[2013] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 10/2010

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE McINTOSH JA

BETWEEN **LOCKSLEY WALLER**

JUDITH DALLAS-WALLER **APPELLANTS**

AND **LARKLAND F ROBINSON**

AMY REECE-ROBINSON

INGRID LEE CLARKE-BENNETT
(EXECUTORS OF THE ESTATE OF
GLASFORD ROBINSON, DECEASED) RESPONDENTS

Andre Earle and Miss Anna Gracie instructed by Rattray, Patterson, Rattray for the appellants

Miss Carol Davis and Mrs Ingrid Lee Clarke-Bennett instructed by Pollard, Lee Clarke & Associates for the respondents

18, 19, 20 June 2012 and 31 July 2013

MORRISON JA

The background

[1] The appellants ('the Wallers') are the owners of a dwelling house situated at 3 Jacks Hill Road in the parish of Saint Andrew ('No 3').

[2] The respondents ('the executors') are the executors of the estate of Glasford Robinson, deceased. During his lifetime, the late Mr Robinson, to whom I shall refer by name, was a building contractor and was, on or about 28 June 1998, engaged by the Wallers on a 'labour only' contract ('the contract') for the construction of No 3, which was to be their future home. There is no dispute between the parties that a labour only contract is a contract under which the contractor "provides the service of labour only and the Employer provides all the material and equipment required to complete the Contract" (see para. 2.3, 'Report on the Construction of Dwelling House at Lot No. 3 Jacks Hill Saint Andrew', prepared by Mr Steve Miller, pursuant to a case management order of Beswick J on 16 May 2003 – 'Mr Miller's report').

[3] At the date of Mr Robinson's untimely death on 22 February 1999, the construction of No 3 was not yet complete. Completion was in due course achieved in December of that same year, with Mr Locksley Waller ('Mr Waller') stepping into Mr Robinson's shoes and acting as his own contractor.

[4] After Mr Robinson's death, an assessment of the work on the site up to November 1998, which, the Wallers alleged, had previously been commenced by agreement between them and Mr Robinson, indicated that the sum of $520,740.00 had been

overpaid by them to Mr Robinson for work done on the construction of No 3 up to that point. The Wallers accordingly brought a claim against the executors for (i) a declaration that the oral agreement made on 28 June 1998 between them and Mr Robinson "was frustrated and/or terminated" by his death on 22 February 1999; (ii) repayment of the said sum of $520,740.00; (iii) damages; and (iv) an account of all monies received and paid out by Mr Robinson and/or his estate in relation to the contract between the parties. The executors for their part disputed the Wallers' claim and counterclaimed for (i) a declaration that the contract subsisted after Mr Robinson's death for the benefit of his estate and was wrongfully terminated by the actions of the Wallers; and (ii) an unspecified amount of damages for breach of contract.

[5] In a written judgment given on 16 October 2009, after a hearing over several days between 2005 and 2007, Campbell J dismissed the Wallers' claim in its entirety. However, judgment was given for the executors on the counterclaim, in the amount of $1,222,555.68, with interest at 10% per annum from 12 February 1999. The executors were also awarded the costs of the action, to be taxed if not agreed.

[6] The Wallers have challenged the judgment of the learned trial judge on a number of grounds, having to do mainly with what they consider to have been shortcomings in his assessment of the evidence that was before him in relation both to the claim, which he rejected, and the counterclaim, which he allowed. The issue for the court in this appeal is therefore whether the learned judge came to the correct conclusions on that evidence. In considering this issue, it will obviously be necessary for the court to have

in mind the well-known limitations on the role of an appellate court in relation to the findings of fact of a trial judge.

The pleadings

[7] Before looking at the evidence, it may be helpful to look briefly at the parties' pleaded cases. By their amended statement of claim dated 20 March 2001, the Wallers pleaded an oral agreement with Mr Robinson, made on or about 28 June 1998, under which Mr Robinson agreed to provide the labour and expertise for the construction of a house for them on their property at No 3. It was agreed between the parties that the Wallers would pay to Mr Robinson an initial mobilisation sum of $470,000.00 and that building certificates would be submitted by him on a monthly basis. Mr Robinson died on 22 February 1999. Paragraphs nine to 12 of the amended statement of claim stated as follows:

> "9. That the contractor commenced work on or about the 1st of July, 1998 (and subsequently submitted building certificates for the months of July, August, September and November 1998) and the Plaintiffs made the aforesaid payments in pursuance of the said agreement.
>
> 10. That it was subsequently realized by the parties (i.e. the contractor and the Plaintiffs) that there were mistakes in the quantity estimates (and consequently the payments made by the Plaintiffs) used for the construction of the said house by the contractor.
>
> 11. That as a consequence of the matters aforesaid in paragraph 10 hereof, the Quantity Surveyor, Mr Omrie Farquharson, employed by the contractor, made an assessment of the bills of quantities and found that there was an overpayment of $520,740.00 made by the Plaintiffs to the contractor, full particulars whereof have already been delivered to the Defendants or are in their possession. The Plaintiffs will, at

the trial hereof, refer to and rely upon the said Bill of Quantities prepared by Mr Omrie Farquharson for its full terms, meaning and effect.

