IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN

Cause No: 425/2007

BETWEEN:

DAWN SMITH (Trading as SUMMIT)

PLAINTIFF

AND:

TRICIA MCDOOM

DEFENDANT

Appearances:	**Ms. Vanessa Allard of Brooks & Brooks for the Plaintiff** **Mr. Robert Jones of Ritch & Conolly for the Defendant**
Before:	**The Hon. Mr. Justice Charles Quin**
Heard:	**8th and 9th February and 19th and 20th May 2010**
Plaintiff's written submissions filed:	**31st May 2010**
Defendant's written submissions filed:	**31st May 2010**

RULING

1. The Plaintiff, Dawn Smith conducted a business as a building and renovation contractor, trading as Summit. On the 21st September 2007, the Plaintiff issued a Writ of Summons and Statement of Claim, which claimed $32,000.00 and a further $4,995.00 for work done to the Defendant's premises at McDoom Lane, West Bay, which was registered as West Bay Block 5B Parcel 292, ("the Premises"), and owned by the Defendant.

2. The Plaintiff claimed the sum of $32,000.00 for work undertaken on the basis of a request by the Defendant to carry out initial renovation work which involved separating the premises in question into four separate apartments and installing and separating electrical and plumbing works for each of the four apartments, as well as for a laundry room. In addition, the Plaintiff claimed a further sum of $4,995.00 for further costs and expenses which were incurred due to interference from the Defendant's agent and mother, Mrs. Donna Welcome ("Ms. Welcome").

3. The Plaintiff claimed that, in breach of their agreement, the Defendant had refused to make payment of the agreed sum of $32,000.00 for the further work, which the Plaintiff pleaded were completed.

4. The Defendant admits that she entered into an agreement with the Plaintiff, for the Plaintiff to carry out certain works. However, The Defendant avers that the terms of the agreement between the parties have not been properly pleaded by the Plaintiff.

5. The Defendant filed a Defence and Counterclaim on the 23rd October 2009 in which she denies that the Plaintiff completed the work she was required to complete. The Defendant avers that the Plaintiff failed to perform and complete the work she agreed to do and, the Defendant further denies that the Plaintiff is entitled to the sum of $32,000.00 or the further sum of $4,995.00.

6. Furthermore, the Defendant averred in her defence that the Plaintiff failed to carry out the work with reasonable skill and care, and or failed to carry out the work in a timely manner and or failed to complete the work at all and or failed to carry out the work in compliance with requirements of the relevant statutory bodies and or legislation.

7. The Defendant in her Counterclaim avers that as a result of the failure on the part of the Plaintiff to complete the works in accordance with their agreement, the Defendant had suffered loss and damage in incurring the costs of remedial works, and or the costs of hiring alternative contractors and therefore the Counterclaim claims damages for loss and damage as a result of the Plaintiff's breach of contract as aforesaid.

8. On the 10th June 2008 the Plaintiff filed her Reply to the Defendant's Defence and her Defence to the Defendant's Counterclaim.

9. The Plaintiff pleaded that she agreed to separate the electrical connection to the house for four (4) apartments, plus the laundry area, install cabinets in each apartment, separate the water connections for each apartment and install appliances including cabinets, air conditioning units and appropriate plumbing, and finish interior and exterior walls, install appropriate fixtures and fittings and paint the apartments.

10. The Plaintiff averred that the works were carried out with all due care and attention, and that the Defendant agreed that upon completion of the works, the Plaintiff would be paid the agreed sum of $32,000.00.

11. In her defence to the Counterclaim the Plaintiff pleaded that the Defendant had indicated her complete satisfaction with the standard of the work performed by the Plaintiff and denied that the Defendant was entitled to any sum by way of a Counterclaim.

Relevant Chronology

12. Summit was operated by the Plaintiff and her husband, Mr. Damien Thomas ("Mr. Thomas"), and they both acted at different times as the Project Manager. Summit had been in business since approximately 2002.

13. The Defendant engaged the Plaintiff and, on or about the 8th January 2004, the Plaintiff provided an initial estimate of $76,444.00 to carry out these works.

14. On or about the 5th August 2004 the Plaintiff provided a revised estimate of CI$126,750.00 to carry out the works, together with cost estimates.

15. On the 11th September 2004 Hurricane Ivan hit Grand Cayman, and accordingly the project was delayed.

16. In October 2004 the Defendant instructed Arnold Berry of Island Drafting to prepare plans and the Court refers to Exhibit 4, which are the three plans – "AOI", the Electrical Plan ("EP")/("EOI"), and the Plumbing Plan ("PP") "No.#6".

17. On or about the 11th November 2004 the Defendant paid the Plaintiff CI$43,787.00 for Phase I of the works. In December 2004 plans were submitted to the Planning Department.

18. On or about the 14th January 2005, the Defendant paid a second installment in the sum of CI$36,627.00.

19. On or about January and February 2005 the Plaintiff and the Defendant discussed plans for an additional two-bedroom apartment at the existing property.

20. On or about the 1st March 2005 the Defendant prepared a draft contract dealing with existing works and Additional Works, and sent a draft to the Plaintiff.

21. On or about the 19th March 2005 the Defendant sent an amended draft contract to the Plaintiff. Initially the draft contract had both the names of the Plaintiff and her husband, Mr. Thomas, but ultimately, at the Plaintiff's request, Mr. Thomas' name was deleted and the contract was ultimately signed by the Plaintiff and is dated the 24th March 2005.

22. It became apparent from both the Plaintiff's and the Defendant's evidence that the Plaintiff had been paid for the initial works which was contractually agreed at $126,750.00, and that the Plaintiff agreed to do the additional work and wait until it was completed to receive the payment of $32,000.00 from the Defendant.

23. It is clear from the documentation and exchange of emails, and also from the Plaintiff's own evidence, that the initial $126,750.00 included the separation of

the Premises into 4 apartments. The $32,000.00 was for the Additional Works – particularly in relation to the electrical work, plumbing work, and also to turn the studio apartment into a one-bedroom apartment, namely apartment 'A'.

