[2017] JMCA Civ 18

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 62/2015

BEFORE: **THE HON MR JUSTICE MORRISON P**
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**EVERETT BRADY**	**APPELLANT**
AND	**NICOLA LAUDER**	**1st RESPONDENT**
AND	**LYDIA JONES**	**2nd RESPONDENT**

Ruel Woolcock instructed by Ruel Woolcock & Co for the appellant

Miss Jacqueline Cummings instructed by Archer, Cummings & Co for the respondents

9 November, 20 December 2016 and 29 June 2017

MORRISON P

[1] I have read in draft the reasons for judgment of my brother F Williams JA. I agree with his reasoning and have nothing useful to add.

F WILLIAMS JA

Background

[2] By this appeal, the appellant sought to set aside orders made in the Supreme Court on 17 April 2015, by which judgment was entered for the respondents in the sum of $30,533,825.58 with interest at the rate of 10% and costs.

[3] We heard arguments in the matter on 9 November 2016 and on 20 December 2016, with a promise that these reasons were to follow, we made the following orders:

1. The appeal as to quantum against the decision made on 17 April 2015, awarding damages on the claim in the sum of $30,533,825.58 with interest of 10%, with costs to the claimants to be agreed or taxed, is allowed.

2. The award of damages in the said sum of $30,533,825.58 with interest and costs is hereby set aside.

3. The matter is remitted to the Supreme Court of Judicature of Jamaica for there to be an assessment of damages by another judge of that court of the amount to be awarded to the claimants/respondents.

4. Half costs of the appeal and in the court below to the appellant to be agreed or taxed.

Nature of claim in the court below

[4] By way of claim form and particulars of claim, both filed on 4 June 2009, the respondents had sued the appellant alleging breach of an oral contract pursuant to which the appellant was required to build a roof on a house at the respondents' premises located at lot 14, Jamaica Beach in the parish of Saint Mary. The premises are registered at volume 1351, folio 945 of the Register Book of Titles.

[5] The appellant had, just before entering into the agreement with the respondents for the construction of the roof, built for them the house on which the roof was later erected. The contract price to be paid to the appellant for the construction of the roof was $2,100,000.00.

[6] The entire building was to have been built in accordance with drawings approved by the Saint Mary Parish Council (the parish council). However, it is common ground that the building was not so built because it was discovered that the building as designed was too big for the lot on which it was to have been built. Adjustments to the building by reducing it in size were therefore necessary. This was done without the required further approval of the parish council.

[7] The respondents' claim against the appellant was based on allegations of negligence and failure to perform the job in a workmanlike manner. In a nutshell, the respondents claimed that the appellant built a timber roof, whereas the agreement was for him to have built a primarily slab roof and that he exhibited poor workmanship in the building of the timber roof.

The grounds of appeal

[8] It is useful to set out the grounds of appeal at this stage, as they reflect: (i) the appellant's bases for challenging the court's ruling; (ii) the main bases for the court's findings and ruling; and, to some extent (iii) some aspects of the appellant's defence at the trial. The grounds are as follows:

> "(i) The learned Judge erred in finding that the Respondents did not acquiesce to the construction of the roof;
>
> (ii) The learned Judge fell into error by finding that;
>
> (a) the efficacy of the design of the roof ought to have been plain to the Appellant and;
>
> (b) the ultimate consequence of the Appellant's less than professional workmanship is to render the

building on which the roof sits unfit for human habitation.

(iii) The learned Judge erred in finding that the Appellant breached a warranty to the Respondents that he would supply good and proper materials as the totality of the evidence pointed to the supply of all material for the erection of the roof being the sole responsibility of the Respondents.

(iv) The learned Judge erred in finding that there was a crush of land space.

(v) The learned Judge erred by failing to consider whether it was reasonable to award damages on the basis of the cost of demolishing the existing roof and replacing it with a roof in keeping with the approved design/drawings.