12. By reason of the death of the contractor and the aforementioned matters in the preceding paragraphs herein, the Plaintiffs state that the said agreement has been frustrated and/or terminated, and the Plaintiffs are entitled to recover the said sum of $520,740.00."

(Particulars omitted)

[8] The Wallers accordingly claimed for the remedies set out at para. [4] above.

[9] By their further amended defence dated 17 July 2003, the executors stated their defence (again, only insofar as is now relevant) as follows:

"6. Paragraph 9 of the Statement of Claim is not admitted and the 3rd Defendant will put the Plaintiffs to strict proof of the contents thereof at the trial hereof. Further the 3rd Defendant will say that there were in fact payments to the deceased for steel and other material supplied by the deceased to the Plaintiffs for which the estate has not been credited.

7. Paragraphs 10 and 11 of the Statement of Claim are denied and specifically the 3rd Defendant denies that the Quantity Surveyor was employed by the deceased.

8. The 3rd Defendant denies each and every allegation made in paragraph 12 of the Statement of Claim and repeats paragraphs 2, 3, 3a, 3b and 4 hereof and will further say that the contract between the contractor and the Plaintiffs continued to exist for the benefit of the Contractor's estate and indeed was wrongfully terminated by the Plaintiffs.

9. In further response to paragraph 12 of the Statement of Claim the 3rd Defendant will state that the estate of the deceased stood ready and willing to complete the contract between the deceased and the Plaintiffs at the time of the deceased's death however the actions of the Plaintiffs made it impossible for the said Contract to be completed. The said

agreement was therefore frustrated by the Plaintiffs' own actions."

[10] On this basis, the executors averred, the Wallers "wrongfully terminated and or frustrated the Contract by their own actions in not allowing the contract for the building of their home to be completed by the Executors of Mr Glasford Robinson deceased after his death". They also counterclaimed for, among other things, (i) a declaration that the contract "subsisted for the benefit of [Mr Robinson's] estate and was wrongfully terminated by the actions of [the Wallers]"; (ii) damages for breach of contract; and (iii) loss of profits.

[11] In their amended reply and defence to counterclaim filed on 3 June 2003, the Wallers maintained their position that the contract was oral, but stated that it was "evidenced in writing", that is, in the certificates and Bill of Quantities referred to in the statement of claim. The executors' allegation that "there were in fact payments to the deceased for steel and other material supplied by the deceased to the [Wallers] for which the estate has not been credited" was denied.

The evidence

[12] Witness statements were provided by Mr Waller, Mr Daniel Thomas, who was the architect who had designed No 3 and upon whose recommendation the Wallers had engaged Mr Robinson's services, and Mrs Ingrid Lee Clarke-Bennett, one of the executors. There was also Mr Miller's report, which, as I have already indicated, was prepared pursuant to an order made at case management. Messrs Waller and Miller

and Mrs Lee Clarke-Bennett all gave oral evidence at the trial. However, Mr Thomas not having come forward for the purpose of giving evidence, no reliance was placed on his witness statement at the trial.

[13] In the absence of Mr Robinson, Mr Waller was the only person able to speak from firsthand knowledge to the discussions which led to the conclusion of the contract. In addition to his witness statement filed on 28 August 2004, he was cross-examined at great length at the trial by counsel for the executors. What follows is therefore a summary of his evidence taken from both sources.

[14] In 1997, the Wallers decided to build their home on No 3. Mr Thomas was asked to design it for them and his drawings when completed were given to a quantity surveyor, Mr Richard Brown, for the purpose of preparing a Bill of Quantities ('BQ'). By April 1998, Mr Brown's draft BQ was ready and, Mr Waller said, "outlined the quantity of work to be done in constructing our home". That BQ "had no rates, only quantities…[m]onetary figures are handwritten…[i]n the original document, there are no rates". In due course, in consultation with Mr Thomas, and after several contractors were interviewed, Mr Robinson was identified as a suitable contractor to carry out the construction. Mr Robinson went through Mr Brown's draft BQ and, Mr Waller said (in cross-examination), "advised of the amount". After an initial bid from Mr Robinson of $6,046,290.00 for the labour component of the contract, the parties agreed on $5,320,000.00 as the contract sum. Mr Waller explained, again in cross-examination, that this "was the figure we settled on when we decided that I would have a sub-contractor for the painting, electrical and mechanical works, including like a garage

door". This estimate was accepted by the Wallers in principle, "with the understanding that it was an estimate only and that the actual quantities would determine the actual labour price". Further, any variation to the original works was to be measured and agreed between the parties. As Mr Waller put it in cross-examination:

> "The original Bill of Quantities form [sic] the true agreement …[t]he basis of the agreement between Robinson and myself, but it wasn't to be the end all of the agreement. The agreement would be amended and altered later on."

