IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

Cause No.: 101 of 2015

BETWEEN

CONSTANTINO ANGGAWAY
& ANALYN FEBRERO AYDOC

Plaintiffs

AND

LORIMAR DEVELOPMENT LIMITED

Defendant

CHAMBERS AS
OPEN COURT

Appearances:	**Mr. Pramod Joshi, Brady Attorneys-at-Law for the Plaintiffs** **Mr. John Meghoo, Attorney for the Defendant**
Before:	**Hon. Justice Marlene I. Carter Actg.**
Heard:	**24th and 25th October 2017**
Judgment Delivered: (for comments)	**17th May 2018**
Judgment Finalised and Released:	**24th May 2018**

GRAND COURT · CAYMAN ISLANDS ·

HEADNOTE

Construction contract; breach; liability for defects; causation.

JUDGMENT

The Plaintiffs' claim is for loss and damage arising out of alleged defective workmanship on the Plaintiffs' residence. The Plaintiffs first entered into an agreement to purchase unit #19 in Lorimar Heights, Phase 5 (hereinafter referred to as "the residence") from the Defendant company Lorimar Development through the Defendant's agents Century 21st on the 2nd May 2011. After some delay the Plaintiffs moved into the residence in April 2012.

2. The Plaintiffs' Particulars of Claim detailed that after they assumed possession of the residence, they became aware of a number of issues related to the construction of the house. These issues concerned the air-condition pipe, the air condition box in the attic, the bathroom toilet, the tiling in the master bedroom and the tiling in the kitchen/living area. The matters relating to the air condition pipe and the air condition box in the attic arose within two months of the Plaintiffs' occupancy and were ultimately resolved, albeit not to the Plaintiffs' full satisfaction. Specifically, with regard to the tiling, the Plaintiffs claim that the first of these issues arose in May 2014, approximately two years and one month after they had been living in the residence.

3. The Plaintiffs state that they informed the developer about the tiling and, in or around June 2014, the Defendant's agent arranged for an independent tile contractor to inspect the tiles at the residence. On the 24th June, following his inspection, the independent contractor concluded that the entire house would need to be retiled and so informed the Plaintiffs. The Defendant's agent made proposals on the Defendant's behalf in order to rectify the problems identified by the independent contractor; however, those proposals were rejected by the Plaintiffs. Further, the Plaintiffs claim that they were offered ex gratia assistance by the Defendants; which they also declined.

4. The 1st Plaintiff claims that the 2nd Plaintiff attended at the George Town Hospital in or around the 12th July 2014, complaining of sinusitis and chest pains purportedly relating to the "dust nuisance" arising from the tiling issue at the residence.

5. The Plaintiffs informed the Defendant of all of these matters prior to commencing legal action in September 2014. To date, the outstanding issues have not been resolved and the Plaintiffs claim that they are neither able to afford the cost of rectifying the poor workmanship issues, nor the cost of securing alternative accommodation whilst the tiles are being replaced. The Plaintiffs also point to the cost of storage required in order to protect their furniture during the period of repair.

6. The Plaintiffs state that they have suffered anxiety, inconvenience and loss of amenities in the enjoyment of the residence and claimed the following as a result:

"1. CI$18,980.00 to remove and replace the tiling ...
2. CI$25.00 on materials purchased for the bathroom tile.
3. Filing fee in the sum of CI$250 dollars.
4. Accommodation while work proceeds with cost to be assessed.
5. Storage cost for furniture with costs to be assessed.
6. General damages to be assessed.
7. Legal costs of CI$1600.00 to date of filing."

7. The Defendant filed a Defence and Counterclaim on the 3rd July 2015. The Defendant denies that the residence was constructed poorly and stated that:

"5. The Plaintiffs writ is flawed and misleading to the Court. They have willfully omitted a material consideration for the Court, i.e. that they refused to accept the tiles that the Plaintiff had selected and intended to install in their home and went on their own and selected tiles of their liking and ordered tiles from Paramount Carpet and Tiles. The Defendant then installed the tiles selected by the Plaintiffs during the construction of the home pursuant to a Contract to Construct.

