

IN THE SENIOR COURTS OF BELIZE

IN THE HIGH COURT OF BELIZE

CLAIM No. CF 197 of 2021

BETWEEN:

DEREK BROMAN

Claimant

AND

LINDA KIMBLE

Defendant

Appearances:

Mr. Rene Montero for the Claimant
Mr. Allister Jenkins for the Defendant

Written Submissions: filed by both parties on 15th of July 2024.

Reply Submission : by the claimant on 30th July 2024.

2023: November 9, 10;
December 15;
2024 April 23;
June 12;
2025 March 31.

JUDGEMENT

*Oral contract for construction/ project management – Trust – Agency – Liability for unaccounted funds –
burden of proof*

GOONETILLEKE, J.:

INTRODUCTION TO THE DISPUTE BETWEEN THE PARTIES

- [1] The claimant Derek Broman is a US national, resident in the USA, who had bought a rental property in Paslow Falls area, in the Bullet Tree village, Cayo District Belize (hereinafter '*the property*'). By an oral contract, in late July of 2019 he engaged Ms. Linda Kimble, the defendant, also a US national but living and working in Belize, to remodel, renovate and repair the property.
- [2] The claimant wired money to the defendant's account, gave her blank cheques and also gave his credit card to the defendant for her to make purchases for renovation of the property. He also, deposited BZ funds into the defendant's Benny's Home Centre contractor's account.
- [3] In or about July 2020, their relationship broke down. Ms Kimble was not granted access to the property. The claimant alleges that the defendant repudiated the contract and that he then had to engage contractors and expend further sums to finish the work and make the property a rental vacation property.
- [4] The action of the claimant is for the defendant to account for the money received pursuant to the above oral agreement for the renovation of the property. The claimant also seeks damages for breach of contract while the defendant seeks payment for work done on a *quantum meruit* basis and damages for breach of contract by the claimant.

THE CLAIMS OF THE PARTIES

- [5] The claimant seeks the following relief;
- (i) An order for the defendant to account for the money received from the claimant and the manner in which the defendant applied that money;
 - (ii) An order that the defendant account for BZ \$ 32,000 deposited by the claimant to the defendant's Benny's Home Centre contractor's account and the manner in which those funds were applied;

- (iii) An order as to what balance money remains with the defendant after giving her credit for money properly expended;
- (iv) A declaration that the defendant is personally liable to make good all sums not duly accounted for, together with interest thereon;
- (v) An order for the defendant to deliver to the claimant all receipts in respect of purchases made by the defendant with the claimant's funds;
- (vi) An order that the defendant pay to the claimant BZ\$ 204, 042.59 or in the alternative damages;
- (vii) Damages for breach of contract or repudiation of the contract;
- (viii) An order for the delivery of the cement mixer bought with the claimant's funds or alternatively payment of BZ \$ 2,654.99 being the cost of the cement mixer; and
- (ix) Damages for wrongful conversion.

[6] The defendant denies all the claims. She alleges that she had done all the work originally contracted for and that the claimant kept adding new work to the project as it progressed. The defendant by way of an ancillary claim seeks the following relief against the claimant;

- (i) BZ \$ 10,000 in damages for breach of the original oral agreement;
- (ii) Compensation for work done on the new projects on a *quantum meruit* basis;
- (iii) Interest on any sums due as damages.

THE EVIDENCE OF THE PARTIES

The claimant – Derek Broman

[7] The claimant gave evidence to state that he entered into an oral contract with the defendant to renovate the property. He had agreed to pay the defendant **BZ \$30,000** to '*supervise and oversee the*

*completion of the project*¹. According to the claimant the defendant hired and paid various personnel to do the work.

- [8] The claimant stated that he wired **US \$ 20,000** to the defendant's bank account to purchase materials and to pay for labour and services and that he also gave the defendant blank cheques and his credit card for this purpose. The claimant alleges that the defendant has expended **US \$ 112,932.04** in cheques and **US \$ 126,089.74** in credit card bills totalling **US \$ 239,012.78** or its Belize equivalent of **BZ\$ 478.025.56**.
- [9] The claimant also asserts that he deposited **BZ\$ 32,000** to the defendant's Benny's Home Centre Contractor's account and that he and the defendant visited the Benny's Home Centre to select appliances, but that they were not purchased at the time as they could get lost or damaged. The claimant alleges that the defendant did not provide receipts for the items purchased from Benny's Home Centre and that some of the items cannot be found on the property.
- [10] The claimant stated that in total the defendant had expended **BZ \$ 518,025.56** of his funds and failed to account for it though repeated requests were made for accounts and that despite such sums being expended the project remained incomplete. As result he said he had to hired two contractors, Shannon Mawson and Jon Siegenthaler and pay them **US \$ 57,500** and **US \$ 2,850** respectively to compete the project and that therefore he had to pay an additional **US \$ 60,350** to complete the work.²
- [11] The claimant also alleges that the defendant damaged tiles; failed to install the pool house door which caused damage to the furniture and the pool house; that kitchen and bathrooms remained in complete; that granite counter tops paid for were not delivered and installed and that he had had to repurchase material, fixtures and appliances totalling **US \$ 83,342.59**.³
- [12] The claimant also alleged that the defendant had also expended his money on mattes not agreed on such as defendant's fuel and sums expended to neuter a dog which he did not own.

¹ Paragraph 7 of the witness statement of Derek Broman, dated 31st of January 2022.

² Paragraph 24 of the witness statement of Derek Broman, dated 31st of January 2022.

³ Paragraph 35 of the witness statement of Derek Broman, dated 31st of January 2022.

- [13] He also stated that he agreed to the purchase of a cement mixer for the use of the project but that in or about July 2020, the cement mixer was removed by the defendant from the property and that he has lost the value of the cement mixer.
- [14] The claimant in cross examination stated that he thought the project could be completed in three months and that the **BZ \$ 30,000** fee to the defendant was **BZ\$ 10,000** per month and that he paid **BZ \$ 20,000** and did not pay the balance **BZ\$ 10,000** as the work was incomplete, there were no accounts, and that the defendant was ahead with the money and that it could not continue like that. However, when shown the report of the defendant at page 741 of the trial bundle (page 2022 of the record) the claimant accepted that the works listed there was a starting point for the contract and that he did give a list of works done afterwards to finish the project. He also agreed in cross examination that the defendant had provided him with a spread sheet (at page 868 of the trial bundle – page 2149 of the record) detailing the expenditure, but the claimant maintained that he had not been given receipts.
- [15] As regards the credit card expenditure it was suggested in cross examination that he would have known the expenditure through his credit card statements and his reply was that the credit card statements reflected the merchants where purchases were made and not the items bought and that the defendant should have submitted bills and receipts.
- [16] The claimant agreed however that there was no fixed estimate for the entire project. He also agreed that the same sub-contractors who were used by the defendant were thereafter used by the claimant after he stopped engaging the defendant and that there was no issues with the electrical work and that though the crews may be different, the sub-contractors used were the same as those used by the defendant.

Ms. Rheanna Serano

- [17] Ms. Serano who is the partner of the claimant gave evidence in support of the claim. She stated that she visited the property in February 2020 and noticed the defendant with several workmen who were working on the outdoor kitchen area around the pool.
- [18] She also stated that she moved into the property in August 2020 and noticed the following; missing cabinets and countertops in the kitchen, bathrooms and bedroom; the kitchen island was missing; the tile work around the pool and '*palapa*' were not started; the locks and knobs on the door were missing

and had to be replaced; missing draws from the cabinets under the sink and the bathroom; missing kitchen sink and faucet; the gate had to be manually opened and closed, there was no generator; the paint was mismatched in many areas, there was no ventilation for the kitchen stove, and the bar by the pool was incomplete and missing counter tops.⁴

[19] She stated that by August 2020, Shannon Mawson was on the property with her employees and that after several months of work thereafter, the property was finally in a state where it could be placed on the market to rent for tourists. In cross examination she clarified that Shannon Mawson was the wife of Nathan Mawson (who had been hired by the defendant).