[15] For the purposes of this judgment, I will refer to the Bill of Quantities as 'the original BQ'.

[16] According to Mr Waller, one of the early amendments to the agreement between the parties related to the labour rate for steel work, which the original BQ had quoted on the basis of $18.00 per kilogram ('kg') of steel. As a result of a discussion in which he, Mr Thomas, Mr Omrie Farquharson and Mr Robinson were involved, Mr Waller testified, it was agreed that this particular rate would be adjusted from $18.00 to $17.00 per kg. However, "[n]o documents were produced evidencing this change…because of the nature of the relationship".

[17] The agreement was that the construction work on No 3 would commence on or about 1 July 1998. In accordance with standard practice in the building industry, Mr Waller advanced the sum of $470,000.00 to Mr Robinson as a "contractor's mobilization loan", which would be recouped over five months in monthly instalments of $94,000.00 per month, to be deducted from payments due to Mr Robinson on certificates to be

submitted by him on a monthly basis. Mr Robinson was responsible for the employment and management of all labour on the site, save for the site watchman, who was the Wallers' responsibility. A gentleman known only as 'Kariba', who was a relative of Mr Robinson, was his "backup" on the site and acted as supervisor when Mr Robinson had to be away from the site, although Mr Robinson was in fact there almost every day.

[18] The object of submitting payment certificates was to enable Mr Robinson to be paid for measured work done to the date of submission of the certificate, while providing the Wallers "with a snapshot of the progress of the work". When the first certificate was submitted in July 1998, "it was realised that it would take some time to carry out the assessment of the Certificates", one of the problems being that it was proving difficult to get the parties' quantity surveyors together (in fact, Mr Waller said, his quantity surveyor was "generally not available"). As a result, it was agreed that, in order to facilitate fortnightly payroll payments, advance payments would be made on the certificates, which were prepared on the basis of the original BQ by Mr Farquharson, Mr Robinson's quantity surveyor. Thereafter, "the balances would be sorted out at the end of the assessment". (As would subsequently emerge from Mr Miller's evidence, this was a variation of the usual process in the construction industry, whereby the contractor's periodic payment claim would be assessed by and agreed with the quantity surveyor for the project, who would then certify the claim for payment to the employer.)

[19] Certificate No 1, which was dated 22 July 1998, showed a gross amount of $684,847.00 due to Mr Robinson. After deduction of the first instalment of $94,000.00 against the mobilisation loan, the net amount due was $590,847.00, of which $582,000.00 was paid by Mr Waller.

[20] In late July or early August 1998, before Certificate No 2 was issued, Mr Robinson was involved in a motor vehicle accident, which resulted in his being seriously injured and hospitalised for several days. During this time, Mr Waller said, the fortnightly payroll became due and the workers on site "were restive, as they did not know how they would be paid". Based on his earlier agreement with Mr Robinson with respect to advance payments, he "did not hesitate to make an advance on the pending certificate", bearing in mind that Mr Robinson was critically ill and unable to "carry out any transaction". He therefore procured $200,000.00 in cash and gave it to Kariba, so that he could pay the workers. Although Mr Waller did not receive a receipt for this payment, Mr Robinson was in due course advised of it and "was grateful for the assistance". It was agreed to treat this payment as an advance on Certificate No 2.

[21] Certificate No 2 was dated 1 September 1998. Again, without any detailed assessment, the full amount of $1,087,027.00 estimated to be due on that certificate was paid (taking into account the $200,000.00 cash advance to Kariba, two small sums also treated as advances by Mr Waller at Mr Robinson's request, and deduction of the second instalment on the mobilisation loan).

[22] Certificate No 3, which was dated 8 October 1998, indicated a further amount of $632,963.00 as being due to Mr Robinson (after again incorporating a deduction of the third instalment on the mobilisation loan). By this time, on Mr Waller's account, it became clear to both parties that "we could not continue using the estimated quantities to calculate the certificates". Large quantities of surplus steel, for instance, even after completion of most of the structural work on the building, suggested that the original estimates "were off". Of the 15 tons of half inch steel bars purchased for the job, Mr Waller was able to sell four tons to Mr Robinson and a half a ton to someone else. There was also enough steel left over to construct the septic tank, which was not in the original estimate and, even after this, there was still steel left over. The parties therefore agreed, at Mr Robinson's suggestion, that a review should be conducted by Mr Farquharson, on the basis that "whoever was to benefit most from the findings of the review would be the party responsible for the payment of Mr. Farquharson". Notwithstanding this agreement, Certificate No 3 was also honoured in full and an advance of $50,000.00 paid on account of Certificate No 4.

