IN THE HIGH COURT OF FIJI
WESTERN DIVISION AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION No. HBC 225/2017

BETWEEN **TOPIK FURNITURE & JOINERY LIMITED,** a limited liability company having its registered office 7 Ruve Place, Lautoka.

PLAINTIFF

AND **SHIVAM NAIDU**, of Lot 42 Riverside Gardens, Denarau, Nadi, Businessman.

DEFENDANT

APPEARANCES : Mr K Patel for the Plaintiff
Mr R Singh for the Defendant

DATE OF HEARING : 1-3 September 2020

DATE OF JUDGMENT : 11 February 2021

DECISION

1. In this claim, commenced by Writ of Summons dated 23 October 2017 the plaintiff (with commendable and welcome simplicity in its statement of claim) claims $61,130.00 being the balance of a contract sum (originally $149,030 but adjusted to $148,030) quoted by the plaintiff for the supply and installation of joinery for a new house being built by the defendant at his property at Denarau. Also claimed in the prayer for relief are general and exemplary damages, plus interest (rate not specified), and costs on a solicitor/client indemnity basis.

2. By a statement of defence and counterclaim dated 7 November 2017 the defendant admits the existence of the contract, and the supply of the joinery, but asserts that the plaintiff was in breach of the following implied terms of the contract:

   i. the plaintiff would use skill and care in carrying out the work
   ii. the materials used in the work would be of merchantable quality
   iii. the materials used would be fit for the purpose of the work
   iv. the plaintiff's work would be completed within 8 weeks of commencement

   and that the work undertaken/supplied by the plaintiff was defective and late, such that the defendant is entitled to set-off against the amount claimed by the plaintiff the sum of $55,735.00 made up as follows:

1.	Door frame sealing onto walls	The contract has not expressly excluded this (unlike door hardware) and hence was	$1980.00

		deemed to be within the contractor's scope of works	
2.	Gap filling	Poorly done and deficient in many places. Can lead to early damage and failure	$345.00
3.	Damage to main door (D6) lock by contractor	Repair work has not provided the original strength of the timber. This can lead to early failure and recursive damage	$1250.00
4.	Master bedroom door frame mounted askew	Botched job by the contractor on the timber frame has led to a crooked and unsightly frame that is also not geometrically square	$1100.00
5.	3 x door locks not installed properly	Door locks not locking because of improper installation	$800.00
6.	Damage to tilework from joinery installation	A number of instances of damage to tilework needs replacing tiles	$1200.00
7.	Damage to paintwork	Many areas of walls had to be reworked due to damage to severe damage to paintwork	$980.00
8.	Contractual delays to completion of work	The contract was awarded in December 2016 with a $28,000.00 deposit paid to ensure indent items were at least ordered on time. Things such as bench-tops and handles had still not been sourced by June 2017. Overall contract delays in excess of 3 months have caused the defendant costs in terms of rental, interest on loans, labour hire, etc.	$43000.00
9.	Kitchen splashback mounting not adequate	The splashback behind the stove has not been glued in place properly and hence will enable moisture and grease to get in between the splashback and the wall	$2300.00
10.	Main door weight	The main door (D6) is too light in weight and the roller catch has been incorrectly mounted on the top rather than on the side (as requested by the defendant). This causes the door to vibrate and will lead to early failure	$280.00
11.	Quality of paintwork on cupboard doors and panels	Pimples on the paintwork 'pop' to expose undercoat. This is unsightly and will lead to further deterioration of paintwork and timber	$2500.00
			$55,735.00

3. As counsel for the plaintiff notes in his submissions, the defendant in his pleadings and evidence, has not disputed the contract sum, or the plaintiff's calculation of the balance payable under the contract. Although at one point in closing submissions for the defendant, counsel argues that the breaches of the contract said to have been committed by plaintiff disqualify it from claiming any further sum under the contract, I am satisfied – for the reasons that I will explain when I come to discuss the law – that this submission is unsustainable. The defendant's opposition to the claim instead depends on the success of his counterclaim, i.e. the extent to which the defendant can show that there has been a breach by the plaintiff of the terms of the contract, and how much the defendant is entitled to recover by way of compensation for those breaches. In the event that the defendant is successful in his counterclaim, the amount he is entitled to will be a set-off against the amount due to the plaintiff as the balance of the contract price. Of course, if the damages payable under the counterclaim exceed the amount due to it under the contract, the plaintiff will be entitled to nothing, and may be liable for the balance of the counterclaim; but I note that the total sum sought by the defendant in his counterclaim is less than the amount claimed by the plaintiff, so even if the defendant is successful there will (subject of course to issues relating to interest and costs) still be a balance payable by him to the plaintiff.

Preliminary issue – late/incomplete discovery

4. On Monday 31 August 2020 (the day before the trial was scheduled to commence), the defendant filed in court, and served on the plaintiff's solicitors, an amended verified list of documents in which it disclosed:

- copies of bank statements and for two bank accounts held by the defendant
- correspondence and receipts related to the purchase of door-locks and door hardware.

The plaintiff objected to this late discovery, and asked the court to disallow use of this material. Rather than interrupt or delay the hearing I allowed the defendant to use the material, on the basis that I would rule on its admissibility as part of this decision.

5. It is obvious from the documents themselves that they predate the commencement of the proceedings, and that they must have been in the possession and control of the defendant at all times. It is also obvious, both from the documents themselves, and from the fact that the defendant now seeks to use them, that the documents are relevant to the claim or defence, and so should have been discovered. The defendant says (through counsel – no explanation was given by the defendant himself), unsurprisingly, that the failure to include these in discovery was inadvertent, the result of an oversight, and that the court should allow him to use the documents so that the matters at issue can be properly addressed. The plaintiff ascribes a more sinister motive to the late-discovery – the intention to disadvantage the plaintiff – and says that disclosure only on the day of the hearing means that counsel for the plaintiff does not have a proper opportunity to examine the documents, or seek further discover, or particulars that may arise from them.

6. While discovery is an obligation of the parties, the true responsibility for it lies with the parties' solicitors and counsel. It is they who understand and define, through their pleadings, the issues that are to be determined, and in doing so, the scope of discovery. They have a professional duty to their client and to the court, to ensure that the parties properly understand what they need to discover. In meeting this duty a solicitor and counsel engaged in litigation cannot simply rely on the parties to understand what discovery means. The parties are unlikely to appreciate the significance that the court attaches to discovery, or to understand how documents are used in evidence, or to readily accept that the duty to disclose extends to documents that may assist the other side, not merely those that support their own case. There is no basis, on the evidence in this case, for me to conclude that the failure to provide timely discovery was deliberate, as the plaintiff suggests, but given that the relevance of these documents would, with a moment's thought, have been obvious from the moment the statement of defence and counterclaim was drafted, the failure to include these documents in discovery denotes, at the very least, gross carelessness on the part of the defendant's advisers in not ensuring that these documents were obtained from him, and included in his disclosure. Their error is compounded by the fact that, even with this disclosure, it seems clear that discovery is incomplete. I assume that there are still documents undisclosed that relate to the defendant's tenancy, and the termination of that tenancy, including perhaps a rental agreement, and communications recording the level of rent, the term of the tenancy, and the giving of notice of termination of that tenancy. All of these are as relevant to the defendant's counterclaim, or to the plaintiff's defence of that counterclaim, as the bank statements are.

