COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law & Equity Division

2014/CLE/gen/00123

BETWEEN

AVANTGARDE INVESTMENTS HOLDINGS CO. LTD

Plaintiff

-AND-

CLIVE GUY

Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. K. Miles Parker of Cedric L. Parker & Co. for the Plaintiff
Mrs. Clarita V. Lockhart for the Defendant

Hearing Dates: 14 November 2017, 15 November 2017, 31 July 2018, 31 May 2019, 24 October 2019, 3 February 2020, 11 February 2020,31 August 2020, 14 September 2020, 25 September 2020

Breach of Contract – Agreement for Sale – Whether construction was completed – Whether the Defendant was unreasonable for withholding the balance of purchase price for any unfinished works

By Specially Indorsed Writ of Summons dated 6 February 2014, the Plaintiff sued the Defendant for breach of contract, claiming $50,000 as damages. The Defendant denied liability.

The Plaintiff alleged that the Defendant breached a Supplemental Agreement for Sale by failing to pay the remaining $40,000 of the purchase price which, by the terms of the Agreement, the Defendant was entitled to hold until the Plaintiff's completion of construction. The Plaintiff maintained that it completed all of the items set out in the Supplemental Agreement for Sale, thereby rendering it entitled to the $40,000. The Defendant, on the other hand, alleged that the Plaintiff never completed the items set out in the Supplemental Agreement which were the conditions of the payment of the $40,000.

Further, the Plaintiff objected to the Defendant withholding an additional $10,000 from the purchase price to account for the fact that there was no longer going to be a pool. The Plaintiff alleged that the price had already been reduced by $10,000 to account for that loss. The Defendant, however, alleged that the purchase price had been reduced by $10,000 for other reasons and, as a result, he was entitled to withhold an additional $10,000.

HELD: Finding in favour of the Plaintiff, the Defendant is to pay to the Plaintiff the sum of $40,000 which he/his Counsel had retained to the present date. The Defendant is to also pay to the Plaintiff the additional sum of $10,000 as the absence of the external amenities was already accounted for in the reduction of the purchase price from $250,000 to $240,000. Costs are awarded to the Plaintiff to be taxed if not agreed.

1. On a balance of probabilities, the Court finds that the Plaintiff had completed the punch list and, at that time, the Defendant ought to have released the $40,000. The Supplemental Agreement did not require the production of any certificate or inspection to evidence completion of construction.

2. Notwithstanding that the Bank had to approve the Supplemental Agreement with respect to the release of funds, the Defendant was not encumbered by the Bank's consent.

3. The Supplemental Agreement, which came long after the Agreement for Sale, provided that what was to be done to the pool was to fill it in. This strongly suggests that the Defendant, at this point in time, knew that the pool was no longer being constructed. Further, the parties are bound by the terms of the Supplemental Agreement.

JUDGMENT

Charles J:

Introduction

[1] This is an action for breach of contract. The key issues to be determined are:

1. Whether the Defendant breached the Supplemental Agreement for Sale by refusing to pay to the Plaintiff the remaining $40,000 which he was supposed to pay upon the Plaintiff's completion of the construction? and;

2. Whether the Defendant was entitled to withhold an additional $10,000 to account for the absence of the pool and other external amenities?

Background Facts

[2] Some of the background facts are not in dispute and are gleaned from the documentation adduced and used at the trial. To the extent that some of the facts may be in dispute, then what is expressed must be taken as positive findings of fact made by me.

[3] Avantgarde Investments Holdings Co. Ltd ("the Plaintiff") is a company beneficially owned by the Ferguson family. They were the developers of the construction of a three unit condominium ("the condominium") and the vendor in the real estate transaction between the parties to this action. The members of the Plaintiff company and the persons who were involved in the development are Iral Ferguson ("Iral") and Ivanya Ferguson ("Ivanya"). Their father, Ivan Ferguson ("Ivan"), was not a member of the company, but was involved in the construction and development of the condominium.

[4] In or about October 2010, Mr. Clive Guy, an Attorney-at-Law and Law Lecturer at the Sir Eugene Dupuch Law School, ("the Defendant") met Iral and expressed an interest in purchasing one of the units in the condominium known as Celestial Breeze Condominium located in the Venice Bay Subdivision on the Island of New Providence that was being constructed by the Plaintiff. At that time, only the middle unit, Unit 2 was available. The Defendant instructed his attorney, Mrs. Clarita Lockhart ("Mrs. Lockhart") to prepare an Agreement for Sale for Unit 2. An unexecuted draft of the Agreement of Sale was exchanged on 14 October 2010 ("the Draft Agreement"). The deposit was $12,500.