[23] Certificate No 4, which was dated 21 November 1998, indicated a further amount of $612,146.00 as being due to Mr Robinson. However, Mr Waller explained that, because this certificate actually came in a week short of five months into the contract and the agreement was that the mobilisation loan was to be repaid over a five month period, "Robinson and Farquharson decided that two payments would be deducted on the fourth certificate". The entire balance remaining on the mobilisation loan ($188,000.00) was therefore deducted from Certificate No 4, which was also settled in

full by Mr Waller (after deduction of two small amounts paid to third parties by Mr Waller on Mr Robinson's behalf). It was agreed by Messrs Waller, Robinson and Farquharson that no further certificates would be submitted until Mr Farquharson's assessment was completed.

[24] It was also agreed that, pending completion of that exercise, Mr Robinson would advise Mr Waller of his cash needs (to cover the fortnightly payrolls as well as contractor's profit or, as Mr Robinson called it, a "little something for him") on a fortnightly basis and that these requests would be met by Mr Waller. Around this time, the original projected completion date of December 1998 was revised to April 1999 and, between 1 December 1998 and 12 February 1999, Mr Waller honoured four advance payment requests by Mr Robinson, in the total sum of $673,000.00. At some point during the week of 4 February 1999, Mr Robinson advised Mr Waller that Mr Farquharson's assessment of the certificates was nearing completion.

[25] Mr Robinson died, tragically, on 22 February 1999. Thereafter, Mr Waller said, he "assumed the role of contractor", employing Mr Robinson's supervisor, workmen and tradesmen and doing "all that was necessary to complete the house, including, but not limited to, the sourcing and purchasing of materials, calculations of payments and preparation of cheques for each contracted worker". In due course, the building was completed and the Wallers moved in to No 3 in December 1999.

[26] Mr Farquharson's assessment was received (and paid for) by Mr Waller in late February 1999. It indicated, on the basis of a comparison of the original BQ and Mr

Farquharson's revised BQ ('the revised BQ'), that an overpayment of $520,740.00, the amount sued for, had been made to Mr Robinson. In his evidence, based on corrections made to Mr Farquharson's figures by Mr Miller, which he accepted, Mr Waller reduced this figure to $509,865.24,

[27] Mr Waller considered that the overpayment had been "triggered" by an "error" in the original BQ, which produced a greater sum ($2,402,402.00) as the total value of the work done at the end of the period covered by Certificate No 3, as against the total shown by the revised BQ ($1,869,410.50). Some of the quantities in the original BQ had in fact been handwritten in the document by Mr Robinson himself, as well as Mr Farquharson. However, Mr Waller maintained, "[a] solution was at hand based on the agreement, Robinson and myself [sic] had for taking care of the overpayment". In fact, Mr Waller said, "Mr Robinson expressly told [me] something was wrong with the figures and he assured me that labour cost would be far less than $5.32M". But although Mr Waller had the impression that Mr Robinson had seen Mr Farquharson's revised BQ before he died, he and Mr Robinson had had no discussion on the figures and, he said, "I don't know if he agreed".

[28] Among the specific factors that contributed to the overpayment, Mr Waller identified the labour rate for steel work and a number of items of work which, although included in the original BQ, were in the end dealt with by subcontractors and as such excluded from the contract. In addition to the electrical, mechanical and painting work, this list included labour associated with windows, doors, flooring, tiling, roofing, grillwork, the perimeter wall and woodwork for cupboards.

[29] Mrs Lee Clarke-Bennett came into the picture after Mr Robinson's death, in her capacity as a personal acquaintance of his, his attorney-at-law during his lifetime and one of the named executors of his will. It is not now necessary to rehearse her detailed evidence of the steps she took upon receiving instructions from members of Mr Robinson's family to settle his affairs and to recover whatever monies were owing to him, "in the interest of his minor children". It suffices to say that, after having asked for and received from the Wallers' attorneys-at-law copies of the original and revised BQs in November 2002, Mrs Lee Clarke-Bennett engaged the services of Mr Steve Miller, a civil engineer with over 20 years' experience in the field, to conduct a review of them. In early February 2003, Mr Miller, after pointing out "various discrepancies" in the two BQs, requested sight of the approved building plans, the monthly certificates and details of all payments made by the Wallers to Mr Robinson, in order to enable him to advise further on the matter. It was Mr Miller's advice, as contained in his expert report, which led Mrs Lee Clarke-Bennett to conclude that the estate was "entitled to be compensated for lost profits and that the estate should defend the claim brought against it".

[30] In cross-examination, Mrs Lee Clarke-Bennett confirmed that she had had nothing to do with the contract and was thus unable to speak to its oral terms. In fact, she knew nothing of the terms of the contract apart from what she had been told by the Wallers' attorneys-at-law. She did, however, state the basis of the executors' counterclaim, which was "for failure to allow the executors to continue the contract with the Wallers".