24. I find both the Plaintiff and the Defendant to be honest witnesses. The Plaintiff honestly accepted that it was her signature on the contract and, although she may not have read it at the time, she does not deny receiving it and she does not deny receiving email and hardcopies of the contract.

25. The Plaintiff also honestly accepted that it was she who asked the Defendant to remove her husband's name from the document, and therefore, the Court finds that the contract was agreed between the Plaintiff and the Defendant for the Additional Works to be completed by the Plaintiff in consideration of $32,000.00.

The Contract

26. The contract stipulates that the parties wished to enter into this agreement, the terms of which superceded the original agreement. At clause 1.8 the contract defines "works" and stipulates that the Plaintiff would carry out works, as set out in the documents listed at Schedule 'A'. Schedule 'A' provides at Schedule A1 – the drawings prepared by Island Drafting, which are Exhibit 4 and are referred to above.

27. The contract specifically refers to:

> "*The works include the Additional Works, works to the house itself and the exterior works such as the septic tank, drainage, demolition of water cistern and existing septic, access roads where required in accordance with the drawings listed in Schedule A.*"

It is clear from the contract that landscaping had been deleted by the parties. The contract also refers to "Additional Works" required due to the extension to Apartment 'A'.

28. The contract provided for the Defendant to obtain all Planning Department approvals, and that the Plaintiff was to perform the work and comply with all applicable Cayman Islands laws, regulations and subordinate legislation, and to carry out any changes instructed by an appropriate representative of the Cayman Islands Planning Authority and/or Building Control Unit.

29. Clause 1.2 states that the contract period for "the Works" and the "Additional Works" was to be three (3) months from the 24th March 2005. Clause 1.3 states that the completion date is the date on which the Works would be completed and a Certificate of Occupancy obtained from the Authority, deeming the site ready to be handed over to the Principal and ready for her use.

30. The contract stated that the price for the Additional Works was to be agreed and was subsequently agreed at $32,000.00, and it is common ground that this was to be paid upon completion of the Additional Works, and once the Defendant had obtained the necessary financing. It is also common ground that the Defendant would obtain financing after the completion date and after the Certificate of Occupancy was granted. The Plaintiff was then to be paid by the Defendant for the completed Additional Works.

31. Clause 5.2 stated that if the Plaintiff failed to complete by the end of the contract period, the Defendant could serve a Notice to Complete, making time of the essence. In addition, under Clause 5.3(a) the Plaintiff was at liberty to terminate the contract if the Defendant interfered or obstructed the work.

The Plaintiff's Position

32. The Plaintiff claims that the Defendant breached the contract dated the 24th March 2005 by failing to pay to the Plaintiff the sum of $32,000.00.

33. The Plaintiff's evidence is that she completed the work. The Plaintiff accepts that the work was not completed within three months, but that in any event, it was completed, and that the tenants were able to move into the apartments. The Plaintiff maintains that she discharged her obligations under the contract.

34. Accordingly, the Plaintiff is claiming the $32,000.00 for the Additional Works done. In addition, the Plaintiff's evidence is that, because of the conduct of the Defendant and the interference of the Defendant's mother, Ms. Welcome, the Plaintiff had to incur additional expenses in the sum of $4,995.00 for electrical works and labour costs and further subcontractors' fees.

35. When one reviews the plans submitted to the Planning Department, namely Exhibit 4, it is clear that the site plan refers to a storm drain, garbage containers, six parking spaces with parking stops, Asphaltic concrete on the parking bays, works on the road around the building on Parcel 292 and an existing septic tank.

Defendant's Position

36. The Defendant's position is as pleaded in her Defence and Counterclaim referred to paragraphs 5, 6, and 7 above.

37. The Defendant maintains that the Plaintiff was in breach of the terms of the contract by failing to perform her contractual obligations, either within the timeframe provide for in the contract, or at all.

Review of the Evidence and Chronology

38. In order to understand the material facts and the chronology in this matter it is necessary for the Court to carefully review the evidence of both parties and the email communications between them.

39. It is clear to the Court that the Additional Works are as set out in the contract. The Plaintiff was to convert the laundry room into Apartment 'A'; complete the units 'A', 'B', 'C' and 'D'; install the necessary electrical fixtures for each apartment and to ensure that they were in accordance with the EP/EOI so that each apartment would be self-sufficient when connecting to the electricity supply from the Caribbean Utilities Company (CUC) and for purpose of renting to tenants. The Plaintiff was to provide the relevant plumbing works and water heaters for each apartment, in accordance with the PP. The Plaintiff was also to install the necessary cabinets. In addition the Plaintiff was to complete the

necessary exterior walls, including painting them, and to ensure that the car parking spaces and garbage receptacles were provided.

40. The Court finds that the parties did enter into a binding contract on the 24th March 2005. It is clear from the evidence of both the Plaintiff and the Defendant that the parties had discussed the terms of this contract, drafts had been exchanged and both parties had made certain amendments. What is particularly important is that the Plaintiff removed her husband, Mr. Thomas, from the contract, leaving herself trading as Summit and thereby being the only party with whom the Defendant made the contract.

41. The Plaintiff in her evidence stated, with some regret that she could not recall if she had read the agreement, but, to her credit, she accepted that she received it and that she also received a hard copy of it.

42. The Additional Works were mainly as set out above. In particular, they included creating the one-bedroom apartment from the studio,, namely Apartment 'A', and the additional electrical and plumbing works to the Premises, to ensure that the four apartments were separate from each other as required by Planning. The Additional Works were in addition to the works to the Premises itself and the exterior works such as the septic tank, drainage, the demolition of the water system and the existing septic tank, and the access road.

43. It is clear from the contract that the Plaintiff was employing subcontractors to do to the Electrical Works. The electrical works were subcontracted to a Mr. Eric

Small supervised by Bells Electrical. The plumbing works were subcontracted to a Mr. Gary Edgar.

44. As late as the 29th March 2005 the Defendant was urging the Plaintiff to sign the contract, and indicating that time was important. The Defendant also noted that the electrician and plumber had started their work at that time.