[5] Subsequently, Unit 1 became available. The Defendant preferred that one because it was an end unit. It was however less advanced in its state of completion than the other two.

[6] Another Agreement for Sale was executed on 15 November 2010 ("the First Agreement") which provided that the purchase price was $250,000 for Unit 2 but amended the deposit to $24,000.

[7] A final Agreement for Sale ("the Final Agreement") which is the governing Agreement was executed on 14 December 2010 for the Unit. In the Final Agreement, the spelling of both the Plaintiff company's name and also that of the Purchaser/Defendant was corrected and the purchase price was reduced to $240,000. Also, the unit was changed from Unit 2 to Unit 1 (hereinafter referred to as "the Unit").

[8] The parties dispute the reason for the reduction in the purchase price from $250,000 to $240,000.

[9] The parties had initially agreed that there was to be a pool and gazebo in the common area but when the construction began experiencing financial difficulties, the Plaintiff determined that the pool would no longer be achievable. The hole had already been dug. The Plaintiff says that the Defendant was advised that there would be no pool before the execution of the Final Agreement and that the decrease in price from $250,000 to $240,000 reflected in the Final Agreement was to account for the absence of the pool. The Defendant, on the other hand, asserts that his cap was $240,000 and the Plaintiff wanted $250,000 if there were going to be wooden tray ceilings in the Unit. The Defendant opted for no wooden ceilings and that accounted for the reduction by $10,000.

[10] In 2012, the Defendant engaged Mr. Alvan K. Rolle, a construction manager and property valuer, to do an Appraisal Report of the Unit. He found Mr. Rolle on First Caribbean International Bank's ("the Bank") list of approved valuers. The Bank was the mortgagee of Unit 1 but not a party to the Final Agreement.

[11] Due to financial and other difficulties experienced by the Plaintiff, the construction of the Unit became stagnant.

[12] Frustrated by the delays, the Defendant sought to create an incentive for the Plaintiff to complete construction by proposing a Supplemental Agreement dated 28 June 2013 by which he would withhold $40,000 unless and until the Plaintiff completed the outstanding works. In 2013, the Defendant again engaged Mr. Rolle

to inspect the Unit to create a list of outstanding works. This list became the Punch List. The Punch List was partly based on what was told to him by the Defendant.

[13] On 28 June 2013, the parties executed a Supplemental Agreement for Sale ("the Supplemental Agreement") to facilitate completion and to chart a course forward. The Supplemental Agreement provided that the Defendant was to withhold $40,000 until the items set out in the Punch List had been completed. The Defendant's attorney was to release any portion of the funds deemed necessary for the Plaintiff to complete construction. It is not in dispute that no portion of the $40,000 was released by the Defendant's attorney to complete the construction. The Supplemental Agreement between the parties expressly provides:

> **"i) The Purchasers attorney shall withhold the sum of forty thousand ($40,000) dollars (hereinafter referred to as "*the retention*") which will be held by the purchaser's attorney as security for the Vendors completion of the punch list.**
>
> **ii) <u>The Purchasers attorney shall release to the Vendors attorney any portion of the retention that the parties hereto agree as being necessary to assist the Vendor in the financing of the completion of the punch list</u>.**
>
> **iii) <u>Upon the Vendor satisfactorily completing the punch list the Purchasers attorney will release the entirety of the retention to the Vendors attorney</u>.**
>
> **iv) Upon the release of the retention the said contract shall be deemed to have been completed by the Vendor it shall be released from all of its obligations set out therein."**

[14] There was no provision in the Supplemental Agreement for any method of independently assessing completion such as a certificate of occupancy, inspection or otherwise nor did it state that any such method was required. The Punch List to be completed by the Plaintiff for the release of the $40,000 was in the following terms:

> "**<u>THE THIRD SCHEDULE HEREINBEFORE REFERRED TO</u>**
>
> **<u>GROUND FLOOR</u>**
>
> - Install missing window operators
> - Electrical break panel to be IDENTIFIED

FIRST FLOOR

- Install window operators

ATTIC FLOOR

- The window needs to be sealed with mortar outside the window

EXTERIOR PREMISES

- Landscaping of the yard
- **Pool to be filled in"** [Emphasis added]

[15] By the execution of the Supplemental Agreement, the Bank paid to the Defendant to entire sum of $240,000.