[20] In cross examination she also clarified that what she meant in paragraph 6 of her witness statement that certain items were “missing” was that they were not in place and not installed or not on the property. She also stated in cross examination that the defendant and a number of workman were doing work on the property in January 2020.

Jon Siegenthaler

[21] Mr. Siegenthaler the owner of Sun’s Electric, an electrical service provider who worked on the property gave evidence in support of the claim. He stated that he had been initially employed by the defendant in August 2019 upon an oral contract to provide electrical services on the property.

[22] It was his evidence that he started work on the claimant’s property in or about September 2019 and worked on the wiring of the main house and second house; replacing all ceiling fans; wiring the *palapa* and the bar; replacing panel boxes; adding circuits to the main house and second house; setting up lighting for the gate and sign outside the property and the exterior lighting.⁵

[23] He said he was paid in cash by the defendant who then entered the payments in an ‘excel’ sheet. In cross examination he admitted that he did not give receipts for work done.

[24] He stated there were other workmen who simultaneously worked on other projects on the property. He also stated that there were small details such as trim work that needed to be attended to that he brought

⁴ Paragraph 6 of the witness statement of Rheanna Serano, dated 31st of January 2022.

⁵ Paragraph 5 of the witness statement of Jon Siegenthaler, dated 31st of January 2022.

to the attention of the defendant. He added that shortly after some of the works were completed, the defendant ceased all construction work at the property and that the pool and the bar were not worked on, nor was the exterior lighting done.⁶

[25] He then goes on to state that he was later contracted by the claimant to work at the property and complete the work that he had started with the defendant. Mr. Siegenthaler states that he took an inventory of items that were needed to complete the project and that there were certain items that were not installed and not on the property. He gives a list of those items at paragraph 12 of his witness statement.

[26] In cross examination he stated that he was not privy to the claimant's instructions to the defendant. He also stated that Mr. Nathan Mawson did most of the work on the property and took instructions from the defendant.

[27] Mr. Siegenthaler stated that he worked on the property upon engagement by the defendant till March of 2020 and that he was re-engaged by Mr. Broman, the claimant in 2021. It was his evidence that the items listed (a) to (f) in paragraph 12 of his witness statement as being missing were extra orders and were left in the garage and at one stage the defendant loaded those into her truck. He said he saw this and that his wife helped load these items to the defendant's truck. He said in his evidence that work on the *palapa* was not done as the defendant had indicated that there was not enough money to do that work after March 2020.

Robert Allen – Engineer - expert witness

[28] On the 14th of June 2022, the then presiding judge Hon. Lisa Shoman, granted approval to the claimant to appoint Engineer Mr. Robert Kevin Allen to be appointed an expert and for him to put in a report. The scope of the expert's testimony was to be limited to the cost of the materials and the work done.

[29] Mr. Allen, filed his expert report on 2nd August 2022, indicating his total estimated cost of the works executed to be **BZ \$ 405,180.10**. He stated that this valuation was done based on a site visit to Mr. Broman's residence where discussions were held outlining the works that were done, which result in

⁶ Paragraph 9 of the witness statement of Jon Siegenthaler, dated 31st of January 2022.

determining the estimated cost of materials and works done. He then set out the value of the works done by Ms. Kimble (the defendant) based on a discussion with Mr. Broman.⁷

[30] One week later on 8th of August 2022, Mr. Allen filed a “REVISED” Engineers (Expert) valuation. He states that the revision is based on further discussions with Mr. Derek Broman, who pointed out that some of the items within the initial valuation were not done by the defendant. Mr. Allan stated that items with a “ZERO” rate with the revised valuation are the items that were not done.⁸ In his revised valuation report he estimates the value of the works done to be **BZ\$ 279, 436.50**. The court notes that in the revised report, quite apart from several items of work done being ZERO rated (works pointed out by Mr. Broman as not having done by the defendant), most items in the revised report also have reduced quantities. According to Mr. Allan, the cost of the works is arrived at by multiplying the quantity of any given item by the standard rate in the industry for that item of work.

[31] Mr. Jenkins, counsel for the defendant objected to the expert report stating that it does not comply with part 32 of the Civil Procedure Rules, in particular that the expert report should be seen to be an independent product of the expert, uninfluenced as to form and content by the demands of litigation. Mr. Jenkins submits that the revised report is the product of the influence of Mr. Broman, on the expert. Mr. Montero for the claimant conceded that this was a valid objection. The court allowed the report into evidence subject to cross examination. Mr. Allen in his *viva voce* evidence stated that he revised his report because the claimant read the initial report and then told him that certain of the works were done by him (Mr. Broman) and that the second report was prepared after that discussion. Mr. Allen also confirmed in cross examination that he had no input from the defendant as to what works she had executed.

[32] Given the above facts and circumstances attached to the report of Mr. Allen and that it has been prepared without any input from the defendant and solely on the instructions of the claimant and thereafter revised on the further instructions of the claimant, the court will disregard Mr. Allen’s reports.

⁷ Covering letter dated 29th July 2022 attached of the report of Robert Allen filed on 2nd August 2022.

⁸ Covering letter to the REVISED valuation report of Robert Allen filed on 8nd August 2022.

Evidence for the defendant

Francisco Alvarez

- [33] The witness statement of Mr. Alvarez dated 1st February 2022 was filed on behalf of the defence and he presented himself 10th November 2023, to give *viva voce* evidence. Mr. Alvarez states that he is a construction worker for Mr. Nathan Mason. In his witness statement Mr. Alvarez makes statements to the effect that Mr. Mawson and the defendant inspected the property and that after the inspection the claimant hired the defendant to oversee the list of projects in schedule 1 to his witness statement. He says that after 30 days of commencement of work, the claimant changed the scope of the work adding new projects and that therefore more money was spent on the updates at Paslow Falls property and the labour costs increased. He said he was paid in cash. He ends his witness statement by stating that all construction work stopped in late March 2020 due to the Covid -19 restrictions.
- [34] In cross examination, Mr. Alvarez, did not know the details of the statements he had made in his witness statement nor could he comment on the schedule he appended to his witness statement. The court questioned Mr. Alvarez and he answered that he can read and write in Spanish but not in English and that he understands English. He demonstrated no credible understanding of the statements in his witness statement. The court will therefore, disregard the evidence of Mr. Alvarez.

Robert Castanon

- [35] Mr. Castanon is a plumber who worked on the property on the engagement of the defendant. He gave evidence through his witness statement dated 1st of February 2022 and was cross examined.
- [36] He explains that there were several issues with supply of water to the main house and the pool due to breakages in the water lines. He states therefore that in addition to the work he was tasked with, he had to repair the broken water lines and install a pump. In addition he states that the claimant decided that he wanted to re-run an existing faulty PVC water supply line from the river to the main house and the pool. He also states that when nearing the completion of his work, the defendant on the instructions of the claimant asked him to remove the tiles in the bathroom of the main house and re do the plumbing. He states thereafter, he was engaged by the defendant to assist with making the caretaker's house liveable as it was in a deplorable condition. According to Mr. Castanon, it was Mr. Nathan Mawson's construction crew that did the construction work and he did the plumbing

[37] He states that he witnesses the installation of electrical wires, windows, a new door, new stairs and kitchen cabinets made from scrap wood taken from the pool house at the property being installed in the caretaker's house.⁹

[38] He says he was paid a daily wage on a weekly basis and that all workers were paid by the defendant on a Monday and that at times, they had to wait while the claimant came and gave the defendant cash, which she counted and paid to the workers.¹⁰

[39] This witness withstood his cross examination and the court will accept his evidence.