6. The Plaintiffs do not enjoy a warranty that extends for over two years after completion. The warranties are clearly set out in the documents that the Plaintiffs executed and the fact that there are no other warranties is made explicitly clear.

The Plaintiffs, one of whom is a police officer, acknowledged that they have obtained professional independent advice and in addition,

> *'acknowledges that there are no oral or written warranties (collateral or otherwise), covenants, guarantees, promises or agreements on the part of the Developer other than those expressly set out in this Agreement.' (see page 32 of the Plaintiffs' Writ)*

7. *The Plaintiffs, as very clearly set out in their Writ, have taken great pains to avoid mitigation. A damaged party is under obligation to mitigate pursuant to multiple precedents."*

8. The Defendant relies upon the Offer to Purchase agreement and the Contract to Construct agreement [hereinafter referred to as "the Contract"] entered into between the Plaintiffs and the Developer on the 1st February 2012, as being the relevant contracts for determination of any rights or obligations between the parties and the Defendant set out in the Defence:

"56. *In respect to Plaintiffs' paragraph 27, the Defendant states that the Plaintiffs do not enjoy a warranty that subsists for two years after they took possession of the house and furthermore, by their own admission they rejected multiple ex-gratia offers by the developer which would have resulted in their tiles being repaired a long time ago. Therefore, any inconvenience, anxiety and loss of amenities that the Plaintiffs experienced and continue to experience are of their own making.*

57. *The Plaintiffs' warranty term and right to inspection is set out in paragraph 3(4) of the Contract to Construct which is at page 27 of their plaint.*

58. *The Plaintiffs' warranty, which they agreed to in writing, expired two years before they made claim.*

59. *The Plaintiffs failed in all respects to mitigate and;*

60. *The Defendant denies that the 'popping up' of the tiles was caused by poor workmanship."*

9. The Plaintiffs joined issues with the Defendant upon his defence in their Reply filed on 24th July 2015. The more pertinent paragraphs of the Reply were as follows:

"2. As regards paragraph 5, the Plaintiff will say that the tiles selected were within the range approved by the Defendant and provided by Paramount Carpet and that in any event, there was no fault with the tiles themselves but in their installation.

....

7. As regards paragraph 38, the Plaintiffs will say that along with an independent contractor, Mr. Carlos Sinclair was present when the poor work was examined and opinions given as to the state of the work to be redone.

8. As regards paragraph 39, the Plaintiffs will say that the Defendant's idea of mitigation was unacceptable in that the Defendant proposed that the Plaintiffs use white tiles (which were much less expensive and in any event different from the brown already installed). The Defendant also proposed lifting tiles from another room to replace shortfall of brown tiles and to replace those tiles from that room with white tiles, the installation and labour costs of which would have been borne by the Plaintiffs. These proposals were equally unacceptable, and paid little regard to the fact that the defective work involved all the underlying thin set on which all the tiles were installed."

Course of the Trial:

10. On the date of trial, the Defendant sought to introduce two witness statements, one of which had only been filed on the morning of the trial, and both of which had been filed out of the time directed for the filing of witness statements in this matter per the Directions Order of McMillan J. of 27th October 2015.

11. The Court noted that further to the Directions Order there had been two previous trial dates set and vacated in this matter and that the facts and matters giving rise to the Plaintiffs' claim dated from as far back as 2012. Between the Directions Order and up to the date of trial the Defendant had never sought the Court's leave to file their witness statements out of time. After careful consideration of whether it was fair in all the circumstances to allow the Defendant to produce this evidence of the Thompson and Howell affidavits at trial and after due consideration of Order 38 r. 2A (1), (2) and (10) this Court ordered that the Defendant could not rely on those witness statements at trial.

12. McMillan J.'s order set out that the affidavits/witness statements were to stand as the Defendant's evidence in chief and therefore the effect of the Court ruling was that the Defendant was unable to produce direct evidence upon the trial. The trial therefore proceeded with the 1st Plaintiff being the only witness to give live evidence.

13. The further effect of this Court's order on the date of trial was that the Defendant was unable to pursue its counterclaim; there being no evidence before the Court to support same.