(vi) The learned Judge erred as a matter of law by misapplying **Applegate v Moss** (1976) BLR 1 to arrive at his decision on the applicable measure of damages."

The hearing of the appeal

[9] At the hearing of the appeal, Mr Woolcock, on behalf of the appellant, decided to first argue ground (v), which, in essence, challenges the reasonableness of the award based on the cost of demolishing the existing roof and replacing it with one in accordance with the approved design. It is therefore that ground that we will consider first.

Ground (v): The learned Judge erred by failing to consider whether it was reasonable to award damages on the basis of the cost of demolishing the existing roof and replacing it with a roof in keeping with the approved design/drawings.

[10] Mr Woolcock submitted that in relation to this award, there were generally two potential methodologies: (i) the cost of reinstatement; and (ii) an award based on the

difference in value between what was built and what was designed. In support of his submission that, if any, it was the latter methodology that the learned trial judge ought to have applied, rather than the former, Mr Woolcock cited the cases of (i) **Ruxley Electronics and Construction Ltd v Forsyth** [1995] 3 All ER 268 and (ii) **British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Limited** [1912] AC 673. The gravamen of Mr Woolcock's complaint under this ground was that the learned trial judge did not address the issue of reasonableness at all. He argued that the learned trial judge appears to have decided to make the award using the reinstatement method, based on (a) the absence of evidence of the cost of repairing the roof; and (b) the opinion of the quantity surveyor that the roof had to be removed and replaced to conform with the approved design. This he characterized as "a critical error" on the part of the learned trial judge.

[11] Mr Woolcock also submitted that there was no evidence before the court that the roof as built was so defective that it had to be demolished. He further submitted that the quantity surveyor's evidence was to the effect that the roof ought to have been constructed in accordance with the design. The quantity surveyor, however, he submitted, could not speak to defects, as he is an expert only in relation to quantities. There was, he further submitted, no expert evidence to say that the existing roof could not be allowed to remain. He submitted that any award of damages should be nominal.

[12] On behalf of the respondents, Miss Cummings submitted that the learned trial judge correctly applied the principles in coming to the measure of damages (applying

the measure of the reinstatement cost). The case of **Archer v Moss; Applegate v Moss** [1971] 1 QB 406, (hereafter referred to as **Applegate v Moss**) she submitted, was appropriately applied by the learned trial judge. On the other hand, she further submitted, the case of **Ruxley Electronics and Construction Ltd v Forsyth** was wholly distinguishable.

The findings below

[13] At paragraphs [153] to [157] of the learned trial judge's judgment, the measure of damages is discussed. There are parts of paragraphs [153], [154] and [157] that are sufficiently important to the issues to be discussed to warrant quotation. Those parts are as follows:

> "[153] According to the learned authors of **Treitel** op. cit. Para. 20-039 the defendant is *prima facie* liable to compensate the claimants "on a "cost of cure" basis: i.e. he must pay for the cost of putting the defects right or of completing the work." This prima facie rule may be displaced in cases where the cost of reinstatement is disproportionate to the advantage gained by the injured party. In the latter case the measure of damages will be "the value of the building had it been built as required by the contract less its value as it stands." (See **McGregor on Damages** 18th ed. para. 26-013)
>
> [154] However, where the party in breach has utterly missed the contract mark the victim's loss is the cost of achieving that contractual objective. This was recognized by Lord Jauncey in **Ruxley Electronics v Forsyth** [1996] A.C. 344, 358:
>
> > 'Where the contract breaker has entirely failed to achieve the contractual objective it may not be difficult to conclude that the loss is the necessary cost of achieving that objective. Thus if a building is constructed so defectively

> that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing.'
>
> ...
>
> [157] From the Quantity Surveyor's perspective it is neither practical nor possible to make adjustments to the roof to make it compliant with the design and specifications. In short it is not repairable. It is perhaps unsurprising that no estimate of repairs was placed before me. I am therefore not in a position to assess the cost of cure in relation to cost of rebuilding the roof. Be that as it may, it appears to me that the instant case is indistinguishable from **Applegate v Moss**. Accordingly, the measure of damages applicable is the same as applied in that case."

