began construction work on A4 on the 14th of September, 2018, the Defendant had only furnished schematic designs and conditionally approved drawings".

[45.] Breach of the *Buildings Regulation Act* was pleaded by HNR in its Reply to Amended Defence and Counterclaim in relation to the A4 project[5] raising the specter of illegality but the allegation was not pursued by HNR. Generally, illegality is not to be presumed, it must be established by those who rely upon it: ***Swaine v Wilson (1889) 24 QBD 252***. The Court will not normally look itself into the surrounding circumstances of a contract which is lawful on its face to ascertain whether it is tainted by illegality: ***North Western Salt Company v Electrolytic Alkali Company Limited [1914] AC 461***. However, where unpleaded facts are revealed in evidence which clearly show there has been illegality affecting the contract, the Court may decline to enforce the contract, whether or not illegality is pleaded, if it is satisfied that all the relevant facts are before it: ***Birkett v Acorn Business Machines Ltd [1999] 2 All ER (Comm) 429***. The Court is not satisfied that illegality has been made out and that it would be appropriate for the Court to decline to enforce the A4 contract on that basis.

[46.] The Court accepted Wright's evidence that he requested fully approved and permitted drawings from PCDL for the A4 project in management meetings on numerous occasions inclusive but not limited to management meetings held between February 2018 and May 2018 and well after the execution of the A4 contract. Whether HNR requested fully approved drawings before or after the execution of the A4 contract is immaterial, however, as it was incumbent on PCDL, as the employer under the A4 contract, to provide HNR with the approved drawings it needed to complete the A4 project in accordance with the contractual timeline set. PCDL suggested that it submitted plans and Wright assumed responsibility to collect them. That Wright may have interacted with the MOW to get the A4 project's drawings approved on Jones' testimony, which the Court accepted on this issue, did not alter PCDL's obligations under the A4 contract.

[47.] The Court accepted Wright's evidence that PCDL never provided HNR with fully stamped and approved plans for the A4 project up to 22 November 2019. Jones said in cross-examination that there were no "permit drawings" or "approved drawings" that one could review and make reference to at the site as the A4 project unfolded. That supported Wright's position. In addition, there was no documentary evidence supporting the contrary position, as one would expect if fully stamped and approved plans were furnished to HNR.

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[5] Paragraph 4 of HNR's Reply to Amended Defence and Counterclaim reads:

"The Plaintiff denies paragraph 4 of the Amended Defence and Counterclaim and avers that prior to the contracts for both the A4 and Om projects being executed by the parties, the Plaintiff, in a meeting held on the 16th day of May A.D., 2018, and in subsequent meetings, stressed to the Defendant the importance of getting fully permitted drawings issued by the Ministry of Works ("MOW") before the Plaintiff company commenced construction as the same was a statutorily required under Bahamian law in order to have a fully completed building. Nevertheless, the Defendant breached Article 8.7.1 of the A4 Contract...The Defendant also acted in breach of The Building Regulation Act of the Bahamas by failing to obtain the fully approved and permitted drawings for the A4 project."

This is not to gainsay the uncontroverted evidence given on behalf of PCDL, which the Court accepted, that the A4 project was fully occupied and completed by the time of trial. However, that evidence had no bearing on whether PCDL ever gave the fully approved plans for A4 to HNR.

[48.] It is an inescapable fact that HNR voluntarily began construction on the A4 project within the constraints of the documents that PCDL provided it. There is no evidence that HNR began work on A4 under any form of compulsion and Wright himself disclaimed that this was so. However, the Court finds that, as Wright testified, HNR operated on the premise that it would get the necessaries as the A4 project progressed to allow the project to progress in sequence. Those necessaries would have included, in due course, fully stamped and approved drawings for each stage of construction. It was PCDL's obligation to provide HNR with fully stamped and approved drawings on a timely basis in order to enable HNR to keep the timeline stipulated for completion under the A4 contract. The Court finds that this was not done.

[49.] The Court accepted Hannaby's evidence that Wright was appointed PCDL's project manager in September 2017. The Court also accepted Hannaby's evidence that Wright was paid $10,000 per month in that position and his evidence that, after Wright completed work on PCDL's Beach Club, his attention focused on the planning, design, permitting and pre-construction preparation works required for A4 and OM. The Court disbelieved Wright when he said that he only reviewed and gave feedback on the A4 project's plans. Management meeting notes dated 2 March 2018 included in HNR's Bundle of Documents recorded that Wright "advised that he had prepared foundation drawings" and had "prepared all revised drawings in this matter and a decision has to be made whether he submits on behalf of PCDL or [Jones]". The Court therefore preferred PCDL's evidence to HNR's on this particular point.

[50.] Even if Wright knew about the lack of fully approved plans before executing the A4 contract, this does not mean that not having fully approved plans did not impact upon HNR's progress. Having considered the evidence and the submissions of the parties, the Court finds that, on the balance of probabilities, not having fully approved plans did impact upon the A4 project. Wright himself testified, and the Court accepted, that HNR experienced "significant delays" because it did not have fully stamped and approved plans. While Wright admittedly did not go into great detail, it is tolerably clear that HNR could not obtain MOW inspections because HNR did not have the requisite approvals/drawings. Wright gave evidence about being unable to obtain inspections of A4's electrical system, which the Court accepted, and about the fact that, before a final inspection for A4 was applied for, HNR needed to have all MOW approvals in place. Final inspections are a condition for obtaining an occupancy certificate, and occupancy

certificates are required to lawfully occupy a building or to cause or permit a building to be occupied under section 9 of the *Building Regulations Act*. PCDL, and in particular, Jones, could not adequately explain how the A4 project was to be completed without the drawings HNR said it required.

[51.] For the foregoing reasons, the Court finds that PCDL breached the A4 contract by failing to provide HNR with fully approved/fully permitted drawings for the A4 project.

Breach #2: Deduction of retention

[52.] Relying on the wording of Article 4.1 of the A4 contract, HNR submitted that PCDL breached the A4 contract by deducting retention totaling $35,388.64 from signed certificates for payment in respect of the A4 project. PCDL submitted that it was mutually agreed that 2.5% retention would be deducted and therefore the deduction of retention was by agreement. PCDL further submitted that there were in fact no deductions from signed certificates because the payment applications included retention before they were certified. That was a technical point that did not bear upon the substance of HNR's complaint.

[53.] Whether retention monies may be deducted is a matter of contract. Construction contracts commonly contain provision for the employer to retain or deduct from interim payments a percentage of the value of work carried out to provide security in the event that the contractor fails to complete or leaves defective work: ***Hoenig v Isaacs [1952] 2 All ER 176*** at page 181; ***Ferguson v. Woods [2015] 2 BHS J. No. 44*** at [100] and [101]. Here, Article 4.1 of the A4 contract expressly provided for "zero percent retention".

[54.] Having considered the competing evidence, the Court preferred HNR's evidence as to whether the inclusion of retention was, as PCDL sought to characterize it, an "oversight". The Court finds that, as Wright testified, it was initially deliberately agreed between the parties that there would be no retention under the A4 contract due to the circumstances in which the parties were contracting. The A4 contract itself reflected that the terms of Article 4.1 of the standard terms of Document A105™-2017 were specifically amended to provide for "zero percent retention". PCDL therefore changed its position on retention during the life of the contract and sought to introduce it when the A4 contract was being performed.

[55.] Although the Court did not accept Batchelor's evidence about whether including retention was an "oversight", the Court accepted Batchelor's evidence that it was mutually agreed between PCDL and HNR that 2.5% would be deducted from monies already paid to HNR and all future valuations for the remainder of the A4 contract. Wright denied the accuracy of an email from Batchelor to Paul Cummins ("Cummins") dated 10 January

2019 stating that a retention of 2.5% had been agreed with Wright. That email may have been inaccurate but Wright's own evidence was that HNR made a "business decision" to include retention on payment applications. That was tantamount to an admission of an agreement.

[56.] The Court accepted Wright's evidence during cross-examination that HNR was pressured into including 2.5% retention on its payment applications because PCDL was delaying payment and Wright's evidence that PCDL had made including retention on payment applications a condition of payment to HNR. However, the utility of those facts to HNR is limited. Economic duress was never pleaded by HNR and no submissions were made by HNR about whether the circumstances Wright described amounted to economic duress in law and, if so, the effect of that economic duress on the facts. Moreover, HNR uncontrovertibly included 2.5% retention on its payment applications no. 4, 5, 6, 7, 8 and 9 which were certified by the Architect of Record over a period of months. Had the issue been live, the Court would have likely been entitled to conclude HNR affirmed the contract.

[57.] Earlier in these proceedings, and during cross-examination, HNR put the validity of any variation to the contracts to include retention in question on the basis of the "no oral modification clause" contained in Article 6.1 of the contracts. Where the parties to a contract have included a "no oral modification clause", amendments or variations to the contract will normally only be effective if the parties have complied with the formalities they have mutually agreed: ***MWB Business Exchange Centres v Rock Advertising [2019] AC 119*** (a case mentioned in PCDL's written closing submissions). Estoppel is, however, capable of ameliorating the harshness of this principle where a party acts on the basis of an orally agreed variation which is *prima facie* invalid: ***Rock Advertising*** (*supra*) cited in ***Kabib-Ji SAL v Kout Food Group [2022] 2 All ER 911***. The Court finds that by HNR including a 2.5% retention in payment application nos. 4 to 9 and proceeding with the A4 contract, in the absence of any evidence of clear and prompt objection, the requirements necessary for an estoppel to arise are present. HNR cannot rely on Article 6.1 of the A4 contract to deny the belated inclusion of retention in the A4 contract.

[58.] The Court finds that Article 4.1 of the A4 contract was varied between the parties to provide for a 2.5% retention and that this variation was binding and effective notwithstanding the absence of any formal written change documentation. Alternatively, HNR cannot claim based on PCDL's deduction of retention notwithstanding the invalidity of the purported variation to Article 4.1.

[59.] The Court further finds that, on the basis of payment application no. 9, which is the best evidence of the amount of retention to be accounted for (as it was signed by both

HNR and by the Architect of Record) retention monies in the amount of $35,388.64, including VAT were permissibly withheld in connection with the A4 project.

Breach #3: Failing to pay certificate for payment no.9

[60.] HNR submitted that PCDL breached Article 4.1 of the A4 contract by failing to pay certificate for payment no. 9 after it was certified by the Architect of Record on 30 October 2019. It is clear that, where a building contract is terminated before the work is completed, the usual position, subject to any express term to the contrary, is that the termination does not affect rights to payment which accrued prior to the date of termination and, therefore, the contractor may sue for interim payments which are accrued but unpaid: ***Hyundai Heavy Industries Co Ltd v Papadopoulos [1980] 2 All ER 29***; ***Stocznia Gdanska SA v Latvian Shipping Co and others [1998] 1 All ER 883***.

[61.] Both parties lodged authorities discussing the principles applicable to payment certificates in the context of construction contracts:

(i) HNR relied on ***ISG Construction Ltd v Seevic College [2015] 2 All ER (Comm) 545*** and ***Rupert Morgan Building Services (LLC) Ltd v Jervis [2003] EWCA Civ 1563***, both of which concerned disputes as to interim payments under contracts affected by the UK's *Housing Grants, Construction and Regeneration Act 1996*, in respect of which there is no local equivalent.

(ii) PCDL relied on ***Thompson and Solomon and Solomon SC Civ App Nos 38 & 39 of 2010***, ***Billyack v Leyland Construction Co. Limited [1968] 1 All ER 783*** and ***Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689***, all of which are well-known cases.

[62.] Neither party addressed the Court on the timing of payments under Article 4.1 of the contract. Article 4.1 of the A4 contract contemplated payments "Seven days before the end of the months [sic]". Article 12.2.1 of the A4 contract required HNR to submit payment applications "at least ten days before the date established for each progress payment". It is not clear from the material before the Court whether there were any agreed dates for progress payments so that it might be determined whether "seven days before the end of the months" meant "calendar months". The A4 contract had a "Projected Cash Flow" document dated 23 July 2018 but none of the lay witnesses mentioned it and, if it established a timeline for progress payments, it only addressed the position up to September 2019. For the purposes of the issue now under consideration, the issue does not require determination, as the fact is that PCDL has never paid the full amount of certificate no. 9.

[63.] The Court finds that PCDL breached Article 4.1 of the A4 contract by failing to settle certificate for payment no. 9 in the amount of $91,375.20. The certificate was never

rescinded in whole or in part. PCDL's stated justification[6] for not paying the full amount certified does not pass muster. Jones certified payment application no.9 in discharge of his professional duties. PCDL requested that Hapgood review the certificate, but, as Del Vecchio opined, it was not for Hapgood to review HNR's payment application. That was the Architect of Record's function under Article 12.3 of the A4 contract. McLeod's evidence did not assist PCDL on this point, as he confirmed that Architect's certificates are not mere recommendations.

Issue 2: Did HNR breach the A4 contract prior to the A4 Termination Letter?

[64.] Turning next to the issue of whether HNR breached the A4 contract prior to the A4 Termination Letter, it is useful to recapitulate that PCDL's pleaded counterclaim is that HNR breached the A4 contract by:

(i) failing to complete the project on the date for Substantial Completion, 18 September 2019 or on an agreed extended date of 11 November, 2019, in accordance with Article 2.3 of the A4 contract;
(ii) not maintaining Commercial General Liability insurance for the A4 project as required by Article 5.1 of the A4 contract; and
(iii) not providing works free from defects and instead providing works which do not conform to the requirements of the A4 contract as was required of HNR by Article 8.5 of the A4 contract.

Breach #1: Failure to achieve Substantial Completion

[65.] As between HNR and PCDL, Article 2.3 of the A4 contract stipulated that, subject to adjustments of the Contract Time as provided in the Contract Documents, HNR was to achieve "Substantial Completion" of the A4 project by 18 September 2019. "Substantial Completion" was defined in Article 12.5.1 of the A4 contract as "the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use".

[66.] Additionally, as is not uncommon in construction contracts, Article 11.1 of the A4 contract stipulated that the time limits stated in the A4 contract were of the essence. The effect of that stipulation as to time being of the essence was that a failure to achieve Substantial Completion by 18 September 2019 was designated a repudiatory breach entitling PCDL to terminate the A4 contract. The A4 contract defined in Article 12.5.2 what ought to have happened if HNR believed "Substantial Completion" had been reached; HNR was to apply to the Architect of Record for an inspection to establish the date of Substantial Completion.

[67.] There can be no genuine dispute that Substantial Completion was not achieved by HNR by 18 September 2019, and the Court so finds. Batchelor's evidence was that the

[6] PCDL did not rely on abatement.

parties agreed to an extended date for Substantial Completion of 11 November 2019 but there is no evidence of a formal agreement about any extended date after 18 September 2019. The A4 Termination Letter suggests that HNR indicated it would complete by 11 November 2019 but, on such evidence as there is, *vide* PCDL's Substantial Completion Enquiry, PCDL was quite evidently content to accept performance by HNR after 11 November 2019. The Court therefore did not accept Batchelor's evidence on this point.

[68.] HNR submitted that it achieved Substantial Completion under the remit of PCDL's conditionally approved drawings for the A4 project before it was terminated. The parties and witnesses were not *ad idem* on what Substantial Completion involved here:

(i) HNR in its written closing submissions pointed to the fact that HNR's payment application no. 9 indicated that the Work was 92% complete, suggesting a quantitative approach to the question.
(ii) Del Vecchio seemed to have difficulty with the concept of Substantial Completion being achieved without the drawings for A4 in their complete form being available to HNR and suggested the date was tolled.
(iii) Jones took Substantial Completion to mean the stage at which a project can be occupied accepting or acknowledging that there are defects that need to be dealt with.
(iv) McLeod thought that, if there were conditionally approved drawings, Substantial Completion would involve the Work being done subject to the MOW's conditions.

[69.] In the final analysis, it is the contractual definition of Substantial Completion that must be applied. After considering the evidence, the Court agrees with the stance taken by Jones in cross-examination that Substantial Completion had not been achieved by HNR before the A4 contract was terminated. The fact that it took HNR's successor on the A4 project 6 weeks to complete the project, the fact that 10% of the Contract Sum remained to be paid to HNR, and the fact that A4 was not ready for final inspection on 15 November 2019, all indicate that the A4 project was not sufficiently complete in accordance with the Contract Documents such that PCDL (or its clients) could occupy or utilize the Work for its intended use.