The defendant – Ms. Linda Kimble

[40] Ms. Kimble states that she is a designer of homes, cabinets and furniture with over forty years of experience, and had moved to Belize in 2003 and worked as a designer and project manager and consultant on various projects.¹¹

[41] She states that she was contacted by the claimant prior to his purchase of the property and he wanted her to inspect the property and give him a report of what work needed to be done on the property to convert it to a high end vacation rental property. She then inspected the property in July 2019 together with Mr. Nathan Mawson, a general contractor that she had worked with before. Ms. Kimble states that at the time of the inspection, the property had three buildings and a garage shed and that she together with Mr. Mawson had inspected the main house, the outdoor kitchen building, the storage building, the above ground water tanks and electrical services and presented a report to the claimant with her recommendation for repairs and changes. She annexes a list containing 60 items of work as her recommendation for renovation.¹²

[42] She states that sometime after that, the claimant himself visited the property and that they entered into a verbal agreement for her to organise and oversee a list of projects on the property though not all the

⁹ Paragraph 9 of the witness statement of Roberto Castanon, dated 1st of February 2022.

¹⁰ Paragraph 11 of the witness statement of Roberto Castanon, dated 1st of February 2022.

¹¹ Paragraph 1 of the witness statement of Linda Kimble dated 1st of February 2022.

¹² Paragraphs 3- 7 of the witness statement of Linda Kimble dated 1st of February 2022.

projects suggested in the inspection report. According to their agreement she was to be paid BZ \$ 30,000 for her engagement, which was to be paid in three monthly instalments.¹³

[43] According to Ms. Kimble, the scope of her engagement in terms of the oral agreement was for her to hire and coordinate independent contractors, to provide an accounting of funds which were paid by the claimant, to provide payment to the independent contractors hired on behalf of the claimant, to source, manage and pay for materials for the projects on the property.¹⁴ She cites an email dated 24th July 2019 by which she sought clarification on her management agreement and the claimant's response as to her management fee by email dated 2nd August 2019 as evidence that she was not a general contractor for the project, but a project manager.¹⁵

[44] As to funds received, Ms. Kimble states she received **US\$ 10,000** on her initial engagement and this is all that she received by way of payment for work and that she was not paid the further **US \$ 5,000 (BZ\$ 10,000)** as her fee of **BZ \$ 30,000** for her work that was agreed. On this there is no dispute, the claimant himself stated that he had withheld **BZ\$ 10,000** for the reason that, according to him, the work was not completed.

[45] She stated the initial agreement was for the claimant to wire the money to her account and for her to pay for labour and materials by cheque and for her to provide the claimant with an account of the money spent. Ms. Kimble states that she was wired a sum of **BZ \$ 39,595** (BZ\$ 40,000 was wired, BZ \$ 5 was absorbed by the bank as bank charges) by the claimant on 8th August 2019 and that she used this money for the project and did all the jobs under the original agreement though she was not paid the full **BZ\$ 30,000** as her management fee.

[46] The defendant alleges that the claimant after the commencement of the project added new works to the property which were to be overseen by her but which were not agreed to in terms of their original oral agreement. She states that there was no sum agreed between them for these additional works.¹⁶ She states that the new projects were undertaken and completed between November 2019 and March 2020.

¹³ Paragraphs 9 and 15 of the witness statement of Linda Kimble dated 1st of February 2022.

¹⁴ Paragraph 10 of the witness statement of Linda Kimble dated 1st of February 2022.

¹⁵ Paragraphs 11-14 of the witness statement of Linda Kimble dated 1st of February 2022.

¹⁶ Paragraph 24 of the witness statement of Linda Kimble dated 1st of February 2022.

- [47] Ms. Kimble states that once the initial funds of **BZ \$ 39,595.00** which was wired to her, was spent, the claimant came and paid merchants by cash. She states that he then gave her his credit card for her to make purchases using his credit card and that he had agreed to the vendors where his credit card could be used. According to this arrangement the card could be used for purchase of construction materials, supplies, fixtures and fittings.¹⁷ She states that on occasion she had used her own credit card to make purchases.
- [48] She then states that she send a spread sheet to the claimant with the expenses she had incurred. The spread sheet is annexed 11 to her witness statement. She was cross examined on this spreadsheet and the several items thereon.
- [49] The defendant has set out three different annexes detailing expenditure from different sources of funding. The first statement relating to expenses of **BZ\$ 204,607.45** incurred from July 2019 to December 2019 are supported with copies of receipts at Annex 19 of her witness statement.¹⁸
- [50] The second statement of expenditure is in relation to all credit card expenditure totalling **BZ\$ 188, 230.82** and is supported with copies of receipts respectively at Annex 20 and 21 of her witness statement. Finally, a third statement detailing cash expenditure is supported by copies of receipts respectively at Annexes 22 and 23 of her witness statement. She states that the combined total of these three statements is **BZ\$ 456, 297.87**.¹⁹
- [51] As regards the Benny's home Centre account, its Ms. Kimble's version that the claimant unknown to her made two deposits (on 26th August and 2nd September 2019) to her Benny's Home Centre account totalling **BZ \$ 33,000**. She produces her Benny's Home Centre account at annex 25 of the witness statement in proof thereof. It is her position that the claimant on 30th September 2019 by one purchase amounting to **BZ\$ 32, 466.11** used her Benny's account to get the discounts that she was getting from Benny's and bought appliances and other materials. She produces her Benny's account statement at Annex 26 of her witness statement in proof thereof.

¹⁷ Paragraph 36 and 37 of the witness statement of Linda Kimble dated 1st of February 2022.

¹⁸ Paragraph 48 of the witness statement of Linda Kimble dated 1st of February 2022.

¹⁹ Paragraphs 49-51 of the witness statement of Linda Kimble dated 1st of February 2022.

- [52] The defendant maintains that she did not know about the deposits or the purchases made at Benny's and was made aware of the same by the claimant. She states that she accompanied the claimant to Benny's only once to view fixtures and that nothing was purchased on that occasion.
- [53] As regards, the cement mixer, it is the defendant's position that the mixer was bought as it would be more convenient to do the work with that machine, and that after the work was done, it was sold on the instructions of the claimant and the money from the proceeds of sale appropriated for the project.
- [54] In March 2020, the defendant had used the claimant's credit card to purchase a Pilates machine for **US \$ 5,368**. It is her version that she was owed **US \$ 5000** as her fee (the third instalment that was not paid by the claimant) and that the claimant said he did not have the money to give her and that she therefore used his credit card for that amount with the claimant's consent. However, the claimant upon discovery of this purchase and the charge by Amazon for it, had filed a fraudulent charge report. Thus the defendant states that she completed the transaction with her credit card.
- [55] She states that the relationship with the claimant broke down in March 2020 and that in late March 2020, work came to a halt due to the Covid 19 restrictions. Upon the lifting of restrictions, in May 2020, when she tried to re-enter the premises to complete the work, she was blocked from entering the premises and locked out. As such she states that she left the cabinetry outside the gate of the property with Mr. Mawson and did not return to the property.

Other witnesses

- [56] The claimant had also listed two other witnesses – (1) Mr. Raymond Franklin an accounts representative from Benny's Home Centre who the claimant wished to produce to demonstrate that he had assisted the claimant and (2) Mr. Nai Long Kuang the owner of Cayo One Stop Hardware store who was to testify that the claimant visited his store and authorised the defendant to use his credit card for purchases. Neither of these witnesses, came forward to give evidence on behalf of the defendant. Their witness statements therefore are disregarded.

