[2020] JMCA Civ 16

JAMAICA

IN THE COURT OF APPEAL

PARISH COURT CIVIL APPEAL NO 14/2016

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**LAWRENCE MILLER**	**APPELLANT**
AND	**BARRY BEEZER**	**RESPONDENT**

Sean Osbourne and Miss Kadian Kerr instructed by Hopeton Clarke for the appellant

Miss Renee Freemantle and Miss Jeromha Crossbourne instructed by Scott Bhoorasingh & Bonnick for the respondent

4, 5 October 2017 and 4 May 2020

MORRISON P

[1] I have read in draft the judgment prepared by P Williams JA in this matter. I agree with the reasons which she gives for the decision we arrived at on 5 October 2017.

BROOKS JA

[2] I have read the draft judgment of P Williams JA and accept that it accurately reflects my own reasons for agreeing to the decision of the court that was handed down on 5 October 2017.

P WILLIAMS JA

[3] This is an appeal against the decision of Her Honour Miss Anne-Marie Nembhard, Senior Parish Court Judge (Ag) for the parish of Clarendon (as she then was), given on 8 September 2016. By plaint filed 14 August 2015, Mr Lawrence Miller, the appellant, brought an action against Mr Barry Beezer, the respondent, to recover damages for breach of contract in the sum of $420,177.00. In March 2014, he had been contracted by Mr Beezer and his wife, Mrs Paula Beezer, to build their house on land situated at St Toolies, Newlands District, Tollgate, in the parish of Clarendon. The sums, he claimed, were the outstanding balance due to him on the termination of the contract.

[4] In May 2016, Mr Beezer counterclaimed, also for damages for breach of contract, in the sum of $1,227,459.76. However he abandoned the amount in excess of $1,000,000.00 to bring his claim within the jurisdiction of the Parish Court. He claimed the sums were due to him as a result of expenditure he incurred to address work not properly done by Mr Miller under the contract.

[5] After hearing the evidence and considering the submissions, the learned Senior Parish Court Judge (Ag), made the following orders:

> "On the Plaint the Court enters Judgment for the Defendant, Mr Barry Beezer.
>
> On the Counterclaim the Court enters Judgment for the plaintiff, Mr Barry Beezer, in the sum of One Million Dollars plus Attorney's costs of One Hundred Thousand Dollars to be paid on or/before December 8, 2016."

[6] Mr Miller is displeased with the decision and has appealed. We heard his appeal and after considering the submissions from counsel on both sides, on 5 October 2017 we made the following orders:

> "1. The appeal is dismissed in relation to the appellant's claim.
>
> 2. Judgment of the learned Parish Court Judge on the claim is affirmed.
>
> 3. Appeal is allowed in relation to the respondent's counterclaim.
>
> 4. Judgment of the learned Parish Court Judge on counterclaim is set aside.
>
> 5. Judgment entered for the appellant on the counterclaim.
>
> 6. No order as to costs in the court below.
>
> 7. Costs of the appeal to the appellant in the amount of $30,000.00."

[7] At that time we promised to reduce our reasons for the decision to writing. We did not intend for so much time to elapse before fulfilling this promise. We apologise for the delay.

Background facts

[8] The parties entered into the contract on 11 March 2014. The house that Mr Miller was contracted to build was to have been constructed in two stages. Stage one was to cover the preparation of the foundation of the building to floor level and the second stage covered the construction from floor to lintel. Mr Miller was provided with a

building plan approved by the Clarendon Parish Council. In the written agreement it was agreed between the parties that the appellant would be paid $1,500,000.00 at the beginning of phase one and a second amount of $1,500,000.00 at the beginning of the second phase. It was also agreed that Mr Miller would be paid 20% and all expenditure for labour and cost of raw material thereafter fortnightly.

[9] In October 2014, Mr Miller's services were terminated by way of an email sent to him by Mrs Paula Beezer, the wife of the respondent. The email read:

> "Paula & Barry Beezer
> 81 Denbigh Street
> Pimlico, London
> SW 1v 2EY
>
> Date 31/10/2014
>
> To: Mr Lawrence Miller
> Larry's trucking Equipment and Properties
> 22 Jackson Crescent
> May Pen P.0. Clarendon
>
> Terminating all Building work By your Company
>
> Dear Mr Miller
>
> This letter is being written to confirm that as of, 31/10/2014 I will no longer need to use your Service. We have been pleased with your prior relationship and it is our wish that we part on good terms, we have decided to use another Building contractor.
>
> The contract agreement with your company was for stage 1 and 2, without any written Contract we have paid and gone further to different stages. My last written notes to you with funds were to clear all unfinished work and outstanding balances. Please use this letter as our notice not to renew any contract or work as you are aware the contract was sign [sic] by Barry Alexander Beezer and a third party. Please feel

free to contact us with any additional issues you may have regarding this termination letter.

Best Wishes,

Paula and Barry Beezer"

[10] In his particulars of claim Mr Miller asserted that during the period between March 2014 and August 2014 he was owed $5,672,940.00 for material and labour and was paid $5,525,762.00, leaving a balance of $420,177.00. The figures have been faithfully reproduced although there seems to be a typographical error in respect of the amount paid. From evidence led, it appears that it should have been $5,252,762.50, but the error was not corrected, even up to the time of judgment.