45. The contract was obviously signed by the 7th April 2005 and the Defendant gave an initial review of the outstanding issues. On that date the Defendant said to the Plaintiff that they needed approval for the Electrical Plan

46. At that time, the Plaintiff's husband, Mr. Thomas, was still involved as he had confirmed that the cracks in the doors and the windows had to be addressed. Additionally, the Defendant had evidently discussed a coat of rendering with Mr. Thomas. At that time the price specifications for the Additional Works were still to be agreed.

47. On the 11th April 2005 the Defendant was still discussing matters with both the Plaintiff, and with the Plaintiff's husband, Damien. The Defendant's email of the 11th April to both the Plaintiff and her husband demonstrated that the Plaintiff and the Defendant had agreed on the $32,000.00 for the Additional Works.

48. As the Defendant stated at paragraph 33 of her Witness Statement:

> "*The $32,000.00 was to cover the additional works referred to in the agreement, which meant the increased roof pitch and the extension of the studio apartment into a one-bedroom, fully-fitted apartment. The "certain*

works" referred to an agreement which meant the installation of the additional paving and the additional electrical works."

At this stage the Plaintiff and the Defendant seem to be in agreement on what Additional Works needed to be done, the time period set out in the contract, the completion date and the price.

49. On the 20th April 2005 the Defendant set out clearly in an email to the Plaintiff, the items about which she had some concern. The Defendant said in this email that she was concerned about cost overruns, and cited the sliding mirrored closet doors. The Defendant stated that she was not fussed about the sizes, as long as they are done. The Defendant drew attention to the cistern area and the parking arrangements. Additionally, she expressed concern about the electrical supply, and communications with CUC regarding meter boxes and electrical wiring. Further, the Defendant raised the question of water meters and the required number of meters. The Court notes that at item 10 of the email dated the 20th April 2005 the Defendant raised the question of the septic tank, and enquired whether they needed to install a well to run with the existing septic tank, or whether there should be a new septic altogether. The Defendant specifically stated that she would not bear any responsibility for unforeseen costs if it turned out that the existing septic is useless.

50. On the 20th May 2005 the Defendant sent an email to both the Plaintiff and her husband saying that she could not afford any delay past the end of June. The Defendant reminded the Plaintiff that the contract ended on the 24th June, and the bank was already requiring her to start repaying on the principal – a fact which, the Defendant said, placed her finances in the "*bright red area*".

51. In response to the Defendant's concerns, the Plaintiff replied by email on the 23rd May 2005 as follows:

> *"FYI: tentative schedule for jobs to be completed May 23 – 28: Internal ceiling, insulation, block cross over between apts, masonry work will be 90% complete, paint internal ceiling white, select internal wall colour, slect tiles, install concrete board and insulate dividing wall."*

The Plaintiff concluded by saying that she hoped to start tiling on Saturday (the upcoming Saturday) but this was uncertain.

52. On the 30th May the Plaintiff sent another schedule by email which read as follows:

> *"tentative schedule to be completed May 29 – June 4: Install firewall between units, complete tiling of both 2-bed units, complete painting of both two bed units, install ¼ round on all windows, close floor in 1 bed unit, install closet in 1-bed and studio unit, Prep bathrooms in 2-bed units for tub/toilet/basin(white,) and, partition 1 bed unit – kitchen/living"*

53. On the 9th June 2005 the Plaintiff amended her previous email to the Defendant and the email read as follows:

> "*Schedule Amended UPDATE FOR LAST WEEK May 29 – June 4. Install firewall between units – done; Completed tiling of both 2-bed units – 95%. (1 bath to be completed); Complete painting of both two-bedroom units – 90% complete; Install ¼ round on all windows – done; Close floor in 1-bed unit; Close floor in 2-bed unit – done; Prep bathrooms in 2-bed units for toilet/basin (white) – 50% (1 bath to be completed); Install tubs in 2-bed units – done*."

54. In another email on the 9th June at approximately 10 minutes after the previous email, the Plaintiff set out her schedule for June 9-15 as follows:

"*Install external doors for 2-beds and studio*; *Install toilet and basin 2-beds and studio*; *Tile bath wall 2-beds*; *Tile studio unit floor and bath*; *Prime studio with white paint*; *Completed tiling of both 2 bed units – 95% (1 bath to be completed)*; *Complete painting of both two-bed units – 90% complete*; *Close floor in 1-bed unit*; *Prep bathrooms in 2-bed units for toilet/basin (white) – 50% (1 bath to be completed). Target is to complete the 2-bed and studio units remaining items are Cabinets, water heater, electrical fixtures."*

55. The Defendant's position is that the work was not completed by the 24th June 2005, as set out in the contract, and, accordingly, on the 30th June 2005 the Defendant sent the Plaintiff a list of outstanding items and also a Notice to Complete pursuant to Clause 5.2 of the contract, informing the Plaintiff that she must complete all the apartments, save for apartment A, by "two (2) weeks from today," that is, by the 14th July 2005, and apartment A by early August 2005. In addition, the Defendant reminded the Plaintiff that time was of the essence, and this was due to the fact that she, the Defendant, was expecting tenants.

56. The outstanding areas listed by the Defendant included many miscellaneous items but she also drew attention to the septic tank and her expectation to see a complete and operational septic system.

57. The most significant item in the list was item 10 and the number of electrical works that were left to be completed. The Defendant highlighted the fact that the Government/Planning would contact CUC once the final inspection had taken place and asked the Plaintiff to check with her electrician and with Planning. The Defendant said that apartments B, C and D needed to be inspected and passed by the 14th July 2005 to give the prospective tenants sufficient time to sort out their accounts with the utility company.

58. The Defendant also highlighted the fact that cabinets were to be installed by the 22nd July, as tenants had been told that the apartments would be available on the 25th July 2005.

59. The Defendant also said she had contacted Felicia Galbraith of Cayman National Bank in accordance with the Bank's request to make another visit to the site. It was clear from the evidence before me that the Bank and the financing were dependent on the completion of the Additional Works as set out in the contract.