7. Order 24, rule 16 High Court Rules makes clear the serious consequences that may be visited upon a party who does not fully comply with his obligations of discovery, and on a solicitor who does not properly advise his client of those obligations:

> ***Failure to comply with requirement for discovery, etc. (O.24, r.16)***
>
> *16(1) If any party who is required by any of the foregoing rules, or by any order made thereunder, to make discovery of documents or to produce any documents for the purpose of inspection or any other purpose, fails to comply with any provision of that rule or with that order, as the case may be, then, without prejudice, in the case of a failure to comply with any such provision, to rules 3(2) and 11(1),*
>
> *(a) that party shall not be entitled subsequently to produce a document in respect of which default was made without the leave of the Court, and*
>
> *(b) the Court may make such order as it thinks just including, in particular, an order that the action be dismissed or, as the case may be, an order that the defence be struck out and judgment be entered accordingly.*
>
> *(2) If any party against whom an order for discovery or production of documents is made fails to comply with it, then, without prejudice to paragraph (1), he shall be liable to committal.*
>
> *(3) Service on a party's barrister and solicitor of an order for discovery or production of documents made against that party shall be sufficient service to found an application for committal of the party disobeying the order, but*

the party may show in answer to the application that he had no notice or knowledge of the order.

(4) A barrister and solicitor on whom such an order made against his client is served and who fails without reasonable excuse to give notice thereof to his client shall be liable to committal.

8. In the event, the decision I have come to about the defendant's counterclaim, for reasons unrelated to the discovery issue, mean that it will be of no consequence if the defendant is allowed to produce and use the documents listed in the amended list of documents. But if this had not been the case, I would have wanted to explore further the completeness of the defendant's discovery, and – if it then transpired that the discovery was still incomplete – I would likely have struck out that part of the defendant's counterclaim that depends on proof of losses arising from the delays by the plaintiff in completing the contract.

Evidence on the counterclaim

9. Since the defendant alleges that the terms referred to in paragraph 2(i)-(iv) were <u>implied</u> terms of the contract for the supply and fitting of the joinery, it is safe to assume that the issues covered by these allegedly implicit terms are not included in the <u>express</u> terms of the contract, and there is no need to look for them there. This is perhaps fortunate, since the documents making up the contract are not well defined, and there is a great deal of email and other correspondence between the parties covering a period of 18 months from 31 May 2016 when the defendant first invited the plaintiff (among others) to quote for the supply of joinery to his new house, until September 2017, by which time the house was complete and the parties were arguing over payment. Certainly the contract includes the quotes provided by the plaintiff to the defendant on 25 November 2016 (for the main work) and 3 May 2017 (for additional work). At the foot of both these quotes the following words appear (albeit in very small print):

> *<u>Please Note:</u>*
> - *All associated materials remain the property of Topik Furniture & Joinery Limited until all payments are received in full.*
> - *Any variations to above contract would be treated as separate from this contract*
> - *Additionally Topik Furniture & Joinery Limited reserves the right without prejudice to its other remedies to enter any premises where the goods may be stored or fixed and remove such goods as to defray all outstanding amounts.*
> - *All the above prices are VAT inclusive unless specified otherwise.*
> - *This quotation is valid for 30 days from dated quotations; it may change with fluctuation of local currency value due to Local Government monetary policy.*

10. There is no specific evidence as to the alleged implied terms referred to in paragraph 2(i)-(iii) above. None of the emails in which the plaintiff (among others) is invited to quote for the work refer to these expectations on the part of the defendant, the only reference to the quality of the work in these emails is the reference, in one of the early invitations to quote, to:

> *all joinery to be plywood with two-pack paint finish in white colour.*

and to:

> *All drawers and cupboard doors to be soft-closing (and self-closing).*

There was no evidence presented to me as to the meaning or significance of these stipulations, and it does not seem that any part of the counterclaim as listed above relates to an alleged breach of these stipulations. Nevertheless I would readily accept that it is reasonable and necessary to infer that the contract includes these terms. Nor does the plaintiff dispute that it is obliged to comply with these standards – in giving his evidence Mr Kumar accepted this.

11. As to the time for completion, this is somewhat less clear. The plaintiff's quotation dated 25 November 2016, which the parties agree applies to their contract, does not – as originally sent by the plaintiff to the defendant - expressly say anything about time. However on the last page of the 4-page quotation there are handwritten additions which the plaintiff accepts record changes to the original quote, and record the parties agreement. The defendant has initialled these changes. The additional words include the following:

> *8 to 12 weeks, - less 2 weeks break.*

In his evidence in chief on behalf of the plaintiff Mr Ajesh Kumar explained that these words reflect discussion between him and the defendant, before and at the time the defendant agreed to the plaintiff doing the work, about when the house would be ready for the plaintiff's joinery to be installed, and how long the job would take. Mr Kumar said that the defendant assured him at this time that the house would be ready in January for installation of the plaintiff's work, and taking into account the estimate of 8-12 weeks (as recorded), that would mean that the job would be completed by March. However, the plaintiff says, the defendant's house was not ready for installation of joinery until April (up to when interior finishing, painting and tiling was still continuing – which meant that the cabinetry could not be brought on site by the plaintiff), and that even after that date the defendant was still making changes and adding and subtracting work, which meant that the plaintiff's work was not completed until 24 August 2017. As late as 13 July 2017 the defendant had asked the plaintiff to quote a price for the supply and installation of 3 x vanity mirrors, a quote which was in due course accepted by the defendant. When cross-examined on this issue Mr Kumar explained that the plaintiff could not begin to build the joinery that the defendant wanted until the building of the house was sufficiently advanced for accurate measurements to be taken. This, he said, was discussed with the defendant, and went on to say (p.66 Notice of Evidence):

> *When we gave him a timeframe, he told us that his house will be ready in January for me to … take measurements and start the joinery and if you still believe that otherwise you can see his email dated 23rd April he is telling me that his house is not ready*

(the email of 23 April 2017 referred to is an email from the defendant to the plaintiff in which the defendant advises:

As an update on the project, we are currently finishing up plastering and applying paint undercoat to the walls. Work on the ceiling boards will start middle of this week once we have confirmed that we have completed the prerequisite works.
Floor tiling is to start later this week once the ceiling boards have been placed.
You could start bringing in the cabinets once the tiling is ready and we can work on the sections that you need access to first.)