[31] Mr Miller's report is dated 2 March 2004, five years after Mr Robinson's untimely passing and more than four years after the Wallers' home at No 3 was completed. His report was therefore based on the materials which were provided to him by Mrs Lee Clarke-Bennett. His assignment, as he recorded it in Appendix F to his report, was "to determine whether monies were owing to the deceased based on the Bills of Quantities, Construction Drawings and Certificates of Payment that were presented by Mr Locksley Waller or vice versa".

[32] Mr Miller took as his starting point the establishment of the contract price. Basing himself entirely on the original BQ, he determined this to be $6,046,290.00. While Mr Miller accepted that, in the construction industry, "quantities will vary for any final assessment of the Works", he nevertheless considered that "the labour rate cannot be changed in any [BQ] item unilaterally and if changed, constitutes a variation order to the Contract, as the labour rates forms [sic] part of the basis of the Contract Price". For this reason, Mr Miller stated in his report (at para. 3.2), "[t]he revised [BQ] was not used in the…final analysis of the documents…" However, Appendix D to his report very helpfully demonstrated in a spreadsheet format the variances between the original and revised BQs, as well as what Mr Miller described as the "Corrected Revised Bills of Quantities" ('the corrected revised BQ'), which he prepared. This analysis, to which I shall have to return, revealed that, using the quantities as presented in the revised BQ, but applying the original contract labour rates, there was a reduction in the scope of the works up to Certificate No 3 of $399,400.50, resulting in a "corrected total value of this section of the Works…[of]…$1,883,699.50".

[33] Based on the original BQ, Mr Miller's calculation in his report was that, up to Certificate No 4, there was an amount of $366,847.27 outstanding to Mr Robinson. He arrived at this figure by taking the difference between the payment due to Mr Robinson as at Certificate No 4 of $3,486,983.00 ($3,392,983.00 being the amount shown on the certificate as the total value of the work executed under the contract to the date of the certificate, plus $94,000.00, the amount of the final instalment on the mobilisation loan which ought to have been taken up in the certificate following the fourth), and the actual payments totalling $3,120,135.73 made by the Wallers up to 21 November 1998. The figure of $3,486,983.00 included, Mr Miller stated, variation orders amounting to $344,809.41. However, he also found that the Wallers had made certain advance payments against Certificate No 5 (which, in the event, was never issued), totalling $745,150.00. After deducting the amount outstanding to Mr Robinson of $366,847.27 from the advance payments of $745,150.00, Mr Miller arrived at a net advance payment against Certificate No 5 of $378,302.73. However, Mr Miller concluded, "Certificate of Payment No. 5 was not presented for evaluation and although the Contractor has received advanced payments for the said certificate totaling **J$378,302.73**, no record of the work done by the contractor after November 21, 1998 was seen".

[34] In his evidence at trial, Mr Miller then added to this analysis a number of assumptions, as follows: (i) that construction would have been completed by April 1999; (ii) that the total value of the work completed up to the date of Mr Robinson's death in February 1999 would have been "approximately 80% of the contract amount"; and (iii) that additional variations would not exceed the $344,809.41 stated in

Certificate No 4. On this basis, he calculated the total value of Mr Robinson's completed work to February 1999 to be $5,181,841.41, arrived at as follows:

Contract sum -	$6,046,290.00
80% thereof -	4,837,032.00
Plus variations -	344,809.41
	$5,181,841.41

[35] Mr Miller's next step was to subtract from $5,181,841.41 the sum of $3,486,983.00, being the value of work stated in Certificate No 4 and "one further mobilisation payment" of $94,000.00, yielding a total of $1,600,858.41. He then added back the amount that he had found to be owing to Mr Robinson as at Certificate No 4 ($366,847.27), before subtracting the sum of $745,150.00 advanced by the Wallers, to yield a total sum owing to Mr Robinson's estate as at February 1999 of $1,222,555.68. On a physical measurement of the house at No 3, Mr Miller found that the structure as built corresponded with the contract drawings as well as the original BQ.

[36] As might have been expected, Mr Miller was searchingly cross-examined by Mr Andre Earle, who, as he has done on the appeal, appeared for the Wallers at the trial. The opening exchanges, as captured by Campbell J's note of the evidence, set the tone:

> "Under Executive Summary, that figure include [sic] electrics. Parties would be subcontracted to someone else. I would not expect it to [sic] lower in a labour only contract. On the basis that the electrics was [sic] subcontracted to someone else.

I included a value for painting. If Mr Robinson did not perform the painting work, I would expect that figure to be lower.

If later on during the contract period, roof was subcontracted to someone, I would expect the figure to be lower. It would be similarly, if the windows and doors were subcontracted to someone else as well as kitchen cupboards. Decorative stonework subcontracted would cause the figure to be lower as well as the bathroom cupboards. Contract price in executive summary is based on the assumption that none of the work related was subcontracted.