[16] In October 2013, Iral advised the Defendant and Mr. Rolle of the completion of the Punch List. By letters dated 24 October 2013, 6 December 2013 and 6 January 2014, the Plaintiff's attorney wrote to the Defendant's attorney advising of the completion of the Punch List and requesting the payment of the balance of the purchase price pursuant to the Supplemental Agreement. The Defendant's attorney did not respond.

[17] On 14 March 2014, the Defendant engaged Mr. Rolle to do another Report ("the 2014 Report). Mr. Rolle reported that some construction works were still outstanding. He identified a number of items which remained either outstanding or poorly repaired. Many of these were not identified in the Punch List of 28 June 2013. The 2014 Report identified the following as outstanding:

"Ground Floor

- Exhaust in powder room was originally omitted; one has since been installed but does not work
- Window missing operators. All have been installed but majority do not work. (Operators appear to be incorrect type) also windows slide off track when opening & closing)
- Electrical panel: complete labeling at all breakers
- Kitchen stainless steel sink: installed with bad rust (remediate or replace)

First Floor

- Telephone outlet to be relocated to proper location as discussed
- No water pressure on this floor
- Window missing operators: all have been installed but majority do not work
- A/C in back room still not connected

Attic Floor

- Master Bedroom: Jacuzzi tub never worked from inception (improperly installed)

Exterior (Common Areas)

- Grounds not properly graded to receive grass
- Electrical meter house: doors not properly installed (falling off hinges)
- Excavated pool area: this area has been refilled (outstanding issue)

[18] As can be gleaned from the 2014 Report, it appears that many more problems surfaced within an interval of about 9 months from the date of the Punch List. Despite all of the inadequacies, an appraisal report commissioned by Mr. Rolle at the instance of the Defendant valued the Unit at $348,350.00 (Fair Market Value) as at 11 June 2013.

[19] It is not disputed that the Defendant's attorney still holds the sum of $40,000.

The evidence

[20] Iral, Ivan and Ivanya gave evidence on behalf of the Plaintiff. The Defendant gave evidence on his own behalf and called Mr. Rolle, deemed an expert in Architecture and Real Estate Appraisal by the Court, to substantiate his account of the outstanding works to be done to the Unit.

Iral Ferguson

[21] Iral filed a witness statement on 19 April 2017 which stood as his evidence in chief at trial. In summary, he testified that, he commenced construction of the condominium in early 2010. He further testified that, by December 2010 he determined that it was no longer feasible to include the construction of a pool on the property as was previously planned and he advised the Defendant of this fact along with the offer of the $10,000 reduction in purchase price. This, he said, was

the reason for the change in purchase price from the $250,000 reflected in the Draft Agreement and the First Agreement to the $240,000 reflected in the Final Agreement, which was executed on 14 December 2010.

[22] Iral further testified that he had completed all of the items on the Punch List by October 2013 and that the Defendant was aware of his completion of the list and seemed to be satisfied with the completion. He said that he returned the house key to the Defendant upon the said completion.

[23] Iral purported to further establish the Defendant's satisfaction of the completion by asserting that, weeks after the completion, the Defendant called on him to do extra work – to install a dishwasher - for which the Defendant paid him. He went on to say that, at no time, did the Defendant complain or mention that there were still outstanding works to be done to the Unit.

[24] Under cross-examination, Iral challenged the Defendant's contention that the $10,000 reduction in the purchase price was to account for the absence of a wooden ceiling and to accommodate the Defendant's pre-approval of $240,000.

[25] He denied the Defendant's contention that there was to be a pool up until 2013 when his father, Ivan took over construction of the condominium.

[26] He stated that after they completed the tasks on the Punch List, his father, Ivan, met with the Defendant and Mr. Rolle and they confirmed that the work was finished. He conceded that he has nothing in writing to verify this.

Ivan Ferguson

[27] Ivan filed a witness statement on 15 November 2017 which stood as his evidence in chief at trial. In summary, he testified that his involvement in the construction of the Unit was minimal before the Supplemental Agreement. Thereafter, he visited the Unit almost daily and he personally attended to the some of the items on the Punch List.