12. Pressed on this point by counsel for the defendant Mr Kumar said (at p.73 N/E):

Let me explain when we took this project on in December, we clearly mention on a completion, a timeframe is given less without our two weeks break and accordingly the project was defendant told me that the project will be ready for joinery in January to March I mean that's what he is taking if you look at that timeframe that was given. If the house is not ready how do I measure my joinery, how do I do my installation. If the roof is not on if the floor tiles is not installed how do I put all those finish items on site, how do I come in start measuring stuff so for me to do my joinery I'll have to wait for those areas to be ready.

I have no difficulty accepting Mr Kumar's evidence on this point. I found him an honest witness who did his best to explain the situation as he saw it, including the complexities of the work.

13. The defendant, Mr Naidu, was the only witness for the defence. On the issue of the time for completion he was asked and said, in examination-in-chief (atp.133 N/E) in reference to the handwritten notation on page 4 of the plaintiff's quote of 25 November 2016:

Mr. Singh:	*Okay now it says 8 to 12 weeks at the bottom there is a notation 8 to 12 weeks minus less 2 weeks break, now first let's look at the first section, what did you understand by that notation 8 to 12 weeks?*
Witness:	*So in terms of the delivery what Mr. Kumar had advised was that they had some work on and they couldn't give a specific date as such so they gave us say timeline of between 8 to 12 weeks of completion so which means starting of the work up till the actual installation, the finished works, finishing of the contract would take up to 12 weeks.*
…	
Mr Singh:	*Okay now let's go to the next notation that's there it says less 2 weeks break, what did you understand by this?*
Witness:	*Sir Mr. Kumar had advised that they would typically break for 2 weeks over the Christmas period that's when the factory has it's down time and that they would resume works as they even if they started works they will shutdown over the Christmas period and then resume going forward.*
Mr. Singh:	*Okay so that is why you understand they put the less 2 weeks break?*
Witness:	*That's correct sir yes.*

14. Mr Naidu went on in his evidence to explain his understanding of how this would work. He expected that once he had paid the deposit (which was paid on 13 December) the plaintiff would immediately commence construction of the cabinetry in its workshop. He did not say so, but I assume he thought that the completed cabinets would then remain at the plaintiff's workshop until the house was ready for installation.

15. There is reference again to this estimate of 8-12 weeks in email correspondence between the parties in June 2017. The significance of this correspondence is not that it changed the terms of the contract (neither party suggests that), but that what

was discussed may assist in resolving what exactly had been agreed, when the contract was entered into, about the time for completion, i.e. what the words mean in the context of the contract. In an email dated 13 June 2017 the defendant raised with the plaintiff the time for completing its work, as follows:

> *As discussed this morning, please expedite the works. The contract was awarded to you early December 2016 with payment of the deposit and the expectation that the items would be ready on time.*
> *Please note that I have given notice to vacate my current premises and will have to move into the house at 42 Riverside Gardens by the end of this month.*
> *Appreciate all the urgency from your team to complete fitout please. Request if installation team can spend full days on site to achieve the required work on time.*

This was followed by an email on 2 July 2017 from the defendant which raised for the first time the suggestion that he would be seeking compensation for delayed completion:

> *As discussed and agreed on site, we expect all the items on your scope to have been installed at the premises by the 14th July 2012.*
> *We had given notice to vacate our current tenancy so we could move into the new house. This move has not been possible due to the schedule not being met in your scope of supply. This has resulted also in extensions to time for subcontracts in plumbing, electrical, tiling and painting works. All this is a cost to me which we will need to discuss and offset from your contract price.*

16. This threat prompted a prompt and lengthy response from the plaintiff by email on the same day:

> *Further to your email below please note we do not agree for deductions to be made from our contract as delays were not from our side.*
> *Contract was signed in December 2016.*
> *We did multiple site inspections in January and February 2017 as your site was not ready.*
> *We managed to get some measurements done in late February around 20th still all works were not started as most of the joinery areas on site were not ready for measurement (plaster works were not done, ceiling was not installed and tiling works had not started… site was not ready till April end. Apart from these delays there were changes made by you to the joinery units which was ready and was supposed to have gone into painting.*
> *We had to dismantle the units modify and re-fix to accommodate the changes requested by you this took more time as units were ready note: we did not charge you for this additional work.*
> *Quotation for other additional works was given (on revised quote) 31/5/17 and approval was given on 21/6/17 (three weeks later) due this works were put on hold in the laundry area as sliding door was approval was delayed.*
> *On 02/5/17 you had advised us to put a hold on all doors.*
> *On 15/5/17 instruction was given by you to continue with the internal doors (13 days later) note: when instruction to hold works on doors was given we had deployed staff in that area to other project and then to redeploy them back to your project took time as they had to complete that other project (approx. 1 week).*
> *Front door designs were sent on 8/6/17 approval was given on 13/6/17 (5 days later) note: before this no request for designs was made from you [for] the front door.*
> *In our last site meeting you had requested changes to the units already installed a price has been given to you on 28/06/17 verbal confirmation has been given but nothing has come in writing.*
> *The unit here and works have started based on your verbal confirmation but I will require written confirmation for our records*

The price also has additional cages to doors (you have requested one with timber and glass) and other additional works that you have requested
Note that this will also take some to do I hope you also take this account before saying that delays have been made by us
Having said that all delays have been caused by us incorrect and we will not be held liable for delays in getting the site on time, approvals/instructions and changes made to joinery are major reasons for the delays in this project
With all these changes, additional works and delays in getting approvals we are entitled to for extension of time which we did not ask for previously as we were trying to complete within your requested time
Also note we had advised you that a project like this will take 8 to 12 weeks to finish please refer our quote and since your site was not ready till April end as per your email of 23rd April 2017 I have still got 4 weeks of contract time left and also have reasons to ask for extension time if required
Please note
We would like to complete all works asap we are targeting the 14th July 2017 for completion but there may be some work left (the reasons I have mentioned above) but this should [not?] stop you from moving in.

There does not appear to have been any reply by the defendant to this email, but the records show that even at 6 August 2017 the defendant was making changes (in an email of that date he sought to exclude an ironing cupboard/cabinet from the scope of work) that reinforce that plaintiff's argument that any time limits agreed initially were no longer enforceable.

17. This email exchange suggests to me that the plaintiff accepts that the time-frame of 8-12 weeks has some contractual effect, albeit with the qualifications expressed in the email referred to above. The plaintiff cannot be held to this estimate so as to be in breach if it is not achieved, if the reasons for that failure lie in delays or delay causing changes to the scope of works by the defendant. When asked by his own counsel whether any of the changes/variations/additions made by him to the scope of works should have delayed the plaintiff's completion of the work, the defendant was inclined to be dismissive, saying (p.144 N/E):

> *In terms of time it shouldn't affect it as was assured by Mr. Kumar. Like I said it would have been noted, I mean time is of the essence for us as we have noted with other emails so that's something that I would have asked you know how long is it gonna take extra*

I don't find this response particularly convincing. There is no evidence that time was ever 'of the essence' of the contract, and this is not alleged in the defendant's counterclaim. The value of this evidence is also substantially reduced by the fact that these propositions (that the changes sought by the defendant would not add to the time for completion, that time was of the essence, and that Mr Naidu always asked – when making a change – what impact that would have on the time to complete) were not put to the plaintiff's witness in the course of cross-examination.