The figure stated in the executive summary of $6.4 is based on Bill of Quantity provided by complainant's attorney. I got the documentation from Ingrid Lee Clarke-Bennett. I am aware that it is an oral contract. It was not necessary to ask participation in contract [sic].

The item is reflected in the Bill of Quantity as item of work to be performed by the contractor. Can't say if it is proof by the contractor.

I can only rely on the documentation presented if variation and assumptions [sic]. I was not presented with anything else. I was not given any documentation to support that work was done by subcontractors. Never inquire [sic] about the oral terms of the contract. Given the documents that were presented would say this is what was agreed on. I don't think it was important to find out from the Wallers the terms of the oral contract. An oral contract agreement by words spoken. Don't know that contracts can be partly written or oral. I have only been engaged in written contracts like FDIC and JCCC.

I did demonstrate that Mr Robinson did electrics. Certificate #4.

See appendix B of report page 16 of 16.

See bold provision measurement electrical - $22,500. See $22,500 up to Certificate of Payment # 4. Total value is $22,500. I would expect the electrical work to be a greater portion of the Contract Price.

Unable to show that Robinson provide [sic] any electrical other than the variation

> There was no evidence to show that painting work was done by Mr Robinson up to Certificate #4. The contract was for five months. Started over five month's period. Would start seeing some painting by Certificate 3 or 4.
>
> Over five month's period, I would expect it about August. I now say October or between September and November.
>
> Painting work would start if rate consistent with five months project. Electrical work would start within.
>
> I expect that the electrician would have started from on [sic] the substructure by November 1998. I would expect that the electrical work would have been substantially more than $22,500. Certain items of work, if not completed within a particular time, would exceed.
>
> From the Certificate of Payment, can come up with work done by contractor.
>
> By looking at the certificate, I would be able to tell if electrics had been done. The works include up to Certificate #4 [sic], did [sic], by looking at work completed, was the foundation work, substructure work and some of super structure work.
>
> Bulk of electrical work would start in superstructure work. I would expect a more substantial sum for electrical work up [to] Certificate #4."

[37] A number of other things emerged from the cross-examination of Mr Miller. The cash payment to Kariba of $200,000.00 was not taken into account by him, although he agreed that, had he done so, "it would have altered the total amount paid under the contract by the Wallers to Mr Robinson". He was unable to say "what the arrangements were post Certificate #4 between Waller and contractor…whether as work was done, the contractor was paid – can't say one way or the other". He had no discussions with either Mr or Mrs Waller about any discussions or terms of the arrangement between the parties, because he "did not think it prudent to do so" and

relied solely on the documents with which he had been presented. He did not know that the contract between the Wallers and Mr Robinson "was partly written and partly oral" and in fact he was "not aware that oral contracts are possible in construction". He was unable to say whether there had been any consultation between the Wallers and Mr Farquharson or Mr Robinson. He had observed that the last two mobilisation loan payments had been taken out of Certificate No 4, but chose "not to so reflect it" in his report. He was not aware of any errors in the original BQ. He was not aware that there was a dispute as to which of the original and the revised BQs was correct. He did not know when the work on No 3 was actually completed, but considered that one could "guesstimate what the volume of work would be in terms of a projection". This was the basis of his estimate of 80% completion in February 1999. He had also done a cash flow projection, but this was not before the court. He agreed that Certificate No 4 would have been paid up in full, based on the papers that he had seen, "assuming there is no Certificate #5". He agreed that there was nothing in his report to suggest that there was a sum of $1,600,000.00 owing to Mr Robinson. In fact, he said, "[m]y report did not go to that level of detail whether money owed to Waller or estate".

What the judge found

[38] Campbell J found that the contract (a) was "partly oral and partly written" (para. 10); (b) required "special skills" and the Wallers "placed reliance on the specialized and personal skill, knowledge, experience and expertise" of Mr Robinson (para. 18); and (c) was for the personal services of Mr Robinson and was "therefore discharged" by his death. However, the learned judge considered that the contract was terminated "only

from the time of the death, so that any right of action which has accrued to either party remains enforceable" (para. 19). As regards the Wallers' claim, he found (at para. 23) that the original BQ was the work of their quantity surveyor, Mr Brown, "without any input from the Contractor" (asking, rhetorically, "What would be the value of such assessment if one of the applicants had prior knowledge of the Quantity Surveyor's report?") The learned judge rejected the Wallers' claim to recover an alleged overpayment to Mr Robinson on the basis of Mr Farquharson's assessment with the observation (at para. 24) that -

> "I find that the assessment was not communicated to the Contractor. On what basis could liability for the overpayment be attached to the Contractor? Should he be held liable for an 'error' he did not make, I think not. It has not been proven that he was told of the overpayment sum; he would not then have a chance to comment on the assessor's finding. The claim for overpayment of $520,000 to the Contractor fails."