60. On the 7th July 2005 the Plaintiff set out, in an email, works that were being carried out.

61. It is accepted that Cayman experienced two hurricane warnings, and consequently, there was some delay in the Additional Works being carried out. In fact, the Defendant's evidence was that the hurricane season had begun early and, accordingly, when the Plaintiff asked for an extension of time – to the end of August – to complete apartment A, the Defendant readily agreed.

62. On the 27th July 2005 the Defendant sent out another action list, which included a number of miscellaneous items. Again, the important items were electrical, to ensure that panel boxes and connections were made to allow the tenants to move in. The Defendant, in that email, also enquired about the cabinets for apartments B and C, the septic tank, and other miscellaneous items.

63. On the 28th July 2005 the Plaintiff informed the Defendant that she would be unable to complete the electrical works on the apartments, even on a temporary basis, because:

> "*The quotes we received from electricians were 4-6 times greater that our current budget. Basically, they realized we were in a tight place in terms of timing and therefore charged exorbitantly. The delay was caused by the threat of several hurricanes and [the lack of] availability of certain material. In addition the electrician on your project had a planned vacation 2 month [sic] ago for the week of July 25th so that he could be home for the birth of his child. Please inform your tenant appropriately as to the delay. A new date of Aug 8th is given for temp power awaiting [pending] Planning approval. I am truly sorry for the inconvenience.*"

64. The Plaintiff had significant difficulties with the ordering of the cabinets. It appears that cabinets were stolen and or damaged, and therefore cabinets were only available for two of the four apartments. Accordingly, the Plaintiff said that Cabinets needed to be re-ordered. On the 29th July the Plaintiff admitted that the cabinet man was "*stressing her out*."

65. By the 2nd August 2005 the Plaintiff said that the electrician was proceeding as planned, and that all fixtures for apartments B, C and D should be done on the 2nd August 2005. The Plaintiff added, "*Plumbing should have been completed yesterday*" and she added that she would confirm whether inspection had been done on that day. The Plaintiff said she was still receiving the runaround regarding cabinets.

66. By the 25th August 2005, the Plaintiff was demanding payment of the $32,000.00, even though it is clear from the exchange of emails and the evidence that the work was not complete, and further, a Certificate of Occupancy had not

been obtained. It was always common ground between the parties that the Defendant's financing was dependent on a valid Certificate of Occupancy.

67. By the 9th August 2005 apartments still had no cabinets, there was no water to the property nor was there electricity. The Defendant was having extreme difficulty in renting out the apartments. Apartment B had no water, no kitchen sink, no cabinets, and a stove that did not work. Accordingly, the Defendant accepted a reduced rent.

68. The Plaintiff continued to have difficulty with the cabinets and in order to progress matters the Defendant paid the Plaintiff the sums of $1,000.00 on the 22nd August 2005 and $500.00 on the 15th September 2005.

69. On the 25th August 2005 the Plaintiff confirmed that the electricians were unable get back to work. No final approval had been given for the electrical works or the plumbing works, and it appears from the witness statements of the Defendant, and the evidence of both the Plaintiff and the Defendant, that these delays continued, with only preliminary inspections from government departments taking place. Accordingly, the Defendant was unable to rent the apartments at the time she had promised.

70. It was the Defendant's mother, Ms. Welcome, who eventually applied for the Certificate of Occupancy on the 30th November 2006. At that time the Planning Department stated that there were still outstanding items regarding drain installation and additional parking. The Planning Department insisted on replacing the four existing parking spaces and adding another two parking

spaces, as required by the plans. The Defendant paid Watler & Heslop the sum of CI$3,125.00 for the installation of drain wells and CI$5,460.00 to Gire Dominguez to execute the necessary parking arrangements

71. On the 12th April 2007 the Water Authority wrote to the Defendant stating that the septic tank at the property had failed and was leaking untreatable wastewater which was going over on to the adjacent lot.

72. It is clear to the Court that the septic was a necessary item that had been brought to the Plaintiff's attention on a number occasions. In addition, the terms of the Planning permission included a provision that required a new septic tank and the Plaintiff had provided for a new septic tank in her estimate.

73. As this was an urgent matter the Defendant paid out the sum of CI$5,167.00 in order to empty and remove the old faulty septic tank and install the new septic tank.

74. At this time relations between both the Plaintiff and the Defendant had disintegrated. The Plaintiff was not willing to pay the expenses that the Defendant had incurred to complete the Additional Works to the premises. It is this Court's view that the delays were unreasonable and excessive and continued from the 30th June 2005 until April 2007.

75. It is quite clear from the evidence of both the Plaintiff and the Defendant that there were a number of factors which prevented the Certificate of Occupancy from being granted. The Defendant was forced to implement a number of repairs.

This was something that was agreed to be completed by the Plaintiff in the contract. In order to obtain the Certificate of Occupancy the Defendant found herself saddled with effecting these repairs which cost her the sum of approximately $19,507.97. As an interim measure, an application for special permission to occupy the apartments. This was applied for on the 15th December 2006, and this special permission was granted on the 22nd December 2006. The Certificate of Occupancy was not granted until the 21st March 2007.

Plaintiff's Reasons for the delay in completion

76. The Plaintiff provided evidence in her witness statement dated 1st June 2009, setting out the reasons for the delay in completion of the works. She said she had many difficulties sourcing materials and labour to conduct construction and repair work to the premises. She avers that, not only was there initially a shortage of labour, but also some severe shortage of materials. The Plaintiff candidly admitted that because of the difficulties with sourcing materials and arranging for labour, the completion of the Additional Works took, unavoidably, far longer than initially anticipated.

77. It is apparent from the Plaintiff's evidence that she had no formal training as a building contractor. She had no engineering qualifications, nor had she any on site experience as a mason, or a plumber or a carpenter or an electrician. In fact, whilst running Summit building contractors the Plaintiff had a very senior and fulltime position as the Director of Technology for a major international bank and was also its Regional Head for Data Management, covering the Cayman Islands, New York, Curaçao and BVI.