[11] In May 2016, Mr Beezer filed his counterclaim for breach of contract. He asserted the following:

"...

2. It was a term of the contract that the work would be of satisfactory quality.

3. It was a term of the contract that the Plaintiff/Defendant would carry out the work with reasonable care and skill."

[12] The particulars of the breach were outlined as follows:

"1. Failing to construct the building in accordance with the approved building plans.

2. Failing to complete the agreed scope of work.

3. Using material of inferior quality.

4. As a result of the plaintiff's/defendant's breach of contract the defendant/plaintiff had to employ other persons to complete the work that ought to have been completed by the defendant [sic] and to correct work that was done at a cost of $1,227,459.76. The plaintiff/defendant hereby abandons the excess."

The case presented by the appellant in the Parish Court

[13] Mr Miller testified that he received money from Mr Beezer to buy material and to make payments to the labourers. His fee would be based on the amount that was spent in total. He made a record of the cost of labour and the material and kept a daily book on the site for payment. It was from that book that he compiled all information necessary to prepare his final statement which he submitted to the Beezer after the termination of his contract.

[14] He explained that it was only after he had submitted this final statement that Mr and Mrs Beezer started to dispute the fact that they owed him. They sent him pictures stating they were displeased with certain areas, whereas before sending the statement he had received no complaints about the construction.

[15] Mr Miller said he had completed stage one of the construction and had "reached lintel, where the window height is", but did not complete stage two because he "received a call from Mrs Beezer". (Although Mr Miller insisted that he had built to lintel level throughout the building, he was of the view that he had not completed stage two. This is because, despite the fact that the contract spoke to stage two being to the lintel level, he testified that stage two was supposed to be up to the belting, that is "when the block section is finished and you are ready for decking". While doing the

construction, he took pictures of his progress and sent to Mr Beezer who expressed pleasure with what was being done. After the contract ended an officer from the parish council visited the site and did an inspection for breaches. None were found.

[16] Mr Miller said that a column was built and after the board was removed there were bulges. He, however, said that bulges occur in every single building and was caused by "too much water or the board".

[17] Under cross-examination, Mr Miller was tested on the amount of monies he had in fact been paid. He agreed that he had sent Mr Beezer a statement of accounting dated 20 May 2014 ("the May statement") but insisted that that was not the final statement that he sent. This document was admitted into evidence. He also accepted that after the May statement he had received more monies prior to the eventual termination of the contract. The final statement was sent after Mr Miller said he had concluded all the work "as to stages one and two".

[18] He denied building an office in the incorrect position according to the plan. It was suggested to him that he had "constructed a staircase not in the same position as on the plan". He denied this. He insisted that he had completed the entire building up to lintel level. He said that he had even gone beyond that level "with some belting at the front". He disagreed with the suggestion that one side of the building was not up to lintel level.

The case presented by the respondent in the Parish Court

[19] Mr Beezer testified that the walls on the left side as well as at the back had bulges. He also complained that Mr Miller had built "the office inside the hallway." He said that had not been corrected. He explained that one side of the house had not been completed to the level Mr Miller was contracted to do. He had to employ different contractors to correct the bulges and to complete the building to the lintel level.

[20] Under cross-examination, Mr Beezer acknowledged that Mr Miller had sent him a final statement of accounting on 5 December 2014 ("the December statement") showing the "amount paid to workers and the cost to purchase material". This document was admitted into evidence. The December statement concludes with the following calculation:

"Grand Total [expenditure and contractor's %]	$5,672,940.00
Total Money Received	$5,252,762.50
Balance	$ 420,177.00 [sic]"

[21] Mr Beezer accepted that nowhere in the email, that was sent to Mr Miller terminating his services, was there any indication of dissatisfaction with the work that had been done. He denied that the complaints were made only when Mr Miller demanded payment of the sums he said he was owed. He denied stopping Mr Miller before he could complete the work contracted to do. He insisted that Mr Miller made alterations to and breached the building plan and used material that was not of good quality.

[22] Mrs Beezer gave evidence supportive of that of her husband. She, however, complained that "both sides of the wall were out of place". The office was placed in the wrong place. It was in the middle of the hallway. Only the front of the building was at lintel level. The back was not at lintel.

[23] She explained that to repair both side walls cost $250,000.00 to level, cut and then rebuild. She said they paid "other guys" to take it up to lintel level and every two weeks they paid these guys $80,000.00 for a period of three months.

[24] She denied ever seeing the December statement and she identified the May statement as the final statement.

[25] Mrs Beezer said that Mr Miller was going onto further stages without consulting them and without documents. She agreed that the email terminating the contract with Mr Miller did not detail any complaints. She sent Mr Miller a long email outlining all the problems and the jobs outstanding. This, she said, was done long before the email of termination and she had proof of it in "whatsapp messages".

[26] She insisted that Mr Miller had been paid all due to him and more than the $420,177.00 that he claimed they owed him.

[27] In answer to a question posed by the court, Mrs Beezer described seeing the right hand side of the wall "sticking out; like it had a bubble".