[70.] HNR's failure to achieve Substantial Completion on the A4 project naturally raises the question of whether HNR was in repudiatory breach of contract for that failure. With respect to that issue, the most compelling conclusion that can be reached on the facts is that, after 18 September 2019, the stipulation in Article 11.1 of the A4 contract making time of the essence was waived by PCDL so far as Substantial Completion of the Work was concerned. Time was no longer of the essence in the absence of any reasonable notice from PCDL fixing a new date for Substantial Completion and making time of the essence once again: ***Charles Rickards Ltd v Oppenheim [1950] 1 All ER 420***. The date for Substantial Completion was indeterminate and, in the absence of any formal adjustment of the Contract Time, was a date that was equitable in all the circumstances.

[71.] There is insufficient evidence before the Court to determine what the precise date for Substantial Completion under the A4 contract was at the date of the A4 Termination Letter. However, HNR raised the point of principle that PCDL caused the delay on the A4 project and therefore cannot hold HNR responsible for it if the date for Substantial Completion had passed as PCDL would essentially be taking advantage of its own wrong.

[72.] HNR referred to the latin maxim "*nullus commodum capere potest de injuria sua propria*" ("no one should be allowed to profit from his own wrong") in connection with this submission (and this case more generally) but did not draw the Court's attention to any particular authority applying the maxim. A good statement of the principle is to be found in ***Roberts v The Bury Improvement Commissioners (1870) LR 5 CP 310*** where *Kelly CB* and *Blackburn* and *Mellor JJ* said at page 326 that "[i]t is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself".

[73.] Delay claims are common in building disputes. In the context of building contracts, one consequence of the "prevention principle" stated in ***The Bury Improvement Commissioners*** is that, if the employer renders it impossible or impracticable for the contractor to do his work within the stipulated time under the contract, then the employer cannot insist upon strict adherence to the time stated in the contract for completion. In ***Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) (2007) 111 ConLR 78***, *Jackson J* (as he then was) said at [48]:

> In the field of construction law, one consequence of the prevention principle is that the employer cannot hold the contractor to a specified completion date, if the employer has by act or omission prevented the contractor from completing by that date. Instead, time becomes at large and the obligation to complete by the specified date is replaced by an implied obligation to complete within a reasonable time. The same principle applies as between main contractor and sub-contractor.

[74.] The Court concurs with HNR that it is impossible to overlook the fact that HNR's response to the A4 Termination Letter dated 22 November 2019 ("the A4 Termination Letter Response") went unanswered by PCDL in correspondence and that no real effort was made by PCDL to deal with its contents in these proceedings whether by evidence, cross-examination or submissions. The Court drew the adverse inference that the reason PCDL failed to specifically respond to HNR's allegations of delay contained in the A4 Termination Letter Response, which have lingered unanswered for years, is because PCDL had no good response to give. The Court accepted the A4 Termination Letter Response as a true record of the delays encountered by HNR as a result of PCDL's conduct.

[75.] With the benefit of the A4 Termination Letter Response, the Court finds that, due to PCDL's conduct, HNR was not in a position to achieve Substantial Completion by 18 September 2019 or 15 November 2019, the date of the A4 Termination Letter. Not only was certificate for payment no. 9 unpaid, in part, as of 15 November 2019 (a point which shall be discussed later), but the revised electrical drawings for A4 had not been approved by the MOW, HNR had not been provided fully approved plans for A4, PCDL had failed to complete installation of the kitchens and vanities (for which it was responsible) and, as a result of these matters, no final inspection of the A4 project could have taken place. Accordingly, the Court finds that HNR was not in breach of Article 2.3 of the A4 contract when the A4 Termination Letter was issued.

Breach #2: Failure to maintain Commercial General Liability Insurance

[76.] PCDL contended that HNR breached the A4 contract by failing to maintain Commercial General Liability Insurance as required by Article 5.1 of the A4 contract. In this aspect of its case, PCDL is caught by the maxim onus probandi actori incumbit ("he who asserts must prove"). PCDL led no evidence at trial in support of the allegation that HNR failed to maintain Commercial General Liability Insurance and, therefore, this aspect of its counterclaim must fail.

Breach #3: Failure to provide works free from defects

[77.] The pleaded particulars of the defective workmanship advanced by PCDL in relation to A4 are summarized earlier in this judgment at [24]. Pursuant to Article 8.5 of the A4 contract, HNR expressly warranted that the Work would conform with the requirements of the Contract Documents and would be free from defects not inherent in the quality required or permitted. PCDL did not seek to rely on any implied terms in the A4 contract notwithstanding there is usually an implied term a contractor will perform his work in a good and workmanlike manner. HNR, for its part, did not dispute that Article 8.5 of the contracts imposed a continuing obligation on it.

[78.] There is a doctrine known as the "theory of temporary disconformity"[7] which is sometimes raised in defects claims under which no cause of action for defective work

[7] The "theory of temporary disconformity" is based on certain obiter statements made by *Lord Diplock* in his dissenting speech in ***P & M Kaye v Hosier & Dickinson [1972] 1 All ER 121.*** The doctrine is controversial. In some cases, courts have emphasized that Lord Diplock was not intending to lay down a principle of universal application and the courts have either limited the scope of the application of the doctrine or outright rejected it. See, as recent examples, ***Agro Invest Overseas Limited v Stewart Milne Group Limited [2019] BLR 187*** at [58] to [62] and ***Owners of Strata Plan 80458 v TQM Design and Construct Pty Ltd [2018] NSWSC 1304*** at [173] to [209]. It has also been suggested that the application of the doctrine may turn on matters of fact and degree: see ***Nobert Klaus v 25 Acres Holding Claim No. NEVHCV2021/00117*** at [103] to [115].

accrues until the date for practical or substantial completion: ***ANM Group Ltd v Gilcomston North Ltd [2009] SCLR 1*** at [35]. The rationale for the doctrine is that it is only at completion that the work has to be completed to a proper standard and it is par for the course that temporary defects arise and are corrected: ***HDK Ltd (t/a Unique Home) v Sunshine Ventures Ltd [2009] EWHC 2866 (QB)*** at [125]. The Court is spared the need to consider the possible application of this doctrine because HNR made no attempt to invoke it and it would be inappropriate for the Court to venture an opinion on it unassisted.

[79.] Similarly, in matters of this sort, a failure by an employer to invite or allow a contractor to rectify allegedly defective work frequently invites arguments that the failure on the part of the employer broke the chain of causation (e.g., ***Owners of Strata Plan 80458 v TQM Design and Construct Pty Ltd [2018] NSWSC 1304***) or amounted to a failure to mitigate (e.g., ***Woodlands Oak Ltd v Conwell [2011] EWCA Civ 254***). HNR's case was not framed in this way and it would not be fair to PCDL for this Court to explore either point unprompted. This being so, as in ***Steeltech Bahamas Ltd. v. Imperial Mattress Co. [2003] BHS J. No. 27***, the Court will deduct damages for any work found to have been defectively performed by HNR from the sums found due to HNR notwithstanding that HNR was not permitted to remedy the defects.

[80.] For its part, HNR met the allegations advanced by PCDL about alleged defects on A4 by (i) denying them, (ii) putting PCDL to proof of them, (iii) attacking PCDL's witnesses' credibility and reliability, (iv) relying on the fact that HNR's work was approved by the Architect of Record and, in most cases, paid for, (iv) pointing out that PCDL's main evidence was based on inspections conducted after HNR left the A4 jobsite and (v) emphasizing, in support of its case that the alleged defects are fabrications, that there is no record of PCDL ever putting HNR on notice of any defects or any persistent failure to carry out work in accordance with the Contract Documents in line with Articles 7.2 or 9.5 of the A4 contract.

[81.] The following is a summary of the alleged defects on the A4 project put to Wright by PCDL during cross-examination and Wright's responses to them:

Alleged Defect	*Response*
Use of ½" drywall in all units	½" drywall is what the construction drawings called for
Installed single living room windows overlooking the verandahs	The windows installed were approved by PCDL and the Architect of Record
Failed to install fixed sidelites on all doors from the living room area to verandah	The doors were installed with PCDL and the Architect of Record's agreement. A verbal specification for

	impact doors was given and samples were approved
Failed to install R-19 roof insulation	R-19 roof insulation was not specified at the time
Failed to correctly align and install recess light fixtures in all the living room areas	Bare denial
Failed to install smoke detectors in all units	The job was not complete and HNR was not to install smoke detectors in all units
Failed to install mechanical ventilation in each kitchen unit	Bare denial
Installed interior ceiling fans in 2 out of 6 units	What was installed was in accordance with the drawings and sketches HNR had
Failed to install shower glazing	Bare denial
Failed to calk tubs	Bare denial
Installed substandard tiling in bathrooms	Bare denial
Poorly finished the entry porch railings and ceilings	Bare denial
Stair risers varied more than permitted by the *Bahamas Building Code*	Bare denial.
Unevenly pickled upper verandah ceilings	Bare denial
Failed to trim the opening in the laundry cupboard walls	Bare denial
Changed electrical riser panel schedule without notifying the Architect of Record thus requiring revision of the same	Bare denial
Failing to install meter cables	Unable to recall
Failing to install electrical panel covers in the meter room	Bare denial
Built the pool defectively 12" too high and 9" out of alignment	Bare denial; was satisfied with HNR's work on the pool at A4
Inferior sanding and painting on door trims, molding and shelving	Bare denial
Defective painting of the interior and exterior walls and rails	Bare denial

[82.] The Court found PCDL's evidence of the alleged defective work on the A4 project compelling and accepted it. The Court preferred Batchelor's, Jones', Heastie's and Beneby's evidence, and PCDL's photograph evidence depicting the defective work on the pool at A4, to Wright's evidence which was essentially uncorroborated. Heastie, Beneby

and Jones, the contractors that made good the alleged defects and the architect that drew the architectural drawings for the project, all professionals, gave evidence on oath about HNR's poor workmanship and the non-conformity of HNR's work. None of HNR's criticisms were convincing enough to overcome their evidence.

[83.] Addressing briefly HNR's main criticisms:

(i) Jones was sufficiently impartial to give reliable evidence about the defects on A4. As Jones himself pointed out, Jones did not always act in PCDL's favour during his administration of the A4 contract.

(ii) in the absence of unusual circumstances, a professional architect of 43 years' experience like Jones may be expected to reliably identify defects on oath. According to his report to PCDL dated 5 December 2019, Jones inspected A4 on 19 November 2019, which is reasonably proximate to the A4 Termination Letter and when HNR left the A4 jobsite.

(iii) while Jones admitted he never gave the plans he submitted to the MOW to HNR, Wright received plans from PCDL and it is inherently improbable that HNR completed a project to approximately 92% completion in a position fundamentally at odds with the Architect of Record about what the project required

(iv) the fact that Jones inspected the work done by HNR on the A4 jobsite and certified HNR's payment applications did not imply that there were no defects.[8] Interim certificates are a form of provisional or qualified approval which do not prevent an employer from subsequently disputing the quality or conformity of work. Article 12.4.4 of the A4 contract stated that a certificate for payment or a progress payment did not constitute acceptance of Work not in accordance with the requirements of the Contract Documents.

(v) it was not satisfactorily proven that Heastie was untruthful about CGCL. Even if Heastie had been untruthful about CGCL, it would not have had a bearing on Heastie's ability to reliably identify defects as any lie Heastie told about CGCL had no bearing on his experience. The Court accepted Heastie is a licensed contractor of some 15 to 20 years' experience.

(vi) while the Court readily accepts that a contractor taking over a project may have a financial incentive to inflate their scope of work, this does not mean that a particular contractor's sworn evidence about the defects they identified and rectified should be rejected out of hand. Heastie impressed the Court as a reasonably reliable witness, and the Court accepted his evidence about the defects at A4. The Court believed Heastie when he said he had no financial motive to say HNR failed to complete the project in accordance with the Construction Documents and that he was given approved drawings before beginning work.

(vii) the levelling defects in A4's pool were patent and would have been identifiable by Beneby on a visual inspection. Beneby's analysis of them would not have

[8] Jones gave evidence to the effect that some of the alleged defects were patent but Jones believed that they would be, or would have to be, corrected as the performance of the contracts proceeded. The Court accepted Jones' evidence.

aided by an inspection of the architectural drawings, which he forthrightly admitted he had not seen. At any rate, Beneby said that the defects in the pool at A4 were caused by poor quality workmanship, lack of knowledge of the correct build protocol, the use of poor-quality fill and incorrect preparation of the foundations of the pool. To the extent the architectural plans were relevant, Jones gave evidence that supported Beneby's evidence.

(viii) HNR correctly submitted that weight must be given to the fact that PCDL was not notified about the alleged defects during the lifetime of the A4 contract or given an opportunity to catalogue its own work or remedy the alleged defects after the termination of the A4 contract – all of which the Court accepted – but these matters were of limited purchase because HNR was not blameless.

(ix) more specifically, the Court accepted Batchelor's evidence that Wright left the A4 jobsite on 15 November 2019 after he received the A4 Termination Letter and Batchelor had to work with Wright's supervisor to obtain the keys for A4. HNR therefore chose not to catalogue its own work. Even were that finding incorrect, it was at all times open to HNR to apply to Court for the inspection and photographing of the A4 jobsite.[9]

[84.] The Court, having accepted PCDL's evidence, finds that HNR breached the A4 contract by carrying out Work which was not free from defects in breach of Article 8.5 of the A4 contract. Those defects were as alleged by PCDL and as are summarized at [81] above.

Issue 3: Was the A4 contract validly terminated by PCDL?

[85.] The next issue to consider is whether PCDL validly terminated the A4 contract pursuant to the A4 Termination Letter, or whether the A4 contract was otherwise validly determined by PCDL. Matters are simplified because HNR accepted in its written closing submissions that the A4 Termination Letter and PCDL's No Weekend Working Email effectually terminated the A4 contract and rendered HNR discharged from any further obligations under the contract.

[86.] HNR submitted that PCDL's evidence did not establish termination for cause and, therefore, PCDL must have invoked Article 16.3 of the A4 contract to effect a termination for convenience. HNR referred to [19] of Del Vecchio's expert report in support of this submission, where Del Vecchio stated that "...the Contract was terminated for convenience, as none of the conditions for terminating for cause had been demonstrated". Relying on Del Vecchio's opinion, HNR contended that the conditions for invoking Article 16.2.1.4 of the A4 contract were not met.

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[9] Under *Order 29* of the *Rules of the Supreme Court, 1978* or under the inherent jurisdiction of the Court to make orders to promote a fair and satisfactory trial (see ***Ash v Buxted Poultry Ltd (1989) Times, 29 November***).

[87.] PDCL's position was simply that, in accordance with Article 16.2.2 of the A4 contract, after consultation with Jones, PCDL instructed Jones on 15 November 2019 to give HNR 7 days' written notice of PCDL's intention to terminate the A4 contract for cause. PCDL submitted that there is no evidence the A4 contract was terminated for convenience; rather, the evidence was that the A4 contract was terminated for HNR failing to complete at the completion date of 18 September 2019 or after 58 days' extension of time. PCDL relied on McLeod's expert opinion that there were sufficient grounds to terminate A4 for cause because there were ongoing unjustified delays immediately prior to the notice being issued.

[88.] While Counsel for HNR referred to various authorities on the discharge of contracts at common law, *viz.* ***Chitty on Contracts, Volume 1 (31st edn)*** at [14-020] (on fundamental breach), ***Mango Bay Limited v Wolfe [2011] 3 BHS J. No. 119*** at [40]-[42] and ***Photo Production v Securicor Ltd [1980] AC 827***, HNR's case, as the Court understood it, turned more on Article 16.3 of the A4 contract than termination pursuant to the general law.

[89.] Article 16.3 of the A4 contract is what is known as a "convenience clause". The nature of such clauses is helpfully discussed in ***Hudson's Building Contracts*** (11th edn) at [12-014]. Briefly, such clauses, which first developed in the context of United States Government contracting, permit an employer to terminate the contract without establishing breach or default of the contract and usually give rise to a right on the part of the contractor to compensation in accordance with a prescribed formula (often one which is more favourable to the employer than under the general law).