Discussion

[14] In the learned trial judge's observations in paragraph [153] of the judgment, it is mentioned that compensation on the "cost of cure" basis is the prima facie rule. The measure of damages is also mentioned, which would be the end result of subtracting the value of the building as it stands, from its value had it been built as required by the contract. Mentioned as well is the view that the latter measure might be used to displace the prima facie rule where "the cost of reinstatement is disproportionate to the advantage gained by the injured party".

[15] At paragraph [154], the learned judge opined that "the cost of achieving the contractual objective" is the measure to be used where the party in breach has "utterly missed the mark". In support of taking this approach reference is made to the case of **Ruxley Electronics and Construction Limited v Forsyth**.

[16] The learned trial judge's approach outlined thus far presents a number of difficulties. To start with, in regard to the case of **Ruxley Electronics and Construction Limited v Forsyth**, it appears that the learned trial judge might not have focussed sufficiently on the full meaning and effect of that part of the quotation (cited at paragraph [154] of the judgment in the court below) that reads as follows:

> "Thus if a building is constructed so defectively that it is of no use for its designed purpose the owner may have little difficulty in establishing that his loss is the necessary cost of reconstructing." (Emphasis added)

[17] Without a doubt, the roof was defective. However, on the evidence that was led, there does not appear to be any or any sufficient basis for the learned trial judge to have concluded that the building in question was "of no use for its designed purpose" as a dwelling and guest house (using the words of Lord Jauncey of Tullichettle in **Ruxley Electronics and Construction Limited v Forsyth**). Neither was there a basis for concluding that the roof "was not fit for the basic purpose it was required" (paragraph [126] of the judgment of the court below).

[18] It seems that the learned trial judge erroneously conflated the issues of whether the appellant had constructed the roof in a workmanlike or professional manner with whether the roof was fit for the basic purpose for which it was required.

[19] A concern also arises from similar conclusions made by the learned trial judge at paragraph [149] of the judgment in relation to issues raised earlier at paragraphs [101] and [102]. These are set out below:

> "[101] ...[D]id the defendant breach his duty to build the roof in a workmanlike or professional manner so that the building upon which the roof was located would be fit for habitation? In other words, was the roof built in accordance with standard building practice and procedure?
>
> [102] The sixth issue for my determination is... are the claimants entitled to damages in the sum of $30,533,825.58? Put another way is the defendant liable to the claimants for [not] installing a roof which accords with the approved drawings?
>
> ...
>
> [149] In addition to that, the work that the defendant did was not done in a workmanlike manner. The ultimate consequence of the defendant's less than professional workmanship is to render the building on which the roof sits unfit for human habitation..."

[20] Paragraphs [101] and [149] seem to assume unfitness for human habitation to be the inescapable consequence of failing to perform the contract in a professional or workmanlike manner. Although at the end of the day the appellant's evidence was rejected at trial, his evidence was that the defects could fairly easily be rectified. There was similar evidence to be found in paragraph 12 of the witness statement of Orelle Whittley of the parish council (which evidence was also rejected by the learned trial judge). However, with the rejection of those bits of evidence, there ought to have been some evidential basis for arriving at the conclusion that the building was unfit for human habitation. In this case there was none, the quantity surveyor not being competent to give such evidence.

[21] Additionally, how the issue is stated in paragraph [102] at first gives the impression that proof of breach of contract would automatically result in the application

of the measure of damages contended for by the respondents at trial. However, the discussion from paragraph [153] onwards shows a consideration of the two main measures of damages.