The evidence of the 1st Plaintiff:

14. The 1st Plaintiff's evidence in chief did not differ significantly from what has been set out and referred to herein from the Particulars of Claim.[1]

The 1st Plaintiff's evidence under cross-examination was:

> *"I reported damage to tiles after approximately two years of occupancy – within two years and one month living in this property. I don't agree it's a long length of time. I think it was a short length of time. I expect the Court to accept that."*
> ....

[1] See paragraphs 1-5 of this Judgment

"I removed some of the tiles that is already broken. I first collected them to avoid injuring my safety and my wife's safety and other persons living there."

....

"The twenty I removed were in kitchen area. I demolished all of them, approximately all of them as per the instruction of the project manager Carlos Sinclair. I do not recall that we receive a report from a quantity surveyor. There was no quantity surveyor report."

....

"Twenty titles in kitchen popped up. Also in the master bedroom, bathroom. Four popped up in bathroom. Initially it was twenty-four. The rest popped up, same as a result of workers trying to rectify as per instructions of Carlos Sinclair. The tiles popped up when they were trying to repair the tiles."

....

In reference to the Waiver document: *"I see my signature on this page. I see the just line of having received independent legal advice. I understand that we have and you have independent legal advice."*

....

"I understand Waiver ---- I was asked to put my initials below which I did on every page. I was a first time buyer. I just signed all the documents. I just put my initials on them."

15. The 1st Plaintiff's evidence under re-examination was:

In reference to the Waiver document: *"I did not read or understand them at the time. No one discussed Waiver with me. I was just asked to put my initials on it." When I had discussions with Mr. Sinclair; I am uncertain of dates but Mr. Sinclair gave me instructions to find guys to fix the tiles. I asked Mr. Sinclair to be present. It was in 2014. I just instructed attorney a couple of months after that. I did not expect there would be problems that I experienced within two years of purchase of this property."*

16. Counsel for the Plaintiffs in his closing arguments sought to have the Court consider the evidence of the 2nd Plaintiff in its determination of the issues between the parties. The 2nd Plaintiff did not appear on the date of trial and her affidavit has not been admitted into evidence. Counsel for the Plaintiffs referred the Court to the provisions of the Evidence Law at Section 42. Section 42 of the ***Evidence Law (2018 Revision)*** states:

"The parties in civil proceedings in or before any court and their spouses are both competent and compellable to give evidence on behalf of either or any of the parties thereto unless specifically excepted by this or any other law."

17. Counsel invited the Court to find that the provisions of this Section: "permits the 1st Plaintiff to speak to the matters raised by his wife and as referenced in her affidavit. He adopted the evidence of his wife as being 'wholesale' as he was present at the time and could give a first-hand account of all that occurred in the case." It appears that counsel did not fully appreciate that Section 42 is aimed principally at ensuring that a Court can receive evidence of one spouse against the other spouse and that Section 42 was primarily aimed at allowing a wife to give evidence against her husband, a position that historically the law did not allow.

18. The Section does not allow a Court to take the evidence of one spouse as the evidence of the other as though that spouse had appeared before the Court when, as in the present case relating to the 2nd Plaintiff, that spouse was unable to appear to give evidence. I therefore find that the only evidence before the Court for its consideration on behalf of the Plaintiffs was that of the 1st Plaintiff. For the reasons outlined by counsel at trial and again in his closing submissions apart from the 1st Plaintiff, the other witnesses for the Plaintiffs were not within the jurisdiction and therefore their evidence was not before the Court and subject to cross examination.