[28] Ivan testified that he had an exhaust fan installed in the powder room by an electrician for less than $100.00. He stated that he was present when he had an employee from Storm Frame Window repair the balcony door. The employee confirmed that it was functional and he paid him roughly $50.00. He stated that, after having an electrician rewire the Whirlpool tub to receive power, he advised the Defendant that the only remaining issue was water pressure reaching the attic floor which could only be solved by the Water & Sewerage Corporation. He advised the Defendant to contact that agency. He also told him that pressure problems to the attic floor could be resolved by a water pump.

[29] Ivan further testified that he personally addressed the landscaping issues with the help of two workers after the Defendant complained of the ground being too rocky. He said that he spent roughly $5,000 on landscaping. He alleged that he personally installed all of the outstanding window operators after his daughter, Ivanya, purchased roughly 10 operators at $29.00 each.

[30] Ivan stated that he instructed the Defendant on how to label the breaker panel in the Unit which involved switching off a circuit breaker in the electrical panel and then identifying which room in the Unit was turned off. He insisted that the Defendant told him “not to worry” about it.

[31] He further expressed that there was no need to install a new sink as it was not rusted. He said that all he had to do was to clean the sink with a product specifically made for stainless steel.

[32] Ivan said that he could not recall telephone outlets being situated in the ceiling but he was present when he instructed an electrician to properly connect the telephone outlets.

[33] He further testified that he personally repaired the door on the electrical meter box. He did not recall the Defendant raising the issue of the air conditioning units but, to his knowledge, the units were properly functioning by October 2013.

[34] He testified that the issue with the attic floor window was not that the mortar required sealing but rather it was not closing properly. He had the employee from Storm Frame Window to repair it thereby repairing the leaks.

[35] Ivan maintained that, throughout the course of the construction of the Unit, he regularly communicated with the Defendant. After October 2013, he received no complaints about any purported incompleteness. In his view, the Punch List was complete.

Ivanya Ferguson

[36] Ivanya filed a witness statement on 25 July 2018 which stood as her evidence in chief at trial. Like her father, she stated that her involvement prior to the Punch List was minimal. Thereafter, she became more heavily involved in "a somewhat administrative capacity in the completion of the outstanding matters for Mr. Guy as set out in the Punch List".

[37] Ivanya confirmed that her father saw to the installation of the exhaust fan in the powder room and that the Whirlpool tub was identified to be a water pressure issue. The Defendant was advised to get a water pump to resolve this issue.

[38] She also confirmed that her father personally addressed the landscaping issues. She was present at the Unit when the pallets of grass arrived and were installed.

[39] Ivanya stated that she personally ordered the windows for the Unit from China and she also ordered the replacement operators set out in the Punch List. She did not recall the telephone outlets being located in the ceiling and, to her knowledge, the air conditioning units were functioning when the Punch List was completed. Under cross-examination she revealed that she facilitated the air conditioning units being installed by her uncle, who had more than 30 years of experience in that field.

[40] She maintained that she communicated with the Defendant regularly and that the Punch List was completed by October 2013.

[41] Under cross-examination, she stated “[T]here was no way at no time we agreed for any money to be held back. It wasn’t possible. We were strapped thin trying to complete this Punch List.”

[42] On re-examination, she confirmed that it was on the basis that upon the completion of the Punch List they would receive the remainder of the funds that they were taking personal funds “bleeding our [their] funds dry to go ahead and do this.”

Clive Guy

[43] The Defendant also testified at this hearing. His evidence in chief is contained in his witness statement filed on 6 November 2017. He testified that sometime during October 2010, he agreed to purchase Unit 1 from Iral. He immediately secured the services of his Attorney, Mrs. Lockhart. He instructed Iral to forward the draft Agreement for Sale to her and he instructed Mrs. Lockhart to ensure that two corrections be made namely:

1. “The purchase price was incorrectly stated as $250,000 and the deposit reflected as $12,500. This is evidenced by the fact that the deposit requested was the $24,000 which is the 10% of the $240,000 as the agreed purchase price. This is primarily why the new contract of Agreement for Sale dated 14th day of December 2010 had to be done.

2. The name of the Vendor was incorrectly spelt and stated as “Avant Guard” did not reflect that as indicated as the registered company so that had to be changed to reflect the correct name of the company”.