18. Although there are a number of emails from the defendant pressing for the work to progress more quickly, there is no explanation by him for the delays that meant that instead of the house being ready for installation in January as initially indicated to Mr Kumar, work was still being done in late April (plastering, fitting the ceiling, painting & tiling) that I accept would have precluded any accurate measurement of

areas for which cabinetry was to be fitted, let alone the installation of cabinetry by the plaintiff.

19. Finally, on this aspect of the counterclaim, there is no evidence from the defendant that explains the calculation of $43,000 claimed in damages for the delays said to have occurred in completion of the contract. While the bank statements for the defendant's personal account (disclosed by the defendant only the day before the hearing commenced) appear to show that the defendant was paying rent of $7,000 per month, no tenancy/lease agreement has been discovered, nor is there any evidence about what notice the defendant was obliged to give, and when he first gave that notice. It might be, as an example of the importance of this information, that the defendant was committed to a tenancy that expired in August 2017. If so, the earlier completion of the house would not have relieved the defendant from the obligation to pay rent to that date. Nor was there any disclosure or evidence about the basis upon which the rest of the house was built, whether that work was delayed or not, who was responsible for those delays, and whether the defendant recovered any compensation for the delays of others. In the particulars of this aspect of its counterclaim (see item # 8 in paragraph 2 above) the defendant says:

> Overall contract delays in excess of 3 months have caused the defendant costs in terms of rental, interest on loans, labour hire, etc.

But apart from the very late disclosure of bank statements there has been no discovery, and there was no evidence about either the terms of rental, the loans and interest rate, or regarding labour hire. In explanation of this aspect of his counterclaim the defendant gave the following evidence (p173 N/E):

Mr. Singh:	*Now as we go the doc number 8 again, go back to the major part and you have mentioned there that certain issues, in your particulars you've noted a number of issues in fact. You've claim delay for 3 months am I correct?*
Witness:	*That's in the calculation yes sir, I mean in essence the delay was a lot more but in calculating the amount we have not been opportunistic nor ……. There was a delay no doubt, we paid for a deposit that he contractor requested and there was a considerable sum $28000 and the idea was that the contract would start in the sense that he would procure the materials that were needed, he would start whatever ……works he could. We found out later through the cause of the project that for example he bench tops, the stone tops we talked about they had not been procured for he had a limited stock, the quantity stock.*
Mr. Singh:	*Now Mr. Naidu we'll stick to the delay. I know you trying to give reasons at the moment for their delay. We have talked about the delay so you assessed the delay for 3 months.*
Witness:	*In this case to come to that amount sir and the delays yes, I use 3months.*
Mr. Singh:	*3 months, why did you use 3 months?*
Witness:	*Like I said it was from point of fairness sir. I although I contract actually it's 6 months that is being delayed. I thought okay we could meet half way, now this is contractor that I have worked with and we have achieved something and like I said rather than being too hard at them the 3 months is what I would accept as a delay in terms of the damages.*

Mr Naidu went on to give evidence that he was paying rental at $7,000 per month (as verified by the bank statements. So it seems that the defendant is seeking

$21,000 (3 x $7,000.00) by way of compensation for additional rent paid during the period of delay. In the course of the defendant's evidence in chief, after he had covered this issue, I raised with counsel for the defendant how the rest of the defendant's claim – under this aspect of the counterclaim - of $43,000 was made up. My concern was not merely to enable me to rule on this aspect of the claim, but also how the plaintiff could be expected to respond when the basis for the claim was not clearly explained and supported by discovery. Counsel's response to this query was that the claim for compensation for delays was a claim in general, not special damages. It seems that the defendant's approach is that the figure of $43,000 represents his concept of what would be a fair/appropriate sum by way of general damages, taking into account – as one of a number of factors in the assessment – that the defendant had had to pay an additional $21,000 in rent over the period of the delay. Presumably other factors I am expected to take into account in assessing the general damages claimed, are the loan interest, and the cost of labour hire, neither of which are referred to in the defendant's evidence. For reasons that I will discuss later I consider that the defendant's claim to general damages for this and other items of his counterclaim has no foundation in law. More to the point, the misplaced reliance on general damages means that the defendant has provided none of the evidence that he should and presumably would have if he had confined his claim to special damages for the losses reasonably incurred as a result of the alleged defective work and other breaches of contract by the plaintiff.

20. With regard to those aspects of the counterclaim that relate to defective work (items 1-7 and 9-11 of the schedule in paragraph 2 above) the defendant's evidence consisted principally of him producing and commentating on thirteen photographs showing what are said to be poor workmanship, defects or damage which the defendant says were done by or were the responsibility of the plaintiff. In the course of Mr Singh's cross-examination of the plaintiff's witness he and I had a discussion in which I sought to understand from him exactly what the defendant was alleging by way of breach, and seeking by way of compensation for any breaches. It emerged from this discussion that in addition to, or perhaps in lieu of, remedial damages for each defect (i.e. the cost of remedying the defect, or the diminished value of the finished house because of the defects) the defendant's case is that the court should award general damages by way of compensation for the defects. As I have indicated previously, I will deal with the legal support (or lack thereof) for this argument in more detail in my analysis. Whether it was because he was distracted by our discussion, or because he had faith in his general damages argument and thought it unnecessary, or because the defendant's evidence was itself insufficiently clear to enable it to be articulated in questions to the witness, counsel for the defendant did not put to Mr Kumar, for the plaintiff, either the specific complaints the defendant had about the items of work listed, or the specific amounts claimed by defendant (listed in the counterclaim). When I raised this with him later, Mr Singh replied that it was sufficient that these defects and figures were set out clearly in the counterclaim, and that it is not necessary – in addition – to give the plaintiff the opportunity in cross-examination to answer the defendant's case. I don't agree, and the weight to be attached to the defendant's evidence on the subject is diminished by the fact that the plaintiff has not been given a proper chance to answer it.