[90.] The A4 Termination Letter identified itself as a "seven days' notice to Terminate the contract for Cause, as per contract clause 16.2.1.4". It was not, *ex facie*, an invocation of Article 16.3. Article 16.2.1.4 of the A4 contract permitted PCDL to terminate the A4 contract if HNR was "...otherwise guilty of a substantial breach of a provision of the Contract Documents". PCDL purported to terminate the A4 contract (through the Architect of Record) due to the "ongoing time delays being experienced" and that is what PCDL has rested its case on. However, as the Court has found that HNR was not in breach of Article 2.3 of the A4 contract when the A4 Termination Letter was issued, it follows that PCDL was not entitled to terminate the A4 contract on that basis.

[91.] At trial, PCDL's witnesses, in particular, Jones, gave evidence which suggested that the A4 contract was terminated not only for delay but also because of PCDL's concerns that the A4 project would not be completed by HNR or finished satisfactorily in light of HNR's conduct. It is good law that, in appropriate circumstances, the accumulation of breaches can justify an employer in expelling the contractor from the site if the employer reasonably believes the contractor lacks the ability, competence or will to complete the

contract work in the manner required by the contract: ***Sutcliffe v Chippendale and Edmundson (1971) 18 BLR 157*** cited in ***Rice (t/a Garden Guardian) v Great Yartmouth Borough Council [2000] Lexis Citation 3404***. However, PCDL did not raise the issue in its pleadings or closing submissions and therefore the possible application of the principle does not arise.

[92.] Not only was PCDL not entitled to terminate the A4 contract on the basis that Jones identified in the A4 Termination Letter, but the A4 Termination Letter described itself as a "seven days' notice to Terminate" when, in the Court's view, it was no such thing. The A4 Termination Letter stated PCDL would be providing its own contractors to finish the A4 project effective 18 November 2019. Yet, PCDL's No Weekend Working Email, sent shortly after the A4 Termination Letter was issued, barred HNR from the A4 jobsite until 18 November 2019. The Court is satisfied that, viewed with the benefit of hindsight and PCDL's No Weekend Working Email, PCDL's real intent behind the A4 Termination Letter was to bring HNR's involvement in the A4 project to an end immediately. PCDL thus failed to comply with the necessary formalities to terminate the A4 contract pursuant to Article 16.2.1. This is additional reason why the A4 Termination Letter was problematic, even if PCDL could rely on 16.2.1 of the A4 contract.

[93.] It follows from what has been said that, in issuing the A4 Termination Letter, PCDL wrongfully terminated the A4 contract for cause. But the A4 contract was terminated – about that there is no dispute. This therefore raises the issue of whether the wrongful termination of the A4 contract may be analyzed as, or deemed to be, a termination for convenience pursuant to Article 16.3 of the A4 contract. The parties did not assist the Court with this issue but the Court was able to identify three Commonwealth authorities that appear to shed light upon the question.

[94.] In ***GEC Marconi Systems Pty Ltd v BHP Information (2003) 128 FCR 1***, a decision of the Federal Court of Australia, *Finn J* said at [753]:

> [753] Subject to a pleading point I will refer to later, the only issue I need determine here is whether a party, by relying on one basis for terminating a contract, is for that reason alone precluded from later relying upon a termination for convenience clause to justify the termination. Subject to what I later have to say about compliance with the requirements of the termination for convenience clause itself and about the relationship of cl 27.1 and cl 27.5; see "Submissions and Conclusions" below; I can see no reason in principle for such a preclusion. It would be inconsistent with the orthodox general principle that, while a termination must be justified by reference to a legal right to terminate, the party terminating may rely on any ground available for termination existing at the time of termination whether or not it was then aware of it: see also Butterworths, The Law of Contract, §7.28 (1999). And I see no reason not to apply that principle in a new setting which would permit later reliance on a termination for convenience clause. ... Though I accept that the exercise of such a clause would, as of course, be subject to a duty of good faith and fair dealing: *Hughes Aircraft Systems*

International v Airservices Australia (1997) 76 FCR 151; cf Claybrook, "Good Faith in the Termination and Formation of Federal Contracts" (1997) 56 Md L Rev 555 ...

[Emphasis added]

[95.] In ***Comau UK Ltd v Lotus Lightweight [2014] EWHC 2122 (Comm)***, a decision of the English High Court, *Robin Knowles CBE KC* accepted an argument that damages for breach of a contract should be assessed on the basis that the party in breach would have been entitled to terminate the contract pursuant to the terms of the agreement. He stated at [23]:

> (a) The present appears to be in the class of case in which the defendant's contractual obligations might have been lawfully performed in different ways.
>
> ...
>
> c) Rather, the present case appears to fall for analysis in accordance with the reasoning of Atkin LJ in *Abrahams v Herbert Reiach Ltd* [1922] 1 KB 477 at 483:
>
> "[i]f a merchant makes a contract to deliver goods to a shipowner to be carried by him for reward, and the merchant fails to provide the goods, the Court must first find what is the contract which has been broken; and if it was to carry the goods to one of two alternative ports at different distances from the port of loading at rates of freight differing according to the distance, the only contract on which the shipowner can sue is a contract for carriage to the nearer port. The plaintiff cannot prove a contract for performance of the more onerous obligation. This explains why in cases of this kind the Court regards only the lesser of two alternative obligations."
>
> (d) Comau's contractual expectation interest accordingly appears to be limited to such profit as it might have made until such time as Lotus chose to "terminate for convenience" under Clause 12.5.
>
> (e) It appears that Comau's loss is be assessed on the basis that but for its breach Lotus would have availed itself of clause 12.5 to reduce its liability to Comau. In point is this passage from Chitty on Contracts 31st edition Vol 1 at 26-074:
>
> "If the defendant fails to perform, when he had an option to perform the contract in one of several ways, damages are assessed on the basis that he would have performed in the way which would have benefited him most, e.g. at the least cost to himself... A similar situation arises where the contract-breaker had an option to terminate the contract: if the claimant accepts the anticipatory breach of the defendant as a ground for terminating the contract, but the defendant could have exercised his option to terminate the contract so as to extinguish or reduce the loss caused by the anticipatory breach, the court will assess the damages for breach on the assumption that the defendant would have exercised the option"
>
> ...
>
> (g) It appears that any assessment of damages would proceed on the assumption that Lotus would have exercised its rights under clause 12.5, because any other assumption ignores the limited nature of Comau's "expectation interest" – that Comau was never entitled to profits on the whole of the goods and services to be supplied pursuant to the Agreement but was only ever entitled to such profit as it might have gained prior to any "termination for convenience". If the effect of clause 12.5 is ignored when assessing damages, the effect would be to give Comau the benefit of a better bargain than it actually made.

(h) In light of what has happened it appears that Comau will not be awarded more than nominal damages even if it does establish liability.

[Emphasis added]

[96.] In ***Atos IT Solutions and Services GMBH v Sapient Canada Inc [2018] OJ No. 2064***, a decision of the Ontario Court of Appeal, *Brown JA*, giving the judgment of the court, similarly said in the context of that case at [42]:

> 42 On the language of the Subcontract, it was open to Sapient to use the termination for convenience clause to terminate the DC services part, while relying on the termination for cause provision to terminate the rest of the contract. While Sapient did not purport to terminate the Subcontract in that fashion, it was a mode of termination open on the language of ss. 17.2 and 17.4. Even if Sapient ultimately could not justify its termination of AMS services for cause, that would not alter the limit placed by the Subcontract's language on Siemens' reasonable expectation about the damages recoverable for the termination of the other part of the contract involving DC services. The termination for convenience clause effectively defined the upper limit of Sapient's liability for damages in respect of DC services: Open Window Bakery (2002), 58 O.R. (3d) 767 (C.A.), at para. 43, varied on other grounds, 2004 SCC 9, [2004] 1 S.C.R. 303, at paras. 9 and 23.
>
> [Emphasis added]

[97.] There is insufficient evidence before the Court to enable it to conclude on the balance of probabilities that, had the A4 contract continued, PCDL would have terminated HNR for cause on the basis of its defective work on A4. It is material that the A4 project was in its finishing stages.

[98.] Guided by the authorities cited, the Court finds that (i) (as is now common ground between the parties) the A4 contract was effectually terminated by PCDL by way of the A4 Termination Letter and PCDL's No Weekend Working Email, (ii) (what is not common ground) the termination of the A4 contract by PCDL on 15 November 2019 was wrongful and (iii) HNR is entitled to be compensated in accordance with Article 16.3 of the A4 contract.

Issue 4: Were HNR's tools and equipment wrongfully withheld by PCDL and was HNR wrongly excluded from the jobsite?

[99.] Considering next HNR's claim for reimbursement for the wrongful detention of its tools and equipment allegedly left the A4 jobsite, HNR submitted that:

(i) adhering to the terms of the A4 contract, and, in particular Article 8.4.1, HNR purchased all tools and equipment for the proper execution of the works on the projects, some of which were specialized tools and equipment.
(ii) HNR was not given any notice under the A4 contract by PCDL, who required HNR to vacate the A4 project jobsite to enable it to takeover and complete construction; and
(iii) by the time HNR received Batchelor's email of 15 November 2019, PCDL did not allow HNR to gather its tools and equipment.

[100.] PCDL submitted in response that:

(i) PCDL never excluded HNR from the A4 job site or wrongfully took possession of HNR's tools and equipment.

(ii) HNR never replied to the A4 Termination Letter and refused to meet any further to discuss issues with PCDL.

(iii) there was no evidence from HNR to substantiate its claim for compensation in relation to its tools and equipment as there was no documentary evidence, no photographs, no serial numbers or other evidence provided about tools and equipment.

[101.] HNR claimed to have left at the projects, among other things, a generator, 40 scaffolding and shoreing clamps, 20 20k frames, a 20 ft container, a jack hammer, 2 reciprocating saws, 3 circular saws, a 14 inch cut off saw, a 14 inch chop saw, a bull float, 6 extension cords, a 40 ft extension ladder, 2 4" angle grinders and 4 wheel buggies. It is impossible to tell from the face of HNR's Amended Statement of Claim what tools and equipment particularized at page 8 of HNR's Amended Statement of Claim relate to the A4 project and what tools and equipment relate to the OM project. Wright's evidence shed very little light on the issue.

[102.] The Court preferred PCDL's evidence that there were no tools and equipment left by HNR at the A4 jobsite. While HNR's narrative of events was superficially attractive, Wright accepted during cross-examination that HNR employed workers, but none of them gave evidence to substantiate HNR's allegation. In addition, HNR provided no documentary evidence, such as receipts or photographs, or details, such as serial numbers, in relation to the tools and equipment allegedly left on the A4 jobsite which might have supported HNR's claim. As PCDL submitted, HNR provided no independent evidence regarding its claim for tools and equipment and provided no acceptable explanation for the lack of supporting evidence. The proposition that HNR left no tools and equipment on the A4 jobsite is not so inherently improbable as to be incapable of belief once it is recalled that HNR was intending to stop work on 15 November 2019 independently of the A4 Termination Letter.

[103.] The Court also accepted PCDL's evidence that it never "excluded" HNR from the A4 jobsite in the sense that the Court understood the parties to have used that term. The Court has found that PCDL's real intent behind the A4 Termination Letter was to bring HNR's involvement in the A4 project to an end immediately. Nonetheless, the Court accepted PCDL's evidence that attempts were made by Batchelor to contact Wright between 15 November 2019 and 18 November 2019 to close out matters but Wright did not engage, HNR never attempted to return to the A4 jobsite after 15 November 2019, and PCDL remained willing to resolve its issues with HNR but HNR had determined to ventilate the parties' issues in litigation. The Court concurs with PCDL that the allegation that HNR was "locked out" of the A4 jobsite is unsustainable once it is accepted that HNR

never attempted to return to the A4 jobsite. That HNR never attempted to return to the A4 jobsite after the A4 Termination Letter itself reinforces the conclusion that no tools and equipment of any value were left on the A4 jobsite.

[104.] For the foregoing reasons, the Court finds that HNR's claim for "reimbursement for the full total value of the tools and equipment that were wrongfully seized by PCDL" fails so far as it relates to the A4 project.

Issue 5: To what remedies, if any, is HNR entitled on its claim so far as it relates to A4?

[105.] The next issue that falls for consideration is the remedies to which HNR is entitled to on its claim so far as it relates to the A4 project in light of the breaches of the A4 contract that the Court has found.

[106.] On this issue, the Court considers, in common with HNR itself, that the primary remedy to which HNR is entitled is damages. HNR cannot obtain the declaratory relief it sought in its Amended Statement of Claim because it conceded that the A4 contract was effectively terminated on 15 November 2019. There is equally no basis for HNR to obtain the injunctive relief it sought in its Amended Statement of Claim. No basis was identified by Counsel for HNR, who made no arguments in support of the relief.

[107.] It is elementary that the object of an award of damages for breach of contract is to put the injured party in as good a position as if the contract had been performed. In ***Moss v Bahama Reef Condominium Association [2011] 1 BHS J. No. 16***, *Evans J* conveniently reviewed some pertinent authorities at [76] to [78]:

> 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).

[108.] The following principles are also germane:

(i) damages must be pleaded and proved. As a general rule, "it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying 'this is what I have lost; I ask you to give me these damages'" (***Bonham Carter v Hyde Park Hotel [1948] 64 TLR 177*** cited in ***The Airport Authority v. Western Air Limited [2014] 2 BHS J. No. 36***).
(ii) "as much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done" (***Ratcliffe v Evans [1892] 2 QB 532*** cited in ***The Airport Authority v. Western Air Limited [2014] 2 BHS J. No. 36***).
(iii) where the Court is satisfied that a plaintiff has suffered substantial loss but the Court is faced with difficulty in quantifying that loss, including where this is caused by the defendant preventing the plaintiff from having access to relevant evidence, the Court must do the best that it can on the available evidence (***One Step (Support) Ltd v. Morris-Garner [2019] AC 649*** at [37] and [38]).
(iv) nominal damages (which are not necessarily "small damages") may be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given (***Greer v Alstons Engineering Sales and Services Ltd (2003) 63 WIR 388*** at [6] and [7]).

Certificate for payment no. 9

[109.] It is convenient to start with the compensation, if any, to be awarded to HNR in relation to certificate for payment no. 9. The issue of abatement does not arise as PCDL did not plead abatement, a substantive defence at common law, and no attempt was made by PCDL to relate the defects in HNR's work on A4 to the specific work to which certificate for payment no. 9 related.

[110.] The starting point must be that HNR cannot resile from the admission contained in Wright's affidavit filed on 3 December 2019 that PCDL paid the sum of $63,876 plus 12%

VAT on 1 November 2019 towards certificate for payment no. 9. No compelling explanation was given for Wright's disclaimer of that admission during trial and Del Vecchio himself acknowledged the amount might need to be deducted from the total under the payment certificate, a fact PCDL pointed out in its written closing submissions.

[111.] Accounting for PCDL's part payment of payment application/certificate for payment no. 9 leaves a balance remaining of $19,829 which *prima facie* ought to have been paid by PCDL to HNR but was not. PCDL did not argue that, in the event the A4 contract remained to be performed, the certificate would have been rescinded by Jones. The Court accordingly finds that HNR is entitled to $19,829 for this aspect of its claim.

[112.] The sum of $19,829 bears pre-judgment contractual interest "from the date payment is due at...at the legal rate prevailing at the place of the Project" pursuant to Article 4.2 of the A4 contract. No effort was made by the parties to indicate an appropriate rate of interest nor did the parties address the Court on the date that payment of certificate for payment first fell due (as mentioned above). In these circumstances, the Court will adopt the prime rate of 4.25% with simple interest running from 7 November 2019, yielding a total of $22,736.53 calculated as of 31 January 2024.

Retention money

[113.] HNR's claim for the retention withheld from certificates for payment under the A4 contract is straightforward. While the Court has found that it was not unlawful for PCDL to deduct retention from certificates under the A4 contract, retention monies represent moneys actually earned by the contractor at the date of the certificates, though the retention moneys are security for cross-claims arising out of the building contract: ***Re Tout and Finch Ltd [1954] 1 All ER 127***. As the A4 contract was terminated, the Court finds that the retention deducted by PCDL in respect of the A4 contract totaling $35,388.64 ought to be paid to HNR.