The Defendant's arguments:

19. The Defendant submits that the Plaintiffs have not proven a causal link between a negligent act or omission of the Defendant to any losses incurred by the Plaintiffs. The Defendant's argument is that the Plaintiffs have not adduced any evidence to indicate that the tiles were defectively installed or, that the tenting the 1st Plaintiff referred to in evidence was not typical when a small amount of installation work was being carried out. The Defendant's argued that:

"This would establish causation in fact, but no such evidence has been adduced. For the 2 plus years that the Plaintiffs took possession of the property, the Defendants had long surrendered care and control of the property, and the Court will never know if there was a novus actus interveniens, breaking the chain of causation, if causation could be established."[2]

20. The Defendant also submits that although it can be implied from the preamble to the Writ that the claim is a contractual one, there is no pleading or evidence to substantiate negligence. The Defendant argues that because of the passage of time the Defendant cannot be said to continue to be liable for the damage or anything consequent of it. Further that the passage of time leads to an element of remoteness to the damage sustained from any act or omission of the Defendant.[3]

21. The Defendant argued that even if it was possible to establish a causal link that the Waiver signed by the Plaintiffs "operates to vest responsibility to the Plaintiffs entirely." The Defendant referred the Court to the case of ***Barnett v Chelsea and Kensington Hospital Management Committee*** [1969] 1 QB 428 in aid of their submission. The Defendant submits that the Waiver clause of the Contract to Construct is fatal to the Plaintiffs' case and supports its argument that the "Waiver" document signed by the Plaintiffs is so clear and unequivocal as to be fatal to their case." The "Waiver clause" to the Contract to Construct agreement is set out in its entirety here:

> "**WAIVER**: *I/we declare that I/we have received in Independent Legal advice in respect to the rights, obligations and liability of this Agreement and I/we understand the obligations and liability and the manner in which such liability could be enforced by the Developer. I/we acknowledge that the (sic) neither the Developer nor any real estate agent or person purporting to act on Developer's behalf has or will be providing advice in relation to the completion of the Agreement. I/we further acknowledge that the Developer's obligations under this agreement are those specifically set out in the Developer's undertakings therein and save for any rights of action*

[2] See Paragraph 11 of the Defendant's Closing Submissions
[3] *Hadley v Baxendale* [1854] EWHC J70

arising specifically and without inference from these undertakings I/we hereby waive any rights of action whatsoever including but not limited to issues of interests, liabilities, losses, expenses, legal costs of any nature whether now or hereafter to become manifest that I/we may have against the Developer which may arise directly or indirectly out of or in connection with the completion of this Agreement or the completion of the Offer to Purchase referred to in clause 7(4)(d) of this Agreement."

The Plaintiffs' arguments:

22. The Plaintiffs submit to the Court that having not granted the Defendant leave to file witness statements on the day of trial that the Court should find that there is no defence and certainly no evidence in rebuttal to the Plaintiffs' claims and that liability on the claims ought to be beyond dispute. The Plaintiffs argue that any evidence not subject to cross examination must stand as unchallenged evidence that the Court can adopt as fact. The Plaintiffs invited the Court to accept as fact that major parts of the Plaintiff's evidence were unchallenged by the Defendant.

23. On the major issues set out above and identified by the Defendant, the Plaintiffs' submissions were as follows:

(i) The contractual issue: The Plaintiffs agree that the key document for the Court's consideration is the Contract to Construct dated 1st February 2012. The Plaintiffs argue that: "There is no contractual wording anywhere in the Contract to Construct that directly places any limitation on liability for defects post-construction or post-completion. None of which is pleaded in the Defence. Paragraph 6 of the Defence instead refers to a denial that the Plaintiffs do not enjoy a 'warranty that extends for over two years' which is both unclear and confusing."

The Plaintiffs also seek to downplay the significance of that document: "It should be remembered that this document was signed before possession and also prior to completion so its importance or effect post-completion when no re-assessment was carried out has to be questionable at the very least."

(ii) The Plaintiffs went further to state that, barring a specific time-embargo placed on the claim, that any argument that a notional two years would be a reasonable time period post-construction to place as a limitation on a claim lacked substance and was in any event never plead. The Plaintiffs state that there is no case authority that imposes a reasonable time period in all of the circumstances and that the Court should find that any such argument should be rejected as being contrary to the Limitation Law and without any actual or imputed contractual basis.

(iii) The Plaintiffs assert that the Waiver document affords no protection for the Defendant as its terms are "rambling and nonsensical" and further that it has no effective contractual value in the context. They argue that in these proceedings where the Waiver seeks to apply a blanket embargo on any claims against the Defendant, that the Waiver was not incorporated into the contract between the parties and its purported effect cannot bind an innocent purchaser.