[28] Mr George Bucknor testified that he had done work on the Beezer's house in November 2015. He described the work he did in order to "cut off the wall that swell

out". This was done on three sides. He explained that if in the boxing of the walls and the columns the straps were not done properly or closely enough, when the material is poured in, bulging would occur. He said the bulging he saw was hard, indicating it had been there for a long time. He was responsible for paying three workmen. He charged $250,000.00 for the work done.

[29] Under cross-examination, he explained that when he commenced working all the building was up to lintel level. He also indicated that the bulging was not only on columns but also on the back porch.

[30] The final witness who gave evidence on behalf of Mr Beezer was Mr Manley Atherton, the father of Mrs Beezer. He did masonry and carpentry work on the building. He was at the site from the construction commenced. Mr Atherton said that he was the one who eventually worked on the house and brought it up to lintel level after Mr Miller left the job. None of the house was at lintel level when Mr Miller left. Mr Atherton said it cost $1,000,000.00 to bring the house to lintel level.

[31] When cross-examined, Mr Atherton explained that he had done a little part-time work with Mr Miller up to the time Mr Miller had stopped working on the house in August 2014. He was there when Mr Miller and a gentleman from the parish council had visited the site but he had prevented them from entering.

[32] Mr Atherton said it took "three days to bring the wall up to lintel level" and "over six months to finish the job". He had started working around three weeks after Mr Miller

left when his daughter called him and told him what had happened. He said the only fault he found was that the columns were bulging.

The decision of the learned Senior Parish Court Judge (Ag)

[33] The learned Senior Parish Court Judge (Ag) identified three issues to be determined; namely:

> "(i) Is [Mr Beezer] indebted to [Mr Miller] in the sum claimed or at all?
>
> (ii) Is [Mr Miller] in breach of his contract with [Mr Beezer]?
>
> (iii) Did [Mr Beezer] incur cost in rectifying the faults in the building the faults in the building constructed by the [Mr Miller]?"

[34] The learned Senior Parish Court Judge (Ag) considered the law relating to a contract before setting out her reasons for judgment. She recognised that it is an implied term in every contract of service that the party providing the service would utilize reasonable care and skill in the performance of his duties.

[35] She rehearsed all the evidence, including the documentary evidence that had been presented. She noted that the May statement showed the total cost for material and labour amounted to $5,184,485.00. She noted that in his evidence Mr Miller agreed that as stated in the May statement, he had been paid $4,963,247.00. This, she found meant that there would be a balance of $221,238.00 and not the amount he had claimed.

[36] She also observed that Mr Miller accepted that after the May statement he had received more sums which when totalled showed that he had been paid in excess of the

amount being claimed. She noted that Mr Miller did not indicate which specific amounts that he claimed was owed for labour or for the purchase of material. She also noted that he did not speak to the contents of the December statement in any significant way. She found it instructive that Mrs Beezer denied receiving that statement.

[37] The learned Senior Parish Court Judge (Ag) queried the delay between the final item on the December statement, 22 August 2014, and the date it was submitted, 5 December 2014. She noted that the letter of termination was dated 31 October 2014, yet no statement of accounting was submitted until December 2014. She noted that the December statement did not reflect all the payments that Mr Miller admitted receiving in his viva voce evidence.

[38] She concluded that Mr Miller had "not proven on a balance of probabilities that [Mr Beezer] is indebted to him in the amount claimed or at all".

[39] She then went on to consider the counterclaim and addressed the question of whether Mr Miller was in breach of his contract with Mr Beezer. She set out her reasons for judgment in relation to the counterclaim in the following terms:

> "299. The Court finds that there is cogent evidence on [Mr Beezer's] case that there were faults in the structure of the building constructed by [Mr Miller].
>
> 300. There is no dispute that there were bulges in a wall. [Mr Miller] contends that this occurs in the construction of every building. [Mr Beezer's] witness, Mr George Bucknor, does not agree with this however and testified that the bulging is as a result of poor workmanship.

> 301. There is also cogent evidence on [Mr Beezer's] case that [Mr Miller] failed to bring the construction of the building up to lintel level in its entirety as contemplated by the contractual agreement between the parties.
>
> 302. [Mr Beezer] has also called as a witness the tradesman whom he alleges he contracted and paid to remedy this.
>
> 303. [Mr Beezer] and his witness have also testified of the construction of the office in the wrong place- in a hallway.
>
> 304. Mr George Bucknor has given evidence of the amount of money that he charged [Mr Beezer] to remedy the bulging in the walls and of the cost of bringing the building up to lintel level in its entirety.
>
> 305. Mr Manley Atherton also testifies about the cost of remedying the defects in the building constructed by [Mr Beezer]."

[40] In her conclusions she had this to say in relation to the counterclaim:

> "The Court finds on the other hand that [Mr Beezer] has proven on a balance of probabilities that were structural faults to the building constructed by [Mr Miller] and that he incurred cost in excess of one million dollars to remedy same."