Work done between 19 October 2019 and 15 November 2019

[114.] There can be no dispute that HNR performed some work between 19 October 2019 and 15 November 2019. Any other conclusion would be absurd. PCDL's Substantial Completion Enquiry acknowledged that HNR had had men working in all units of A4. The Court finds that HNR is entitled to compensation for the work that it performed on the A4 project during the aforementioned period. This is so notwithstanding that no payment application was submitted by HNR for the work. The difficulty arises in determining what was done and its value. PCDL submitted that HNR's claim for work done at A4 between 18 October 2019 and 15 November 2019 was a "fabricated claim" because it was unsubstantiated.

[115.] At trial, Wright gave no evidence describing the work that was done on the A4 project between 19 October 2019 and 15 November 2019. There was essentially no evidence quantifying the value of that work. HNR relied on "Final Accounts" which were not in evidence and a bald assertion that the figure claimed was based on 2% of the Contract Sum for the project. HNR did not particularize the work allegedly done and failed to credibly substantiate in any way that 2% of the contract scope was completed between 19 October 2019 and 15 November 2019. That was plainly an inadequate foundation on which to sustain a claim for unbilled work in the amount of $105,679.36, even without making any finding that HNR fabricated its claim.

[116.] PCDL correctly submitted that there is no independent way to assess or value HNR's work as there are no photographs or payment receipts to substantiate what HNR did in evidence and the work done by HNR was not certified by the Architect of Record. However, this does not mean that HNR is not entitled to any compensation. PCDL also correctly submitted that HNR failed to substantiate the $105,679.36 that it claimed with any invoices or receipts. The situation is that HNR has proven some loss but not quantified it. In the circumstances, the Court will award HNR $5,000 in nominal damages for work done on A4 between 19 October 2019 and 15 November 2019.

Loss of overhead and profit on work done between 19 October 2019 and 15 November 2019

[117.] The Court finds that HNR is entitled to the overhead and profit it would have earned under the A4 contract on the work that it did on the A4 project between 19 October 2019 and 15 November 2019.

[118.] Wright gave evidence that HNR was entitled to overhead and profit of 17% under the contracts (10% being overhead and 7% being profit). That evidence contradicted the A4 Tender Summary, which stated that HNR's overhead and profit on the A4 project was 5%. Counsel for PCDL never put to Wright that his overhead and profit under the A4 contract was not 17% but 5%. However, as the Contract Sum under the A4 contract was derived from the Tender Summary, the Court is not bound to accept Wright's evidence and prefers to place reliance on the Tender Summary.

[119.] In view of the fact that the Court awarded HNR $5,000 in nominal damages for the work HNR did on the A4 project between 19 October 2019 and 15 November 2019, the Court will award HNR $250 for loss of overhead and profit on that work.

Costs incurred by reason of the termination, along with reasonable overhead and profit on the Work not executed

[120.] Despite relying on Article 16.3 of the A4 contract, in its Amended Statement of Claim, HNR did not seek to recover any costs incurred by reason of PCDL's termination and no evidence was led as to the amount of those costs. Consequently, nothing can be recovered for those costs if any such costs were incurred.

[121.] Article 16.3 of the A4 contract also entitled HNR to "reasonable overhead and profit on the Work not executed". Although it is awkwardly drafted, HNR's statement of claim is broadly drafted enough to include a claim for loss of overhead and profit on Work not executed by HNR as a result of the termination of the A4 contract notwithstanding the claim is not articulated as well as it might have been.[10]

[122.] The Court shall proceed on the basis that the contractual rate of overhead and profit is reasonable as it has not been suggested that it was not. In payment application no. 9, HNR represented that the balance to finish plus retainage was $138,873 and the Architect of Record certified this amount. That amount was the original contract net sum (which included the overhead and profit embedded in the contract) less the total completed and stored.

[123.] Based on the figures outlined, the Court will award HNR $7,496.89 for loss of overhead and profit on the remainder of the A4 contract.

Structural design and inspection fees

[124.] HNR submitted that PCDL's breach of contract entitles HNR to reimbursement of the monies it paid to Graphite Engineering Ltd for electrical drawings relating to the A4 project. PCDL submitted that HNR is not entitled to the structural design and inspection fees it claims as they were never included in any payment application and PCDL never agreed to pay them.

[125.] Under cross-examination, Wright confirmed the dates that the structural design and inspection fees HNR claimed were paid by reference to HNR's Amended Statement of Claim. Wright admitted that the fees were never included in a payment application and were an expense "beyond the contract" which PCDL did not agree to pay.

[126.] Wright said in relation to A4 that he paid $1,100 (the pleaded amount is $1,000) to Graphite Engineering Ltd because he received emails and WhatsApp messages from

[10] In particular, paragraph 14 of HNR's Amended Statement of Claim stated: "As a result of the Defendant's breaches of the contracts for the works on Anchorage 4 and OM the Plaintiff has suffered loss and damage. The Defendant is entitled to recover as damages his loss of profits and overheads for both Anchorage 4 and OM in addition to works completed for which a payment request has not been made or has not resulted in a Certificate signed by the Architect."

Jones asking him to help close the matter and the fees were necessary to obtain the drawings for the modified electrical riser on A4 to submit them to the MOW for approval.

[127.] The Court accepted Wright's evidence that he paid Graphite Engineering Ltd's fees at the prompting of Jones to obtain the drawings for the modified electrical riser on A4 to submit them to the MOW for approval. However, as the Court has found that HNR changed the electrical riser panel schedule without notifying the Architect of Record, thus requiring revision of the same, HNR cannot recover the fees paid to Graphite Engineering Ltd.

[128.] The Court will disallow this aspect of HNR's claim.

[129.] Totaling the discrete awards outlined above, the Court awards HNR $70,872.06 in damages on its claim for breach of contract insofar as it relates to the A4 project.

Issue 6: To what remedies, if any, is PCDL entitled on its counterclaim so far as it relates to A4?

[130.] Having proven that there were defects in the work that HNR performed on the A4 project, PCDL is entitled to recover its reasonable costs of remedying the defects it has proven in HNR's work. This is not a result of Article 14 of the A4 contract, as PCDL appeared to suggest, as Article 14 only operated when work was rejected by the Architect pursuant to the terms of the A4 contract (e.g. in exercise of the Article 9.5 power). It is the result of the application of common law principles.

[131.] PCDL claimed the sum of $360,386 in its Amended Defence and Counterclaim as the cost of repairing the defects in HNR's work. There is no itemized breakdown of that sum in PCDL's pleading and PCDL did not explain the sum in its written closing submissions.

[132.] PCDL's evidence, contained in Hannaby's witness statement, was that PCDL spent a total of $332,379.77 completing the A4 project including the cost to repair defective works, overhead and profit, management and interest. That evidence departed from PCDL's pleaded case and was too vague to be of any assistance. The Court did not accept it.

[133.] A document labelled "Anchorage 4 Counterclaim" at Tab 1A-14 of PCDL's Bundles of Documents filed on 10 September 2021 stated that the total amount spent by PCDL on defective work up to 27 July 2021 was $105,650.03. That document was of little value, however, because it did not identify how the figure of $105,650.03 was arrived at or what

it was composed of. It is true that McLeod referred to the figure in his witness statement, but his witness statement shed no further light on how the figure was arrived at.

[134.] According to quotes and invoices contained in PCDL's Bundles of Documents filed on 10 September 2021 at Tabs 1A-3 and 1A-25, PCDL spent $50,321.40 to remedy the defective pool at A4 and the external staircases at A4. It is unclear what amount PCDL spent to remedy the other pleaded defects that PCDL successfully established. There are CGCL invoices contained in PCDL's Bundles of Documents at Tab 1A-25 relating to the A4 project totaling $65,843.34 but they were not referred to by any witness and the Court is not prepared to assume they related to HNR's defective work that PCDL has pleaded. The Court will award $10,000 for those defects.

[135.] PCDL did not lead evidence capable of justifying a substantial award of general damages and therefore the Court awards PCDL $2,500 for delay, inconvenience etc. arising out of the remedial works required to remedy the defective work PCDL successfully established at trial.

[136.] In the circumstances, the Court awards PCDL $62,821.40 in damages on PCDL's counterclaim for breach of contract so far as it relates to A4.

Issue 7: Did PCDL breach the OM contract prior to the OM Acceptance Letter?

[137.] Transitioning to the OM contract, the next issue that arises for consideration is whether PCDL breached the OM contract prior to the OM Acceptance Letter. HNR's pleaded claim is that PCDL breached the OM contract by (i) failing to obtain fully approved drawings even up to 22 November 2019; (ii) deducting retention from signed certificates in the amount of $45,701.60 ($40,805 + 12% VAT); and (iii) failing to pay payment application no.7 in the amount of $199,605.28 ($178,219 + 12% VAT).

Breach #1: Failure to provide fully stamped and approved plans

[138.] HNR submitted that PCDL breached the OM contract by failing to provide fully stamped and approved drawings in accordance with Article 6.3 and Article 8.71 of the OM contract. HNR submitted that the construction of the OM project was limited by conditionally approved drawings which HNR carried out the works with. HNR operated on the understanding that PCDL would provide the fully stamped and approved drawings from the MOW in order to properly complete the OM project by 22 November 2019. HNR/ Wright requested fully stamped and approved drawings from PCDL but, so HNR submits, it is clear that PCDL failed to secure fully stamped and approved drawings up to trial.

[139.] PCDL submitted that neither Article 8.7.1 of the OM contract nor any other article of the OM contract required PCDL to provide "fully stamped and approved drawings" or placed responsibility on PCDL to obtain drawings. PCDL's case in any event was that the drawings provided to Wright were submitted to MOW and Wright took responsibility to collect them. PCDL further submitted that PCDL did not breach the OM contract as alleged by HNR, as PCDL had a MOW permit number and approved foundation drawings at the commencement of the OM contract, which is what HNR began with. PCDL submitted also that HNR began work voluntarily and Wright was paid to assist with and was involved with the drawings for OM before HNR even began work on OM. PCDL contended that the fact that HNR paid fees for structural and engineering designs lent weight to its case that the drawings did not impact the OM contract as HNR suggested.

[140.] For the same reasons as were given in relation to the A4 contract, the Court concurs with Del Vecchio that, under the OM contract, PCDL was obliged to provide HNR with fully stamped and approved drawings. The Court finds this was a component of the obligation PCDL voluntarily assumed under Article 8.7.1 of the OM contract, or alternatively, Article 7.1.2 of the OM contract, for the same reasons as were given in relation to the A4 contract. Fully stamped and approved drawings were necessary for the project to be completed in accordance with the *Buildings Regulation Act* and to enable HNR to carry out and complete its obligations under the OM contract. HNR could not obtain the inspections required under the *Buildings Regulation Act* without fully approved drawings. Like with the A4 contract, fully stamped and approved drawings needed to be provided within a reasonable time, so as not to frustrate HNR's works and so as to comply with the law. However, HNR has not shown that they were required before or when construction commenced.

[141.] Like with the A4 contract, the Court finds that HNR was not furnished with a full suite of stamped and approved drawings when HNR began construction on the OM contract. Batchelor's evidence in his witness statement was that PCDL had a MOW permit number for OM and approved foundation drawings which were given to HNR before construction commenced. Batchelor's evidence was also that, shortly after, HNR was provided all architectural drawings, structural drawings and MEP drawings for OM. Wright's evidence was that PCDL did not have fully approved foundation drawings but only conditionally approved foundation drawings and that HNR began work under the premise that (i) the project would be started in line with the conditions that were issued by the MOW and (ii) that PCDL and the Architect of Record would acquire the permits necessary for HNR to progress the project in sequence but this did not materialize. The Court preferred Wright's evidence as it was supported by the documents in HNR's Bundle of Documents showing that (i) as late as July 2019 the drawings for OM were being

finalized by Graphite Engineering Ltd and (ii) HNR was requesting approved structural plans and architectural and MEP approvals on or about 6 November 2019.

[142.] The Court accepted Wright's evidence that he requested fully approved and permitted drawings for the OM project in management meetings before and after the execution of the OM contract. Whether HNR requested fully approved drawings before or after the execution of the OM contract is in fact immaterial. Like the position that obtained under the A4 contract, it was incumbent on PCDL, as the employer under the OM contract, to provide HNR with the approved drawings it needed to progress the OM project in accordance with the contractual timeline set. The Court accepted Wright's evidence that HNR completed significant work on the OM project as far as allowable with the drawings it had in hand.

[143.] The Court also accepted Wright's evidence that PCDL never provided HNR with fully approved plans for the OM project up to 22 November 2019. The documentary record discloses that Batchelor informed Wright on 9 November 2019 that fully approved plans had been obtained for OM but there is no correspondence subsequent to that date in evidence showing that PCDL ever provided HNR with the fully approved plans that PCDL had just obtained. The Court accepted PCDL's evidence that the OM project had been completed at the time of trial, but that evidence was not probative of whether fully stamped and approved plans were ever provided to HNR prior to the OM Acceptance Letter or 22 November 2019.

[144.] Like with the A4 contract, it is a fact that HNR voluntarily began construction on the OM project within the constraints of the incomplete set of documents that PCDL provided it. There is no evidence that HNR began work on OM under any form of compulsion and Wright himself disclaimed that this was so. This having been said, the Court finds that, as Wright testified, HNR operated on the premise that it would get the necessaries as the OM project progressed to allow the project to progress in sequence. Those necessaries would have included, in due course, fully approved drawings for each stage of construction. It was PCDL's obligation to provide HNR with fully stamped and approved drawings on a timely basis in order to enable HNR to keep the timeline stipulated for completion under the OM contract. The Court accepts that this was not done.

[145.] As mentioned above, the Court accepted Hannaby's evidence that Wright was appointed PCDL's project manager prior to the execution of the OM contract. The Court also accepted Hannaby's evidence that Wright was integral in the planning, design, permitting and pre-construction preparation works required for the OM project. The Court disbelieved Wright's evidence that he only reviewed and gave feedback on the OM project's plans. Management meeting notes dated 27 February 2018 included in HNR's

Bundle of Documents record that Wright had "spent many hours redesigning WJ inadequate drawings" and that Wright had saved PCDL "$100,000's on the build by changing unnecessary over spec'd designs". An email from Wright to Jones dated 30 August 2018 also acknowledged Wright had revised Jones' plans. The Court therefore preferred PCDL's evidence to HNR's on Wright's activities as project manager in the lead up to the OM contract.

[146.] Nonetheless, even if Wright knew about the lack of fully approved plans before executing the OM contract, like with the A4 contract, this does not mean that not having fully approved plans did not impact HNR's progress. The Court finds that, on the balance of probabilities, not having fully approved plans did impact upon the OM project. Wright himself testified, and the Court accepted, that HNR experienced "significant delays" because it did not have fully approved plans. Like with the A4 project, at a minimum, HNR would not have been able to obtain MOW inspections on a timely basis because HNR did not have the requisite approvals/drawings.

[147.] For the foregoing reasons, the Court finds that PCDL breached the OM contract by failing to provide HNR with fully stamped and approved drawings for the OM project on a timely basis.

Breach #2: Deduction of retention

[148.] Relying on the wording of Article 4.1 of the OM contract, HNR submitted that PCDL breached the OM contract by deducting retention totaling $45,701.60 from signed certificates for payment in respect of the OM project.

[149.] The parties' arguments relating to the alleged breach by PCDL of the OM contract by deducting retention from signed certificates were essentially the same as in relation to the A4 contract.

[150.] As mentioned above, the Court accepted HNR's evidence that the inclusion of retention was not an "oversight" as PCDL sought to characterize it. The Court finds that it was initially deliberately agreed between the parties that there would be no retention under the OM contract. The OM contract itself reflected that the terms of Article 4.1 of the standard terms of Document A105™-2017 were specifically amended to provide for "zero percent retention". PCDL changed its position on retention during the life of the contract, at the same time as in relation to the A4 contract.

[151.] Although the Court did not accept Batchelor's evidence about whether including retention was an "oversight", the Court accepted Batchelor's evidence that it was mutually agreed between PCDL and HNR that 2.5% would be deducted from monies already paid

to HNR and all future valuations for the remainder of the OM contract. Retention appears to have been negotiated for both contracts at the same time. Wright said that HNR made a "business decision" to include retention on payment applications and that was tantamount to an admission of an agreement between the parties about retention.