[39] As regards the executors' counterclaim, Campbell J was struck by what he described as "the stark difference" between the four sums totalling $673,000.00, which Mr Waller had testified to having advanced to Mr Robinson at his request between December 1998 and February 1999 and the four certificate payments that had preceded them. The judge's comment (at para. 29) was that "[t]he total of the request payments amounted to less than the monthly average for payments made under the certificates". The judge was also greatly impressed by Mr Miller, whom he described (at para. 31) as "an expert, whose credentials were not challenged before us". After reviewing Mr Miller's evidence, the learned judge's conclusion on the counterclaim was as follows (at paras 33-35):

"(33)…I accept the evidence of Mr Miller. I see no flaw in the opinion expressed by Mr Miller. His opinion falls squarely within his field of expertise. There is no evidence that he has failed to take relevant factors into account which could have lead [sic] a different conclusion. See **Jamaica Flour Mills Ltd v West Indies Alliance Insurance Co. Ltd and Others**, SCCA 92/94 delivered on the 16th May 1997.

(34) I find, based on the evidence before me that as of the death of the Contractor, the project would have been 80% completed. That the list of payments by the Employer demonstrates there is a sum due to the Defendants. The sum due I compute as follows:

80% of Contract Value $6,046,290.00 x 80%)	$4,837,032.00
Add Total variation to Contract	$ 34,809.41 [sic]
	$5,181,841.41
Less Value of Certificate #4	$3,486,983.00
	$1,694,858.41
Less Mobilization Repayment	$ 94,000.00
	$1,600,858.41
Add outstanding monies owed to contractor up [sic] certificate #4	$ 366,847.27
	$1,967,705.68
Less total advance for Certificate # 5 (not yet presented)	$ 745,150.00
Total monies owing to the Estate	$1,222,555.68

(35) Judgment is entered for the estate on the Counterclaim in the amount of $1,222.555.68 with interest thereon at the rate of 10% from the 12th February 1999. Costs to be agreed or taxed.

The Claimant's [sic] Claim is dismissed. Costs to the Defendant to be agreed or taxed."

The grounds of appeal

[40] The Wallers filed eight grounds of appeal, as follows:

"(a) That the Learned Judge erred as a matter of fact, in that, he failed to have any or any adequate regard to the fact that although the contract commenced on or about 28th June 1998, the parties would have been in discussions prior to that date concerning the contract;

(b) That the Learned Judge failed to consider or failed to adequately consider having found that the Contractor was possessed of specialized skill and knowledge of various areas that his expertise would have been called upon and would have informed the quantities on the contract;

(c) That the Learned Judge failed to consider or failed to adequately consider the evidence under cross examination of Mr Steven [sic] Miller, witness for the 3rd Defendant that the 'errors' in the quantities would produce a figure in the region of that claimed by the Claimants;

(d) The Learned Judge erred when having accepted the assessor's report that there was an error in the original Bill of Quantities that the Contractor having not been alerted to the error prior to his death would not be liable for the sums overpaid;

(e) The Learned judge erred in fact as he found that the contract sum was $6,034,610.00 [sic] and not $5,320,000.00 based on the evidence before him.

(f) The learned judge failed to appreciate that the project was the Claimants' house and the Claimants were not aware who the estate was and were under a duty to mitigate their losses which would mean to complete the work within a reasonable time;

> (g) The learned judge in accepting the evidence of Mr Miller failed to appreciate or failed to adequately appreciate that Mr Miller was not present at the time the works were progressing;
>
> (h) The learned judge in appreciating the difference in the value of the claims being made by the Contractor failed to appreciate that the works would have slowed resulting in the lower claims and accordingly could not have been 80% complete as suggested by Mr Miller."

The argument

[41] Taking grounds (a) and (b) together, Mr Earle submitted that the learned trial judge had failed to give any or any sufficient weight to the evidence of the role Mr Robinson had played in the initial stages of the contract, as clearly appeared from the fact that some of the quantities on the original BQ were in fact written in by him; the fact that there was some internal evidence in the original BQ itself that it was not finalised until June 1998, by which time Mr Robinson was already in the picture; and the fact that some input from Mr Robinson would in any event have been necessary in the light of the acceptance of his bid of $5,320,000.00. In the light of this uncontradicted evidence, Mr Earle submitted, it was clear that Mr Robinson "not only informed the costing but also informed the actual quantities required so as to achieve the desired outcome".

[42] On grounds (c) and (d), Mr Earle pointed out that Mr Miller's own calculations in his corrected revised BQ, based on his on site measurements to ensure that No 3 was constructed in accordance with the approved drawings, produced a discrepancy with the original BQ in an amount not dissimilar to that contained in the revised BQ. It was therefore submitted that the learned judge had erred in rejecting the revised BQ on the

basis that there was no evidence that the error had been communicated to Mr Robinson before his death, since that was not the issue that the court was called upon to decide. The issue was whether or not there had been an overpayment and there was ample, again un-contradicted, evidence that there had in fact been an overpayment. In this regard, Mr Earle pointed out, the learned judge had made no finding as to Mr Waller's credibility, which was in any event buttressed by the documentary evidence contained in the BQs and the certificates themselves.