21. Furthermore, when it came to the defendant's own evidence of the defects, and the steps taken to remedy them, this was singularly vague and subjective. There was no independent evidence of the defects (for example by someone unrelated to the parties giving evidence on the genuineness of the defendant's complaints, and on the means of repairing them). No invoices were produced for the cost of materials or labour spent in remedial work to correspond to the amounts claimed. The defendant said that he or his employees/contractors had remedied some of the defects complained of, but there was no detail as to what this remedial work involved, how long it took or how much it cost. It transpired that although specific amounts are claimed for the items listed, some of those items have not been repaired at all, and it was unclear what was the basis upon which the amounts claimed had been calculated. To quote two examples:

- Item 1 in the defect list relates to the front door frame, for which $1980.00 is claimed. The description of this item in the counterclaim (see paragraph 2 above) complains about the sealing of the door frame to the wall. In his evidence on this item the defendant says (at p.164 N/E):

  Mr. Singh: *… Now if you look at the first one is the doorframe sealing onto walls? Now could you what doorframe sealing are first?*

  Witness: *Yes sir, so any door has a frame to mount and hold the door securely and you'll see around this room in particular as well, all the doors has frame so how is the doorframe attached to the wall? In this case we leave it to the contractor to attach the door the doorframe onto the wall so that stays in place. That wasn't done properly in this case and in that's a scope that the contractor has to complete. It's there installation it's part of their job to do.*

  Mr. Singh: *Right so but you agree that it wasn't a confirmed quote. You are saying here it was implied that they will do that.*

  Witness: *Well when I raised that initially on site sir I was told that oh for them to do but I couldn't understand how you could, it's not a loose piece of furniture you it needs to be secure and it's a door. A door is something that's operated daily. You open it you close it, it moves*

  Because this evidence was not put to the plaintiff's witness when he was giving his evidence we do not have the benefit of his response to this, nor does either the defendant have the opportunity of clarifying his evidence to answer any response the plaintiff might have made if he had been asked about it. The result is that we have an almost incoherent description of what the complaint is about, and it is very difficult to understand exactly what the problem is, what was done to fix it, or why it is the responsibility of the plaintiff (while the plaintiff clearly was to supply doors and frames for the house, I would have expected that the door-frames would be fitted by the builder, rather than by the plaintiff. If I am wrong about this, it nevertheless illustrates the importance and value of putting one's evidence to the witnesses of the other side, particularly in a case such as this, where although the defendant is effectively the plaintiff, he gave his evidence only after the plaintiff). No evidence was given on this other than by the defendant, or by photographs taken by the defendant. There was no

evidence from those who repaired the defect or even by the defendant himself about exactly what was done, no before and after photographs, and no independent assessment about the extent of the defect, or the reasonableness of the measures taken to repair it.

On the issue of the amount of the defendant's claim on this item, he explained that $1980.00 is the cost of repairing the defect. No documents (invoices, time sheets for work done) were discovered or produced to verify this amount. The defendant's evidence was as follows (p. 181 N/E):

Judge:	***So is item 1 an estimate or is that a actual cost of repair?***
Witness:	*That was an actual cost sir in terms of the use of materials and the use of labour.*
Judge:	***…discovery Mr. Singh?***
Mr. Singh:	*No, all we've given is this.*
Judge:	***No materials, no invoices for materials?***
Mr. Singh:	*No.*
Judge:	***… so how much of that Mr. Naidu is materials and how much is labour?***
Witness:	*In this case the materials would have been perhaps yeah just in excess of the $1000. It's special foam material to fill a cavity.*

- Items 3 & 4 of the defect list are for gap filling ($345.00 claimed) and damage to the main door ($1250.00 claimed). On these items the defendant's evidence was as follows:

Mr. Singh:	*… Now Mr. Naidu I believe we were, you were on number 2 …….filling?*
Witness:	*That is correct sir yes.*
Mr. Singh:	*Now you've said in the particulars that ……deficient many places.*
Witness:	*That is correct sir. So with all the items that the contractor was installing obviously it's two hard surfaces so timber or a stone top going against a concrete wall. There is a gap so I mean all the items that the contractor provided from the factory doesn't come perfect either so that gap normally has to be sealed. So for example in the kitchen you'd ……..to wet areas so that the water doesn't penetrate and damage the hardware later and similarly in all other areas. Normally you'd want the gaps to be filled so that there is no ……of dusts, insects and other things. So this was not done properly at all and in fact we had to do it ourselves because just to avoid that hygiene condition that that could lead to. And like I said it could lead to failure as well you know if this water going in or other elements going in.*
Mr. Singh:	*Now Mr. Naidu go to number 3 damage to main door lock by ……..because lot of talk about the doors how that was damaged and photos were shown in fact to the court as well in terms of the doors. Now and let's start with the so when was the door damage, the lock?*
Witness:	*It was sometime between the 24th and the 30th of August and how we discovered it, it was the door had the lock had been installed so the lock is installed, there is not many contractors around it's just that Tropik Wood and their team and some of our sub-contractors with the painting works and finishing work.*
…	
Witness:	*And so how this happened was I had not seen the incident myself but that's what we gathered talking to everyone on the site. There was a particular employee of Tropik Wood person by the name of Kavitesh I believe and young boy they were fooling around and the door had been locked from the*

inside. From the outside you can't tell whether the door is locked or not. He pushed and he pushed really hard so that broke the door with the lock intact. So locked door he pushed and the door is broken essentially.

Mr. Singh: *Who remedied the problem?*

Witness: *Sir I raised that with the contractor and they remedied it. They remedied by gluing a small panel or the same panel that had brown off, the same panel was glued back on so I raised the point that look first of all it shows that obviously the door is not strong enough and secondly just by gluing it doesn't restore it back to it's original strength.*

Mr. Singh: *So what happened after that it was glued or what about the door now?*

Witness: *It's still in the same condition. I means if there was an offer to replace it I would have accepted it but obviously you know it's just glued on and when we got site I can still show you where the crack is on the door.*

In the case of both these items the defendant acknowledges that they have not been repaired. The amounts claimed appear to be his estimate of what it might take to repair the defects. Again, the plaintiff was not questioned by counsel for the defendant on any of this evidence, or about what might be required to repair the defects complained of.

22. The plaintiff acknowledges that, although it contests that it (or its employees) were responsible for the damage to the front door, it offered to replace the front door to meet the defendant's concerns. The defendant did not take them up on that offer, and as matters stand at the time of the hearing it seemed that the defendant was arguing not only that the front door was damaged, but also that it was defective, in that it lacked weight or substance that would allow it to withstand the weather in Fiji. Again, there is no evidence on this issue other than the defendant's personal opinion, furthermore, there appears to be nothing in the explicit, or in the alleged, terms of the contract for the supply of joinery, that specifies what type/design of front door was to be supplied. No plans or specifications have been discovered or produced in evidence that would enable the court to assess whether the door supplied by the plaintiff did or did not meet its contractual obligations. On the issue of damages (in case breach on the part of the plaintiff is established) the defendant's evidence was unclear.

23. Finally, in this discussion of the evidence, I should mention that at the start of the trial counsel for the defendant raised the possibility of a site visit, to enable me to see the house and the defects, on the basis that this might assist me to better understand the evidence. I reserved the issue for later discussion, and although the matter was raised briefly thereafter, in the event no such site visit took place. The purpose of a site visit (permitted by O.35, r.6 High Court Rules) is to help the court better understand the evidence that has been presented. It is not a substitute for presenting admissible and persuasive evidence. One of the risks of having a site inspection is that the judge will see and hear things, and possibly – even subliminally - obtain an impression of the evidence, either supporting or adverse to a particular party's case, that there is no opportunity for a party to reinforce, or contradict. Given the state of the defendant's evidence I would have been concerned, had a site inspection taken place, that I might have been shown defects etc. upon which, without proper evidence of what I was seeing, I was left to draw my own conclusions. Given that the plaintiff's work was completed over 3 years before any

inspection might have taken place, during which the defendant and his family were living in and using the property, I would have been concerned that what I was seeing on a site visit was different, in nature or degree, from what existed at the time the work was done.