[152.] The Court accepted Wright's evidence during cross-examination that HNR was pressured into including 2.5% retention on its payment applications because PCDL was delaying payment and Wright's evidence that PCDL had made including retention on payment applications a condition of payment to HNR. However, as with A4, the utility of those facts to HNR is limited. Economic duress was not pleaded by HNR in relation to OM either and no submissions were made by HNR about whether the circumstances Wright described amounted to economic duress in law and, if so, the effect of that economic duress on the facts. Moreover, as with A4, HNR uncontrovertibly included 2.5% retention on payment applications nos. 2, 3, 4, 5, 6 and 7 for OM, which were certified by the Architect of Record, over a period of months. Had the issue been live, the Court would have likely been entitled to conclude HNR affirmed the contract.

[153.] The Court adopts its reasoning in relation to the A4 contract and finds that, by HNR including a 2.5% retention in payment application nos. 2 to 7 and proceeding with the OM contract, in the absence of any evidence of clear and prompt objection, the requirements necessary for an estoppel to arise are present. HNR cannot rely on Article 6.1 of the OM contract to deny the belated inclusion of retention in the OM contract.

[154.] The Court finds that Article 4.1 of the OM contract was varied between the parties to provide for a 2.5% retention and that this variation was binding and effective notwithstanding the absence of any formal written change documentation. Alternatively, HNR cannot claim based on PCDL's deduction of retention notwithstanding the invalidity of the purported variation to Article 4.1.

[155.] In addition, the Court finds, on the basis of payment application no. 7, which is the best evidence of the amount of retention to be accounted for, as it was signed by both HNR and by the Architect of Record, retention monies in the amount of $45,701.60, including VAT were permissibly withheld in connection with the OM project.

Breach #3: Failure to pay certificate for payment no.7

[156.] HNR submitted that PCDL breached Article 4.1 of the OM contract by failing to pay certificate for payment no. 7 after it was certified by the Architect of Record on 30 October 2019. PCDL's defence to this aspect of HNR's claim for breach of contract was more complex than in relation to certificate for payment no.9 under the A4 contract and involved Articles 12.2.1 and 16.2.1.2 of the OM contract.

[157.] PCDL submitted that the figure of $199,605.28 claimed by HNR on certificate for payment no. 7 was disputed as the sum did not solely represent contract works carried out by HNR and, therefore, PCDL was justified in withholding payment from HNR as HNR was not entitled to the amount claimed. Under cross-examination, Wright testified that the figure did represent work carried out by HNR but he also accepted that the sum of $199,605.28 included a sum of $72,960 which HNR intended to pay to Basden Elevator Company Limited for the elevator at OM. Wright never reconciled this discrepancy in his testimony.

[158.] Batchelor said in his witness statement that, when HNR requested payment of payment application no. 7, discussions had already commenced between the parties regarding PCDL taking direct responsibility for some elements of the OM contract, including the elevator contract with Basden Elevator Company Limited. Batchelor said that a quotation was given to Batchelor and it was proposed by HNR that PCDL would take over the elevator contract. Batchelor further said that the $72,960 due to Basden was subsequently paid directly to Basden by PCDL.

[159.] In his witness statement, Hannaby went further than Batchelor and said that PCDL had agreed with Wright that certain elements of the OM contract would be provided by PCDL as demonstrated by HNR's "Change Order Summary" dated 4 November 2019. Hannaby said that the "Change Order Summary" detailed the items that PCDL was to provide. Hannaby was not challenged on that evidence during cross-examination but Wright gave evidence inconsistent with it.

[160.] Under cross-examination, Wright did not accept that $72,960 was directly paid by PCDL to Basden as Batchelor alleged. Wright also denied that any agreement was ever come to with PCDL for PCDL to take over any subcontractor/supplier contracts, including the elevator contract. Wright admitted, with some reluctance, that there were negotiations between the parties within one month of the completion date under the OM contract about reducing HNR's scope of work. However, Wright denied that HNR proposed to remove any items from the contract. Wright said that PCDL wanted to explore removing items from the OM contract after HNR raised the issue of when it would be paid in several meetings. According to Wright, in the course of discussions, HNR prepared a change order for PCDL's consideration showing what PCDL could potentially take from the contract. HNR put in writing that it did not agree with the deductions and that changes needed to happen in accordance with the contract.

[161.] Having considered the competing evidence and compared each witnesses' evidence against the documentary record, apart from accepting that $72,960 was directly

paid by PCDL to Basden on 5 December 2019,[11] the Court largely preferred Wright's evidence to Batchelor's evidence and Hannaby's evidence. The Court finds that:

(i) Shortly after HNR submitted payment application no. 7, discussions commenced or recommenced between the parties regarding PCDL taking direct responsibility for some elements of the OM contract including the elevator contract with Basden Elevator Company Limited. (Basden had issued an invoice addressed to Batchelor dated 1 October 2019 stating that $72,960 was due to it before the discussions referred to began.)

(ii) On 28 October 2019, Cummins wrote to Wright to the effect that PCDL would carry out several "finishing" elements of the OM contract and requested that Wright "update his spreadsheet and recalculate the new contract sum and resubmit". In an email Batchelor sent to Wright on 2 November 2019, Batchelor prompted Wright to respond to Cummins' email. That email included a request from Batchelor to Wright to provide the "latest invoice" from Basden Elevator Company Limited so that he could pay it. Discussions regarding the renegotiation of the OM contract scope were evidently in train.

(iii) On 1 November 2019, PCDL approved payment of $76,972.48 ($68, 725.43 + VAT) of the $199,605 sought by HNR in payment application no. 7. PCDL prepared a revised application and certification based on advice from Hapgood which reduced some of HNR's claims, leading to the $76,972.48 figure. However, before PCDL was prepared to release any funds, it wished to have HNR's answers to questions relating to the payment of subcontractors (discussed below). There is no evidence that Jones had rescinded the certificate he issued on 30 October 2019.

(iv) Wright circulated a "Change Order Summary" on HNR letterhead dated 4 November 2019, which proposed deductions from the OM contract totaling $1,626,682 including the removal of the main lift (i.e., the Basden elevator contract) from the scope of the OM contract. However, the HNR "Change Order Summary" merely evidenced negotiations and was not a formal variation of the OM contract. Wright wrote to PCDL on 6 November 2019 stating that any changes to the OM contract would happen in accordance with the contract. Wright repeated this position in the HNR Stop Work Email.

(v) In PCDL's OM Rejection Email, PCDL wrote to HNR stating, under the rubric "Payment Applications", that:

> ...we agree that the request to exercise our contractual right, to complete portions of the works, should be fairly and equitably assessed. It is only fair that you are providing a reasonable amount to propose value of these omissions. When calculating these omission please refer to Article 10.1 with regards to valuing Changes in The Work. Whilst this has no bearing on the progress on site, in relation to the current application, it stands to reason that no further payment shall be made for specialist packages Palm Cay Development Company intend to omit from your scope. Please note that

[11] This was clearly demonstrated by FirstCaribbean International Bank International Wire Transfer Results detailing a transfer of $72,960 USD on 5 December 2019 to Basden Elevator Company Limited at Tab 1B-12 of PCDL's Bundles of Documents filed on 10 September 2021.

this is where the largest discrepancy in your Payment Application and the Owner Approved Payment Certification exists.

[162.] Against this background, the Court finds that PCDL was not entitled to refuse to pay the sum certified by Jones to be due under payment application no. 7 on the basis that it included $72,960 due to Basden Elevator Company Limited, which was a portion of the OM contract that PCDL intended to take over. There was, up to the OM Acceptance Letter, no valid agreement to vary the OM contract and, as appears from PCDL's OM Rejection Email, PCDL had not yet formally exercised the power it had to order "deletions" to work within the general scope of the OM contract under Article 10.1.

[163.] While the conclusion just reached may appear a victory for HNR, it is in substance a pyrrhic success. The Court finds that, had the OM contract continued to be performed by both parties, PCDL would have (i) exercised the Article 10.1 power to remove the "main lift" from the scope of the OM contract and (ii) had Jones' certificate of payment application no. 7 adjusted. The Court accepted Batchelor's evidence that Jones certified payment application no. 7 without knowledge of the subcontractor issues on OM. There is persuasive authority for the view that an employer cannot use a power to omit work to take work from a contractor so that another builder or contractor can perform it: ***Carr v JA Berriman Pty Ltd (1953) 89 CLR 327***. However, it is right to record that no reliance was placed by HNR on this principle to argue that what was proposed to be done by PCDL could not be done under the OM contract.

[164.] With respect to PCDL's subcontractor queries, in his witness statement, Batchelor said that he undertook a review of previous payment requests to ensure that HNR complied with Article 16.2.1.2 of the OM contract, which gave PCDL authority to terminate the OM contract if HNR failed to make payments to subcontractors and/or suppliers for materials or labor in accordance with payments already made by PCDL to HNR. Hannaby said, and the Court accepted, that, overall, a total of $127,176.64 was paid to HNR which was not passed on to subcontractors.[12] In response to these allegations, Wright said during cross-examination that he believed PCDL had been "playing a game" belatedly querying HNR's subcontractor payments. Wright maintained that HNR did not breach the OM contract. Wright said, and the Court accepted, that HNR had no grievances with any subcontractor and HNR "owed no one who had a bill to HNR" (i.e. no one who presented HNR with a bill for payment).

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[12] Hannaby stated in his witness statement that $27,040 was paid to Wright by PCDL for payment on to Cool Breeze. This was not a part of PDCL's pleaded claim. It was never put to Wright. The Court is without the benefit of Wright's response to the specific allegation and PCDL is not entitled to rely on it in these proceedings.

[165.] HNR's payment application no. 4 dated 6 April 2019 included a mobilization sum of $52,500 for Basden Elevator Company Limited which PCDL paid to HNR. Basden confirmed they had only been paid $36,480 by HNR. HNR had made that payment on 20 May 2019 and the payment was reflected on Basden's invoice to Batchelor dated 1 October 2019. The Court accepted Batchelor's evidence that the $52,500 figure was later changed by HNR to $42,000 on payment application no. 6 dated 16 September 2019 without explanation. Hannaby corroborated Batchelor's evidence. In cross-examination, Wright disagreed he had been dishonest. He initially refused to address the allegation front on but eventually said the entry "main elevator" on HNR's payment application included work HNR performed and the numbers changed because the applications were drafts. As the OM contract was a fixed sum contract based on aggregating contract values for individual deliverables (such the main elevator), the Court accepted Wright's explanation of the difference between what PCDL paid HNR and what HNR paid to Basden but did not accept that the explanation was ever provided to PCDL.

[166.] PCDL paid an interim mobilization sum of $195,112.40 to HNR pursuant to HNR's payment application no. 6 on 20 September 2019 intended for Ultimate Door & Window. However, when Batchelor contacted Ultimate, he was advised that they had only been paid $100,000 on 23 September 2019, $20,000 on 18 October 2019, and $20,000 on 12 November 2019. Batchelor said that, despite several meetings, Wright never explained why HNR paid $55,112.14 less than the mobilization amount paid to HNR. Hannaby corroborated Batchelor's evidence. In cross-examination, Wright accepted that HNR had only paid Ultimate $140,000. Wright said that he only paid Ultimate what they invoiced him at the time and the amount invoiced to PCDL included HNR's work. Wright denied he never gave this explanation to PCDL. The Court accepted Wright's explanation of the difference between what PCDL paid HNR and what HNR paid Ultimate again having regard to the nature of the OM contract; but the Court did not accept that the explanation Wright gave was ever provided to PCDL.

[167.] Another payment to a subcontractor that PCDL queried was a payment to Thermoset Roofing for $22,624.50 which had been included in the mobilization sum PCDL paid pursuant to HNR's payment application no. 6. Batchelor said in his witness statement, and the Court accepted, that he spoke with Thermoset Roofing and they confirmed they had not received any payment for HNR and further noted that they had not issued an invoice in the amount of $22,624.50 to HNR. Hannaby corroborated Batchelor's evidence and Batchelor's evidence was supported by an email from Thermoset Roofing dated 12 November 2019. In cross-examination, Wright responded to PCDL's allegation by stating that HNR had, at PCDL's request, estimated $20,000 would be required for the roof of OM. Wright said that the $22,624 was not earmarked for Thermoset Roofing specifically, as Thermoset was just one of the vendors HNR solicited.

Wright admitted he never had any business with Thermoset Roofing and "they never gave him a bill". The Court accepted Wright's explanation for why the $22,624 PCDL paid to HNR was not paid to Thermoset Roofing. In the events that transpired, there was a failure of consideration for the payment.

[168.] In the premises, none of the justifications advanced by PCDL justified its refusal to pay any sums towards certificate for payment no. 7 on the strict letter of the OM contract. The Court therefore finds that PCDL breached the OM contract by failing to pay certificate for payment no. 7.

Issue 8: Did HNR breach the OM contract prior to the OM Acceptance Letter?

Breach #1: Failure to providing supporting data substantiating HNR's right to payment

[169.] PCDL submitted that HNR breached Article 12.2.1 of the OM contract by failing to provide supporting data substantiating HNR's right to payment when requested by PCDL, such as payments made to subcontractors and suppliers. PCDL submitted that HNR refused to provide evidence about the amounts it paid to Basden Elevator Company Limited, Ultimate Door & Window and Thermoset Roofing. PCDL submitted that HNR could not supply any coherent rationale for why subcontractors were paid a different amount than was a part of the OM contract and lacked transparency.

[170.] The Court concurs with HNR that the information requested by PCDL about the payment of subcontractors ought to have been requested by PCDL prior to Jones certifying payment application no. 7. Read in the context of Article 12 as a whole, Article 12.2.1 of the OM conferred a right on PCDL to require information from HNR such as evidence of payments made to, and waivers of liens from, subcontractors and suppliers, but only for the purposes of the consideration of a payment application. The certification of payment application no. 7 ended that process. PCDL was not in breach of Article 12.2.1.

Breach #2: Failure to pay suppliers and/or subcontractors upon receipt of payment from PCDL

[171.] PCDL submitted that HNR breached Article 12.4.2 of the OM contract by not paying suppliers and/or subcontractors upon receipt of payment from PCDL. Article 12.4.2 of the OM contract obliged HNR to pay subcontractors "in accordance with the terms of the applicable subcontracts and purchase orders". PCDL's submissions were couched in terms suggesting there were subcontractors/suppliers who were owed funds. However, as HNR pointed out in its closing submissions, PCDL failed to adduce any cogent evidence at trial demonstrating that HNR was in arrears with its obligations under any particular subcontract or purchase order. None of PCDL's witnesses said funds were actually in arrears and no subcontractors or supplies were called to give evidence to that

effect. Wright's evidence that no subcontractor had an issue with HNR regarding payments was essentially uncontroverted. HNR was not in breach of Article 12.4.2.

Breach #3: Failure to pay for materials and other facilities and services necessary for proper execution and completion of the work

[172.] PCDL submitted that HNR breached Article 8.4 of the contract by not paying for materials and other facilities and services necessary for proper execution and completion of the OM project. Despite the plausibility of this submission, the Court has found that PCDL failed to demonstrate that HNR was in arrears under any particular subcontract or purchase order. PCDL did not sufficiently develop an independent case that materials and other facilities and services were not in place when they ought to have been on the OM project or that what HNR had paid for was wanting despite HNR being in a position to pay for additional materials and other facilities and services. Were this conclusion wrong, however, the breach would not be repudiatory and PCDL led no evidence capable of justifying a substantial award of damages.

Breach #4: Failure to maintain Commercial General Liability Insurance

[173.] PCDL pleaded that HNR breached the OM contract by failing to maintain Commercial General Liability Insurance as required by Article 5.1 of the OM contract. As with the A4 contract, as regards this aspect of its case, PCDL is caught by the maxim onus probandi actori incumbit ("he who asserts must prove"). PCDL led no evidence at trial in support of the allegation that HNR failed to maintain Commercial General Liability Insurance and, therefore, this aspect of its counterclaim must fail.

Breach #5: Failure to provide works free from defects

[174.] PCDL submitted that HNR breached Article 8.5 of the OM contract by providing works which were not free from defects and providing works which did not conform to the Contract Documents. PCDL submitted that the allegedly defective work was rejected at OM. The pleaded particulars of the defective workmanship advanced by PCDL in relation to OM are summarized earlier in this judgment at [24]. However, it is worth reproducing PCDL's pleaded case on this issue in full, which appears at paragraph 11 of PCDL's Amended Defence and Counterclaim:

> After instructing the architect to write HNR on the 15th of November 2019, PCD discovered significant defective works at OM. There are significant structural defects which include but are not limited to, the concrete beams, the structural columns are incorrectly positioned preventing the door aperture being formed, the wall blocks were not poured in accordance with the approved design, irregular spacing with the majority of the concrete stairs and landings have been condemned as they do not conform with building codes. There is also a significant plumbing issue with all ground floor Units sewer drainpipes back falling onto the building. PCD will rely on reports at trial to substantiate the defects made by HNR at OM.