[44] The Defendant alleged, that during initial negotiations, he was presented with a valuation done by Mr. Rudolph Dean (“Mr. Dean”) where certain amenities were promised which included a pool and a gazebo enclosed by a wall. He explained to the developers that the Bank considered the contract to purchase as a “turn-key” one and would not lend him money for an incomplete structure. He said that the Bank assigned its own inspector, Mr. Rolle, at his expense, to certify the completion process.

[45] He stated that he did not learn that there would be no pool until 2013 when he was informed by one of the other owners that they had been given a $10,000 credit for the absence of the pool and other amenities.

[46] The Defendant further testified that the Unit was not completed as promised by February 2011 whereby he had to rent a two-bedroom apartment which Iral had promised he would pay. He detailed that the construction ran out of funds and Iral "disappeared" for over 5 months. He asserted that "there was never any discussion with himself and Mr. Rolle that there would not be a pool or the other amenities on the premises".

[47] The Defendant stated that he was finally permitted to enter an incomplete Unit in December 2012 and that Mr. Rolle did a valuation and a list of the outstanding work. He was assured by Ivanya and Ivan that they would complete all incomplete work and, on that basis, he signed the agreement to retain certain funds. On one of the visits by Ivan to the premises in 2013, he inquired about the status of the pool as there was simply an extremely large hole in the back yard. He was surprised to learn that there was not going to be a pool.

[48] On 14 March 2014, he commissioned Mr. Rolle to review the Appraisal Report of Mr. Dean dated 11 June 2013 and to inspect the status of all outstanding items and to produce a Construction Inspection Report of the Unit: Exhibit "AKR-1" dated 4 October 2012. In his report, Mr. Rolle remarked that the condominium complex was approximately 80% complete and based on the construction performance to date, completion is expected within the next 10 weeks. At the trial, Mr. Rolle stated that 93% of the Unit was complete.

[49] The Defendant deposed that, to date, he has only been supplied with a copy of a Temporary Occupancy Certificate. He admitted that he took the sum of $6,000 for appliances since Iral told him to do so.

[50] The Defendant maintained that up to today, the Plaintiff has not completed the outstanding work. He disagreed with the Plaintiff that the Punch List was completed, on two main grounds namely:

a. The valuator's report by Alvan Rolle indicated that there are several things outstanding from the initial Punch List; that Mr. Rolle is the bank's valuator and the bank gave strict instructions not to release any funds until and unless the scope of works as agreed in the contract are (sic) completed and a certificate of completion furnished.

b. To date, despite several requests, the Plaintiff has failed to produce a certificate of completion.

[51] He further maintained that he has not breached the terms of the contract/agreement with respect to the withholding of $40,000 and he is entitled to a credit of $10,000 for the failure of the Plaintiff to install a pool and other external amenities. He urged the Court to order the Plaintiff to complete the work to the satisfaction of Mr. Rolle and that he be furnished with a certificate of completion of works.

[52] The Defendant was extensively cross-examined. Upon cross-examination, he acknowledged that the Agreement did not expressly state that it was to be a "turn-key". Notwithstanding, he said that this was understood by the parties.

[53] He maintained that the reason for the reduction in the purchase price was because of a conversation he had with Iral/Ivan wherein they agreed to reduce the purchase price to accommodate the fact that he had been pre-approved by the bank for $240,000 and to account for the fact that he agreed to take ceilings and not wooden tray ceilings which were shown to him.

[54] Under cross-examination, the Defendant stated that his Attorney is holding the $40,000 which can be released without any involvement of the Bank and that the

Bank had paid to him all of the money from the loan. The Bank is a third party to the Supplemental Agreement.

[55] Under further cross-examination, the Defendant confirmed that he conceptualized the idea of the Punch List and stated:*"I discussed it with my attorney. I discussed it with Mr. Rolle and this (the Punch List) is resulted from the various discussions."*

[56] The Defendant admitted that he got several quotes for repair works on the Unit but he has not produced any of them. He also stated, under cross-examination, that he has completed all of the repairs to the Unit, having changed the balcony doors and most of the windows in 2019. He also stated that he purchased a water pump due to the pressure issues on the third floor. However, he produced no receipts or invoices.

Alvan Rolle

[57] Mr. Rolle filed a witness statement on 6 November 2017. He testified that he is a licensed corporate architect, construction manager and certified valuer. He stated that the Defendant engaged him to prepare several reports with respect to the Unit. He was paid each time for the preparation of the reports. One of the reports was done for the purpose of determining what the Punch List should comprise of.