Mr. George Swift – Expert witness in regard to the accounts presented by the defendant

[57] On the 21st of February 2024, the court directed that an expert be appointed to examine the statement of accounts and bills filed by the defendant and to report on the accuracy of the statements. Accordingly, the parties agreed to appoint Mr. George Swift as the expert for this purpose. His terms of reference were as follows; to review the documents provided and respond to the questions:

- A) Do the credit card statements and cheques at Exhibit DB 1 of the claimant's witness statement reflect and/or substantiate that the claimant expended US \$ 112, 923.04 in cheques US \$ 126,089.74 in credit card bills totalling US \$ 239,012.78? If not what are the differences.
- B) With reference to paragraphs 48, 49 and 50 of the defendant's witness statement at page 737 of the trial bundle, the following questions to be answered;
- a) Do the receipts that appear as Annex 19 referred to in paragraph 48, correspond to Statement 1 which is at Annex 13 referred to in paragraph 41? If not, what are the deficiencies?
 - b) Do the receipts that appear as Annex 21 of the trial bundle correspond to statement 2 which is at Annex 20 referred to in paragraph 49? If not, what are the deficiencies?
 - c) Do the receipts that appear at Annex 23 of the trial bundle correspond to statement 3 which is at Annex 22 referred to in paragraph 50? If not, what are the deficiencies?
 - d) Based on your calculations, what is the amount of all the receipts provided at Annex 19, Annex 21 and Annex 23?
 - e) What is the total combined expenditure contained in Statement 1, 2, and 3?

[58] Mr. Swift's findings were as follows:

A) That the credit card statements and the cheques at Exhibit DB 1 of the claimant's witness statement did not reflect that the claimant expended US \$ 112, 923.04 in cheques and US \$ 126, 089.74 in credit card bills. In his opinion the proper numbers are:

Cheques **US \$ 112, 923.00** (difference of 04 cents from the amount stated)

Credit card Bills

US \$ 164, 222.72 (According to witness statement of Mr. Broman US \$ 126, 089. 74 was expended by the defendant using the credit card – a difference of US \$ 38, 132.98 which according to the expert is understated by the claimant.)

B)(a) There is a difference between the receipts at Annex 19 and the total at paragraph 48 of the defendant's witness statement which lists the expenditure as BZ\$ 204, 607.45. According to the expert this difference is BZ\$ 122, 626.14. The expert states that the difference arises from illegible receipts and actual differences between the amounts listed in statement 1 and the source documents provided. Appendix 5 of the expert report lists that amount in the documents considered questionable is **BZ\$ 8, 931.91**. This sum is what is determined by the expert to be the Real Deficiency demanded by question/ instruction D 12 (b) (b) (a). The expert however found that total of statement 1 should be BZ\$ 109,049.40 taking in to account omitted document, arithmetical errors and the lack of matching documents. In other words, the expert's finding is that in regard to statement 1 of the defendant (at paragraph 48 of her witness statement) there are documents to substantiate **BZ \$ 109, 049.40** in expenditure and that there is another BZ\$ 8, 931.91 in illegible receipts and that this will add up to **BZ\$ 117, 981.31** as receipts available.

B(b) The Expert's response to the question posed by parties at paragraph D12(b)(b)(b) of the Terms of Reference is as follows: the total of the receipts that appear in Annex 21 of the trial bundle do not correspond to statement 2 (prepared by the defendant in relation to credit card expenditure – stated at paragraph 49 of the defendant's witness statement). According to the expert the difference of **BZ\$ 13, 793.99** is shown from the source documents – in other words, the source documents show an expenditure of BZ\$ 174, 436.83 and not BZ\$ 188, 230.82 as stated in paragraph 49 of the defendants witness statement.

The Expert also opines that there are no matching documents to the value of BZ\$ 19, 418.32 and that there are questionable documents to the value of BZ\$ 49, 527.51. Further, that there is an arithmetical error of BZ\$ 6,144.14 which should be deducted from the total. The expert states that the defendant has omitted to add BZ\$ 11, 750.47 in receipts available and gives her credit for that. As such in the opinion of the expert the proper amount in statement 2 of the defendant should be **BZ\$ 124, 891.32**. In other words, the Expert finds after adjusting for arithmetical errors there are BZ\$ 124, 891.32 worth of

receipts that correspond to statement 2 of the defendant.²⁰ The expert then states that the real deficiency demanded by question/ Instruction D 12 (b)(b)(b) in the terms of reference is BZ\$ 49, 545.51 (That is the Expert's adjusted statement 2, value of 124, 81.32 minus the source documents).²¹ This however is expressed in the negative which means that there are more receipts (some not corresponding to expenditure) than expenditure in the Experts adjusted statement 2.

B)(c) The Expert's response to the question posed by parties at paragraph D12(b)(b)(c) of the Terms of Reference is as follows: The receipts in at Annex 23 of the trial bundle do not correspond to statement 3 of the defendant in relation to cash expenditure set out in paragraph 50 of the defendant's witness statement. His view is that there are receipts in excess of **BZ\$ 4, 507.05** the amount stated in Annex 23. Statement 3 (cash expenditure – paragraph 50 of the defendants witness statement) gives a figure of BZ\$ 72, 495.60 while there are receipts or source documents for BZ\$ 76,966.65.

In regard to the figures in statement 3, the Expert opines that there is an arithmetical error of BZ\$ 4, 434.98 that should be added to the statement; that there are no matching documents for expenditure of BZ\$ 9,821.39, that there are BZ\$ 10, 190 .90 worth of questionable documents that should be excluded from the receipts, and that there are BZ\$ 9,893.46 worth of receipts that have not been included in statement 3, which should be added thereto.²² Taking all these factors into account, the Expert adjusts statement 3 to **BZ\$ 66,775.75**. Thus in response the question in the Terms of Reference, he opines that the real deficiency demanded by question D12 (b)(b)(b) is **BZ\$ 10,190.90** which is the difference between the amount of receipts available (BZ\$ 76,966.65) minus his adjusted amount for statement 3 (which is BZ\$ 66,775.75).²³

B)(d) In response to the question as to what is the total amount of all the receipts provided at Annex 19, 21 and 23 (of the defendant's witness statement), the Expert states that total receipts taken to mean total source documents after adjustment for duplications is **BZ\$ 369,384.79** (Annex 19 – **BZ\$ 117, 981.31** + Annex 21 – **BZ\$ 174, 436.83** + Annex 23 **BZ\$ 76, 966.65**).²⁴

²⁰ Appendix 6 of the Expert Report of Mr. George Swift, page 3233/3234 of the Record.

²¹ *ibid*

²² Appendix 7 of the Expert Report of Mr. George Swift, page 3243/3244 of the Record

²³ *Ibid*

²⁴ Expert report of George Swift. Page 2939 of the record.

B)(e) The Expert's response to question D12 (b)(b)(e) of the Terms of the terms of reference in regard to what is the total combined expenditure in statements 1, 2, and 3 prepared by the defendant, the Expert's opinion is that the figure is BZ\$ 300,716.47 (statement 1 BZ\$ 109,049.40 + statement 2 BZ\$ 124,891.32+ statement 3 BZ\$ 66,775.75).²⁵ The figures taken to aggregate the total are the figures the Expert gives to statement 1, 2, and 3 after his adjustments and not the amounts stated by the defendant.

ISSUES TO BE DECIDED

[59] The following issues arise to be determined;

1. Did the oral contract between the claimant and defendant include the entire scope of work that was done at project completion? If not, is the defendant entitled to be compensated on a *quantum meruit* basis?
2. Was the claimant employed as a contractor for the project or as a project manager and/or agent of the claimant?
3. If the defendant is an agent of the claimant, is the defendant required to give the claimant an account of the expenditure?
4. Has the defendant given an accurate account of the expenditure? If not, what is the amount that is unaccounted for?
5. Which of the parties breached or repudiated the contract?
6. Which of the parties is entitled to damages?
7. What reliefs are either or both of the parties entitled to?
8. Is the claimant entitled to the cost of the cement mixer that was sold/and or appropriated by the defendant?