[175.] While no point was taken by HNR about the quality of PCDL's pleading, it was contrary to good practice for PCDL to refer to "significant defective works" but to provide inadequate particulars in the form of a non-exhaustive list of defects. The reference generically to "reports" was also wanting and prejudicial to HNR. HNR appears not to have sought further and better particulars at an early stage of the proceedings but there would have been wisdom in it doing so. The state of PCDL's pleading was not cured by PCDL's cross-examination of Wright. The following reflects the specific defects that PCDL put to Wright during cross-examination (at pages 49 to 56 of the 4 October 2021 transcript) and the thrust of his responses:

Alleged Defect	*Response*
Structural columns were incorrectly positioned preventing door structure from being formed.	Denied. HNR's work was supervised by the Structural Engineer Quincy Price. He never identified the issue. Quincy Price's reports were submitted every month before payment was made and the Architect of Record had an opportunity to inspect the site.
Wall blocks were not poured in accordance with the approved design	Denied. There is a tolerance in construction. If Price had pointed out concrete did not pour all the way to the bottom of one cell, HNR would have fixed it. Price never made a note of the issue and nothing was hidden from him. Price never said the work was non-compliant.
Irregular spacing in concrete stairs and landings at OM in breach of the *Bahamas Building Code*.	Denied. Someone had to point that issue out to HNR for HNR to address it. There is a remedy for a ¼" difference in stairs. No finish work was done. OM was not a finished product that was handed over to PCDL.
Significant plumbing issues with all the ground floor units with sewer pipes falling back into the building	Denied. When the sewer pipes were installed they were installed by a master tradesman.

[176.] Materially, nowhere was it mentioned during Wright's cross-examination that there were sagging floors, sagging of walkways, variations in door openings, an unlevelled elevator shaft, major issues with the window openings, exposed steel and incorrect propping of forms which floors to be out of level (described as the "biggest issue" by Heastie in his witness statement). Bearing in mind that no particulars of these defects were ever pleaded, if it wished to hold HNR responsible for the alleged defects, it was PCDL's duty to put these allegations to Wright to give him an opportunity to deal with

them. In the circumstances, fairness requires that PCDL be precluded from succeeding on these unaired allegations.

[177.] Subject to what has been said, the Court found PCDL's evidence of defective work on the OM project compelling and accepted it. The Court preferred Batchelor's, Jones', and Heastie's evidence, supported by the photographs contained in PCDL's Bundles of Documents filed on 10 September 2021, to Wright's attempts to explain away the defects. Heastie and Jones, the contractor that made good the alleged defects and the architect that drew the architectural drawings for the project, all professionals, gave evidence on oath about HNR's poor workmanship and/or the non-conformity of HNR's work. Their evidence was supported by Jones' report dated 10 December 2019 (expressed to have been based on "recent inspections") and Price's report dated 14 December 2019 (expressed to have been based on a site visit on 30 November 2019). None of HNR's criticisms were convincing enough to overcome their evidence, for essentially the same reasons as the Court identified in relation to the A4 project.

[178.] The Court, having accepted PCDL's evidence, finds that HNR breached the OM contract by carrying out Work which was not free from defects in breach of Article 8.5 of the OM contract. Those defects are summarized at [175] above.

Issue 9: Was the OM contract validly terminated and if so, how?

[179.] To frame the next issue that arises, HNR sent the HNR Stop Work Email on 7 November 2019 threatening to stop work on OM on 15 November 2019 if it was not paid, until such time as it was paid. PCDL purported to reject HNR's notice of intention to suspend work in PCDL's OM Rejection Email. On 15 November 2019, the Architect of Record, acting on behalf of PCDL, purported to "accept" HNR's offer to suspend work and requested that HNR terminate works and exit from the site leaving all unfixed materials and equipment "until matters can be resolved to the satisfaction of both parties to the contract". No reference was made by the Architect of Record to PCDL's OM Rejection Email. However, in the OM Rejection Email, PCDL reserved its right to "take action as per the contract".

[180.] HNR's characterization of events in its written closing submissions was that it properly invoked Article 12.3 of the OM contract to issue a "Stop Work" notice and that, upon the expiration of the "Stop Work" notice, PCDL improperly barred HNR from the OM jobsite without cause. According to HNR, the OM Acceptance Letter and PCDL's No Weekend Working Email effected a termination for convenience. Opposingly, PCDL characterized itself as accepting HNR's offer to cease or terminate work until a satisfactory resolution could be reached regarding the OM payment issues. In its closing written submissions, PCDL contended that the OM contract was terminated for cause and

not convenience. PCDL appeared to contend that it had cause to invoke Article 16.2.4 of the OM contract.

[181.] For his part, Del Vecchio opined that PCDL failed to make payments to HNR in accordance with the OM contract then used HNR's claim for payment and notification that work would stop if accounts were not brought current to invoke Article 7.3 of the OM contract. However, according to Del Vecchio, once the Architect of Record issued his certificate in relation to payment application no. 7, PCDL was required to make payment to HNR for the amount certified due. In his opinion, HNR's notification to the owner that it was exercising its rights under the contract to stop work did not amount to cause to terminate the OM contract. Del Vecchio opined that neither the Architect of Record nor PCDL ever established that HNR default or neglected to carry out the Work in accordance with the approved Construction Documents and that PCDL's claim that HNR had not made payments to subcontractors was baseless as there was no evidence HNR had failed to made payments to subcontractors or suppliers.

[182.] By contrast, McLeod opined that the OM contract was not formally terminated by either party pending a review of the disputed payments. HNR did not return to the project site following the agreement to cease works pending the resolution of the outstanding payment dispute. In McLeod's opinion, the termination was not a termination for convenience as there were no formal notices. To his mind, the evidence suggested there were significant defects in the construction completed prior to HNR stopping construction. Such defective works could give grounds for the contract to be terminated in accordance with Article 16.2.1. Such a termination would allow PCDL to complete the works by whatever method if felt was appropriate. In McLeod's opinion, there were sufficient grounds to terminate the OM contract for cause. In his view, after HNR failed to return to the project site following its suspension of works, PCDL proceeded to complete the works through the provisions of a termination for cause route but both parties failed to document this.

[183.] Article 12.3 of the OM contract upon which HNR relied provided:

> The Architect will, within seven days after receipt of the Contractor's Application for Payment, either (1) issue to the Owner a Certificate for Payment in the full amount of the Application for Payment, with a copy to the Contractor; (2) issue to the Owner a Certificate for Payment for such amount as the Architect determines is properly due, and notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in part; or (3) withhold certification of the entire Application for Payment, and notify the Contractor and Owner of the Architect's reason for withholding certification in whole. If certification or notification is not made within such seven day period, the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until

payment of the amount owing has been received. The Contract Time and the Contract Sum shall be equitably adjusted due to the delay.

[184.] On the plain and ordinary interpretation of Article 12.3 of the OM contract, it is clear that it did not confer upon HNR a right to stop the Work in the circumstances that transpired because the Architect of Record had already certified payment application no. 7 and there was no question of the Architect notifying HNR of its reasons for withholding certification in part or withholding certification in whole. If a contrary interpretation at odds with the plain and ordinary interpretation of Article 12.3 is the authoritative construction placed upon the standard American Institute of Architects' form, it was incumbent on the parties (in particular, HNR) to demonstrate that this was so. No decision of any kind from a court in the United States of America was provided by HNR.

[185.] For completeness, although it was not contended for by HNR, HNR also did not enjoy an implied right to suspend work until payment was made. Where time is of the essence (as it was under the OM contract pursuant to Article 11) a delay in payment may entitle the unpaid party to treat the contract as having been wrongfully repudiated: ***Lombard North Central plc v Butterworth [1987] QB 527***. Additionally, a refusal to honour payment obligations, at least insofar as it relates to a relatively sizeable sum of money or the threat not to pay further money due in accordance with the contract can be repudiatory: ***C J Elvin Building Services Limited v Noble [2003] EWHC 837 (TCC)*** at [91]. However, all this does not translate into a right to temporarily cease works as distinct from rescinding the contract *in toto* in response to a repudiatory breach.

[186.] The point was considered by the English High Court in ***Dick van Dijik v Wilkinson t/a HFF Construction [2000] All ER (D) 2334***. There, *Judge Bowsher KC* said at [60]:

> Unless provided for by contract, there is no general right to suspend work if payment is wrongly withheld. The principle is stated in Keating on Building Contracts, 6th edition page 167:
>
> > **"No general right to suspend work.** Although particular contracts may give the contractor express rights if certificates are not paid, there is no general right to suspend work if payment is wrongly withheld. This is consistent with the principle that, except where there is a breach of condition or fundamental breach of contract, breach of contract by one party does not discharge the other party from performance of his unperformed obligations."
> >
> > In *Channel Group v. Balfour Beatty* [1992] 1 QB 656, Staughton L.J. said:
> >
> > > "There is a further potential dispute of considerable importance. The contractors maintain that they are entitled to suspend work on the cooling system, although they have not yet done so, by reason of Eurotunnel's breaches of contract described above. If it were solely a question of English law, this argument would face some difficulty. It is well established that if one party is in serious breach, the other can treat the contract as altogether at an end; but there is not yet any established doctrine of English law that the other party may suspend performance, keeping the contract alive. It is

said that there is authority, at any rate in the Commonwealth, which would support such a doctrine."

[187.] A similar position was taken by the Singapore High Court in ***Jia Min Building Construction Pte Ltd v Ann Lee Pte Ltd [2004] SGHC 107***, where *Rajah JC* said at [56] to [58]:

> 56 It appears to be settled law that a contractor/sub-contractor has no general right at common law to suspend work unless this is expressly agreed upon. This is so even if payment is wrongly withheld: see Lubenham Fidelities and Investments Co Ltd v South Pembrokeshire District Council (1986) 33 BLR 46, per May LJ at 55:
>
> > Whatever be the cause of the under-valuation, the proper remedy available to the contractor is, in our opinion, to request the architect to make the appropriate adjustment in another certificate, or if he declines to do so, to take the dispute to arbitration ... [emphasis added]
>
> 57 This view is echoed in Halsbury's Laws of Singapore, vol 2, (LexisNexis Singapore, 2003 Reissue) at [30.321] (see also Keating on Building Contracts, (7th Ed, 2001) at para 6-96). Hudson's Building and Engineering Contracts, vol 1, (11th Ed, 1995) at para 4-223 states:
>
> > [I]t seems clear that in England and the Commonwealth there is recognised right to suspend work, or indeed of payment otherwise due upon a breach by the other party (although in the case of payment, as has been seen ... legitimate deduction for damage previously suffered or other valid set-offs will, in the absence of express provision, be permitted from sums otherwise due). [emphasis added]
>
> This passage appears to support, at first blush, the contrary position. It is, however, amply evident that this passage has endured an editorial mishap, for at para 4-224, it is stated:
>
> > [I]t is no accident that the English and Commonwealth courts have consistently refused to imply a right to suspend work (or of non-payment by the owner) upon a breach of contract.
>
> 58 There appear to be strong grounds for denying such a right. The existence of such a right could create chaos within the building industry if contractors were to muscle their way through disputes with threats or actual acts of suspension instead of having their disputes adjudicated. Projects could be held to ransom with severe consequences. Furthermore, it would be incorrect in principle to imply in what is commonly viewed as "an entire contract for the sale of goods and work and labour for a lump sum payable by instalments", a right to break up performance into segments in the absence of any specific and express contractual agreement.
>
> [Emphasis added]

[188.] From a general contract law perspective, the reasoning of the English Court of Appeal in ***Triple Point Technology Inc v PTT Public Co Ltd [2019] 3 All ER 767*** is

compelling and applicable to the present case against the implication of a right to temporarily suspend work. In that case, *Sir Rupert Jackson LJ* said at [64] to [66]:

> [64] Triple Point contends that in order to make the CTRM contract commercially workable, a term must be implied that Triple Point could suspend work in the event of non-payment. Mr Stafford relies on the judgment of Lord Neuberger in Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd [2015] UKSC 72, [2016] 4 All ER 441, [2016] AC 742(at [21]). He submits that without the suggested implied term the contract would lack practical coherence.
>
> [65] I do not agree. If PTT failed to make payments on the due dates, Triple Point would have all the usual remedies for non-payment. These would include suing for the money due, applying for summary judgment, treating non-payment as a repudiation and so forth. There was no need for the contract to incorporate a provision that Triple Point could suspend work for non-payment, even though from one party's point of view such a term would have been nice to have. I reject the suggestion in para 28.2 of the appellant's skeleton argument that without such an implied term the contract would be 'wholly one-sided'. Furthermore, even if the contract were to favour one party strongly, that is no reason for the court to redress the balance by implying terms.
>
> [66] The contract expressly provided for the suspension of work in certain specified circumstances. Article 15.6 enabled PTT to suspend work on ten days' notice. Article 16.1 provided for the suspension of work in the event of force majeure. These terms show that the parties addressed their minds to the circumstances in which work could be suspended. Those circumstances did not include non-payment.
>
> [Emphasis added]

[189.] The result is that HNR was in anticipatory breach of the OM contract when it threatened to suspend work by the HNR Stop Work Email. As is well-known, an anticipatory breach of contract gives rise to an immediate cause of action if it is accepted. However, the innocent party is entitled to affirm the contract and call for performance. In this case, by PCDL's OM Rejection Email, PCDL called for performance and reserved its right to self-perform the OM contract under Article 7.3 in the event that HNR suspended work. PCDL invited HNR to act on its communicated intention to suspend work until payment was resolved on 15 November 2019, which HNR did. When it became clear that HNR was not going to participate in resolving the payment issues on a timely basis and therefore would not be returning to the project jobsite within a reasonable timeframe, PCDL was entitled to hand the project over to another contractor and to treat the contract as determined. The OM contract was not terminated by PCDL for convenience under Article 16.3 but under the common law. Article 16 of the OM contract did not abrogate PCDL's common law rights: ***Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689***.

[190.] For further completeness, in the event that the foregoing analysis is incorrect, the Court accepts McLeod's opinion that PCDL was entitled to terminate the OM contract for the defective work HNR carried out on the OM project prior to the HNR Stop Work Email.

Issue 10: Were HNR's tools and equipment wrongfully withheld by PCDL and was HNR wrongly excluded from the OM jobsite?

[191.] With respect to HNR's claim for reimbursement for the wrongful detention of its tools and equipment allegedly left the OM jobsite, it suffices to record that the parties' submissions on the issue were in substance the same as in relation to the A4 project.

[192.] The Court preferred PCDL's evidence that there were no tools and equipment left by HNR at the OM jobsite. As mentioned in relation to HNR's claim in connection with the A4 project, Wright accepted during cross-examination that HNR employed workers, but none of them gave evidence to substantiate HNR's allegation that it left tools and equipment at the OM jobsite. In addition, HNR provided no documentary evidence, such as receipts or photographs, or details, such as serial numbers, in relation to the tools and equipment allegedly left on the OM jobsite which might have supported HNR's claim. The lack of independent evidence is fatal to HNR's claim. The proposition that HNR left no tools and equipment on the OM jobsite is not so inherently improbable as to be compel a positive result for HNR. HNR intended to stop work on the OM jobsite from 7 November 2019.

[193.] The Court accepted PCDL's evidence that it never excluded HNR from the OM jobsite in the sense that the parties used that term. The Court accepted PCDL's evidence that, before it formally retook possession of the OM jobsite on 22 November 2019, attempts were made by Batchelor to contact Wright between 15 November 2019 and 18 November 2019 but Wright did not engage, HNR never attempted to return to the OM jobsite after 15 November 2019 and PCDL remained willing to resolve its issues with HNR but HNR had determined to ventilate the parties' issues in litigation. The allegation that HNR was "locked out" of the OM jobsite is unsustainable once it is accepted that HNR left the OM jobsite and never attempted to return. That HNR never attempted to return to the OM jobsite reinforces the conclusion that no tools and equipment of any value were left on the OM jobsite.