[58] On cross-examination, he said that on his last inspection in 2014, "some items inside the Unit that was (sic) still outstanding even though some efforts were made to have them corrected." When asked about the cost of repairing some of the purported non-functional work, he estimated that an exhaust fan would cost roughly $100 and its installation would cost from $75 to $135. He said that the cost of taking down the door and realigning the frame to repair the Plaintiff's attempt at its installation would cost from $3,000 to $3,500.

[59] With respect to the absence of a fourth boundary wall complained of by the Defendant, Mr. Rolle explained that it is absent in his report because "I was told that there was going to be a … when I say boundary wall, that is a wall enclosing the property." He conceded that he had not seen an enclosing boundary wall on

the plan but noted its absence in his report on the basis of a conversation with Ivan, who stated that there would be an enclosing wall.

[60] Under cross-examination, Mr. Rolle confirmed that the only significance of having a final certificate of occupancy as opposed to not having one dictates whether the electricity bill will be in the occupant's name or not. He conceded that nothing prevents the Defendant from obtaining a final occupancy certificate and that, in his expert opinion, it is within the Defendant's realm to do so.

Analysis and findings

[61] This is a civil case wherein the standard of proof is on a balance of probabilities. Having had the opportunity to see and observe the demeanour of the witnesses as they testified and analysing all of the evidence including the documentary evidence, I prefer the testimony adduced by the witnesses for the Plaintiff to that of the Defendant and his expert witness, Mr. Rolle. I accept the Plaintiff's evidence that, by October 2013, it had completed all of the items in the Punch List. I also accept their evidence that this was made clear to the Defendant and he did not complain of any incompletion or malfunctioning to the Plaintiff.

[62] I do not accept the expert evidence of Mr. Rolle as being either credible or independent. Although he was a valuator/inspector on the list of approved valuators of the Bank, he was hired and paid by the Defendant on a number of occasions. He also commissioned an appraisal report at the instance of the Defendant. What compromised Mr. Rolle's independence even further is the fact that his reports were irrefutably influenced by what the Defendant told him. I find that his reports were unduly prejudiced by the Defendant's expectations.

[63] I agree with learned Counsel Mr. Parker who appeared for the Plaintiff, that the Bank was out of the completion picture. It was not a party to the Supplemental Agreement, notwithstanding that it did approve the terms. The Bank merely approved the course to completion set out in the Supplemental Agreement. It had, at this point, paid to the Defendant all of the money which it agreed to loan.

Notwithstanding that the Bank had to approve the Supplemental Agreement with respect to the release of funds, the Defendant was not encumbered by the Bank's consent.

[64] I am satisfied that the Plaintiff installed the window operators which were outstanding at the date of the Supplemental Agreement but I also accept the Defendant's evidence that they were not functioning after their installation. I am also satisfied that the Plaintiff's installed an exhaust fan in the powder room but I also accept the Defendant's evidence that they were not functioning after the installation. That said, the Defendant ought to have produced receipts for any work left undone by the Plaintiff. In the absence of receipts, this Court cannot award any damages to him or mitigate any loss.

[65] Further, I accept Ivan's evidence with respect to the breaker panel – that he instructed the Defendant on how to label the breaker panel and that the Defendant told him "not to worry about it." I also prefer the Plaintiff's evidence over the Defendant's evidence with respect to the sink. I am satisfied that there was no rust, which was the reason identified in the 2014 Report as the need for its remediation/replacement. Therefore, the Plaintiff's failure to replace the sink was reasonable. I also accept the Plaintiff's evidence with respect to the telephone outlets. In other words, there was no reason to relocate the outlets because they were never in the ceiling.

[66] With respect to the water pressure, the matter could have been resolved by the Defendant purchasing a water pump. I accept the Plaintiff's evidence that they had the master bath tub properly rewired. I also accept Ivan's evidence that the issue with the attic window was not an issue of sealing mortar as stated in the 2014 Report but rather it was not closing properly. This was repaired by the employee from Storm Frame Window.

[67] All in all, I accept the evidence of the witnesses for the Plaintiff as being credible and honest and that the Plaintiff completed everything on the Punch List in

accordance with the Supplemental Agreement, thereby discharging its obligations under the said Agreement. At the same time, I accept that there were one or two minor things outstanding or poorly done, for example, the exhaust in powder room, window operators (installed but not functioning required repairing and the mortar around the door; the cost of which the Defendant was forced to incur. However, these were minimal and, in any event, the Defendant has not provided any receipts to the Court.