²⁵ Expert Report of Mr. George Swift, page 2939 of the Record.

9. Is the claimant entitled to an account of expenditure in regard to the BZD\$ 32,000 deposited to the claimant's Benny's home centre contractor's account?
10. Is the claimant entitled to any balance lying to the credit of the defendant's Benny's Home centre contractor's account from the unexpended sums deposited by the claimant?

DISCUSSION AND ANALYSIS

Issue No. 1: Did the oral contract between the claimant and defendant include the entire scope of work that was done at project completion? If not is the defendant entitled be compensated on a *quantum meruit* basis?

- [60] According to the claimant, in cross examination when shown the report of the defendant at page 741 of the trial bundle, the claimant accepted that the works listed there was a starting point for the contract and that he did give a list of works done afterwards to finish the project. It is therefore clear that the initial oral agreement, whereby both parties agreed that the defendant would get paid BZ\$ 30,000 for the project was for a specified number of items and that the scope of the work was later expanded.
- [61] Even in written contracts for work, new work or additional work is not unusual. Such additional work is covered in a written contract under the heading of variations. How variations are to be costed is also set out in a written contract. There is no such stipulation in the oral contract between the parties, therefore, the work and the cost became open ended. The claimant must bear the risk of such an arrangement. He acknowledged in cross examination that there was no fixed cost/ budget estimate for the entire project.
- [62] I therefore hold, that the oral agreement between the parties whereby the claimant agreed to pay the defendant BZ\$ 30,000, did not cover the entire scope of work that was done at the completion of the project. The defendant would therefore be entitled to be compensation on a *quantum meruit* basis for any extra work done by her. The amount of such compensation, if any, will be discussed under the heading of reliefs the parties are entitled to.

Issue No. 2 - Was the claimant employed as a contractor for the project or as a project manager and/or agent of the claimant?

[63] This is an important issue to resolve as the defendant's duty to provide accounts and the matter of whether any money given by the claimant to the defendant was held in trust, and any damages for incomplete or defective works, would revolve around this issue.

[64] In a building contract with a contractor, there is usually a scope of work, a Bill of Quantities (BOQ), and a schedule of work with milestones and a completion date. The works are usually set out in a Gantt chart, and if not completed, time stands at large. In a written building contract, the contractor's price or profit is based on a percentage of the work, as builders profit – the items in the contract are billed at a unit rate, together with the builders profit and overheads, which include both fixed and variable overheads. As such, the price of the contract is expressed as a fixed amount in lump sum contracts or on a measure and pay basis. Thus, the contractor is not paid a separate amount for his services. The contractor is compensated by his profit that is included in the cost.²⁶ None of these elements are there in the oral contract between the parties.

[65] What has been agreed between the parties is that the defendant will be paid BZ\$ 30,000, for overseeing the project. She has employed independent contractors to do the work. This is not the same as a contractor sub-contracting the work. I therefore hold that in the circumstances described above, the defendant was not employed as a contractor but as a project a project manager and agent of the claimant, due to the nature of the agreement between them and how the works proceeded. The money for the payment for the goods was sent by the claimant, he wanted an account of the expenditure, and the works were added to and expanded without a budget – all of these factors point to the defendant being the project manager and agent of the claimant and not the contractor of the project.

²⁶ FIDIC standard written building/construction contracts are used globally in the construction industry. The FIDIC suite of construction contracts is written and published by the International Federation of Consulting Engineers. The FIDIC acronym stands for the French version of the Federation's name (*Federation Internationale des Ingenieurs-Conseil*). Smaller and lower value contracts usually use the FIDIC Green book standard contract. See https://fidic.org/sites/default/files/FIDIC_Suite_of_Contracts_0.pdf.

Issue No. 3 If the defendant is an agent of the claimant, is the defendant required to give the claimant an account of the expenditure?

[66] The relationship of principle and agent is that the principle is responsible for the actions of the agent. Likewise, the agent may contract on behalf of the principle and is accountable to the principle.²⁷

[67] The level of trust initially present between the parties included an open ended budget (there was no cost estimate) and the claimant gave blank cheques and his credit card to the defendant for expenditure towards the project. These modalities of payment for transactions involving the project also indicate the principle/agent relationship between the parties and the need for the defendant in such circumstances to give an account of the expenditure involved on the project using the claimant's credit card and cash. I therefore hold that the defendant acted as the agent of the claimant in engaging the various contractors and was, and is, responsible to give an account of the expenditure to the claimant on the basis of agency.

Issue No. 4 - Has the defendant given an accurate account of the expenditure? If not, what is the amount that is unaccounted for?

[68] The defendant had given the claimant a spread sheet with her accounting of the expenditure on the project.²⁸ However, the issue is whether it is accurate. Further, the court has also to consider paragraphs 48, 49 and 50 of the defendant's witness statement which provides three statements of expenditure:

- (1) Statement 1 being a statement of expenditure from July 2019 to December 2019;
- (2) Statement 2, (which does not include expenditure in statement 1) is a statement of expenditure using the claimant's credit card; and
- (3) Statement 3 (again which does not include any expenditure in statement 1) is an account of cash expenditure.

[69] In support of these three statements of expenditure, the defendant annexed to her witness statement Annexes 19, Annex 21 and Annex 23; which consisted of a large number of receipts in support of statements 1, 2, and 3 respectively. This court is not equipped to be going through a forensic accounting

²⁷ *Taylor v Yorkshire Insurance Co.* [1913] 2 I.R.1; *Wells v Smith* [1914] 3 K.B. 722

²⁸ Page 868 of the Trial Bundle, page 2149 of the record.

exercise to check each receipt against expenditure and check on the veracity of supporting documents and to check if they have been accurately reflected in the statements or double counted or overlooked or even understated. Therefore, it was suggested to the parties that an accounting expert be jointly agreed to and be appointed by court to report on the three statements of accounts and to cross check the corresponding receipts and supporting documents. It was in these circumstances that Mr. George Swift, who is a member of the Chartered Institute of Accountants of Belize and a Fellow of the Chartered Association of Certified Accountants of England and Wales, came to be appointed as an Expert to assist and report to court.

[70] The burden of proving any particular fact, rests on the party who asserts it.²⁹ The claimant asserts that he gave the claimant money by way of cheques, cash and his credit card to pay for expenditure on the project. The defendant has admitted to receiving US \$ 20,000 by wire transfer and also admitted to receiving cheques and being provided with the claimant's credit card to make purchases.³⁰ Thus, once admitted that funds have been received, the burden shifts from the claimant to the defendant to prove how those funds were expended. The proof of any particular fact falls also on the party within whose knowledge that fact lies.³¹ In this instance, the fact of the expenditure of the funds received by the defendant is within the knowledge of the defendant, and so the burden of proving the expenditure falls on the defendant. There is no evidence by the claimant for the cash payments made by him. The court will therefore examine and go by the amounts set out by the defendant as cash received and expended.

Statement 1

[71] The expert's finding in regard to statement 1 of the defendant is set out in Appendix 5 of his report at page 3224 of the record. The defendant has stated a sum of **BZ\$ 240,607.45** as expenditure. The expert states that there are no matching documents to the value of BZ\$ 129,374.60. This brings the amount of expenditure that can be justified to **BZ\$ 111,232.85** (240,607.45 – 129,374.60). The expert also states at Appendix 5 of his report that he excluded BZ\$ 8,931.91 as documents considered questionable.³² I will give the benefit of this amount to the defendant. Some of the documents are faded and this is plausible as is the fact that no name is written on the receipt for small amounts from vendors.

²⁹ *Robins v National Trust Co.* [1927] A.C. 515 – Phipson on Evidence, Sweet & Maxwell 12th Ed.

³⁰ Paragraphs 16, 20, 35-40, 45 and 47 of the defendant's witness statement dated 1st February 2022.