[22] Mr Woolcock's concern about the court below basing its conclusion that the roof was not repairable on the evidence of the quantity surveyor is understandable and justified, given a quantity surveyor's specialization in quantities. Additionally, the quantity surveyor's sole focus appears to have been on building a roof in accordance with the original approved design. Therefore, his evidence did not address the cost of remedying the defects in the roof, or making the existing roof functional. Indeed, at page 160 of the record of appeal, the 2nd respondent is recorded as saying:

> "The instruction I gave to Clifton and [sic] Logan Associates Limited was to provide cost and [sic] replacing entire roof in keeping with the plan."

[23] In paragraph [157] of the judgment, it is indicated that no estimate of repairs was before the court to have enabled it to assess the cost of cure in respect of the defects to the roof. However, it was, of course, open to the court below to have settled the question of liability alone at that stage and then set the matter down for assessment of damages - either by that court itself or another court differently constituted. So that the absence of evidence at that point was not an insurmountable obstacle and that approach (of dealing with liability alone first and ordering an assessment) could have been adopted in order to obtain the required evidence for the court to use in arriving at and applying the correct measure of damages.

[24] There is support for Mr Woolcock's submission that the slab roof was suggested by the draftsman solely on the basis that it would be more aesthetically pleasing to site the air conditioning units and electrical and other services there, than on the walls of the building. (See, for example, paragraph 7 of the witness statement of Richard Griffiths). This lends further support to the validity of Mr Woolcock's submission as to the effect of the failure of the court below to consider the reasonableness of the award that it made having regard to the particular facts of this case.

[25] In respect of the case of **Ruxley Electronics and Construction Limited v Forsyth** cited by Mr Woolcock, that was a case in which it was established that the appellants were in breach of their contract with the respondent for the construction of a swimming pool at the respondent's house. Instead of building the pool with a maximum depth of 7 feet 6 inches, the appellants built it with a maximum depth of only 6 feet. The respondent sued to recover the cost of demolishing the pool and rebuilding it to the agreed maximum depth. The claim succeeded on liability but failed in relation to the measure of damages sought, on the basis that it would be unreasonable to carry out the demolition and rebuilding works. By a majority, the court of appeal allowed the appeal, and awarded damages based on the cost of reconstruction. On appeal to the House of Lords, the appeal was allowed and the judgment of the trial judge restored, that court finding that to award damages based on the cost of reinstatement in that case would be unreasonable.

[26] There are several dicta contained in **Ruxley Electronics and Construction Limited v Forsyth** which are useful in demonstrating the importance of the

consideration of reasonableness in arriving at the correct measure of damages in any given case. This, for example, was what Lord Mustill had to say on the matter at page 277j of the judgment:

> "[T]he test of reasonableness plays a central part in determining the basis for recovery, and will indeed be decisive in a case such as the present when the cost of reinstatement would be wholly disproportionate to the non-monetary loss suffered by the employer."

[27] Similarly, Lord Lloyd of Berwick, at page 282a-d, made the following observations:

> "This does not mean that in every case of breach of contract the plaintiff can obtain the monetary equivalent of specific performance. <u>It is first necessary to ascertain the loss the plaintiff has in fact suffered by reason of the breach.</u>" (Emphasis added)

[28] There appears to be nothing in the judgment in this case that demonstrates that the court below ascertained the respondents' actual loss as a precursor to determining the measure of damages that would have been properly applicable. With the construction of the roof, defective though it is, the respondents would have obtained some value; but there is no evidence of the value that they actually obtained or a consideration of this value in monetary terms in arriving at the award.

[29] From another perspective, the award that was made by the learned trial judge has the potential to work a very real injustice to the appellant and, looking at the matter objectively, not to bring about the justice that each party in this matter seeks. It is important to realize that in this case, it is not as though the respondents paid the

appellant the sum of $30,533,825.58, or a sum in that region, and got a defective roof. What the respondents paid to the appellant was the sum of $2,100,000.00 or thereabouts; and it was not established that that was what they would have had to pay for erecting a slab roof. Without that evidential foundation, the award, if allowed to stand, would carry with it at least two potential dangers: (i) that the respondents, having paid only $2,100,000.00 in labour (and we do not know how much for materials, as there is no clear evidence on this) could end up with a roof valued at $30,500,000.00 So that, the appellant, having received only $2,100,000.00 would be funding for the respondents a roof valued at $30,500,000.00. (ii) If the present roof is repairable for, say $1,000,000.00 and the award were to be allowed to stand, respondents in the place of these could decide to effect the repairs for the $1,000,000.00 and find themselves enriched to the sum of approximately $29,500,000.00.