[68] The question is whether the Defendant's refusal to release the $40,000 upon the Plaintiff's purported completion was a breach of the Supplemental Agreement. This requires determination of whether the Punch List was actually complete in accordance with the Supplemental Agreement. Reiterating, I find that the Punch List was completed by the Plaintiff. In addition, the Supplemental Agreement did not stipulate a means for determining completion.

[69] With respect to the time at which the Defendant was advised that there would be no pool and the reason for the reduction in the purchase price in the Final Agreement, the Defendant maintained that he was advised that there would be no pool after the execution of the Supplemental Agreement. He said: "I asked Mr. Ivan Ferguson what is the status of the pool as there was simply an extremely large hole in the back yard. Further, it was on the agreed list of things to complete/punch list as indicated by Mr. Alvan K. Rolle."

[70] On this issue and, on a balance of probabilities, I prefer the evidence of the witnesses for the Plaintiff to that of the Defendant. I accept Iral's evidence that he advised the Defendant that there would be no pool before the execution of the Final Agreement and that accounted for the reduction in the price to $240,000.

[71] In addition, the Punch List which was signed by both parties stated that the pool was "to be filled in". This strongly suggests that at the date of the execution of the Supplemental Agreement, both parties were aware that the construction of the pool had been abandoned.

Whether the Defendant is justified in withholding the $40,000 pursuant to the Supplemental Agreement/ Can the Defendant withhold from the Plaintiff $40,000 of the purchase price

[72] Learned Counsel for the Plaintiff Mr. Parker submitted that the Plaintiff fulfilled its obligations under the Supplemental Agreement by completing the items in the Punch List. Mr. Parker argued that having completed the tasks identified in the Punch List which were the condition precedents for the release of the $40,000, the Defendant's refusal to pay the money is a breach of the Supplemental Agreement.

[73] On the other hand, learned Counsel Mrs. Lockhart submitted that the Plaintiff has not, up to the date of trial, completed the items identified on the Punch List. Therefore, says Mrs. Lockhart, the Defendant's retention under the Supplemental Agreement is proper. The Defendant opposes the Plaintiff's contention that it completed the Punch List on the following grounds:

a. The valuator's report by Alvan Rolle indicated that several things were outstanding from the initial Punch List;

b. Alvan Rolle is the valuator for the Bank and that the Bank gave strict instructions not to release funds until and unless the scope of work were completed and a certificate of completion furnished and;

c. The Defendant never produced a certificate of completion.

[74] Reiterating, the question to be determined is whether the Plaintiff completed the items listed on the Punch List. This Court has already found, as a fact, that the Plaintiff did so.

[75] Additionally, I agree with Mr. Parker that the Defendant's reasoning for disputing the Plaintiff's completion of the construction is, in itself, ill-founded. The Defendant attempted to increase the probativeness of Mr. Rolle's assessment by stating that "he is the valuator for the Bank". However, as stated above, although Mr. Rolle was on the Bank's list of valuators, he was hired directly by the Defendant to look

after his interest of having the construction finally completed without reference to the Bank. Also, the Bank had nothing to do with the Supplemental Agreement.

[76] Further, I agree with Mr. Parker that it does not follow that the Plaintiff's failure to obtain a final occupancy certificate or certificate of completion meant that the items on the Punch List were not complete. The Supplemental Agreement did not stipulate any means for determining the completion of the items on the Punch List. It did not say that the funds were to be held subject to the approval of Mr. Rolle, subject to obtaining a completion certificate or a final certificate of occupancy, but rather, upon the completion of the Punch List. Therefore, the Plaintiff having asserted that they have completed the Punch List, the Defendant was bound, by the terms of the Supplemental Agreement, to release the funds unless he could prove that there were works outstanding or there were material malfunctions. However, as stated, I accept the Plaintiff's evidence that it completed the Punch List by October 2013 and that the Defendant was pleased with the construction. Therefore, he ought to have released to the Plaintiff the $40,000 at that point in time.

[77] The malfunctioning of the air conditioning and the external front wall complained of by the Defendant were not items on the Punch List. Accordingly, the Defendant cannot use them against the Plaintiff.