(iv) The Plaintiffs assert that the Defendant failed to plead any issue of causation or the need for the Plaintiffs to obtain expert evidence. The Plaintiffs submit that absent any evidence from the Defendant, the Plaintiffs' case respecting the defective tiles is proven. The Plaintiffs also dealt with the issue of costs associated with replacing the defective tiles if the Defendant is found liable for such by way of supporting quotations provided in this regard.

Court's considerations:

24. The Contract to Construct of 1st February 2012, to which both parties agree that they are bound, appears to be a standard contract between a developer and a buyer. For the purpose of determining the issues between the parties, paragraph 3 of the Contract is relevant and states:

"3. ***CONSTRUCTION***

(1) The Developer warrants to the Customer that it will commence construction on or before ***1 FEBRUARY 2012*** *and (subject to the later provisions of this clause) will by the* ***31 MAY 2012*** *complete construction of the house which the Customer is contracting the Developer to build together with any required works within the Common Property in a proper and workmanlike manner and in compliance with all Government consents, regulations and statutory requirements in accordance with the plans, elevations and specifications prepared on behalf of the Developer and approved by the Central Planning Authority, copies of which are kept at the offices of the Developer, all of which are open to inspection by the Customer who is deemed to have notice. The house must be built in accordance with the plans approved by the Central Planning Authority of the Cayman Islands as they are at present in existence, but the Developer has the right to make such reasonable modifications to them as it deems fit provided the modifications to not materially affect the appearance or the structure of the house."*

25. Also, at paragraph 3(4) is set out:

'Upon receipt of the Certificate of Occupancy for the house and the serving of notice to complete by the Developer, the Customer will have seven days to inspect the house and identify any faults and provide notice of such faults in writing. Such faults will be rectified by the Developer prior to Completion and the date for Completion may be extended for up to sixty days to allow the Developer to remedy such faults. Any remedial action shall be inspected and certified by the Consultant whose decisions shall be final."

26. There are no issues as to payment, termination or completion under the contract. At the heart of this matter is whether the Plaintiffs can properly claim that the developer has not constructed the house in "a proper and workmanlike manner" in relation to defects that arose some two years after it was turned over to the Plaintiffs.

27. The burden rests on the Plaintiffs to the requisite standard on a balance of probabilities. Although in this case the Defendant has not given any evidence upon his defence at trial the Plaintiffs must still satisfy the Court of his claim on a balance of probabilities.

28. The Particulars of Claim are somewhat deficient in certain respects. The Plaintiffs recite a myriad of facts without focusing on the clear legal obligation and alleged breach. "Since the Plaintiffs took possession of the house they became aware of a number of problems in regards to the construction of the house." "That the Plaintiffs are unable to afford the costs of rectifying the poor workmanship and the costs of alternative accommodation...". However, the trial however proceeded on the basis that this was a claim for breach of the Contract.

29. ***The Limitation Law (1996 Revision)*** states that:

> *"An action founded on simple contract shall not be brought after the expiration of six years from the date on which the cause of action accrued."*

30. To this extent there is no "time embargo" against bringing this claim two years after the date of completion of the contract. However, it appears to this Court that the Defendant's argument is not limited to a question of limitation in that sense, but rather is pointed toward a question of what this Court would need to be convinced of on a claim for damage that allegedly only manifested itself some two years after the completion of the construction. This is a valid question in the circumstances of this case.

31. In order for this Court to find that there is causation in the legal sense, it must first find that there has been some factual causation shown, that is, that damage has resulted from the breach of contract. It must be proved in this case on a balance of probabilities that poor workmanship caused the damage that the Plaintiffs found at the residence two years after the handover. If this factual causation is established, it is then necessary to determine whether the law will attribute the damage to the particular breach, notwithstanding the factual connection. This is an important distinction to make in this case as damage which is too remote is not recoverable even if there is a factual link between the breach of contract and the loss or damage thereby sustained.