78. In Summit's construction business, the Plaintiff and her husband, Mr. Thomas, both acted as Project Manager. However, no evidence was produced to demonstrate that Mr.Thomas had any experience or qualifications to be a building contractor, nor was there any evidence that he had any on-site experience as a mason, or a plumber, or a carpenter or an electrician. I understand from the Plaintiff's evidence that he had a B.Sc. and an M.Sc. in Business Administration. In addition, he also had a fulltime job in the Financial Services industry. Accordingly, the Plaintiff's evidence was that in the times he could not be the Project Manager, she would fill in, and when she could not be the Project Manager, he would fill in. This would have to be described as a very haphazard and unreliable approach to the running of a business that clearly demands a strict regime of supervision from those in charge.

79. Also, at various times, they had an employee called Stanford Campbell who apparently supervised the workers on the site because the Plaintiff and her husband recognized that they both had fulltime jobs in the financial services industry – which this Court notes are themselves very demanding occupations.

80. The Court is of the view that although the business may have had some success over the period of time prior to the Plaintiff having been contracted to do the Additional Works, it is extremely unsatisfactory for the Plaintiff to run her business in this way. Construction and renovation for four apartments is not a simple matter and it needs experience, expertise and most of all fulltime attention.

81. In addition to the fact that both the Plaintiff and her husband had fulltime jobs, they were, during the material time, experiencing significant marital discord and I understand that divorce proceedings had commenced. Although the evidence is that the Defendant was sympathetic to the Plaintiff's marital difficulties, the Additional Works necessary to renovate the Premises should not have suffered as a result of this distraction.

82. The Plaintiff had constant problems in the electrical area. After Mr. Eric Bell, a Mr. Merlin Wells was the next subcontracted electrician, but his performance, again, was less than satisfactory. At varying times the Plaintiff employed other electricians by the names of "Cleo Scott," "Eric" and "John". The Plaintiff in her evidence candidly acknowledged that her biggest problem was the failure to perform the necessary electrical works. Various electricians walked off the job for different reasons. The costs in this area were constantly increasing with each new electrician. Moreover, there were many times when no electrical work was being carried out. Again, this was the liability of the Plaintiff and to a large extent caused the Plaintiff to be in breach of her contractual obligations to the Defendant.

83. In her email dated the 28th June 2006 to the Defendant the Plaintiff says:

> "*It seems that the electrician will be the hold up again, your mother is excellent at getting him to work, so perhaps you could encourage her to do this.*"

84. Almost a month later, on the 24th July 2006 the Plaintiff said in another email:

"*The electrician has run off … again. Saga continues*…"

85. The Defendant, on many occasions, reminded the Plaintiff of her contractual obligations and of the need for the work to be completed on a timely basis. It is clear from the Plaintiff's evidence that she was unable to complete the work she agreed to do in the time period set out in the contract. The Plaintiff, in fact, admitted to the Court that she did not respond to the prevailing circumstances on site as much as she should have. She said in her evidence that, with hindsight, she should have responded to the Defendant's emails but due to her problems with the different electrical contractors, her ongoing divorce, her failure to obtain and install the cabinets and, what she herself described as a "*spell of bad luck[which all] had a knock-on effect.*" The Plaintiff actually described the failure to install the cabinets as having the "*wind taken out of her*."

86. The Plaintiff experienced what she termed as very bad luck with all her electricians – with the best example being in her evidence under cross examination that "Martin" left in September 2006. Martin had told the Plaintiff that he was waiting for a particular inspector however, Martin was, not only not doing his job, but he also went off the site.

87. On the 11th August 2006 the Plaintiff writes to the Defendant and states:

> "*Look!! You informed me of the deadline but I can't force people to work. The electrician received his money and then was late a week. What the f… do you want me to do about that…I could have paid many electricians previously the 10K or 4.5K they were asking, but why should I when I was not going to get it back, thus it took time to find a decent electrician that would work for 2K, given all the circumstances. Not too many people want to pick up someone else's work*."

88. On the 24th July 2006 the Plaintiff stated in an email:

> "*The final plumbing inspection is tomorrow … the final structural inspection is July 28th … I have seen the estimates [the estimates for the electricians]… only 1 day work left. Apt A is 95% complete.*"

89. Yet on the1st August 2006 the Plaintiff said in her mail:

> "*I have had three other people look at the job and they all estimate 3-4 days to complete Apartment A and 2-3 to review all previous work before inspection.*"

90. On the 2nd August 2006 the Plaintiff said:

> "*The final plumbing and building inspections are complete … just waiting on electrical.*"

91. On the 14th August 2006 the Plaintiff said:

> "*The electrician is almost completed, should be finished by Wednesday and apply for inspection assuming all goes well final inspection for electrical should be done this week.*"

92. Yet, on the 29th August 2006 the Plaintiff in an email stated:

> "*We had a preliminary electrical inspection. The inspector provided the electrician with a list of things that need to be done. He will start working on them today and re-apply for inspection this week*."

93. On the 4th September 2006 the Plaintiff stated:

> "*The electrician has not returned to the island…thus no progress has been made. He assures me that he will be back to finish this week and arrange inspection immediately following.*"

94. On the 13th September 2006 the Plaintiff stated:

> "*The electrician has finished. The a/c guys were supposed to complete a/c today but I had difficulty getting them keys to enter. Thus they will be by tomorrow to complete. Inspector said he would be able to do the inspection on Friday. My guys will finish on the weekend. Should have CO by September 26th assuming no delays from Planning.*"

95. On the 23rd September the Plaintiff said:

> "*The Inspector issued additional changes…if all goes well… we will have signoff on Monday the [25th September 2006]*."

96. On the 2nd October 2006 the Plaintiff said:

> "*Electrician asked us to bear with him. He is going through some personal stuff at the moment. There are 12 open items from the Inspector. 4 have been completed…Electrician said things should be done and he should have request to CUC submitted for full power by Monday [9th October 2006]*."

97. On the 23rd October 2006 the Plaintiff stated:

> "*Final inspection complete. We will need to arrange to get the CO [Cert of Occupancy] issued*."