The grounds of appeal

[41] Mr Miller filed his notice of appeal on 22 September 2016, challenging the decision of the learned Senior Parish Court Judge (Ag) on the following grounds:

> "1. The Learned Senior Parish Court Judge erred in law in entering judgment for the defendant/respondent in the sum of $1,000,000.00 when the defendant/respondent failed to present relevant evidence to support the sum awarded.

2. The Learned Senior Parish Court Judge erred in law in entering judgment for the defendant/respondent where little or no weight was placed on the evidence which would have supported the case of the plaintiff/appellant.

3. The Learned Senior Parish Court Judge failed to take into consideration the evidence in support of the plaintiff/appellant which would have led to the judgment in favour of the defendant/respondent [sic].

4. The appellant craves the court's leave to file additional grounds of appeal as soon as the notes of evidence are available.

5. That the judgement entered by the Learned Senior Parish Court Judge is unreasonable and cannot be maintained on the evidence."

[42] The following 'particulars' were also identified :

"a. The Learned Senior Parish Court Judge found that the plaintiff/appellant owes the defendant/respondent the sum of one million dollars despite the fact that on the defendant/respondent evidence the expert witness, Mr George Bucknor, states that he received the sum of two hundred and fifty thousand dollars for the work he had done on the house.

b. That the defendant/respondent did not provide any substantial evidence to the court to which the Learned Senior Parish Court Judge would find that the plaintiff/appellant would be liable to the defendant/respondent.

c. The Learned Senior Parish Court Judge gave little weight to the evidence from the parties that the services of the Plaintiff//appellant was terminated before the work was completed; therefore, the defendant/ respondent would have put himself in the position of having to employ someone else to complete the work.

d. The Learned Senior Parish Court Judge gave no consideration to the fact that the

defendant/respondent did not call upon the plaintiff appellant to rectify any defect that was identified by him and that the premature termination of the contract by the defendant/respondent would have prevented the plaintiff/appellant from rectifying any defect thereafter identified.

e. The fact that the Learned Senior Parish Court Judge found that the Plaintiff/Appellant was in breach of contract notwithstanding evidence presented that indicates that the defendant/respondent was satisfied with the work done."

[43] When the matter came up for hearing, Mr Osbourne, on behalf of Mr Miller, was granted to permission to argue another ground namely:

> "The learned Parish Court Judge failed to consider the credibility of the witnesses."

Submissions for Mr Miller

[44] Mr Osbourne submitted that although the court concluded that Mr Beezer had proven on a balance of probabilities that there were structural faults in the building constructed by Mr Miller, Mr Beezer had no documentary proof to support his bald assertions that he had incurred cost in excess of $1,000,000.00 to remedy same. In civil proceedings, he who alleges must prove, and findings of fact are to be supported with evidence from which the court could reasonably infer that the disputed figures existed at the relevant point in time. Counsel cited **Watt (or Thomas) v Thomas** [1947] AC 484 for support of this submission.

[45] Counsel further submitted that the learned Senior Parish Court Judge (Ag) erred in law by entering judgment for Mr Beezer while little or no weight was placed on the

evidence given by Mr Lawrence. He contended that the sum claimed was owed as part of the contractor's fee which was derived as a percentage of the total cost of material and labour and the learned Senior Parish Court Judge (Ag) erred by failing to distinguish contractor's fees from monies paid over for material and labour.

[46] It was further submitted that the judgment entered by the learned Senior Parish Court Judge (Ag) was unreasonable and cannot be maintained on the evidence. The court's finding that there were structural defects to the building constructed by Mr Miller, which was remedied at a cost of $1,000,000.00 by Mr Beezer, was unreasonable in that the court failed to:

> "i. consider whether [Mr Miller] was made aware of the structural defects by the [Mr Beezer] and was allowed a fair chance to remedy same;
>
> ii. appreciate the reality that structural defects reasonably occur during construction and would be insufficient ground to ground a claim for breach of contract;
>
> iii. appreciate the true nature of the counterclaim of $1,000,000.00 as a response to being sued for $420,000.00 since no positive action was taken by the [Mr Beezer] prior to the initiating of the suit by the [Mr Miller] and considered the counterclaim a pivotal factor in the case and gave little weight to the substantial issues regarding the claim for breach of contract."

Submissions for Mr Beezer

[47] In response, Miss Freemantle, for Mr Beezer, submitted that the learned Senior Parish Court Judge (Ag)'s finding that the contract was breached was clearly supported

by the evidence. There was no dispute that the walls were bulged, there was an admission of this from Mr Miller in cross-examination, and this was also the evidence of Mr Beezer and his witnesses. There was evidence that the building was not up to lintel level and that the office was built in the wrong position. Counsel submitted that Mr Beezer and his witnesses clearly established that expenses in excess of $1,000,000.00 were incurred in order to rectify the breaches.

[48] To the suggestion that there was no documentary proof to support the claim that Mr Miller had incurred expense of $1,000,000.00, it was submitted that it is well settled that the learned Senior Parish Court Judge (Ag) was properly able to make findings of fact based on the oral evidence of witnesses even in the absence of documentary proof. Counsel cited the cases of **Mark Bowen v Andrew Ignatius Ho-Shue** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 23/2002, judgment delivered on 30 July 2004 and **Electoral Office of Jamaica v Haughton Duhaney** [2012] JMCA Civ 27, in support of this proposition.