32. The first issue that this Court must determine is whether the Plaintiffs have proved factual causation. The Plaintiffs allege that the breach occurred because there was poor workmanship. The Plaintiffs invite the Court to make a finding of poor workmanship based on two factors. Firstly the 1st Plaintiff in his evidence points to a statement that he alleges was made by the Defendant's independent contractor as evidence of this poor workmanship. Paragraph 9 of the Particulars of Claim was as follows:

"The Developer's independent tile contractor attended the Plaintiff property on Tuesday 24th June 2014 and concluded that the thin set was defective and that the contractor had used regular thin set rather than multi-purpose. He then advised the Plaintiff that the whole house would need to be retiled."

33. The independent contractor was not called as a witness on this trial, and therefore the weight that this Court can give to this out of court statement even if this Court accepts that the statement was made to the 1st Plaintiff is limited. Section 44 of the ***Evidence Law (2018 Revision)*** states:

> *"In civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of this or any other law or by agreement of the parties, but not otherwise."*

34. The statement of the independent contractor, evidence of which was given by the 1st Plaintiff, is not evidence of any fact stated therein.

35. Secondly, on the issue of causation, the Plaintiffs point to the evidence of the 1st Plaintiff. His evidence was that a tile first "popped out" in the bedroom of the residence. Within a month of that happening a further 16 to 20 tiles lifted in the kitchen area. The evidence of the 1st Plaintiff was that the Plaintiffs were given $100.00 and replacement tiles by the contractor. The Plaintiffs then made arrangements for the work on the tiles but while

attempting to get them fixed surrounding tiles also popped out, leading to all the tiles in the kitchen and dining room area having to be removed. The 1st Plaintiff did not offer any other evidence going to the reason why the tiles had become displaced in the manner that he described. The Court notes that in Plaintiffs' Reply referred to above they pleaded:

"As regards paragraph 33, the Plaintiffs will say that they have no experience in construction and tiling work and invited the contractor to view the poor work and sought his opinion before commencing the removal work."

36. There was no other evidence led as to the poor workmanship which was at the basis of the claim. The breach, and the fact that the cause of the breach lay at the hands of the Defendant, as well as the damage caused by the breach must all be proved under this contractual claim. The Plaintiffs' submission that because the Defendant has failed to plead any issue of causation or the need for the Plaintiffs to obtain expert evidence meant that the Court should find, absent any evidence from the Defendant, that the Plaintiffs' case respecting the defective tiles is proven, is untenable. It is one of the principle maxims of law that he who alleges must prove. It is for the Plaintiffs to prove causation and damage to the requisite standard, on a balance of probabilities.

37. On the evidence before this Court the Plaintiffs have not satisfied that burden. The admissible evidence led by the Plaintiffs does not satisfy this Court, on a balance of probabilities, that it was poor workmanship that caused the issues with the tiles as claimed. The Plaintiffs have the burden not only of identifying the defect but of proving that it was the fault of the Defendant in order to establish breach of the contract. The Plaintiffs have not led sufficient evidence to establish to this Court that the tiling issue was a result of the failure of the structure due to poor workmanship at the time of completion.

38. There is no other basis advanced upon which the Plaintiffs could claim against the Defendant. The Plaintiffs have advanced no claim for negligence. No duty has been referred to, shown or pleaded in the Particulars of Claim. As such the Plaintiffs cannot

avail themselves of the principle of *res ipsa loquiter*. Without the evidence of causation, there was, on this contractual claim, a lacuna in the evidential chain led by the Plaintiffs at trial.

39. The Court's Order:

(i) The Plaintiffs' claim is dismissed.

(ii) The Defendant's counterclaim is dismissed.

(iii) In considering its order regarding the Defendant's counterclaim, the Court noted that the Plaintiffs had never filed a defence to the counterclaim and therefore while the counterclaim stands dismissed for the reasons stated at paragraph 13 above, this Court will make no order for costs on this counterclaim.

(iv) Costs to the Defendant to be assessed if not agreed.

HON. JUSTICE MARLENE I. CARTER
JUDGE OF THE GRAND COURT (ACTG.)

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