98. However, by the end of October 2006 the Plaintiff had left, she says having completed all the work she could. On the 31st October 2006 the Defendant wrote to the Plaintiff and stated that:

> "*Ken Wright has informed us that certain plumbing/building inspections have not been signed off*."

99. In effect, the Central Planning Authority did not issue the final Certificate of Occupancy for the Plaintiff's Premises until the 24th March 2007.

100. The Plaintiff employed subcontractors to complete the Additional Works she had contracted to do for the Defendant. When her subcontractors failed to complete the Additional Works, the risk and liability fall squarely on the Plaintiff.

101. For many reasons, not least of which has been the failure of her subcontractors to do the work, the Court finds that the Plaintiff is in breach of her contract by failing to carry the works in accordance with the plans prepared by Island Drafting. The Site Plan dated December 2004 which bears approved stamps dated the 6th February and 8th March 2005 refers to a storm drain, garbage containers, six parking spaces with parking stops, Asphaltic concrete on the parking bays and the roads around the building at Parcel 292, and, an existing septic tank.

102. The Plaintiff throughout the course of the 18 months of delay on the project consistently sought to lay blame for delays at the feet of workers, subcontractors, the Defendant's mother, the Inspectors' inspection reports and so on. The Court finds no evidence of the Plaintiff taking full or any responsibility for the delays as the contractor and the signatory to the contract, either in her email responses and explanations to her client, the Defendant, or by putting in place successful remedial actions to avoid the repeated delays.

103. The Court has examined the evidence before it and cannot find where the Defendant's agent and mother, Ms. Welcome, interfered in a negative manner to affect the Plaintiff's capacity or ability to complete the Additional Works. In fact, as was recognised by the Plaintiff, all Ms. Welcome was trying to do was to assist the Plaintiff in completing the Additional Works so that the Defendant's tenants could move in to the apartments, to the satisfaction of Cayman National Bank thereby ensuring that the financing would be made available to pay the Plaintiff for the completed Additional Works.

104. The Court finds that the Plaintiff failed to provide two of the required six parking spaces and also, the Plaintiff was in breach of the contract by failing to adequately cover the parking bays and the reduced roadway area with a sufficient quantity of Asphaltic concrete.

105. Despite the fact that the Plans required a storm drain and the 24th March 2005 contract refers to drainage, the Court finds that no storm drains were installed by the Plaintiff.

106. Additionally, despite the fact that the Plans refer to garbage containers, no garbage containers were supplied by the Plaintiff.

107. The contract dated the 24th March 2005 refers to the demolition of the existing septic tank and its replacement. The Plans also refer to the existing septic tank and an FEFF well. Despite repeated warnings by the Defendant, the Plaintiff failed to check whether the old septic tank was fit for the purpose. Clearly, from the report of the Water Authority it was faulty. Accordingly, the Court finds that

the Plaintiff is in breach, for failing to install a new septic tank and thereby causing the Defendant further loss and damage.

108. There is evidence that the Plaintiff also failed to complete certain painting and caulking work. In addition, the Court finds that a number of appliances such as toilet paper holders, towel rails and items in Apartment 4 had not been completed, forcing the Defendant to make good these faults.

109. It is common ground that the Plaintiff voluntarily left the site in October 2006 – that is, some five to six months before the Certificate of Occupancy was obtained. At no time did the Plaintiff exercise her right under the contract to either suspend or terminate the agreement.

110. Although Clause 5.4 states:

> *"Upon termination of this Agreement by either the Contractor or the Principal, the Contractor remains entitled to, and the Principal must ensure as far as reasonably practicable, that the Contractor will receive the reasonable proportion value of the Works done by the Contractor up to such date*."

111. It is apparent that there were some negotiations between the parties to reach a settlement but these efforts broke down and ultimately the Plaintiff issued her proceedings in September 2007.

112. On the evidence before this Court the Plaintiff voluntarily left the site after having failed to complete the Additional Works within the contract period

or within the period stipulated by the Defendant's Notice to Complete and well before the Certificate of Occupancy was obtained.

113. In view of the fact that the parties agreed that the completion of the Additional Works would cost a lump sum of CI$32,000.00, the contract can be properly described as one with entire obligations rather than divisible obligations. At paragraph 21-027 of the 29th Edition of ***Chitty on Contracts*** the learned authors state:

> "*A contract is said to be "entire" when complete performance by one party is a condition precedent to the liability of the other; in such a contract consideration is usually a lump sum which is payable only with complete performance by the other party.*"

114. Accordingly, this Court finds the contract in this matter to be an entire contract rather than a divisible contract.

115. The learned authors of ***Chitty*** further state at paragraph 21-029:

> "*In the reported cases the courts have tended to the view that in every lump sum contract there is an implied term that no part of the price is to be recovered without complete performance*."

116. When one reviews the terms of this contract, it is clear that the Defendant's obligation to pay CI$32,000.00 to the Plaintiff would only come into existence after the completion date as set out in Clause 1.3 of the contract.

117. Furthermore, at paragraph 21-030 the learned authors of ***Chitty*** state:

"*Where a party performed only part of an entire obligation he can normally recover nothing, neither the agreed price, since it is not due under the terms of the contract, nor any smaller sum for the value of his partial performance, since the court has no power to enforce apportion the consideration. The refusal of pro rata payment is based on the inability of the court, as a matter of construction, to add such a provision to the contract, and also upon the rule that the mere acceptance of acts of part performance under an expressed contract cannot, taken alone, justify the imposition of a restitutionary obligation to pay on a quantum meruit basis.*"

118. In this case the Plaintiff has failed to complete the work she undertook to do, and it is this court's view that her claim fails.

119. The Court finds, on all the evidence, that the Plaintiff has failed to carry out, maintain and complete the works and the Additional Works with reasonable care and skill. In addition the Plaintiff also failed to put right the defects in the Additional Works, due to faulty workmanship and faulty material.

120. On the evidence before me, the Court finds that the Plaintiff is in breach of the contract to complete the project in 3-month timeframe provided for in the terms of the contract. The Plaintiff failed to perform the works in accordance with the Plans submitted to the Planning Authority and failed to complete all the works as agreed between the parties.