[49] Counsel contended that the learned Senior Parish Court Judge (Ag) could safely rely and properly relied on the evidence of Mr Atherton regarding the cost of bringing the building up to lintel level. She pointed out that neither Mr Atherton nor Mr Bucknor had been challenged in cross-examination on their evidence as to the cost for doing the work they did.

[50] With regard to the submission that little or no weight was placed on Mr Miller's evidence, counsel submitted that the learned Senior Parish Court Judge (Ag) was

entitled to and was indeed expected to give weight to the evidence of witnesses who were assessed to be credible and to place little or no weight on the evidence of incredible witnesses. Counsel submitted that it was clear from the learned Senior Parish Judge (Ag)'s reasons for judgment that she was not impressed with the Mr Miller's evidence in the wake of clear inconsistencies, fabrications, as well as certain admissions made by him in cross-examination.

[51] Miss Freemantle also submitted that the learned Senior Parish Court Judge (Ag) made no error or misunderstanding as it relates to contractor's fees since both statements of account showed contractor's fees separate from the cost of labour and materials. Further, Mr Miller's claim was for an alleged balance for work done and not contractor's fees. Additionally, Mr Miller's evidence was unreliable as the May statement showed a balance of $221,238.00 and he admitted under cross-examination that he received payments after the date of that statement which amounted to more than $221,238.00. Regarding the December statement, counsel pointed out that the final item on that statement bore a date in August 2014 which supported Mr Beezer's contention that Mr Miller had stopped working on the house in August 2014 and therefore it was questionable that Mr Beezer waited four months before submitting his final statement of accounts.

[52] Counsel submitted that the fact that Mr Beezer counterclaimed for damages for breach of contract as opposed to having commenced the action himself ought not to and did not affect the learned Senior Parish Court Judge (Ag)'s assessment of the evidence. It is well settled law that a party has a right to commence legal proceeding as

soon as the cause of action arises and this right continues unless the defence of limitation is successfully pleaded.

[53] Miss Freemantle further submitted that, given that it is well settled that an implied term in every contract for service is that the party providing the service would utilize reasonable care and skill in the performance of his duties, the contract is breached once that due care and skill is not forthcoming. She contended that it therefore follows that there was no duty on Mr Beezer to give Mr Miller the opportunity to remedy the defects.

[54] Counsel submitted that credibility was a live issue in the case and was carefully considered by the learned Senior Parish Court Judge (Ag). She contended that the learned Senior Parish Court Judge (Ag) considered Mr Miller's credibility in light of the statements of account that were submitted to the court. Counsel reiterated that the statements cannot be safely relied on as there were discrepancies in the figures between what Mr Miller stated was owed and what he admitted to receiving, which supported Mr Beezer's case, that no money was owed.

The law

[55] A Parish Court Judge is required to set out a statement of his reasons for the judgment, decree or order appealed against (see section 156 of the Judicature (Parish Court) Act). In so doing, one of the things the Parish Court Judge is expected to do is set out the facts proved and, if there are any conflicts in the evidence, he must demonstrate how he resolved the conflicts.

[56] The decision arrived at by the learned Senior Parish Court Judge (Ag) was influenced by her findings of fact. It is well established that this court is loath to interfere and will not lightly disturb such findings made by the tribunal which has the responsibility for doing so. Their Lordships of the Privy Council have in several decisions stated the principles which should guide appellate courts when confronted with complaints relating to findings of facts made in courts below.

[57] In **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21, at paragraph [12], the Board stated:

> "…It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'. See, for example, Lord Macmillan in *Thomas v Thomas* at p 491 and Lord of Craighead in *Thompson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd* v *Jackson* [1992] ICR 85, Lord Donaldson at p 92. Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169."

[58] In **Bahamasair Holdings Ltd v Messier Dowty Inc** [2018] UKPC 25, the Board revisited the matter and, at paragraph [36], Lord Kerr had this to say:

> "The basic principles on which the Board will act in this area can be summarised thus:
>
> 1. '… [A]ny appeal court must be extremely cautious about upsetting a conclusion of primary fact. Very careful consideration must be given to the weight to be attached to the judge's findings and position, and in particular the extent to which, he or she had, as the trial judge, an advantage over any appellate court. The greater that advantage, the more reluctant the appellate court should be to interfere…' - *Central Bank of Ecuador v Conticorp* SA [2015] UKPC 11; [2016] 1 BCLC 26, para 5.
>
> 2. Duplication of the efforts of the trial judge in the appellate court is likely to contribute only negligibly to the accuracy of fact determination - *Anderson v City of Bessemer,* cited by Lord Reed in para 3 of *McGraddie*.
>
> 3. The principles of restraint 'do not mean that the appellate court is never justified, indeed required, to intervene.' The principles rest on the assumption that 'the judge has taken proper advantage of having seen the witnesses, and has in that connection tested their evidence by reference to a correct understanding of the issues against the background of the material available and the inherent probabilities.' Where one or more of these features is not present, then the argument in favour of restraint is reduced - para 8 of *Central Bank of Ecuador*."