[78] I also agree with Mr. Parker that the Defendant's failure to advance to the Plaintiff some of the $40,000 to facilitate its completion of the items on the Punch List is unfavourable to his position. The Defendant's defence is based on strict compliance with the Supplemental Agreement. Yet, he failed to strictly comply with the terms of the Supplemental Agreement which provided that he was to advance funds to the Plaintiff to allow completion. It would be gravely unfair not to consider the evidence of Ivanya that the Plaintiff was exhausting all of its finances to complete. It cannot be said that if the Defendant had advanced funds to the Plaintiff, there would have been a need by him to repair the exhaust in the powder room, window operators and the mortar around the door which are the only repairs

which I found that he might have incurred. However, the Defendant still has to specifically prove that he incurred these expenses as a result of the Plaintiff's failure to complete these tasks. Special damages has to be specifically proved.

[79] In my judgment, it seems unreasonable for the Defendant to have retained the sum of $40,000 when, as a factual finding, the Punch List was completed.

Whether the Defendant was entitled to withhold another $10,000 to account for the pool and other external amenities

[80] Learned Counsel Mrs. Lockhart submitted that the Defendant was entitled to withhold an additional $10,000 from the purchase price to account for the absence of the pool and other external amenities. She contended that he was not made aware that there was going to be no pool until 2013 when the other owners advised him that they had been given a $10,000 reduction to account for the absence of the agreed amenities.

[81] On the other hand, Mr. Parker submitted that the absence of the pool and the external amenities had already been accounted for by the $10,000 reduction in the purchase price in the Final Agreement. According to Mr. Parker, the Defendant was not entitled to a further reduction of the purchase price.

[82] The question to be determined with respect to the $10,000 is whether the reduction in the purchase price from the Draft and First Agreement to the Final Agreement was to take account of the absence of the pool and loss of the amenities. The evidence of the parties is strikingly conflicting. The issue therefore is: when did the Defendant become aware that the pool and the external amenities were going to be abandoned? This is a question of fact.

[83] The letter from the Defendant's attorney to the Plaintiff's attorney which accompanied the Final Agreement where the price changed from $250,000 to $240,000 did not indicate why the purchase price was reduced.

[84] As stated, I prefer the evidence of the Plaintiff's witnesses. Additionally, I found the Defendant's explanation with regard to the time when he was advised that there would be no pool to be inconsistent. According to the Defendant, he was advised that there would be no pool after the execution of the Supplemental Agreement. He asserted that in 2013, he asked about the status of the pool and Ivan told him that there was not going to be a pool. However, the Punch List, which was signed by both parties, stated that the pool was "**to be filled in**". This suggests that at the date of the execution of the Supplemental Agreement, both parties were aware that the construction of the pool had been abandoned.

[85] What is most important is that both parties were bound by the terms of the Supplemental Agreement which appended the Punch List in the Third Schedule. The Punch List states "Pool to be filled in" not "pool was to be constructed or completed". This gives credence to the Plaintiff's position that, by the date of the Supplemental Agreement, the Defendant knew that there would be no pool.

[86] It is therefore more probable than not that the reduction in the purchase price had to do with the absence of the pool and the other external amenities and not the wooden tray ceilings. There is also evidence that the other neighbours got back $10,000.00 for the absence of the pool and external amenities.

Conclusion

[87] In my judgment, the Plaintiff did complete the items on the Punch List as at October 2013. At that time, the Defendant ought to have released the sum of $40,000 which his attorney holds. As I stated, I have no doubt that there were still some minor outstanding issues to be fixed which were not on the Punch List but which surfaced in the 2014 Report. Had the Defendant provided this Court with the requisite receipts, I might have been in a position to award some damages to him.

[88] Further, in my judgment, the reduction in the purchase price from $250,000 to $240,000 accounted for the loss of the pool and the external amenities. Therefore, the Defendant was not entitled to withhold an additional $10,000.

[89] The Defendant must pay to the Plaintiff the sum of $50,000 not later than 21 June 2021.

Costs

[90] The Plaintiff, being the successful party in these proceedings, is entitled to its costs. The Defendant shall pay those costs. The Plaintiff has provided a Bill of Costs in the sum of $57,900. This seems rather exorbitant. I will therefore order that costs are to be taxed by the Registrar if not agreed.

Dated this 7th day of May, A.D. 2021

Indra H. Charles
Justice