121. Accordingly, this Court rejects the Plaintiff's claim for the sum of CI$32,000.00 and further rejects the Plaintiff's claim for the additional $4,995.00.

Defendant's Counterclaim

122. The Defendant's Counterclaim filed on the 19th October 2007 is set out at paragraph 5, 6 and 7 of this Ruling.

123. The evidence supporting the Defendant's Counterclaim was provided by the Defendant in her witness statement dated the 4th February 2010 and by Ms. Welcome in her Witness Statement dated the 7th February 2010, and in their evidence before this Court given on the 19th and 20th May 2010.

124. In September 2009 the Defendant had to leave the Cayman Islands to take up a position in the United Kingdom, and it was then that her mother, Ms. Welcome, began acting as the Defendant's agent to try and ensure that the Additional Works to the premises were completed. Ms. Welcome's evidence was that apartments B, C, and D were occupied by tenants by the 1st September 2005, although there were still outstanding construction issues with apartments B, C and D. In addition, Ms. Welcome's evidence demonstrated that apartment A was far from complete.

125. Ms Welcome's task was to stay "on the ground" to make site visits and to organise payments and to liaise with the utility companies, government departments and the Planning Department.

126. In her evidence Ms. Welcome stated that there was a lot of painting which needed to be done as well as caulking, and after the caulking, more painting. She said that the Plaintiff's husband, Mr. Thomas, was still involved

and he helped to patch up one side of a wall. Ms. Welcome's evidence was detailed and she said that only one apartment had the base skirt boards, and that apartments B, C, and D did not.

127. Ms. Welcome said she had asked the Plaintiff to avoid using sheetrock and recalled two panels of cement board being joined. She said the Plaintiff's husband, Mr. Thomas, "patched up one side" but never did the other side. Ms. Welcome said that, as a result of this, she had to call the Plaintiff on many occasions. Ms. Welcome's evidence is that the Plaintiff often promised to ensure that the other jobs would be done, but, more often than not, that did not happen. Ms. Welcome said that she could not get through to the Plaintiff, Dawn Smith, on many occasions. She also raised these matters with the Plaintiff's husband, particularly when the plumbing was not complete and when there were no faucets. Ms. Welcome said that despite reassurances from the Plaintiff and her husband that they would take care of matters, things were not done. Ms. Welcome said that oftentimes Dawn Smith, the Plaintiff, did not return her calls for over a week, and she found the whole experience to be very unsatisfactory.

128. This Court finds that the Defendant was put to the following additional expenses in order to complete the Additional Works. It would appear to be unchallenged that the Defendant gave the Plaintiff CI$2,000.00 to enable her to purchase cabinets and countertops. In addition the Defendant paid the Plaintiff CI$1,500.00 to allow her to purchase electrical wire. This evidence came from Ms. Welcome's Witness Statement.

129. The Defendant also had to pay Gire Dominguez the sum of CI$5,636.10 to finalise the necessary parking for the Premises as set out in paragraph 73 above.

130. It is clear from the evidence before this Court as well as the evidence provided by the documents from the Water Authority, that a new septic tank had to be installed and, accordingly, despite several warnings from the Defendant, the Plaintiff failed to do this. This cost the Defendant an additional CI$5,167.00 which this Court will allow.

131. In addition, the Defendant had to pay Watler & Hislop the sum of CI$3,125.00 to install drain wells, as referred to in paragraph 70 above.

132. Ms. Welcome kept detailed accounts in relation to the miscellaneous items and even kept the copies of the cheques to the various local companies, which were paid for the purchase of items such as fire extinguishers, paint, cable wires, toilet seats, door locks, mirrors, towel racks, garbage bins and associated materials – all amounting to a total of CI$5,166.20 as set out in Ms. Welcome's Witness Statement and exhibited in the court bundle.

133. Accordingly, the Defendant paid out the following amounts in relation to the necessary remedial work and cost of hiring alternative contractors in order to complete the Additional Works:

a. Cash advances – CI$ 3,500.00

b. Parking – CI$ 5,636.00

c. Septic tank – CI$ 5,167.00

d. Drain wells – CI$ 3,125.00

e. Miscellaneous – CI$ 5,166.20

f. Subtotal – CI$22,594.30

Loss of Rent

134. The Defendant in her Counterclaim pleaded that she has suffered loss and damage in incurring the costs of remedial works and or the cost of hiring alternative contractors, and loss and damage generally.

135. Although the Defendant did not specifically plead loss of rent, she is claiming for loss of rent in her general claim for loss and damage.

136. The Defendant submits that the Plaintiff was fully aware of the deadline in relation to tenants, as an important consequence of the completion of the contract, as was the fact that the Defendant would not be able to obtain financing from CNB until the granting of the Certificate of Occupancy. The Defendant contends that this is confirmed by the terms of the contract which specified the period of three (3) months and a completion date corresponding with the grant of the Certificate of Occupancy.

137. The lamentable litany of subcontractors failing to do their work, as well as the unreliable supervision of the project, led to the inevitable conclusion that

the Plaintiff failed to perform what she was contracted to do. Furthermore, the Plaintiff singularly failed even to complete the Additional Works within the further reasonable and specified period, as set out in the Defendant's Notice to Complete, and even with the Defendant's assistance to the Plaintiff of making additional payments (as detailed in paragraph 127 above) which were already provided for in the original quotation.

138. It is clear from the evidence of both parties that the Plaintiff knew that the Defendant could only obtain financing after the Certificate of Occupancy was in hand, and, in addition, the Plaintiff knew that financing to the Defendant from Cayman National Bank was dependent on the fact that the Defendant had represented to the Bank that she would be renting the apartments from July 2005.