[194.] The Court finds that HNR's claim for "reimbursement for the full total value of the tools and equipment that were wrongfully seized by PCDL" fails in relation to the OM project.

Issue 11: To what remedies, if any, is HNR entitled on its claim so far as it relates to OM?

[195.] As with its claim so far as it pertains to the A4 project, HNR is entitled to damages on that part of its claim that relates to the OM project. HNR cannot obtain the declaratory relief it sought in its Amended Statement of Claim because it conceded that the OM contract was effectively terminated. There is also no basis for HNR to obtain the injunctive relief it sought in its Amended Statement of Claim. No basis was identified by Counsel for HNR, who made no arguments in support of the relief.

Certificate for payment no. 7

[196.] Beginning with the compensation due in relation to certificate for payment no. 7, the issue of abatement does not arise as PCDL did not plead abatement and no attempt was made by PCDL to relate the defects in HNR's work on OM to the specific work to which certificate for payment no. 7 related. However, as the Court has found that, had the OM contract continued to be performed by both parties, PCDL would have (i) exercised the Article 10.1 power to remove the "main lift" from the scope of the OM contract and (ii) had Jones' certificate of payment application no. 7 adjusted, PCDL is entitled to $126,645 including VAT. This is more than the $76,972.48 that PCDL itself agreed to pay on certificate for payment no. 7, but PCDL did not make any attempt to show that its calculation was justified in its written closing submissions.

[197.] HNR is entitled to pre-judgment contractual interest on the sum of $126,645 "from the date payment is due at...at the legal rate prevailing at the place of the Project" pursuant to Article 4.2 of the OM contract. No attempt was made by the parties to indicate a rate of interest or the date from which interest should be taken to run and, therefore, the Court will, as with the A4 contract, adopt the prime rate of 4.25% and take simple interest as running from 7 November 2019. This yields a total of $149,457.60 as of 31 January 2024.

Retention money

[198.] HNR's claim for the retention withheld from certificates for payment under the OM contract sounds in the same outcome as under the A4 contract although the amount of retention withheld differs under the two contracts. As the OM contract has been terminated, the Court finds that the retention deducted by PCDL in respect of the OM contract ought to be paid to HNR. The Court relies on the amount of retention specified on payment application no. 9, which was signed by HNR and approved by Jones, and therefore finds PCDL is liable to HNR for $45,701.60 in connection with this aspect of HNR's claim.

Work done between 19 October 2019 and 15 November 2019

[199.] The Court finds that HNR is entitled to compensation for the work that it performed on the OM project between 19 October 2019 and 15 November 2019 notwithstanding that no payment application was submitted by HNR for the work. There can be no dispute that HNR performed some work between 19 October 2019 and 15 November 2019 as the contrary conclusion would make a nonsense of the HNR Stop Work Email (as HNR would have already suspended work). As with the case in relation to the A4 project, the difficulty that arises is determining what was done and its value

[200.] At trial, Wright gave no evidence describing the work that was done on the OM project between 19 October 2019 and 15 November 2019. As was the case under the A4 contract, there was essentially no evidence quantifying the value of HNR's work. HNR relied on "Final Accounts" which were not in evidence and a bald assertion that the figure claimed was based on 3% of the Contract Sum for the project. HNR did not particularize the work allegedly done and failed to credibly substantiate that 3% of the contract scope was in fact completed between 19 October 2019 and 15 November 2019. That was plainly an inadequate foundation on which to sustain a claim for completed but unbilled work in the amount of $199,222.29.

[201.] PCDL correctly submitted that there is no independent way to assess or value HNR's work as there are no photographs or payment receipts to substantiate what HNR did in evidence and the work done by HNR was not certified by the Architect of Record. However, as with the A4 contract, this does not mean that HNR ought not to be paid any compensation. The situation is that HNR has proven some loss but not quantified it.

[202.] In the circumstances, the Court will award HNR $7,500 in nominal damages for work done on OM between 19 October 2019 and 15 November 2019.

Loss of overhead and profit on work done between 19 October 2019 and 15 November 2019

[203.] The Court finds that HNR is entitled to the overhead and profit it would have earned under the OM contract on the work that it did on the OM project between 19 October 2019 and 15 November 2019.

[204.] As mentioned in relation to the A4 project, Wright gave evidence that HNR was entitled to overhead and profit of 17% under the contracts (10% being overhead and 7% being profit). That evidence also contradicted the OM Estimate Summary, which stated that HNR's overhead and profit on the OM project was 5%.

[205.] Counsel for PCDL never put to Wright that his overhead and profit under the OM contract was not 17% but 5%. However, as the Contract Sum under the OM contract was derived from the Estimate Summary, the Court does not regard the failure to put to Wright that his estimate of the overhead and profit under the OM contract precludes the Court from relying on the Estimate Summary.

[206.] Accordingly, as the Court awarded HNR $7,500 in nominal damages for the work HNR did on the A4 project between 19 October 2019 and 15 November 2019, the Court will award HNR $375 for loss of overhead and profit on that work.

Costs incurred by reason of the termination, along with reasonable overhead and profit on the Work not executed

[207.] In light of the Court's findings, unlike in the case of the A4 contract, HNR is not entitled to the costs it incurred by reason of the termination of the OM contract or its reasonable overhead and profit on Work not executed.

Structural design and inspection fees

[208.] HNR submitted that PCDL's breach of contract entitles HNR to reimbursement of the monies it paid to Quincy Price for structural design and inspection fees relating to the OM project. PCDL submitted that HNR is not entitled to the structural design and inspection fees it claims as they were never included in any payment application and PCDL never agreed to pay them. Batchelor gave the following evidence relevant to the issue in his witness statement:

> ...it is denied that PCD owes HNR the sum of $33,049 for Structural Design and Inspection Fees. This amount has never been included in any payment request or invoice to PCD and was never addressed during weekly Construction meetings held.
>
> PCD paid the Architect of record, Winston Jones & Associates and by extension through the architect, the appointed Structural Engineer, Certified Consultants and Technicians (CCT Engineers) the fees for the preparation and submission of their original drawings to the Ministry of Works. ...

[209.] Under cross-examination, Wright confirmed the dates that the structural design and inspection fees HNR claimed were paid by reference to HNR's Amended Statement of Claim. Wright also admitted that the fees were never included in a payment application and were an expense "beyond the contract" which PCDL did not agree to pay. Wright denied that the plans to which the fees related were required because HNR requested a variation to substitute concrete beams for steel beams to save time and costs and PCDL agreed provided it would not impact, on time, structural integrity or cost. Wright pointed

out that, as a contractor, it could only make recommendations. The Court accepted that evidence.

[210.] As PCDL was responsible for providing plans under the OM contract and ultimately PCDL benefited from the plans, HNR is entitled to recover the structural design and inspection fees it paid to Quincy Price including VAT at 12%, which totals to $36,377.60.

[211.] In sum, the Court awards HNR $239,411.80 in damages on its claim for breach of contract insofar as it relates to the OM project.

Issue 12: To what remedies, if any, is PCDL entitled on its counterclaim so far as it relates to OM?

[212.] Having proven that there were defects in the work that HNR performed on the OM project, PCDL is entitled to recover its reasonable costs of remedying the defects it has proven in HNR's work. This is not a result of Article 14 of the OM contract, as PCDL appeared to suggest, as Article 14 only operated when work was rejected by the Architect pursuant to the terms of the OM contract (e.g. in exercise of the Article 9.5 power). It is the result of the application of common law principles.

[213.] PCDL claimed the sum of $526,527 in its Amended Defence and Counterclaim as the cost of repairing the defects in HNR's work. There is no itemized breakdown of that sum in PCDL's pleading and PCDL did not explain the sum in its written closing submissions. The sum was, however, verified by Hannaby in his witness statement. However, it includes work on defects which PCDL did not prove or put to Wright and therefore cannot recover for.

[214.] According to quotes and invoices contained in PCDL's Bundle of Documents filed on 4 October 2021 (in particular, CGCL invoices OMJAN2020-12, OMJAN2020-14 and OMJAN2020-16) PCDL is entitled to $146,791 for the alleged defects identified. No supporting documentation was provided referring to the cost of rectifying the fact that the concrete beams and structural columns were incorrectly positioned preventing a door aperture from being formed but the Court will award $5,000 for this defect.

[215.] PCDL did not lead evidence capable of justifying a substantial award of general damages and therefore the Court awards PCDL $10,000 for delay and inconvenience arising out of the remedial works on OM.

[216.] PCDL is entitled to $22,624.50 for the amount paid to HNR in connection with Thermoset Roofing/the roof on the OM project.

[217.] In the circumstances, the Court awards PCDL $184,415.50 in damages on PCDL's counterclaim for breach of contract so far as it relates to OM.

Conclusion

[218.] For the foregoing reasons, the Court finds that HNR has established its claim to the extent of $310,283.86 and PCDL has established its counterclaim to the extent of $247,236.90.

[219.] Order 15, rule 3 of the Rules of the Supreme Court, 1978 provides that, where a defendant establishes a counterclaim against the claim of the plaintiff and there is a balance in favour of one of the parties, the Court may give judgment for the balance.

[220.] In the particular circumstances of this case, it is convenient to enter one judgment only for the balance between the parties and therefore judgment is given to HNR in the amount of $63,046.96 which shall bear interest at the statutory rate until paid.

[221.] Unless the parties request an oral hearing, the Court will hear the parties on costs by written submissions to be delivered and exchanged within 14 days or such further period as the parties may agree.

Postscript

[222.] As a postscript to this judgment, the Court is obliged to acknowledge that the delivery of this judgment was delayed beyond the timeline established by the Court of Appeal within which judgments after trial ought to be delivered. The Court must express its regret for the delay and any inconvenience caused to the parties notwithstanding that the presentation and preparation of the matter did not promote the efficient resolution of the litigation.

[223.] Unconnectedly, while it is entirely understandable that HNR would wish to take full advantage of Mrs. Wright's undeniable professional skills and experience, Mrs. Wright's representation of HNR at trial may have been disadvantageous. Without intending to be unduly critical of her, Mrs. Wright at times appeared to lack the dispassionate, disinterested objectivity that the Court relies on from counsel. Parties and counsel should take care to avoid similar situations in other cases where practicable.

Dated the 6th day of February 2024

Sir Ian R. Winder
Chief Justice

APPENDIX

EXPRESS TERMS OF THE A4 CONTRACT

ARTICLE 1 THE CONTRACT DOCUMENTS

The Contractor shall complete the Work described in the Contract Documents for the Project. The Contract Documents consist of:

.1 this Agreement signed by the Owner and Contractor;

.2 the drawings and specifications prepared by the Architect, dated , and enumerated as follows:

Drawings:

Number	Title	Date
	Layout Drawings (by Other)	12th, September, 2018

Specifications:

Section	Title	Pages

.3 addenda prepared by the Architect as follows:

Number	Date	Pages

.4 written orders for changes in the Work, pursuant to Article 10, issued after execution of this Agreement; and

.5 other documents, if any, identified as follows:

ARTICLE 2 DATE OF COMMENCEMENT AND SUBSTANTIAL COMPLETION

§2.1 The Contract Time is the number of calendar days available to the Contractor to substantially complete the Work.

§2.2 Date of Commencement:

Unless otherwise set forth below, the date of commencement shall be the date of this Agreement.

18th September, 2018

§2.3 Substantial Completion:

Subject to adjustments of the Contract Time as provided in the Contract Documents, the Contractor shall achieve Substantial Completion, as defined in Section 12.5, of the entire Work: (

(Check the appropriate box and complete the necessary information.)

[ ] Not later than ( ) calendar days from the date of commencement.

[ ] By the following date: 18Th September 2019

ARTICLE 3 CONTRACT SUM

§3.1 The Contract Sum shall include all items and services necessary for the proper execution and completion of the Work. Subject to additions and deductions in accordance with Article 10, the Contract Sum is:

One Million Five Hundred Thirty-Five Thousand, Four Hundred Seventy-Seven Dollars and Eight Cents (B$ 1,535,477.08)

§3.2 For purposes of payment, the Contract Sum includes the following values related to portions of the Work:

(Itemize the Contract Sum among the major portions of the Work.)

Portion of the Work	**Value**
See Tender Summary Attached Dated 7-23-18	$1,535,477.08

§3.3 The Contract Sum is based upon the following alternates, if any, which are described in the Contract Documents and hereby accepted by the Owner:

(Identify the accepted alternates. If the bidding or proposal documents permit the Owner to accept other alternates subsequent to the execution of this Agreement ,attach a schedule of such other alternates showing the amount for each and the date when the amount expires.)

NIL

§3.4 Allowances, if any, included in the Contract Sum are as follows:

(Identify each allowance.)

Item	**Price**

NIL

§3.5 Unit prices, if any, are as follows:

(Identify the item and state the unit price and quantity limitations, if any, to which the unit price will be applicable.)

Item	**Units and Limitations**	**Price per Unit ($0.00)**

Interior/Exterior Tile Finish Material $/Sf 3.55

ARTICLE 4 PAYMENTS

§4.1 Based on the Contractor's Applications for Payment certified by the Architect, the Owner shall pay the Contractor, in accordance with Article 12, as follows:

(insert below timing for payments and provisions for withholding retainage (0% Retention), if any.)

Seven days before the end of the months. Zero percent retention applied

§4.2 Payments due and unpaid under the Contract Documents shall bear interest from the date payment is due at the rate below, or in the absence thereof, at the legal rate prevailing at the place of the Project.

(Insert rate of interest agreed upon, if any.)

%

ARTICLE 5 INSURANCE

§5.1 The Contractor shall maintain the following types and limits of insurance until the expiration of the period for correction of Work as set forth in Section 14.2, subject to the terms and conditions set forth in this Section 5.1:

§5.1.1 Commercial General Liability insurance for the Project written on an occurrence form, with policy limits of not less than ($) each occurrence, ($) general aggregate, and ($) aggregate for products-completed operations hazard. General Liability 1,000,000 Star General Quote Attached

§5.1.2 Automobile Liability covering vehicles owned, and non-owned vehicles used, by the Contractor, with policy limits of not less than ($) per accident, for bodily injury, death of any person, and property damage arising out of the ownership, maintenance, and use of those motor vehicles along with any other statutorily required automobile coverage.

§5.1.3 The Contractor may achieve the required limits and coverage for Commercial General Liability and Automotive Liability through a combination of primary and excess or umbrella liability insurance, provided that such primary and excess or umbrella insurance policies result in the same or greater coverage as those required under Section 5.1.1 and 5.1.2, and in no event shall any excess or umbrella liability insurance provide narrower coverage than the primary policy. The excess policy shall not require exhaustion of the underlying limits only through the actual payment by the underlying insurers.

§5.1.4 Workers' Compensation at statutory limits.

§5.1.5 Employers' Liability with policy limits not less than ($) each accident, ($) each employee, and ($) policy limit. *Quote Attached.*

§5.1.6 The Contractor shall provide builder's risk insurance to cover the total value of the entire Project on a replacement cost basis. *Star General Quote Attached.*

§5.1.7 Other Insurance Provided by the Contractor

(List below any other insurance coverage to be provided by the Contractor and any applicable limits)

Coverage	**Limits**
Contractor's All Risk	1.5 Million
Third Party Liability	1.0 Million
Employer's Liability	1.0 Million

§5.2 The Owner shall be responsible for purchasing and maintaining the Owner's usual liability insurance and shall provide property insurance to cover the value of the Owner's property. The Contractor is entitled to receive an increase in the Contract Sum equal to the insurance proceeds related to a loss for damage to the Work covered by the Owner's property insurance.

§5.3 The Contractor shall obtain an endorsement to its Commercial General Liability insurance policy to provide coverage for the Contractor's obligations under Section 8.12.

§5.4 Prior to commencement of the Work, each party shall provide certificates of insurance showing their respective coverages.

§5.5 Unless specifically precluded by the Owner's property insurance policy, the Owner and Contractor waive all rights against (1) each other and any of their subcontractors, suppliers, agents and employees, each of the other; and (2) the Architect, Architect's consultants, and any of their agents and employees, for damages caused by fire or other causes of loss to the extent those losses are covered by property insurance or other insurance applicable to the Project, except such rights as they have to the proceeds of such insurance.