The law

24. In the decision of the Privy Council in **BP Refinery (Westernport) Pty Ltd v Shire of Hastings** (1977) 16 ARL 363 on appeal from the High Court of Australia, the court listed the criteria for implying a term in a contract as follows (at p.376):

> *(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.*

and the defendant relies on this case in support of its contention that a terms as to the time for completion of the plaintiff's work must be implied into the contract. However, in the intervening years since this decision was delivered in the Privy Council, this passage from **BP Refinery** has come to be relied upon not only in cases involving the implication of terms in a contract, but also where the court is asked to construe the meaning of a contract. In commenting on this distinction the Supreme Court of England & Wales in **Marks and Spencer PLC v BNP Paribas Securities Services Trust Co (Jersey) Ltd** [2016] AC 742 (per Lord Neuberger) made the following distinction:

> [26] *I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. However, Lord Hoffmann's analysis [in **Attorney General of Belize v Belize Telecom Ltd** [2009] 2 All ER 1127 commenting on the criteria from the **BP Refinery** case] could obscure the fact that construing the words used and implying additional words are different processes governed by different rules.*
>
> *[27] Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.*
>
> *[31] In those circumstances, the right course for us to take is to say that those observations should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms.*

In the present case, given the inclusion of the handwritten wording referring to '8 to 12 weeks' in the plaintiff's quote, the issue is less about the implication of a term relating to time, and more about working out what these words mean in the context of the contract, and so the comments in the **Marks and Spencer** case are more pertinent than those in **BP Refinery**.

25. If there is, in the present contract between the parties (whether construed or implied), a term as to the time for completion, the plaintiff makes the point, which I accept in principle, that the term cannot be applied against a party where the delays are the fault of the other party. This is established by the decision of the House of Lords in **Trollope & Colls Ltd v North West Metropolitan Regional Hospital** [1973] 2 All ER 260. In that case the House of Lords affirmed the proposition made by Lord Denning in the Court of Appeal below, derived from an earlier case, **Dodd v Churton** [1897] 1 QB 562;

> *It is well settled that in building contracts—and in other contracts too—when there is a stipulation for work to be done in a limited time, if one party by his conduct—it may be quite legitimate conduct, such as ordering extra work—renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time.*

But the true significance of this passage is illustrated by the subsequent comments of Lord Pearson delivering the majority opinion (concurred in by Lords Guest, Diplock and Cross of Chelsea). Having found that the contractually agreed time limit no longer applied, because of variations sought by the principal, the court went on to consider whether it should construe or imply additional terms whereby a new time limit was imposed in lieu of the original limit. The House of Lords firmly concluded that it could and should not do so, and in coming to that decision rejected the contention by Lord Denning in the Court below that:

> *… when the parties have given no thought to the matter and something occurs for which they have not provided, then the court itself will imply a term such as it considers that the parties, as fair and reasonable persons, would have provided if they had thought about it. In short the court decides according to what is fair and reasonable.*

As Lord Pearson pointed out:

> *Suppose, however, that the parties did overlook the possible effect of an overrun of phase I on the time for completing phase III. What is the extension of time which they must have intended? There are at least four possibilities:*
>
> *(a) One can say that the time for phase III should be extended by so much of the delay in phase I as was attributable to the acts of the respondents in requiring or sanctioning variations through their architect. That time was 25 weeks.*
>
> *(b) The period of extension of the time for phase III might be the period of 47 weeks in fact allowed by the architect whether or not some further extension should have been allowed. This has the advantage of being ascertained at the time when the appellants would have to plan their work on phase III. But it is not the period for which the respondents have contended.*
>
> *(c) The period of extension of the time for phase III might be a period equal to the extension of time for the completion of phase I properly allowable under conditions 'A'. That is the period for which the respondents have contended. There are at least two objections. First, the length of that period would, in a case where there was a dispute, not be known until the arbitrator decided what it should be, and therefore would not be known at the time when the appellants were planning their work in phase III. Secondly, it would not cover a situation which could arise in which delays attributable to the appellants would so curtail the time allowed for phase III that it*

would not be possible to nominate sub-contractors willing to undertake the required obligations.

(d) The period of extension of the time for phase III might be the total period of the delay in completing phase I—including the respondents' delay and the neutral delay (inclement weather etc) and the appellants' delay. This period of extension is at least as good a candidate as any of the others. It can be said to give business efficacy to the contract, because it would give the appellantsand the sub-contractors a fair start with a full 30 months' period ahead of them for completion of phase III.

At any rate the period referred to in (c) is not obviously what the parties must have intended and, therefore, is not to be implied. In my opinion, the respondents' contention fails and the appeal should be allowed.

The facts of the present case are of course different from those in **Trollope & Colls,** but the multiple options referred to by Lord Pearson illustrate the problem that the court would be faced with attempting to substitute for the original '8 to 12 weeks' some other time for completion. The House of Lords preferred the view that:

the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term 'necessary' to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves.

26. Finally under this heading there is a need to discuss the law relating to general damages for breach of contract, which obviously is an important part of the defendant's counterclaim. The classic statement by Alderson B in **Hadley v Baxendale** (1854) 9 Exch 341 (at 354) dealing with damages recoverable for breach of contract is:

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 breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such 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.

In **Victoria Laundry (Windsor) Ltd v Newman Industries Ltd** [1949] 1 All ER 997 the English Court of Appeal made the following additional comments about this proposition:

(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: Wertheim v Chicoutimi Pulp Co. 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 recognised 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 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 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 also 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: see certain observations of Lord Du Parcq in Monarch Steamship Co Ltd v A/B Karlshamns Oljefrabriker ([1949] 1 All ER 19).*

(6) *Nor, finally, to make a particular loss recoverable, need it be proved that on 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 enough, to borrow from the language of Lord Du Parcq in the same case, 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.*

It is true that these cases focus mainly on the issue of foreseeability of losses at the time the contract is made, and this is not an issue in the present case. But this issue of foreseeability is at least part of the explanation for the idea, expressed by by Bingham LJ in the English Court of Appeal in **Watts v Morrow** [1991] 1 WLR 142:

> *A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.*
>
> *But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead. If the law did not cater for this exceptional category of case it would be defective. A contract to survey the condition of a house for a prospective purchaser does not, however, fall within this exceptional category.*
>
> *In cases not falling within this exceptional category, damages are in my view recoverable for physical inconvenience and discomfort caused by the breach and [for] mental suffering directly related to that inconvenience and discomfort. If those effects are foreseeably suffered during a period when defects are repaired, I am prepared to accept that they sound in damages even though the cost of the repairs is not recoverable as such. But I also agree that awards should be restrained …*

This decision was applied, and explained in the House of Lords in **Farley v Skinner** [2001] 4 All ER 801 perhaps most clearly in the decision of Lord Hutton at pp 818-

825. This decision makes it clear that the summary quoted above from **Watts v Morrow** is made up of three propositions corresponding to the three separate paragraphs quoted. These propositions deal with:

- the general principle that applies to most contracts
- an exception to this general principle where one of the objects of the contract is to provide pleasure etc., and that object is not met because of a breach of the contract (e.g. as in **Jarvis v Swan Tours** [1973] 1 All ER 71 and **Jackson v Horizon Holidays** [1975] 3 All ER 92)
- in cases not covered by this exception, what is recoverable where a party suffers physical inconvenience or discomfort caused by the breach, or mental suffering directly related to that physical inconvenience and discomfort.