Analysis

[59] I propose to consider the issues in the manner that they were identified by the learned Senior Parish Court Judge (Ag).

Was Mr Beezer indebted to Mr Miller in the sum claimed or at all?

[60] The learned Senior Parish Court Judge (Ag) correctly rehearsed the evidence surrounding Mr Miller's claim. She recognised that by a mathematical calculation of the sums he said he had spent, less those which he accepted he was paid, the amount being claimed was not justified.

[61] In attempting to prove his case, Mr Miller did not offer any documentary evidence detailing the amounts he claimed was due to him. The December statement was shown to Mr Beezer by counsel appearing for Mr Miller at the trial and accepted by him as the one Mr Miller had sent to him. It was therefore curious, as the learned Senior Parish Court Judge (Ag) observed, that this document was never commented on by Mr Miller himself.

[62] Although in the submissions made before this court, counsel for Mr Miller contended that the learned Senior Parish Court Judge (Ag) failed to appreciate the significance of the contractor's fee, it was clear from the manner in which his claim was set out that there was no indication that such a distinction was to be made. His particulars spoke to what he was owed for material and labour and what he was paid leaving a balance which he said was owed.

[63] In any event, there was included in the May statement an amount for "Mr Miller's 20%". It was demonstrated from the cross-examination of Mr Miller that he had subsequently received an amount in excess of the total set out in this statement. In the December statement an amount was included in the total owed for "contractor". It was from this total amount that the amount received was deducted. However, as the learned Senior Parish Court Judge (Ag) correctly observed, this statement did not include all the sums Mr Miller acknowledged receiving and the balance reflected therefore could not be relied on. The learned Senior Parish Court Judge (Ag) cannot be faulted for dealing with the issue in the manner she did.

[64] It cannot be said that the learned Senior Parish Court Judge (Ag) was "plainly wrong" in her finding that on the evidence the appellant had failed to prove his case.

Was Mr Miller in breach of his contract with Mr Beezer?

[65] The learned Senior Parish Court Judge (Ag) commenced her reasons for judgment in relation to this issue by stating that she found cogent evidence that there were faults in the building constructed by Mr Miller. She concluded by finding that on the balance of probabilities there were structural faults to the building. The particulars of the breach which had been identified in the counterclaim were failure to construct the building in accordance with the plan, failing to complete the agreed scope of work and using material of inferior quality.

[66] The first observation that has to be made is that the learned Senior Parish Court Judge (Ag) did not consider the evidence in relation to the specific breaches identified. In treating the complaints as being under the general rubric of structural faults, she failed to delineate which of them was as a result of failure to construct the building in accordance with the plan or of failure to complete the agreed scope of work or of using material of inferior quality.

[67] The learned Senior Parish Court Judge (Ag) found that there was no dispute that there were bulges in a wall. Mr Beezer said the bulges he saw were on a wall to the left side and at the back. Mrs Beezer spoke of "both sides of the wall being out of place" and of seeing the "right hand side of the wall sticking out like it had a bubble". Mr Buckner, who testified to fixing problems with the walls, did so over a year after Mr

Miller had stopped working on the building. He first said it was three sides that he "cut off the wall" and later said he was not referring only to columns but that it was also at the "back porch, the side of column [he] saw bulges". He said that the bulging was hard, which indicated it was there for a long time. Mr Atherton said he saw bulges but did not say where. He said he had started working around three weeks after Mr Miller had stopped and that "it took around six months to finish the job". He would therefore have done work after Mr Miller's contract had been terminated and before Mr Bucknor had done his corrective work.

[68] The state of the evidence was such that there was no clear picture as to which of these bulges the Senior Parish Court Judge (Ag) was satisfied to describe as bulges "in a wall". In the circumstances, I do not think her limiting her finding to there being no dispute that there were bulges in a wall was sufficient.

[69] Further, it seems to me that a question arose as to whether the bulges Mr Bucknor said he corrected were there as a result of work Mr Miller had done, especially given the intervening work of Mr Atherton. This question remained unresolved, even though Mr Miller spoke of seeing bulges in a column when his services had been terminated.

[70] Certainly the existence of bulges could have been viewed as a breach of the implied terms of the contract to do work of a satisfactory quality and to carry out work with reasonable care and skill. It seems to me, however, that the learned Senior Parish

Court Judge (Ag) was obliged to demonstrate how she resolved the conflicts that arose in the evidence.

[71] The learned Senior Parish Court Judge (Ag) found there was cogent evidence on Mr Beezer's case that the house had not been brought up to lintel level "in its entirety". Although not specifically identified as such, this would be in relation to the issue of whether Mr Miller had completed the agreed scope of work. Mr Beezer testified that the right side of the house was not at lintel level. Mrs Beezer testified that the back was not at lintel level. She also said that Mr Miller was going unto other stages without consulting them. Mr Atherton, on the other hand, said that no part of the house was at lintel level and it was he who brought it up to that level.