³¹ *Serene Constructions Ltd v Salata and Associates Ltd.* [2021] EWHC 2433

³² Listing 2, of Annex 5 of the expert report at page 3229 of the record.

The expert also gives the defendant credit for BZ\$ 6,166.26 of documents that have been omitted from statement 1. Therefore, this sum should be added as money spent that can be justified and with this amount the defendant has a justifiable amount of **117,339.11** (111,232.85 + 6,166.26). The expert also credits the defendant with an arithmetical error of BZ\$ 582.20, which should also be added to the sum of expenditure that can be justified, thus bringing the total expenditure that can be justified on statement 1 to **BZ\$ 117,921.31** (117,339.11 + 582.20).

[72] In regard to statement 1 therefore, I hold that the defendant has justified expenditure of BZ\$ 117,921.31. According to the expert, as regards statement 1, the defendant, has not been able to justify expenditure of **BZ\$ 129,374.60** with source documents. However, some of the expenditure which is listed at Listing 1 of Annex 5 of the Expert Report (at page 3228 of the record) includes labour costs. It was in evidence that workmen do not give receipts for daily wages. I will therefore give the defendant, on a balance of probability, credit for the amounts spent on labour and add such sums to the total of justifiable expenditure.

[73] The amounts spent on labour set out in List 1 of Appendix 5 of the expert report of Mr. George Swift is as follows:

19- August -2019	5 days Wall labour	- 001,000.00
19 August -2019	3 days wall labour	- 000,799.24
25 August 2019	5 days wall labour	- 001,280.00
28 August 2019	tree cutter to take down 10 large trees	- 001,500.00
30 August 2019	Wall crew	- 001,235.00
08 September 2019	Wall crew	- 001,475.00
10 September 2019	Backhoe tree removal and haul-off	- 003,475.00
10 September 2019	Tree cutter – south sides	- 000,500.00
17 September 2019	Wall payroll through Sept 15	- 001,545.00

23 September 2019	Wall crew	- 001,500.00
23 September 2019	Tree cutter – south side tree removal	- 002,250.00
30 September 2019	Wall crew through Sep. 29	- 001,575.00
07 October 2019	George Quintenilla – pay	- 000,245.00
10 October 2019	Wall crew	- 001,425.00
10 October 2019	Wall crew terminated 09 Oct.	- 000,765.00
17 October 2019	George Quintenilla	- 000,245.00
17 October 2019	Robert Casternon – painter	- 000,250.00
24 October 2019	George Quintenilla	- 000,245.00
24 October 2019	Tito Casternon – painter	- 000,250.00
31 October 2019	George Quintenilla	- 000,245.00
31 October 2019	Tito Casternon –painter	- 000,250.00
03 November 2019	Nathan Mawson and wall crew	- 009,420.00
06 November 2019	Tito Casternon Painter – terminated	- 000,250.00
06 November 2019	George Quintenilla pay through Nov. 3	- 000,245.00
14 November 2019	Nathan Mawson crew and wall crew	- 008,787.00
18 November 2019	George Quintenilla pay through Nov. 17.	- 000,245.00
21 November 2019	Nathan Mawson crew and wall crew	- 009,311.00
25 November 2019	George Quintenilla pay through Nov.24	- 000,245.00
28 November 2019	Nathan Mawson crew and wall crew	- 007,420.00

04 December 2019	George Quintenilla pay through Dec. 1	- 000,245.00
09 December 2019	Nathan Mawson crew and wall crew	- 006,522.00
09 December 2019	George Quintenilla pay through Dec. 8	- 000,245.00
Total Labour expenditure as per List 1		- 064,989.24

This figure can be rounded off to BZ\$ 65,000.00

[74] For statement 1 of the defendant, a sum of **BZ\$ 117,921.31** is what can be justified by documents and accounting errors. This figure can be rounded off to **BZ\$ 177,921** to which can be added **BZ\$ 65,000.00** that can be credited as labour costs, bringing the total expenditure for which she can be given credit as **BZ\$ 182,921** (177,921 + 65,000). The defendant's expenditure of **BZ\$ 57,686** (BZ\$ 240,607 -182,921) is not supported by any documentation. She may have expended this amount on the project, however, without any supporting documents, it is not possible to give her credit for this amount. I therefore hold that in regard to statement 1 of the defendant's expenditure, she would be liable to make good **BZ\$ 57,686** to the claimant as she has no supporting documents to justify this expenditure.

Statement 2

[75] Statement 2, provided by the defendant is expenditure in regard to the credit card of the claimant used by her. She has stated in paragraph 49 of her witness statement that she has expended **BZ\$ 188,230.82** on the claimant's credit card. This expenditure is detailed in Annex 21 of the defendant's witness statement. As set out in Statement 1, the expenditure commenced on 3rd December 2019 and ended with the last entry dated 27th February 2020. Annex 21 of the defendant's witness statement has the supporting documents which include the credit card customer's copy of the merchant's receipt and invoices. According to the expert Mr. Swift, at Appendix 6 of his report, he states however, that Annex 21 has source documents only for BZ\$ 174,436.82. There is thus a discrepancy of **BZ\$ 13, 793.99** in regard to expenditure that is not support with any document.

[76] The expert however, increases the discrepancy to **BZ\$ 63,333.50** on the basis that there are no matching documents (BZ\$ 19, 418.32), questionable documents (BZ\$ 49,527.51), arithmetical errors (BZ\$ 6,144) and expenditure incurred not reported on statement 2 (BZ\$ 11, 750.47).

[77] Having examined the expert's report on these figures, I will permit the defendant to rely on the figures excluded by the expert at List 6 of Annex 6, which is referred to as documents considered questionable and excluded by the expert. Listing 6 of Annex 6 of the expert report lists the reasons for excluding these sums as, '*no invoices attached only proof of payment*' and in one instance, '*printed receipt not legible*'. It has to be noted that the claimant has also to assume some risk in the arrangement he made with the defendant for her to use his credit card for expenses for the project. Some merchants may not issue invoices for credit card purchases unless specifically requested to do so. I will therefore allow this expenditure to the benefit of the defendant though the defendant ought to have requested for invoices for accounting purposes especially when using another person's credit card.

[78] I therefore find in regard to credit card expenditure by the defendant that the total expenditure on the credit card is **BZ\$ 199,981.29** (BZ\$ 188, 230.82 reflected in statement 2 added to documents in Annex 21 omitted in statement 2 amounting to BZ\$ 11,750.47 –Listing 7 of Annex 6 of the expert Report). From this sum, the sum for no matching documents (BZ\$ 19, 418.32) and the sum for arithmetical error (BZ\$ 6,144.14) ought to be deducted as credit for such sums cannot be given to the defendant. This leaves an amount **BZ\$ 174, 418.83** that has been accounted for (BZ\$ 199,981.21 of total expenditure including receipts not in statement 2, minus BZ\$ 19,418 .32 for no matching documents, minus BZ\$ 6,144.14 for arithmetical errors). Therefore the discrepancy or unaccounted amount of credit card expenditure is **BZ\$ 25, 562.38** (BZ\$ 199, 981 .21 of total expenditure including receipts not in statement 2, minus justifiable expenditure of BZ\$ 174, 418.83).

[79] I therefore hold the defendant liable for **BZ\$ 25,562.38** in expenditure of the claimant's credit card, which cannot be justified by the accounts and documents produced by her.

Statement 3

[80] Statement 3 referred to, at paragraph 50 of the defendant's witness statement lists cash expenditure as BZ\$ 72,459.60. She presents the statement of account at Annex 22 to the defendant's witness statement and the supporting documents at Annex 23 to her witness statement. The expert, Mr. George Swift in his report at Appendix 7 sets out that there are more receipts than expenditure listed. According to the figures supplied by the expert; there are documents to the value of BZ\$ 9,893.46 omitted from the statement of expenditure and BZ\$ 4,434 .98 of arithmetical errors that should be added to the expenditure. This would take the total expenditure to **BZ\$ 86,788.04** (BZ\$ 72,459.60 expenditure listed

by the defendant, plus BZ\$ 9,893.46 worth documents not stated in defendant's total, plus BZ\$ 4,434.98 in arithmetical errors).