[30] It seems to me that the correct approach in deciding on the measure of damages to be utilized in a case involving a breach of a building contract is that set out in **McGregor on Damages** 17th edition, 26-011. It reads as follows:

> "If, however, the cost of remedying the defect is disproportionate to the end to be attained, the damages fall to be measured by the value of the building had it been built as required by the contract less its value as it stands."

[31] An illustration of the application of this principle might be found in the case of **GW Atkins Ltd v Scott** (1980) 46 ConLR 14, CA. In that case the home owner appellant failed in his claim for the cost of the removal and replacement of all the floor

tiles that had been laid at his home, even though he had successfully established that the defendant/respondent had done the work defectively. The finding of the first-instance judge was to the effect that the defects were relatively minor. He therefore refused to award damages of approximately £1,400.00, using reinstatement as the measure, instead awarding the sum of approximately £300.00 for bad workmanship. His appeal to the Court of Appeal was dismissed. At page 23 of the judgment of the Court of Appeal, Sir David Cairns observed as follows:

> "...in some cases it would be grossly unreasonable, or capricious, or perverse, to suggest reinstatement and that in such a case some other basis of assessment must be found. I confess that I can see no reason in principle, nor any support in the authorities, for the proposition that the test is other than lack of reasonableness simpliciter..."

[32] From a reading of the judgment in the instant case, there was a failure to consider the reasonableness of the use of the proposed measure of damages and to ascertain the respondents' actual loss. It is my view that these considerations in respect of ground (v) ought to be determined in the appellant's favour and are in fact sufficient to dispose of the appeal as to quantum in his favour as well.

[33] I will, however, go on to give some brief consideration to the other grounds.

Ground (vi): The learned Judge erred as a matter of law by misapplying Applegate v Moss (1976) BLR 1 to arrive at his decision on the applicable measure of damages.

[34] In relation to the case of **Applegate v Moss**, which the learned trial judge found to be indistinguishable from the instant case, it is useful at this point to set out a summary of its facts. In that case, the defendant had entered into building contracts

with two plaintiffs for the building of a house for each of them. He employed a company to do the job. Defects were later discovered by the plaintiffs in the footings of the houses and they sued for breach of contract. The defendant pleaded section 26 of the Limitation Act of 1939, which, in essence, would have exempted him from liability except in a case of fraud. The trial judge found the defendant liable on the basis of fraud within the meaning of the section. The defendant's appeal against liability was dismissed, the Court of Appeal finding that the defendant's action in covering up the foundations of the houses to conceal from the plaintiffs the defects was sufficient for a finding of fraud in that case. A surveyor, builder and "some experts" were employed by one of the plaintiffs to examine the extent of the damage to the houses. These were among the observations made by Lord Denning, the Master of the Rolls, at page 750 a of the report about the workmanship on the houses:

> "There was no concrete raft. The foundation was on concrete footings. But the footings, instead of being 3 feet or 3 feet 6 inches deep, were only 2 feet 3 inches deep. Worst of all, the concrete was not the proper mixture at all. Instead of an 8 to 1 aggregate and cement, as it ought to have been, it was 15 to 1; with the result that it was friable and liable to break and crumble. Wide cracks were opening beneath the houses. So much so that they were unsafe and unfit to live in. In January 1966 both houses had to be evacuated. It was quite impossible to repair them at any reasonable cost. They were only fit to be pulled down."