[72] It is not clear to me which evidence in particular the learned Senior Parish Court judge (Ag) preferred on this issue to have found as she did that the house had not been brought up to lintel level in its entirety. The evidence was in such conflict that she ought to have demonstrated clearly whether she found that only one portion was not up to lintel level and, if so, whether it was the back as Mrs Beezer had said or the right side as Mr Beezer had said. Or was it that she accepted that it was the entire building that had not been brought up to the required level, as Mr Atherton had testified? She ought to have clearly demonstrated which of the three versions she found to be credible such that she was able to arrive at her conclusion that there was cogent evidence on this matter.

[73] The Learned Senior Parish Court (Ag) noted the evidence that the office was not constructed in the right place. Both Mr and Mrs Beezer had spoken of an office being built in the hallway. Mr Miller had maintained that he did not build an office in the incorrect position, "not according to the plan".

[74] This complaint could be viewed as concerning the failure to construct the building in accordance with the approved building plan. Although there was evidence that a plan existed which was to have guided how the house was to be constructed, none was admitted into evidence. The only other evidence about this was to be found in the written agreement for construction which stated:

> "...Thereafter, the architectural drawing will be followed as indicated on the plan, master bedroom, bathroom and closet, second bedroom and third bedroom to compromise with the use of one bathroom and two closets. Living area will be amended based on owner's decision along with kitchen, washing room, back porch as stated."

It is clear from this that there is no mention of an office in the plan. How then could it be proven that the office was built in the incorrect position?

[75] In any event, other than noting the fact that the evidence was given, the learned Senior Parish Court Judge (Ag) did not make any other comment about this matter thereby demonstrating if and how it influenced the reasons for her decision.

[76] It seems to me that the evidence did not support the learned Senior Parish Court Judge (Ag)'s finding that there was "cogent" evidence of faults in the structure of the building. There was therefore merit to the overarching ground of appeal that the

judgment entered by the learned Senior Parish Court Judge (Ag) was unreasonable and could not be maintained on the evidence as it related to the counterclaim.

Did Mr Beezer incur costs in rectifying the faults in the building constructed by Mr Miller?

[77] The learned Senior Parish Court Judge (Ag), having found that there were faults, made two observations about the cost of effecting the repairs. Firstly, she noted that Mr Bucknor had given evidence of the amount of money he had charged to remedy the bulging and of the costs of bringing the building up to lintel level in its entirety. She clearly misquoted the evidence from Mr Bucknor who had said nothing about his being involved with bringing the house up to lintel level.

[78] She also noted that Mr Atherton had testified about the costs of remedying the defects in the building. Mr Atherton said it had cost $1,000,000.00 to only bring the house up to lintel level, not to remedy all defects. He gave no indication of how this amount was arrived at.

[79] Counsel for Mr Miller was therefore correct in his submission that Mr Beezer had failed to present relevant evidence to support the sum awarded. The learned Senior Parish Court Judge (Ag) was satisfied on only the assertions of the witnesses, especially that of Mr Atherton, that Mr Beezer had incurred cost in excess of $1,000,000.00 to remedy the structural faults which she found had existed.

[80] In **Mark Bowen v Andrew Ignatius Ho-Shue**, this court explained the need to adduce evidence to support a claim for special damages. In that case, the appellant

had taken two jet skis, a wave runner and a jet mate boat from the respondent with a view to renting them. The appellant took custody of the items in February 1995 and they were never returned. In May 1998, the respondent demanded the return of his equipment and thereafter commenced legal action. One of the awards made to him was for special damages for the cost incurred by him in the acquisition of rented water sports equipment. The appellant's challenge to this award was on the basis that the respondent had failed to discharge the onus of strictly proving his loss.

[81] At pages 6 to 7 of the judgment Cooke JA, writing on behalf of the court, had this to say:

> "This court has accepted the principle that there is an onus on a plaintiff to prove his loss strictly. See **Lawford Murphy v Luther Mills** [1976] 14 J.L.R 119. However, what is sufficient to amount to strict proof will be determined within the context of the particular case. For example, a casual worker could not be expected to produce documentary evidence of his earnings. The position would be the same in respect of income earned from a sidewalk vending trade...
>
> The appellant submitted that in order to strictly prove his loss of $666,000 he should have either (a) called the individuals from whom he purchased the equipment; or (b) produced receipts, and neither was done. There are however two factors to be considered. Firstly, the evidence of the respondent as to the purchase price was never challenged by the appellant who was in the water sports business. It is not an unreasonable inference that, in the absence of any such challenge, the appellant accepted the sum claimed as the purchase price as reasonable. Secondly, there is the evidence of the appellant that he paid US$3000 for his comparable jet Skis. The respondent claimed $110,000 for each of the rented skis.... In 1994 the average exchange rate of our dollar vis-a-vis the United States dollar was $33.50 to one. So, a conversion of what the appellant said

> he paid for one ski would approximate to what the respondent said he paid for each of the rented skis. The learned judge found the respondent to be a credible witness. Certainly it cannot be said that the purchase prices he claimed were unreasonable."

[82] From this reasoning, it is clear that, although there was no documentary or other evidence to support the respondent's claim, there was a basis for concluding that the amount being claimed was not unreasonable.