Dealing with the second of these propositions, Lord Hutton says in **Farley v Skinner** at p.823

> *It will be for the courts, in the differing circumstances of individual cases, to apply the principles stated in your Lordships' speeches in this case, and the matter is not one where any precise test or verbal formula can be applied but, adopting the helpful submissions of counsel for the plaintiff, I consider that as a general approach it would be appropriate to treat as cases falling within the exception and calling for an award of damages those where:*
>
> *(1) the matter in respect of which the individual claimant seeks damages is of importance to him, and*
>
> *(2) the individual claimant has made clear to the other party that the matter is of importance to him, and*
>
> *(3) the action to be taken in relation to the matter is made a specific term of the contract.*
>
> *If these three conditions are satisfied, as they are in the present case, then I consider that the claim for damages should not be rejected on the ground that the fulfilment of that obligation is not the principal object of the contract or on the ground that the other party does not receive special and specific remuneration in respect of the performance of that obligation*.

27. The result in **Farley v Skinner** was that the decision of the Court of Appeal was overruled, and the judgment in the High Court reinstated, awarding damages to the plaintiff where a property surveyor carrying out a pre-purchase inspection had, in breach of a specific request by the purchaser to report on this aspect, wrongly reported that the property was not affected by aircraft noise from a nearby airport. Although upholding the award of £10,000 (which he regarded as 'high') Lord Steyn commented:

> *… I have to say that the size of the award appears to be at the very top end of what could possibly be regarded as appropriate damages. … I consider awards in this area should be restrained and modest. It is important that logical and beneficial developments in this corner of the law should not contribute to the creation of a society bent on litigation.*

28. This decision appears to have been considered in two cases in Fiji, both at High Court level. In **Chandra v Fiji Care Insurance Ltd** [2004] FJHC 311; HBC0220.1999 (23 September 2004) Jiten Singh J awarded $1000.00 in damages to a plaintiff against her medical insurer which had wrongly declined her medical health claim in breach of the insurance contract. This was in spite of the fact that such loss was neither pleaded nor proved in the plaintiff's evidence. In the other case, **Sundaram v**

Mascardo-Holmes [2016] FJHC 1063; HBC257.2012 (23 November 2016) Tuilevuka J declined a claim for such damages by a purchaser of land who had successfully sought specific performance of a sale and purchase agreement.

29. It follows from the general rule (the first paragraph quoted above from **Watts v Morrow**) that unless one of the exceptions applies, only special damages are claimable for breach of contract. Special damages are damages that compensate the innocent party for the tangible losses that it has suffered. Such damages can be assessed in a variety of ways, depending on the nature of the loss. The purpose is to restore the aggrieved party to the position it would be in had the contract been performed. Most commonly, in breach of contract cases, this will be done by awarding the aggrieved party the cost of that restoration, usually the cost of repairing the breach, but – if such repair is not possible or practicable - making up for value lost as a result of the breach. To award damages on any other basis would be to punish the party in breach, and rather than merely compensate the innocent party would put it in a better situation than it would have been had the contract been properly performed. The reason for this approach appears in the extract quoted above from the **Trollope & Colls** case. The parties when they make their contract have the opportunity to agree on what the contract is to provide, and what is to follow from a breach of it. It is not the function of the courts to improve on that contract, particularly in a case such as this, where the defendant is an experienced property developer and engineer, and presumably could have forseen and stipulated in the contract for the consequences of the failures he now complains about.

30. Also implicit from the passage from **Watts v Morrow**, and the other cases referred to above, is that in cases where it is said that one of the exceptions to the general rule applies, the party claiming the benefit of the alleged term of the contract for conferment of pleasure, or claiming to have suffered physical or mental suffering as a result of some breach of the contract, must plead accordingly, so as to properly inform the other party of the nature of the claims against it. It also follows that the claimant must prove the elements of the claim, including the physical or mental distress suffered, and how this arose from the other party's breach.

31. Counsel for the defendant has not referred to me, and I cannot find in my research, any authority for the proposition that special damages and general damages can in some way be combined, and that the court can in some way award a global amount that the court thinks is 'fair', but bears no causal relationship to the contract pleaded, or the losses apparently suffered.

Analysis

32. In closing submissions for the defendant his counsel submits (at paragraph 51 of his submissions) that:

> *the Plaintiff should not be entitled to be paid under the contract as it delayed the completion of the works and the works done by them were of poor workmanship.*

The case relied on by counsel in support of this proposition is the decision of Inoke J in **JK Builders v Dakai** [2011] FJHC 244. But, with respect to counsel, that is a case in which, although it had some similarities with this case in that it was a case where the builder was claiming from the owner the balance of the contract price, while the owner had a counterclaim for delay, is not otherwise applicable. In that case there was an express liquidated damages clause, and the owner had been locked out of his premises by the builder for just under four years up to the date of the court's decision. The court having found that the lockout was unwarranted, the liquidated damages that the owner was entitled to greatly exceeded the balance of the contract sum that otherwise might have been claimable by the builder. It is in this context that the court noted that the builder was not entitled to the balance of the retention sum. This result does not arise from the court holding that a party in breach of contract is not entitled to claim the balance due to him under the contract.

33. Although I accept that there may be contracts where non-completion of work will disentitle a party in breach from any payment, that is something that must be agreed, and clearly does not apply in the present case, where the parties had agreed to progress payments. I see no basis other than to treat this as a conventional contract claim, and counterclaim, where each party will be entitled to such damages for breach of contract as they are able to prove, and the end result will be to offset the amount owed by one against any amount payable by the other.

34. As I have mentioned, there is otherwise no dispute that, except for any set-off arising from the defendant's counterclaim, the plaintiff is entitled to be paid the balance of the contract price for the supply and installation of joinery, i.e. $61,130.00 which was due on completion of the work. In terms of section 3 of the Law Reform (Miscellaneous Provisions)(Death & Interest) Act 1935:

> ***Power of High Court to award interest on debts and damages***
>
> ***3***. *In any proceedings tried in the High Court for the recovery of any debt or damages the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:*

No evidence or argument has been presented by the plaintiff about the interest rate that might be appropriate. In my view a fair rate is 6% per annum, and interest should apply from the date of the plaintiff's statement to the defendant on completion of the work, 31 August 2017 to the date of judgment. Thereafter, in terms of section 4 of the Act referred to, interest on the amount of the judgment will accrue at 4% per annum until the judgment is satisfied.