ARTICLE 6 GENERAL PROVISIONS

§6.1The Contract

The Contract represents the entire and integrated agreement between the parties and supersedes prior negotiations representations or agreements, either written or oral. The contract may be amended or modified only by a written modification in accordance with Article 10.

§6.2 The Work

The term "Work" means the construction and services required by the Contract Documents, and includes all other labor, materials, equipment and services provided, or to be provided, by the Contractor to fulfill the Contractor's obligations.

§6.3 Intent

The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work by the Contractor. The Contract Documents are complementary, and what is required by one shall be as binding as if required by all.

§6.4 Ownership and Use of Architect's Drawings, Specifications and Other Documents

Documents prepared by the Architect are instruments of the Architect's service for use solely with respect to this Project. The Architect shall retain all common law, statutory, and other reserved rights, including the copyright. The Contractor, subcontractors, sub-subcontractors

§6.5 Electronic Notice

Written notice under this Agreement may be given by one party to the other by email as set forth below.

(Insert requirements for delivering written notice by email such as name, title and email address of the recipient, and whether and how the system will be required to generate a read receipt for the transmission.)

ARTICLE 7 OWNER

§7.1 Information and Services Required of the Owner

§7.1.1 If requested by the Contractor, the Owner shall furnish all necessary surveys and a legal description of the site.

§7.1.2 Except for permits and fees under Section 8.7.1 that are the responsibility of the Contractor, the Owner shall obtain and pay for other necessary approvals, easements, assessments and charges.

§7.1.3 Prior to commencement of the Work, at the written request of the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. The Contractor shall have no obligation to commence the Work until the Owner provides such evidence.

§7.2 Owner's Right to Stop the Work

If the Contractor fails to correct Work which is not in accordance with the Contract Documents the Owner may direct the Contractor in writing to stop the Work until the correction is made.

§7.3 Owner's Right to Carry Out the Work

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents and fails within a seven day period after receipt of written notice from the Owner to commence and continue correction of such default or neglect with diligence and promptness, the Owner may, without prejudice to other remedies, correct such deficiencies. In such case, the Architect may withhold or nullify a Certificate for Payment in whole or in part, to the extent reasonably necessary to reimburse the Owner for the cost of correction, provided the actions of the Owner and amounts charged to the Contractor were approved by the Architect.

§7.4 Owner's Right to Perform Construction and to Award Separate Contracts

§7.4.1 The Owner reserves the right to perform construction or operation elated to the Project with the Owner's own forces, and to award separate contracts in connection with the other portions of the Project.

§7.4.2 The Contractor shall coordinate and cooperate with the Owner's own forces and separate contractors employed by the Owner.

ARTICLE 8 CONTRACTOR

§8.1 Review of Contract Documents and Field Conditions by Contractor

§8.1.1 Execution of the Contract by the Contractor is a representation that the Contractor has visited the site, become familiar with the local conditions under which the Work is to be performed, and correlated personal observations with requirements of the Contract Documents.

§8.1.2 The Contractor shall carefully study and compare the Contract Documents with each other and with information furnished by the Owner. Before commencing activities, the Contractor shall (1) take field measurements and verify field conditions; (2) carefully compare this and other information known to the Contractor with the Contract Documents; and (3) promptly report errors, inconsistencies or omissions discovered to the Architect.

§8.2 Contractor's Construction Schedule

The Contractor, promptly after being awarded the Contract, shall prepare and submit for the Owner's and Architect's information a Contractor's construction schedule for the Work.

§8.3 Supervision and Construction Procedures

§8.3.1 The Contractor shall supervise and direct the Work using the Contractor's best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures, and for coordinating all portions of the Work.

§8.3.2 The Contractor, as soon as practicable after award of the Contract, shall furnish in writing to the Owner, through the Architect, the names of subcontractors or supplies for each portion of the Work. The Contractor shall not contract with any subcontractor or supplier to whom the Owner or Architect have made a timely and reasonable objection.

§8.4 Labor and Materials

§8.4.1 Unless otherwise provided in the Contract Documents, the Contractor shall provide and pay for labor, materials, equipment, tools, utilities, transportation, and other facilities and services necessary for proper execution and completion of the Work.

§8.4.2 The Contractor shall enforce strict discipline and good order among the Contractor's employees and other persons carrying out the Contract Work. The Contractor shall not permit employment of unfit persons or persons not skilled in tasks assigned to them.

§8.5 Warranty

The Contractor warrants to the Owner and Architect that: (1) materials and equipment furnished under the Contract will be new and of good quality unless otherwise required or permitted by the Contract Documents; (2) the Work will be free from defects not inherent in the quality required or permitted; and (3) the Work will conform to the requirements of the Contract Documents. Any material or equipment warranties required by the Contract Documents shall be issued in the name of the Owner, or shall be transferable to the Owner, and shall commence in accordance with Section 12.5.

§8.6 Taxes

The Contractor shall pay sales, use and similar taxes that are legally required when the Contract is executed.

§8.7 Permits, Fees and Notices

§8.7.1 The Owner shall obtain and pay for the building permit and other permits and governmental fees, licenses, and inspections necessary for proper execution and completion of the Work.

§8.7.2 The Contractor shall comply with and give notices required by agencies having jurisdiction over the Work. If the Contractor performs Work knowing it to be contrary to applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities, the Contractor shall assume full responsibility for such Work and shall bear the attributable costs. The Contractor shall promptly notify the Architect in writing of any known inconsistencies in the Contract Documents with such governmental laws, rules and regulations.

§8.8 Submittals

The Contractor shall promptly review, approve in writing, and submit to the Architect shop drawings, product data, samples and similar submittals required by the Contract Documents. Shop drawings, product data, samples, and similar submittals are not Contract Documents.

§8.9 Use of Site

The Contractor shall confine operations at the site to areas permitted by law, ordinances, permits, the Contract Documents, and the Owner.

§8.10 Cutting and Patching

The Contractor shall be responsible for cutting, fitting or patching required to complete the Work or to make tis parts fit together properly.

§8.11 Cleaning Up

The Contractor shall keep the premises and surrounding area free from accumulation of debris and trash related to the Work. At the completion of the Work, the Contractor shall remove its tools, construction equipment, machinery, and surplus material; and shall properly dispose of waste materials.

§8.12 Indemnification

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them, from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

ARTICLE 9 ARCHITECT

§9.1 The Architect will provide administration of the Contract as described in the Contract Documents. The Architect will have authority to act on behalf of the Owner only to the extent provided in the Contract Documents.

§9.2 The Architect will visit the site at intervals appropriate to the stage of construction to become generally familiar with the progress and quality of the Work.

§9.3 The Architect will not have control over or charge of, and will not be responsible for, construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs in connection with the Work, since these are solely the Contractor's responsibility. The Architect will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

§9.4 Based on the Architect's observations and evaluations of the Contractor's Applications for Payment, the Architect will review and certify the amounts due to the Contractor.

§9.5 The Architect has authority to reject Work that does not conform to the Contract Documents.

§9.6 The Architect will promptly review and approve or take appropriate action upon Contractor's submittals, but only for the limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents.

§9.7 On written request from either the Owner or Contractor, the Architect will promptly interpret and decide matters concerning performance under, and requirements of, the Contract Documents.

§9.8 Interpretations and decisions of the Architect will be consistent with the intent of, and reasonably inferable from the Contract Documents, and will be in writing or in the form of drawings. When making such interpretations and decisions, the Architect will endeavor to secure faithful performance by both Owner and Contractor, will not show partiality to either and will not be liable for results of interpretations or decisions rendered in good faith.

§9.9 The Architect's duties, responsibilities, and limits of authority as described in the Contract Documents shall not be changed without written consent of the Owner, Contractor and Architect. Consent shall not be unreasonably withheld.

ARTICLE 10 CHANGES IN THE WORK

§10.1 The Owner, without invalidating the Contract, may order changes in the Work within the general scope of the Contract, consisting of additions, deletions or other revisions, and the Contract Sum and Contract Time shall be adjusted accordingly, in writing. If the Owner and Contractor cannot agree to a change in the Contract Sum, the Owner shall pay the Contractor his actual cost plus reasonable overhead and profit.

§10.2 The Architect may authorize or order minor changes in the Work that are consistent with the intent of the Contract Documents and do not involve an adjustment in the Contract Sum or an extension of the Contract Time. Such authorization or order shall be in writing and shall be binding on the Owner and Contractor. The Contractor shall proceed with such minor changes promptly.

§10.3 If concealed or unknown physical conditions are encountered at the site that differ materially from those indicated in the Contract Documents or from those conditions ordinarily found to exist, the Contract Sum and Contract Time shall be subject to equitable adjustment.

ARTICLE 11 TIME

§11.1 Time Limits stated in the Contract Documents are of the essence of the Contract.

§11.2 If the Contractor is delayed at any time in progress of the Work by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, or other causes beyond the Contractor's control, the Contract Time shall be subject to equitable adjustment.

§11.3 Costs caused by delays or by improperly timed activities or defective construction shall be borne by the responsible party.

ARTICLE 12 PAYMENTS AND COMPLETION

§12.1 Contract Sum

The Contract Sum stated in this Agreement, including authorized adjustments, is the total amount payable by the Owner to the Contractor for the performance of the Work under the Contract Documents.

§12.2 Applications for Payment

§12.2.1 Applications for Payment

§12.2.1 At least ten days before the date established for each progress payment, the Contractor shall submit to the Architect an itemized Application for Payment for Work completed in accordance with the values stated in this Agreement. The Application shall be supported by data substantiating the Contractor's right to payment as the Owner or Architect may reasonably

require, such as evidence of payments made to, and waivers of liens from, subcontractors and suppliers. Payments shall be made on account of materials and equipment delivered and suitably stored at the site for subsequent incorporation in the Work. If approved in advance by the Owner, payment may similarly be made for materials and equipment stored, and protected from damage, off the site at a location agreed upon in writing.

§12.2.2 The Contractor warrants that title to all Work covered by an Application for Payment will pass to the Owner no later than the time of payment. The Contractor further warrants that upon submittal of an Application for Payment, all Work for which Certificates for Payment have been previously issued and payments received from the Owner shall, to the best of the Contractor's knowledge, information, and belief, be free and clear of liens, claims, security interests, or other encumbrances adverse to the Owner's interests.

§12.3 Certificates for Payment

The Architect will, within seven days after receipt of the Contractor's Application for Payment, either (1) issue to the Owner a Certificate for Payment in the full amount of the Application for Payment, with a copy to the Contractor; (2) issue to the Owner a Certificate for Payment for such amount as the Architect determines is properly due, and notify the Contractor and Owner in writing of the Architect's reasons for withholding certification in part; or (3) withhold certification of the entire Application for Payment, and notify the Contractor and Owner of the Architect's reason for withholding certification in whole. If certification or notification is not made within such seven day period, the Contractor may, upon seven additional days' written notice to the Owner and Architect, stop the Work until payment of the amount owing has been received. The Contract Time and the Contract Sum shall be equitably adjusted due to the delay.

§12.4 Progress Payments

§12.4.1 After the Architect has issued a Certificate for Payment, the Owner shall make payment in the manner provided in the Contract Documents.

§12.4.2 The Contractor shall promptly pay each subcontractor and supplier, upon receipt of payment from the Owner, an amount determined in accordance with the terms of the applicable subcontractors and purchase orders.

§12.4.3 Neither the Owner nor the architect shall have responsibility for payments to a subcontractor or supplier.

§12.4.4 A Certificate for Payment, a progress payment or partial or entire use or occupancy of the Project by the Owner shall not constitute acceptance of Work not in accordance with the requirements of the Contract Documents.

§12.5 Substantial Completion

§12.5.1 Substantial Completion is the stage in the progress of the Work when the Work or designated portion thereof is sufficiently complete in accordance with the Contract Documents so the Owner can occupy or utilize the Work for its intended use.

§12.5.2 When the Contractor believes that the Work or designated portion thereof is substantially complete, it will notify the Architect and the Architect will make an inspection to determine whether the Work is substantially complete. When the Architect determines that the Work is substantially complete, the Architect shall prepare a Certificate of Substantial Completion that shall establish the date of Substantial Completion, establish the responsibilities of the Owner and Contractor, and fix the time within which the Contractor shall finish all items on the list accompanying the Certificate. Warranties required by the Contract Documents shall commence on the date of Substantial Completion of the Work or designated portion thereof unless otherwise provided in the Certificate of Substantial Completion.

§12.6 Final Completion and Final Payment

§12.6.1 Upon receipt of a final Application for Payment, the Architect will inspect the Work. When the Architect finds the work acceptable and the Contract fully performed, the Architect will promptly issue a final Certificate for payment.

§12.6.2 Final payment shall not become due until the Contractor submits to the Architect releases and waivers of liens, and data establishing payment or satisfaction of obligations, such as receipts, claims, security interests, or encumbrances arising out of the Contract.

§12.6.3 Acceptance of final payment by the Contractor, a subcontractor or supplier shall constitute a waiver of claims by that payee except those previously made in writing and identified by that payee as unsettled at the time of final Application for Payment.

...

ARTICLE 14 CORRECTION OF WORK

§14.1 The Contractor shall promptly correct Work rejected by the Architect as failing to conform to the requirements of the Contract Documents. The Contractor shall bear the cost of correcting such rejected Work, including the costs of uncovering, replacement, and additional testing.

§14.2 In addition to the Contractor's other obligations including warranties under the Contract, the Contractor shall for a period of one year after Substantial Completion, correct work not conforming to the requirements of the Contract Documents.

§14.3 If the Contractor fails to correct nonconforming Work within a reasonable time, the Owner may correct it in accordance with Section 7.3.

ARTICLE 15 MISCELLANEOUS PROVISIONS

§15.1 Assignment of Contract

Neither party to the Contract shall assign the Contract as a whole without written consent of the other.

§15.2 Tests and Inspections

§15.2.1 At the appropriate times, the Contractor shall arrange and bear cost of tests, inspection, and approvals of portions of the Work required by the Contract Documents or by laws, statutes, ordinances, codes, rules and regulations, or lawful orders of public authorities.

§15.2.2 If the Architect requires additional testing, the Contractor shall perform those tests.

§15.2.3 The Owner shall bear cost of tests, inspections or approvals that do not become requirements until after the Contract is executed. The Owner shall directly arrange and pay for tests, inspections or approvals where building codes or applicable laws or regulations so require.

§15.3 Governing Law

The Contract shall be governed by the law of the place where the Project is located, excluding that jurisdiction's choice of law rules.

ARTICLE 16 TERMINATION OF THE CONTRACT

§16.1 Termination by the Contractor

If the Work is stopped under Section 12.3 for a period of 14 days through no fault of the Contractor, the Contractor may, upon seven additional days' written notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed including reasonable overhead and profit, and costs incurred by reason of such termination.

§16.2 Termination by the Owner for Cause

§16.2.1 The Owner may terminate the Contract if the Contractor

.1 repeatedly refuses or fails to supply enough properly skilled workers or proper materials;

.2 fails to make payment to subcontractors for materials or labor in accordance with the respective agreements between the Contractor and the subcontractors;

.3 repeatedly disregards applicable laws, statutes, ordinances, codes, rules and regulations, or lawful orders of a public authority; or

.4 is otherwise guilty of a substantial breach of a provision of the Contract Documents.

§16.2.2 When any of the above reasons exist, the Owner, after consultation with the Architect, may without prejudice to any other rights or remedies of the Owner and after giving the Contractor and the Contractor's surety, if any, seven days' written notice, terminate employment of the Contractor and may

.1 take possession of the site and of all materials thereon owned by the Contractor, and

.2 finish the Work by whatever reasonable method the Owner may deem expedient.

§16.2.3 When the Owner terminates the Contract for one of the reasons stated in Section 16.2.1, the Contractor shall not be entitled to receive further payment until the Work is finished.

§16.2.4 If the unpaid balance of the Contract Sum exceeds costs of finishing the Work, such excess shall be paid to the Contractor. If such costs exceed the unpaid balance the Contractor shall pay the difference to the Owner. This obligation shall survive termination of the Contract.

§16.3 Termination by the Owner for Convenience

The Owner may, at any time, terminate the Contract for the Owner's convenience and without cause. The Contractor shall be entitled to receive payment for Work executed, and costs incurred by reason of such termination, along with reasonable overhead and profit on the Work not executed.

ARTICLE 17 OTHER TERMS AND CONDITIONS

(*Insert any other terms or conditions below.*)