[83] The need for something more than the assertion of a claimant to assist the court in assessing special damages in certain cases was again demonstrated in **Electoral Office of Jamaica v Haughton Duhaney**. The appellant challenged the quantum of damages that had been awarded to the respondent in his claim for damages for injuries he had suffered from an accident caused by an agent of the appellant. One issue that arose was whether the learned trial judge was correct in making an award for the paid assistance which the respondent claimed he had needed for four years. The basis for the challenge to the award was that there was an absence of "evidence other than that of the respondent that he had paid for his care". This court noted that the learned trial judge had correctly reviewed the medical evidence adduced in the reports from three doctors and concluded that "it was open to the trial judge to assess the nature of the injuries described in the medical reports and, by inference, determine whether it was reasonable in those circumstances for the respondent to have obtained assistance".

[84] Harris JA, writing on behalf of the court, stated at paragraph [16]:

> "....In my view, it is not unreasonable to conclude that the arrangement in relation to the paid assistant may not have been of so formal a nature as to involve the giving of receipts. It would therefore have been for the judge, after observing the respondent being tested under cross-examination, to decide whether he accepted that he had paid for the help. In my view, once the learned judge was satisfied that the nature of the injuries was of such as to require the extra help and he believed the respondent that he had paid these sums, he was entitled to make the award."

[85] In **Attorney General of Jamaica v Tanya Clarke (nee Tyrell)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2002, judgment delivered 20 December 2004, this court revisited the issue in circumstances where the appellant had challenged an award of damages for visits to a doctor without any documentary support of the cost per visit. Cooke JA had this to say at pages 12 -13:

> "The respondent relies on the court below accepting 'that evidence as true, credible and reasonable' (i.e. the evidence of the respondent). However, I am at a loss as to determining the criteria which were employed in the assessment of either credibility or reasonableness.... Here is a situation where the court could not utilize its experience, without more, in the adjudication of whether or not the assertion of the plaintiff in this regard was acceptable. The court was a stranger as to medical costs in the United States of America. This is a different situation from the cases of **Desmond Walters v Carlene Mitchell**, (supra) **Grant v Motilal Moonan Ltd and Another**, (supra) **Hepburn Harris v Carlton Walker and Central Soya of Jamaica Ltd. v Junior Freeman** (supra). In these cases the experience of the court could be employed. Judges live in their society and are not oblivious to the realities therein."

[86] In applying that guidance to this case, it may be said that the learned Senior Parish Court Judge (Ag) merely referred to the fact that certain witnesses had given evidence of amounts they had charged for the work they had done and concluded that

Mr Beezer had incurred cost in excess of $1,000,000.00 to remedy the structural faults she had accepted existed. She did not make an explicit determination as to whether the amount being claimed by Mr Beezer was reasonable. This was a matter in which the question as to whether in these circumstances she had properly utilised her experience, without more, in making the award does not arise.

[87] The evidence of the amount incurred by Mr Beezer to remedy the defects came from three witnesses namely Mrs Beezer, Mr Bucknor and Mr Atherton. While Mr Beezer said he had to get other contractors to correct the bulge and to bring the building up to lintel level, he did not say who those contractors were or give any indication as to the amount he had paid to them.

[88] As has been discussed above, the evidence as to what was actually needed to be done to complete the work that ought to have been completed or to correct work that was done as alleged in the counter claim was not clear. Mr Miller challenged the necessity for any further work relating to what he had done and so the fact that he did not specifically challenge the amount claimed did not mean that he accepted it.

[89] The evidence from Mr Bucknor as to the amount he charged to do whatever work he did must be considered against the fact that he did work in November of 2015, when Mr Miller's services had been terminated in August of 2014 and Mr Atherton had in between that time done work on the building. This raised the issue of whether the corrections made by Mr Bucknor were indeed related to the work of Mr Miller. It has

already been noted that the learned Senior Parish Court Judge (Ag) did not address her mind to this issue.

[90] Mrs Beezer, who testified that they paid "other guys" to take the building up to lintel level, had said it was only the back that was not at lintel. She said they paid the guys $80,000.00 and further that every two weeks they had paid three guys $80,000.00 for three months. She did not indicate whether one of those "guys" was in fact her father. In any event, his evidence did not support hers, since he said it was he who had brought the house up to lintel level at a cost of $1,000,000.00. Further, he said it took him three days to bring the wall up to lintel level and six months to finish the job. To my mind, this was a discrepancy which required a proper assessment to determine who had in fact brought the building up to lintel level in order to make a finding as to what if any sums Mr Beezer had incurred.

[91] Unfortunately, the careful way that the learned Senior Parish Court Judge (Ag) considered the evidence in support of Mr Miller's claim was not apparent in her approach to the counterclaim. In these circumstances, the need for evidence from which a determination as to whether an amount in excess of $1,000,000.00 had been incurred to remedy any structural faults other than the mere assertion of the witnesses was necessary.

Conclusion

[92] The learned Senior Parish Court Judge (Ag)'s findings in relation to the claim made by Mr Miller were entirely reasonable and were supported by the evidence.

However, she failed to properly analyse the evidence in relation to the counterclaim and this failure was such that it undermined her conclusions. This meant that this court was therefore obliged to disturb and set aside her decision based on these conclusions.

[93] It was for these reasons therefore that I agreed with the order in paragraph [6].