[81] The expert has excluded BZ\$ 10,190.90 as documents considered questionable. He has listed them at Listing 10 of Annex 7 of his expert report. This sum is made up of several small transactions, most of which are under BZ\$ 100 and three transactions over BZ\$ 1000 - one for BZ\$ 1,204.53 for which there is no valid receipt or invoice, the second for BZ\$ 1,698 for which there is no purchaser's name and the third for BZ\$ 4,315.5 paid by credit card (presumably the defendant's card) for which there is no description on the credit card. The smaller transactions have been excluded with reasons such as '*no purchaser's name*' and '*receipt not legible*'. Given that most of the transaction amounts are small, it is plausible that no name is written on the receipt. I will therefore give the defendant credit for those amounts in listing 10 of the expert report excluding the sum of BZ\$ 1,204.53 for which the expert has given the reason of '*not a valid receipt/invoice*'. I therefore hold that a sum of **BZ\$ 8,985.37** (BZ\$ 10,190.90 the experts total of questionable documents, minus BZ\$ 1,204.53 which I have excluded as there is no valid receipt) should be given credit to the defendant as expenditure that is supported, from and out of the amount that has been excluded by the expert on the basis that the documents are questionable.

[82] Thus in regard to cash expenditure by the defendant I find that from total expenditure of **BZ\$ 86,788.04** (BZ\$ 72,459.60 expenditure listed by the defendant, plus BZ\$ 9,893.46 worth documents not stated in defendant's total, plus BZ\$ 4,434.98 in arithmetical errors) the sums of BZ\$ 9,821.39 listed by the expert as no matching documents and a sum of BZ\$ 1,204.53 as a sum with a questionable document as discussed above, should be excluded to arrive at the amount that can be justifiable as cash expenditure by the defendant. That amount is BZ\$ 75,762.12. (BZ\$ 86,788.04 – BZ\$ 9,821.39 – BZ\$ 1,204.53) I therefore find, a discrepancy of **BZ\$ 11,025.92** as being the amount not supported by documents for which the defendant will be liable to the claimant for the cash expenditure.

[83] Issue 4 is therefore answered in the negative. I hold that the defendant has not given an accurate statement of expenditure supported by verifiable documents. The extent of the discrepancy is as follows; As regards statement 1 a sum of **BZ\$ 57,686** is not properly accounted for; as regards statement 2 a sum of **BZ\$ 25,562.38** is not properly accounted for; as regards statement 3 a sum of **BZ\$ 11,025.92** is not properly accounted for. The total sum of statements 1, 2, 3 provided by the

defendant that is not properly accounted for is therefore **BZD 94,272.30** (57,686 + 25,562.38 + 11,025.92).

Issue No. 5: Which of the parties breached or repudiated the contract?

[84] According to the evidence available, there had been a stoppage in work by the defendant due to the lockdown imposed consequent to the Covid pandemic. When she wanted to resume the work, the funding for the project stopped and she found herself locked out of the project site.

[85] I therefore hold, that it was the claimant that repudiated the contract. I also find that as there have been more items of work added to the initial scope of work and as there has been no budget or estimate of the work or an agreed timeline for the completion of the additional work, there has been no breach of the contract by the defendant.

Issue 6: Which of the parties is entitled to damages?

[86] As stated above I find that the defendant has not breached the contract; it was an open ended contract with no budget and no fixed timelines as new items of work had been added to the original work agreed to be done by the parties. Therefore, the defendant was performing her work and was not in breach of the contract.

[87] The claimant admittedly was unhappy with the progress of the work and the expenditure thereon and the accounting of the expenditure. From the claimant's perspective though there was no agreed cost to the project it seemed there was both a cost and time overrun of the project. In the claimant's view and in his own words "*she (the defendant) was ahead with the money, and it could not continue like that*". He therefore repudiated the contract, and locked the defendant out of the Paslow Falls property (project site), preventing the defendant from further performance of the contract. As the claimant has repudiated the contract, the defendant is therefore entitled to damages.

Issue 7: What reliefs are either or both of the parties entitled to?

Relief the defendant is entitled to

[88] As I have held that the claimant has repudiated the contract, the defendant is entitled to damages and to payments on a *quantum meruit* basis.

- [89] It is admitted that the claimant has not paid the last tranche of the BZ\$ 10,000 that was due to the defendant for services rendered. The defendant is therefore entitled to this payment of **BZ\$ 10,000** since the contract was repudiated by the claimant.
- [90] From the evidence available, it appears that the initial scope of work was to be performed over a three month period and this was the claimant's perspective. Thus, his position was that the defendant's fee was US\$ 5,000 per month, or BZ\$ 10,000 per month totalling a fee of BZ\$ 30,000. The work under this contract is neither on a lump sum basis as there is no budget, nor on a measure and pay basis. In assessing payments on a *quantum meruit* basis, it is possible generally to fix it as a percentage of the work done based on expenditure if there was a lump sum agreed or there was measure and pay scale or unit rate. Neither of those formulae are applicable in this instance as there is no fixed sum for the work, nor a unit rate. In fact, because there was no budget for the project nor a bill of quantities nor a unit of measurement to cost the works, the court held above that the defendant was not a contractor but an agent and project manager of the claimant. The basis for assessment of *quantum meruit* payment would therefore have to be on time spent on the project.
- [91] The initial understanding was that the project was to last three months. It is not disputed that more works were added to the project after the initial contract. There has also been a lock down for the Covid pandemic. There is no evidence to indicate how long that lock down was or for how long the defendant was not able to perform the contract due to the Covid pandemic. The first payment by the claimant to the defendant took place by wire transfer on 8th August 2019 (Paragraph 19 of the defendant's witness statement). In terms of the statements of account presented by the defendant, the last expenditure on the project is dated 25th February 2020 (Listing 5 – Appendix 6 of Expert Mr. George Swift). I therefore hold that that the defendant worked for a period of 6 and a half months on the project. Of these six and half months, a period of one and a half months will be deducted as a reasonable period of stoppage or interruptions of work and the intervening holiday season.³³ I therefore hold that the claimant is entitled to a further payment of BZ\$ 20,000 for an extra two months' work on the project on a *quantum meruit* basis.

³³ The Expert report of Mr. George Swift, Annexes 5, 6, 7 and their listings do not show any charges incurred after December 19, 2019 and before 10th January 2020.

Relief the claimant is entitled to

[92] I have also held that the claimant as agent and project manager of the claimant held the funds of the claimant in trust for the claimant and has a duty to account for the funds. As held above, the claimant has not rendered an accurate statement of accounts and has not been able to justify all expenditure with documents. I therefore hold, that the defendant would be liable to refund to the claimant the monies that cannot be accounted for.

[93] The quantum of that refund is as follows;

- a. In regard to statement 1, a sum of **BZ\$ 57,686**
- b. In regard to statement 2, a sum of **BZ\$ 25,562.38**
- c. In regard to statement 3, a sum of **BZ\$ 11,025.92**

The total sum refundable in aggregate is **BZD 94,274.30** (57,686 + 25,562.38 + 11,025.92)

Netting

[94] In deciding the liabilities of the parties, netting or aggregating the amounts owed by each party to the other is permitted. From the above, the defendant is liable to refund to the claimant a sum of BZ\$ 94,272.30 and the claimant is liable to pay the defendant BZ\$ 30,000.00 (One outstanding payment of BZ\$ 10,000 on the original contract and two months payment - BZ\$ 20,000 for work done on a *quantum meruit* basis).