[35] The following were among the more important observations of the Master of the Rolls in relation to the question of the measure of damages (at page 751f):

> "If the defects had not been so serious, and the houses could have been repaired at reasonable cost, the damages would be the cost of repair at the date when in 1965 the

> breach was discovered... But in 1965 it was not an economical proposition to repair the houses. It would have cost too much to underpin them.
>
> The only thing was to pull them down. In these circumstances it seems to me that we should apply the general principle that the party injured by the breach should be put into as good a position, as far as money can do it, as he would have been if there had been no breach."

[36] On behalf of the appellant, it was submitted that, if **Applegate v Moss** had been correctly applied, the damages awarded ought to have been the value of the roof at the time the defects were discovered; and not the replacement cost of the roof at the time of trial.

[37] On behalf of the respondents, it was submitted that **Applegate v Moss** was correctly interpreted and applied.

Discussion

[38] I find myself to be in agreement with Mr Woolcock as well that the instant case is distinguishable from **Applegate v Moss** on the facts of each case. In **Applegate v Moss**, the defects affected the very foundation of the structures that were built and necessitated their demolition, meaning that they could not be used for the very purpose for which they were built. In the instant case, however, there is no complaint about the quality of the construction of the building itself that the appellant built; and the defects do not approach the seriousness of those in **Applegate v Moss**. On this basis, I find **Applegate v Moss** to be distinguishable from the instant case. I would therefore find for the appellant on this ground as well.

Ground (i): The learned Judge erred in finding that the Respondents did not acquiesce to the construction of the roof

[39] It was Mr Woolcock's submission that the evidence, taken as a whole, pointed to clear acquiescence by the respondents - in particular regarding the material they obtained for the roof and, in so doing, their acquiescence in the type of roof that was eventually constructed. He submitted that the learned trial judge failed to attach any or any sufficient weight to the following aspects of the evidence and thereby fell into error: (i) the very large amount (two container loads) of lumber bought by the respondents and shipped to Jamaica; (ii) the non-supply of materials such as cement and steel that would be required for constructing a slab roof; (iii) the respondents' knowledge that the approved design featured a predominantly slab roof; (iv) the fact that the 2nd respondent would visit the site at least twice per month; (v) the fact that the 2nd respondent saw the roof as it was being constructed; and (vi) the 2nd respondent testified to having been happy with the roof, before the defects were discovered.

[40] On behalf of the respondents, Miss Cummings submitted that the learned trial judge was correct in his finding that there was no acquiescence. She urged the court to apply the principle enunciated in **Watt v Thomas** [1947] AC 484, one of the main dicta of which urges restraint by an appellate court in determining whether to review the findings of facts of a judge of a lower court.

Discussion

[41] It appears that there is no clear evidence that conclusively demonstrates that the court below erred in coming to its finding on this issue. Although it is somewhat questionable as to why a quantity as large as two container loads of lumber would have been bought without question for the construction of a slab roof, the learned trial judge apparently gave some credence to the view that the respondents were inexperienced in matters of construction and were placing heavy reliance on the advice being given by the appellant.

[42] The resolution of this issue turned on a straight question of fact for the learned trial judge; and whilst there might be matters on this issue that another judge might have approached differently, there is not enough on the evidence and the ultimate finding to warrant this court's intervention on this ground.

Ground (ii): The learned judge fell into error by finding that:

(a) the efficacy of the decision to site the air conditioning and electrical services on the roof ought to have been plain to the appellant (see paragraph 127 of the Judgment) and;

(b) the ultimate consequence of the Appellant's less than professional workmanship is to render the building on which the roof sits unfit for human habitation (see paragraph 149 of the Judgment).

[43] In respect of the first half of this ground (that dealing with the insufficiency of evidence to ground a finding that the efficacy of the decision to site the electrical, air conditioning and other services on the roof ought to have been apparent to the appellant), the court's finding was challenged by counsel for the appellant. On behalf of the appellant, it was submitted that there was no evidence that there was any means

by which the appellant would have become so aware. It was further submitted that in fact the services were said by the quantity surveyor in his evidence not to have been indicated on the drawing that he saw. In fact, counsel pointed to the evidence of the quantity surveyor that it was not a requirement that the services be put on the slab roof. He further submitted that neither did the respondents testify to having conveyed that information to the appellant.