35. With regard to the defendant's counterclaim, in both the pleadings and closing submissions, the defendant argues that the four terms referred to in paragraph 2 above are implied terms of the contract. This is admitted by the plaintiff in respect of the implied terms as to quality, and fitness (items (i)-(iii) listed in paragraph 2 above), but the plaintiff denies that there was a term of the contract that the work

would be completed in 8 weeks, and says that the delays in the completion of the work were solely due to the defendants failure to provide the plaintiff with the site ready for the commencement of the work.

36. I accept that the plaintiff is not bound by the estimate given to complete the works in '8 to 12 weeks'. The evidence shows that this estimate was given in the context of an assurance by the defendant that the house would be ready in January for the plaintiff to begin installing the cabinetry. It was not, and there is no suggestion that the plaintiff was responsible for the situation whereby even in late April 2017 there was still significant work to be done to the house before it would be in a state where measurements could be made with confidence, and where the cabinetry could be safely brought to the site and installed. In a situation where the plaintiff is expected to provide and install work that fits the spaces where it is to go, and meets the expectations of the owner as to its appearance, it is entirely reasonable, in my view, for the plaintiff to postpone the measurement and start of construction until the house has reached a state of completion where measurements taken are precise and will not change (e.g. by the addition of layers of plaster or tiles), and where the finished work will not be vulnerable to damage from others working on the site. The defendant would have been entitled to complain (and I have no doubt would have done so) if the cabinetry did not fit, or having been installed while other building work was still under way, was then damaged in the course of that work. The photographs produced by the plaintiff of work practices followed by workers/subcontractors engaged by the defendant, in my view, give ample justification for the plaintiff's concerns.

37. Furthermore, once the defendant had failed to provide a house ready for measurement and installation in January, any warranty/assurance given by the plaintiff to complete the work in 8 to 12 weeks no longer applied. The term relating to the time for completion is not capable of reinterpretation, or application to cover the new circumstance whereby the plaintiff's work could not commence until the end of April. Even after that, (and even if the estimate of 8-12 weeks could simply have applied to a later start date – which I do not accept) the defendant was still making changes and requiring additional work that would have affected the ability of the plaintiff to complete the work within the time estimate it gave at the start. I also accept that the estimate for completion that the plaintiff was willing to give in December 2016 applied to the circumstances that existed at that time. The plaintiff cannot be assumed to have agreed that that estimate would still apply to the circumstances that applied in April 2017, when the plaintiff had other commitments, on other jobs, that it had to meet. Certainly, it might have been possible for the defendant to stipulate, in December 2016 when the terms of the contract were finalized, a term as to completion that was capable of applying to such changed circumstances. But the defendant did not require such a term, and cannot ask the court to imply new terms, or a meaning to the term that was agreed, that meets the situation in which he found himself. At that point also, the parties might have reached a new agreement about the completion date, but there is no evidence that they did so. Even in June/July 2017, when the issue of the consequences of delay were directly raised by the defendant, the plaintiff did no more than give an assurance that it would do its best to complete by 14 July. In the event even that

was impossible, because the defendant had not supplied the door fittings. Before a party can complain of a breach by the other party to a contract, it must have performed its own obligations in a way that did not contribute to any failure by the other party. I am satisfied that the defendant had not done so. Taking into account the warning contained in the case of **Trollope & Coll** referred to above, I decline to try to rewrite the parties' contract to insert some other provision as to time for completion, in place of the agreed term that had been superseded by events.

38. This means that the term of the contract whereby the plaintiff agreed to complete the work within 8 to 12 weeks no longer applied to the situation when the contract was completed in August 2017. For the reasons explained above, I am satisfied that no other term was agreed by the parties to substitute for the original estimate, and I do not accept that the plaintiff was in default of any implied term that it would complete the work within a reasonable time (even if that had been part of the defendants claim – which it was not). Hence the claim by the defendant for damages for the delay in completion cannot succeed.

39. Even if I had concluded otherwise on the issue of whether the plaintiff was in breach of contract for its delay in completion, I am not satisfied that the defendant is entitled to general damages of $43,000 for that breach. If there had been a breach by the plaintiff, the defendant would have had to show that the breach had caused the additional expenses/losses claimed. Certainly, I accept that rent payable on alternative premises might have been part of that claim. But in claiming that amount I would have expected evidence from the defendant to show that there were no other factors in the delay, apart from the conduct of the plaintiff. The defendant has not come close to establishing this. Apart from the fact that he has provided no discovery on either the situation with the rest of the build, or as to details of his tenancy, or his loan interest, the fact that the house was supposed to be ready for joinery to be installed in January, but it was not ready until May, suggests that others were responsible for the delays, either instead of or in addition to any delays on the part of the plaintiff. On the matter of general damages, neither the pleadings or the evidence meet the requirements to establish that the defendant is entitled to general damages of the sort awarded in **Farley v Skinner** referred to above. In the final analysis there is simply no foundation for the claim for $43,000 in damages.

40. On the issue of damages for breach of the terms of the contract as to quality, the deficiencies in the defendant's evidence mean that while I am inclined to accept that at least some of the issues complained of are likely to be genuine, the evidence does not establish that they are the responsibility of the plaintiff, and does not persuade me that the amount claimed by the defendant represents the cost of repair (in a number, if not most, of the cases it seems that the defects have not been important enough to require repair), or the diminished value of the finished house. In those cases where he has claimed the estimated cost of repairing the defects, the defendant has not established that his opinion evidence for that cost (unsupported by evidence from some independent assessor) is something that I am entitled to rely on.

41. Given the plaintiff's acknowledgement that it offered to replace the front door after the damage it suffered (for which the plaintiff did not accept its employee was responsible), I would have been inclined to direct that this at least happen, had it not been for the defendant's complaint that the door as supplied was defective for being too light. As I have noted, there is no evidence that the contract required any particular type or style of front door, and I am not going to direct the plaintiff to provide a replacement door that the defendant thinks (again without evidence to support the contention) is inadequate for its purpose.

42. Accordingly, the defendant's counterclaim fails for lack of proof of breach, loss or damage.

Conclusion

43. I therefore make the following orders:

    i. Judgment is given for the plaintiff against the defendant in the sum of $61,130.00.
    ii. The plaintiff is entitled to interest on this amount at 6% per annum from 31 August 2017 to the date of judgment.
    iii. The defendant's counterclaim is dismissed.
    iv. The defendant is to pay costs of $7,000 (summarily assessed) to the plaintiff for these proceedings (covering both the claim and counterclaim).

_____
A.G. Stuart
Judge

At Lautoka this 11th day of January, 2021

SOLICITORS:
Krishnil Patel Lawyers, Lautoka, solicitors for the plaintiff
Patel & Sharma, Nadi, solicitors for the defendant