139. The Defendant gave detailed evidence regarding her frustration and inability to rent apartments A, B, C and D. On the 9th August 2005 the apartments still had no cabinets, there was no water to the property and there was no electricity. The Defendant had a tenant for apartment B who had paid a deposit on the basis that the apartment would be completed by the 25th July 2005. The Defendant's tenant moved into apartment B some time between the 11th and the 15th August 2005, but the tenant had no water, no kitchen sink, no cabinets and a stove that did not work, so, therefore instead of paying CI$1,500.00 for the month of August, the rent was reduced to CI$450.00, resulting in a loss to the Defendant of CI$1,050.00.

140. The tenant for apartment C was also to move in by the 1st August 2005. Again, for the reasons set out above, this tenant was not able to move in until the

1st September 2005. Therefore the Defendant lost one month's rent, being CI$1,650.00.

141. Apartment D suffered from the same problems but the tenant was prepared to occupy the apartment and the Defendant reduced the rent from CI$950.00 to CI$650.00. Therefore the Defendant only lost CI$300.00 on apartment D.

142. Accordingly, the Defendant lost CI$3,000.00 on apartments B, C and D.

143. Although the issues in relation to apartments B, C and D were eventually finalised by the end of 2005, the problems with apartment A continued and therefore this apartment was not rented until the 1st November 2006. Accordingly, the Defendant lost 15 months of rent on apartment A, making the total loss on this apartment CI$16,500.00.

144. Accordingly, the Defendant lost rent of CI$19,500.00 on all four apartments as set out in paragraph 72 of her Witness Statement.

145. The evidence of this loss of rent was clearly set out by the Defendant in her Witness Statement dated the 4th February 2010 and was not challenged by the Plaintiff either by direct evidence or in cross examination of the Defendant. As I said before, I find both parties to be honest and I have no reason to disbelieve the Defendant on this issue.

146. In considering the question of damages and their quantum in relation to the Defendant's Counterclaim, I note that the Defendant's counsel reiterates that the starting point, is as enunciated by the learned authors of McGregor on Damages, 18th Edition at paragraph 6-155, where they stated:

> "*The starting point in resolving a problem as to the measure of damages for breach of contract is the rule that the claimant is entitled to be placed so far as money can do it, in the same position as he would have been in had the contract been performed.*"

147. Counsel for the Defendant also relies on dicta in ***Hadley v. Baxendale*** 1854 9 Exch 341 and at paragraph 6-157 of McGregor which stated:

> "*Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such a breach of contract should be such as may have fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such a breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it*."

148. The ***Hadley v. Baxendale*** rule was re-stated in the judgment of Asquith L.J. in ***Victoria Laundry v. Newman*** [1949] 2KB 528, from which the learned authors of *McGregor on Damages* saw fit to re-state the six propositions:

> *"(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed. This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss de facto resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognized as too harsh a rule. Hence,*
>
> *(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.*

(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties, or, at all events, by the party who later commits the breach.

(4) For this purpose, knowledge 'possessed' is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the 'ordinary course of things' and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the 'first rule' in Hadley v. Baxendale. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the 'ordinary course of things,' of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the 'second rule' so as to make additional loss recoverable.

(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result.

(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough…if he could foresee it was likely so to result. It is indeed enough if the loss (or some factor without which it would not have occurred) is a 'serious possibility' or a 'real danger.' For short, we have used the word 'liable' to result. Possibly the colloquialism 'on the cards' indicates the shade of meaning with some approach to accuracy."

149. It is correct that Asquith L.J.'s judgment in ***Victoria Laundry v. Newman*** was criticised by Lord Reid in the House of Lords decision of ***Czarnikow v. Koufos*** [1969] 1 A.C. 350, but as the learned authors of ***McGregor*** state as paragraph 6-152:

"*Yet it is fair to say that taken as a whole, Asquith L.J.'s careful restatement in **Victoria Laundry v. Newman** has survived the various strictures appearing in their Lordships' speeches. For Lord Morris, Asquith L.J.'s "illuminating judgment" was "a most valuable analysis" of the **Hadley v. Baxendale** rule. For Lord Pearce, it was "a justifiable and valuable*

*clarification of the principles which **Hadley v. Baxendale** was intending to express.*"

150. Furthermore, Donaldson J. in ***Aruna Mills v. Dhanrajmal Gobindram*** [1968] 1 Q.B. 655 stated that ***Victoria Laundry v. Newman*** "remained unimpaired as the classic authority on the topic of remoteness in contract. As ***McGregor*** states at paragraph 6-163:

"*…no doubts were cast upon Asquith L.J.'s second criteria that liability depends upon actual or imputed knowledge, and even the objection to his first criterion of reasonable foreseeability was really that it was liable to be misunderstood rather than that it was necessarily wrong.*"

151. It is my view that the Plaintiff was aware of the nature of the work she was to perform and was clearly aware of the fact that the Defendant intended letting the apartments on a commercial basis. The completion date in the contract itself was tied to the Certificate of Occupancy so that the site would be ready to be handed back to the Defendant ready for use. Indeed the Defendant told the Plaintiff by email on the 20th May 2005:

"*I'm just letting you know that I cannot afford any delay past the end of June. The contract ends on June 24th and the Bank has already required me to start repaying the principal, which puts my finances in the bright red area. So please put first priority on this project and a full crew on the site as much as possible to ensure completion by June 24th.*"

152. Furthermore, on the 10th August 2005, the Defendant informed the Plaintiff by email:

"*Both tenants have confirmed they cannot wait any longer and must move in, i.e. be living in the unit by w/e. I will need to collect all keys off you once cabinets are installed and laundry machines installed.*"

153. Accordingly, I accept the Defendant's contention that the claim for loss of rent in this case is a claim for a loss naturally arising from the breaches of the Plaintiff which have already been enumerated in the foregoing paragraphs, and the damages arising are natural and are according to the usual course of things and would have reasonably been in the contemplation of both parties.

154. Accordingly I find that the Defendant has made out her Counterclaim, and therefore award the Defendant the sum of CI$42,094.30 for loss and damages sustained by the Defendant by reason of the breach of the contract by the Plaintiff.

155. As costs follow the event I also order that the Plaintiff pays the Defendant's costs, to be taxed if not agreed, and interest thereon.

Dated this the 27th September 2010

Quin J.
Judge of the Grand Court