[44] On behalf of the respondents, Miss Cummings submitted that the learned trial judge was quite correct in his finding and that the said finding should not be disturbed.

Discussion

[45] Again, from the evidence, it seems that Mr Woolcock's submissions in respect of this ground are correct. There is nothing in the evidence that I have seen that indicates that the appellant would have been made aware of the reason for the inclusion of a slab roof in the design and that the services were expected to have been sited there. In fact, the evidence of the quantity surveyor appears to be to the contrary: that is that – (i) the proposal to site the services on the roof was not indicated on the drawings; and (ii) there is no requirement for the services to be sited on a slab roof (vide page 10 of the notes of evidence). Therefore, with respect, there was no evidential basis for that finding.

(b) the ultimate consequence of the Appellant's less than professional workmanship is to render the building on which the roof sits unfit for human habitation

[46] Similar to his submissions on ground 2(a), Mr Woolcock submitted that there was no evidence on which the learned trial judge could have based a finding that the building was unfit for human habitation. He submitted that it was the learned trial judge's finding of the existence of defects in the fascia boards, sunlight shining through the roof and other similar defects that led to the finding of unfitness for human habitation. However, he submitted, that finding was not supported even by the testimony of the respondents, who said at most that the sub-standard nature of the work meant that further work on the building could not proceed. It was further submitted that not even the quantity surveyor, on whose evidence the learned trial judge relied, testified that the roof as constructed was defective or rendered the building uninhabitable. The focus of the quantity surveyor in his testimony was on the deviation of the roof as constructed from the drawings.

[47] On the respondents' behalf, Miss Cummings submitted in summary that there was sufficient evidence on which the learned trial judge could have based that finding and, as such, the said finding should not be disturbed.

Discussion

[48] As previously discussed at paragraphs [17] to [19] of this judgment, the learned trial judge fell into error in respect of this ground. This arose by the learned trial judge's seeming equating of the existence of the defects with the rendering of the building uninhabitable, when the two cannot, without more, be equated. It seems to me that,

evidentially, the question of whether the building was uninhabitable or not did not emerge during the trial at all. Neither did it loom large as a part of the pleaded case.

[49] The learned trial judge therefore fell into error in this regard.

Ground (iii): The learned Judge erred in finding that the Appellant breached a warranty to the Respondents that he would supply good and proper materials as the totality of the evidence pointed to the supply of all material for the erection of the roof being the sole responsibility of the Respondents

[50] The essence of the appellant's arguments and submissions in respect of this ground was to the effect that the evidence at the trial pointed to the supply of materials for the construction of the roof solely by the respondents. Having fallen into error by omitting to recognize this important term of the contract between the parties, the learned trial judge, as a result, incorrectly relied on the case of **Hancock and Others v BW Brazier (Anerley) Ltd** [1966] 2 All ER 901.

[51] On behalf of the respondents, Miss Cummings submitted that there was sufficient evidence for the learned trial judge to have based that finding and so the appellant's arguments on this ground ought to be rejected. She also submitted that, even if the court below erred on this ground, that would not affect the matter at the end of the day.

Discussion

[52] In relation to this ground, perhaps some doubt might have arisen from the use of some of the words of the claim form, in a part of which it was averred that the

appellant:

> "...failed and/or refused to do the work in a workmanlike manner and was not of a merchantable quality." (Emphasis added)

[53] However, a perusal of the particulars of claim, especially paragraphs 4 and 5, reveals that the substance of the claim against the appellant was for his alleged failure to do the job in a workmanlike manner. This is how those paragraphs of the particulars of claim read:

> "4. It was an expressed and/or implied term of the said agreement between the Claimants and the Defendant that the Defendant would use reasonable skill and care in such works.
>
> 5. Further, or in the alternative the Defendant owed to the Claimants a duty of care to see that his work was done in a workmanlike or professional manner so that the building upon which the roof was located would be fit for habitation."