[95] When these sums are netted, the defendant is liable to pay the claimant a refund of **BZ\$ 64,274.30**.

Issue 8: Is the claimant entitled to the cost of the cement mixer that was sold/and or appropriated by the defendant?

[96] It is not in dispute that the cement mixer that was bought for the project was sold or taken by the defendant. The defendant's version stated at paragraph 61 of her witness statement is that after its use, the claimant approved of the sale of the cement mixer and therefore it was sold for BZ\$ 3,000 on or about 25th January 2025, and the proceeds of the sale appropriated for the project.

[97] The accounting of the defendant is however, only on the expenditure side. There is no accounting of the incoming funds for the project. Except for the cheques and the credit card expenditure, there is no account of the cash that came into the project.

[98] As I have held above that the burden of proving any particular fact is on the party who has knowledge of that fact, the burden of proving that the proceeds of the sale of the cement mixer was appropriated for the project falls on the defendant. I hold that the defendant has failed to discharge this burden. There is no evidence except the *ipse dixit* of the defendant to show that the cement mixer was sold and that the funds were applied for the project.

[99] I therefore hold the defendant liable to make good the value of the cement mixer at sale which according to the defendant was sold for BZ\$ 3,000.

Issue 9: Is the claimant entitled to an account of expenditure in regard to the BZD\$ 32,000 deposited to the claimant's Benny's Home centre contractor's account?

[100] The evidence on this issue is that BZ\$ 33,000 was credited to the defendant's Benny's Home Centre contractor's account. The defendant's version is that the claimant credited these amounts in two payments on 26th August 2019 and 2nd September 2019 without her knowledge in order to obtain the discount that the defendant got at Benny's. She also states at paragraph 55 and 56 of her witness statement that the claimant made a single purchase of BZ\$ 32,466.11 on 30th September 2019. In proof of this assertion the defendant annexes her Benny's Home centre account statement which reflects the relevant deposits and expenditure on the corresponding dates.

[101] The claimant's evidence did not contradict the position that he deposited the money into the Benny's account. His position, however, is that he had a walk through at Benny's home centre with the defendant and selected items and that it was not purchased at that time but that the defendant was to purchase them later on and that no delivery of these items were effected at that point in time. It is the claimant's version in his witness statement at paragraphs 11-14 that defendant used this deposit to make several purchases for fixtures which cannot be found on the property and that she had informed that some of the items were not available and had to be bought elsewhere and that he had to thereafter purchase several items from the US for the project.

[102] There is therefore contradictory evidence on this issue; the claimant states that he did not purchase anything but only made the deposit, while the defendant denies this position stating that she did not accept the money, and that it was the claimant who made the deposit to her account and then made purchases himself. Regrettably, the Benny's store clerk who was to give evidence on behalf of the defendant and who could have shed light on what actually happened, did not turn up to give evidence.

[103] The burden of proof is on he that alleges the fact. Further, in instances where there are contradictory versions of events, the burden is on the party who would fail if no evidence is adduced at all.³⁴ In these circumstances, the burden of proving that the defendant misappropriated the goods or bought items with the claimant's deposit falls on the claimant. No evidence has been placed by the claimant to this court to demonstrate that the defendant bought or cleared the goods which were purchased using the claimant's deposit. The defendant has produced an account of Benny's which shows (Annex 25 and 26 of the defendant's witness statement) that BZ\$ 32,466 of goods were purchased on 30th September 2019. At the time these purchases were made, the relationship between the parties were good. There is no email or other evidence of communication produced by either of the parties on these purchases to indicate that it was bought to be delivered later or that it was bought and held by the defendant. Given this paucity of evidence, this court cannot conclude either way³⁵ as to what took place with the goods in relation to the Benny's account. The burden of proof on this issue rests with the claimant, and this burden has not been discharged by the claimant. This issue is therefore answered in the negative and in favour of the defendant.

Issue 11: Is the claimant entitled to any balance lying to the credit of the defendant's Benny's account from the unexpended sums deposited by the claimant?

[104] It is interesting that the claimant states that he deposited BZ\$ 32,000 into the defendant's Benny's Home Centre account, whereas the defendant in her witness statement and in the Benny's account presented states that the claimant deposited in two tranches, BZ\$ 33,000 (BZ\$ 13,400 on 26th August and BZ\$ 19,600 on 2nd September 2019 – Annex 25 of the defendant's witness statement) to her said account. The defendant's version will therefore be accepted as she concedes this amount and has produced an account statement in support thereof.

³⁴ *Mills v Barber* (1836) 1 M. & W 425 – Phipson on Evidence, Sweet & Maxwell 12th ed.

³⁵ See *Bray v Palmer* [1953] 1 W.L.R. 1455, *Stephens v Cannon* [2005] EWCA Civ. 222.

[105] Going by the defendant's version, goods were bought for an amount of BZ\$ 32,466.11 inclusive of tax, from and out of the amount deposited by the claimant. This leaves a **balance of BZ\$ 533.89** to the credit of the defendant which the defendant ought to return to the claimant. These figures in fact make the defendant's version more probable. The claimant did not know the exact amount he deposited as it was not his account the money was deposited into, however, he may have a recollection of the amount spent which by memory he approximated to BZ\$ 32,000.

[106] I therefore hold that the defendant shall refund to the claimant sum of **BZ\$ 533.89** as the balance from the claimant's deposit to the defendant's Benny's Home centre account.

[107] It is to be noted that the decision in this trial has been fact intensive and the dispute in this case has occurred due to the parties engaging in an oral contract on a matter that should have had a written contract. Due to the nature of the fact checking that was involved with accounts and figures, this judgment has taken longer than usual to be delivered; this is regretted but the time taken was necessary.

DISPOSITION

[108] I hold that;

- a) The claimant repudiated the contract and is therefore not entitled to damages;
- b) The defendant is entitled to damages of **BZ\$ 10,000** unpaid fees on the original contract and a further sum of **BZ\$ 20,000** on *quantum meruit* basis for extra work on the project.
- c) The defendant was the project manager and *de facto* agent of the claimant and therefore held the claimant's funds in trust and is liable to account for all expenditure on the project.
- d) The defendant has not presented expenditure that is corroborated by documents and is liable to refund to the claimant the following sums on the basis of the accounts presented;
 - i. In regard to statement 1, a sum of **BZ\$ 57,686.00**
 - ii. In regard to statement 2, a sum of **BZ\$ 25,562.38**
 - iii. In regard to statement 3, a sum of **BZ\$ 11,025.92**

Total of BZD 94,274.30

- e) The defendant is liable to refund to the claimant the sale value of the cement mixer amounting to **BZ\$ 3,000**.
- f) The defendant is also liable to refund a sum of **BZ\$ 533.89** which was not expended from the deposit of BZ\$ 33,000 made by the claimant to the defendant's Benny's Home Centre account.
- g) When the sums due to each party are netted; the defendant shall pay the claimant a sum of **BZ\$ 67,808.19** ($94,272.30 + 3,000 + 533.89 - 30,000$) together with interest thereon at a rate of 6% per annum from 1st July 2020.
- h) As the court has awarded both parties reliefs against each other, and as the court has held that the claimant has repudiated the contract and has failed to prove certain matters, each party will bear their own costs. The claimant will bear the cost of expert witness Mr. Robert Allen, while both parties will share in equal proportion the cost of the expert witness, Mr. George Swift.

IT IS HEREBY ORDERED THAT

- (1) The defendant shall pay the claimant a sum of **BZ\$ 67,808.19** together with interest thereon at a rate of 6% per annum from 1st July 2020.
- (2) Each party will bear their own costs.
- (3) The claimant will bear the cost of expert witness Mr. Robert Allen
- (4) Both parties will share equally the cost of expert witness Mr. George Swift.

Rajiv Goonetilleke
High Court Judge