[54] In paragraph 17 of the defence and counterclaim, the appellant contended that he had purchased material at QD Roofing, Port Antonio Branch, 51 West Street, Port Antonio, Portland for $170,664.00. However, in paragraph 8 of the reply and defence to counterclaim, the respondents specifically deny this averment and in turn aver that:

> "...the building materials for the roof was [sic] purchased by Claimants from Quality Dealers Limited..."

[55] As is indicated in paragraphs [150] to [152] of the judgment in the court below, the end result of the trial included a rejection of the counterclaim. The court below came to the conclusion that the appellant's counterclaim "was 'proved' only to the extent of the claimants' admission" (paragraph [150] of the judgment). This would mean, therefore, that the contention that the appellant had supplied goods was also

rejected. If that contention was rejected, there would have been no basis for a finding of breach of warranty. It would be correct, therefore, as Mr Woolcock submitted, that the case of **Hancock and Others v BW Brazier (Anerley) Ltd**, which was a case in which the defendant had clearly had the responsibility of supplying material, was distinguishable from the instant case and therefore the former case was misapplied.

[56] The respondent's contentions on this ground must also, therefore, be rejected and those of the appellant accepted.

Ground (iv): The learned Judge erred in finding that there was a crush of land space

[57] This finding that is being challenged is to be found at paragraph [128] of the judgment where the learned trial judge is recorded as stating as follows:

> "[128] There was already a crush of land space resulting in the building being re-sized. This constraint of space should have telegraphed to this seasoned contractor that the slab roof was needed to site these services."

[58] A summary of the challenge to the judgment on this ground is that there was not any or any sufficient evidence on which the court below could have based this finding.

Discussion

[59] It would be difficult not to agree with the appellant's submission on this ground. The evidence of the quantity surveyor on this issue to which I would refer is that recorded at page 165 of the record of appeal, where the quantity surveyor said:

> "Can't say for sure that [sic] whether in fact there was sufficient space for those sufficient to be accommodated on the land."

[60] It is to be remembered that the building as designed was too large to fit on the lot. It had to be reduced in size by omitting some of the apartments. There is no evidence as to any measurements of the space around the building before the adjustment was made, although the court below was told that a truck could not drive completely around it. There is no evidence as to how much space there was around the building after the adjustment was made, although, presumably, there would have been more land space around the building after the adjustment was made than before. There is also no evidence as to how much land space would have been needed to accommodate the services. In the light of the absence of evidence on these matters, the finding of a crush of land space by itself and, more especially, as a basis for concluding that that created a greater need for the construction of a slab roof, is, with respect, not warranted.

[61] The appellant must also succeed on this ground of appeal.

Conclusion

[62] At the end of the day, although there did not appear to be enough by way of error on the part of the court below to disturb the finding on liability (as the ultimate issue was one of a question of fact), there was enough to warrant a setting aside of the award of damages. This was so mainly because the court below failed to consider the question of reasonableness in arriving at what it considered to be the appropriate measure of damages. In the result, there was no alternative but to remit the matter to the court below for damages to be assessed, using the measure of damages stated in **McGregor on Damages**, which is, first, "the cost of remedying the defect". The

assessment should, therefore, seek to focus on the cost of making the adjustments that are necessary to correct the defects in order to make the existing roof functional, bearing in mind at all times the consideration of reasonableness. If that cost is disproportionate to the end to be obtained, then the measure should be: " the value of the building had it been built as required by the contract less its value as it stands".

[63] Using this approach in the assessment of damages should ensure that a result that is fair, equitable and reasonable to the parties is achieved.

[64] It was for these reasons that we made the orders indicated in paragraph [3] hereof.

P WILLIAMS JA

[65] I too have read the draft reason for judgment of my brother F Williams JA and agree with his reasoning. There is nothing I wish to add.