[43] In support of these grounds, Mr Earle referred us to ***Gillespie Brothers & Co v Cheney, Eggar & Co*** [1896] 2 QB 59, 62 ("…although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement" – per Lord Russell of Killowen CJ); ***Couchman v Hill*** [1947] 1 KB 554, 558 ("…there was clearly an oral offer of a warranty which overrode the stultifying condition in the printed terms" – per Scott LJ); ***J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd*** [1976] 1 WLR 1078, 1082 ("The cases are numerous in which oral promises have been held binding in spite of written exempting conditions" – per Lord Denning MR); ***Lipkin Gorman (A Firm) v Karpnale Ltd*** [1991] 3 WLR 10, 15 ("…any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit

derived from another which it is against conscience that he should keep" – Lord Templeman, quoting Lord Wright in ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*** [1943] AC 32, 61); and the Law Reform (Miscellaneous Provisions) Act, section 2 ("…on the death of any person…all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of his estate").

[44] As regards ground (e), Mr Earle referred to Mr Waller's evidence as to the items that were excluded from the contract, as well as Mr Miller's admission in cross-examination that he had done nothing to ascertain the nature of the arrangements between the parties. Therefore, he submitted, there was no basis for the learned judge's conclusion that the contract price was $6,046,290.00 rather than $5,320,000.00.

[45] On grounds (f) and (g), it was submitted that the learned judge erred in accepting Mr Miller's evidence that the contract would have been 80% complete by February 1999, in that he failed to consider adequately that Mr Miller (i) was not present on the site during the period of construction of No 3; (ii) did not interview either the Wallers or any of the workmen on the site to get an indication of how the work progressed during the period December 1998 to February 1999; (iii) did not ascertain the date of actual completion of the building; (iv) did not, in a labour only contract, consider or make any provisions for the kinds of conditions which usually affect labour, such as the onset of the Christmas holidays and inclement weather; and

(v) assumed that the original BQ was correct and represented the entire contract between the parties without himself doing any measurement of all the quantities.

[46] On the basis of all these factors, Mr Earle submitted, the judge erred in his acceptance of Mr Miller's opinion evidence, which was not supported by the other evidence in the case. Further, it was the function of the court, and not of an expert witness, to decide on the central issues (referring for this point to ***Eagle Merchant Bank of Jamaica Ltd and another v Paul Chen Young et al*** Suit No 1998/E. 095, page 12, delivered 4 May 2006, in which Anderson J observed that, in order for conclusions of an expert to be accepted, "the Court would have to be satisfied as to the probity of the facts upon which the conclusion is based").

[47] At the very outset of her submissions, Miss Carol Davis, who appeared for the executors, referred us to ***Industrial Chemical Co (Jamaica) Ltd v Ellis*** (1986) 35 WIR 303, in which the Board reiterated the principle that an appellate tribunal should only upset the findings of fact by a trial judge if it is satisfied that, on the evidence the reliability of which it was for him to assess, he had plainly erred in his conclusions. In this regard, Miss Davis also referred us to some observations by Ward LJ on the approach of the court when reviewing the decision of a trial judge in the judgment of the Court of Appeal of England and Wales in ***Assicurazioni Generali SpA v Arab Insurance Group (BSC)*** [2003] 1 WLR 577, to which I shall return in due course. Against this background she submitted, after pointing out that all the grounds of appeal

related to the judge's findings of fact, that the appellants were therefore required to show that he was "plainly or blatantly wrong".

[48] Turning specifically to the grounds of appeal, on grounds (a) and (b), Miss Davis queried whether any pre-contract discussions could have affected the contract, unless they became part of the concluded contract. She submitted that the judge had rightly found that, in a labour only contract, the contractor would not have been responsible for the quantities, which, it was clear from the evidence, were the work of the Wallers' quantity surveyor, Mr Brown. Why, she asked, if the original quantities were as excessive as alleged by the Wallers, did it take as long as three months to detect this? Further, why would something as important as the reduction in the labour rate for steel work not have been duly recorded? In these circumstances, it was submitted that the trial judge had been correct to reject "self-serving, uncorroborated evidence that the contract price was varied verbally or unilaterally".

[49] On ground (c), Miss Davis insisted that Mr Miller did not accept that there was any error in the quantities and pointed out that she had not been able to identify any reference in the judge's notes of the evidence to Mr Miller accepting that the alleged error could have produced a figure bearing "a strong resemblance" to the amount of the claim for overpayment. She submitted that there was no challenge to Mr Miller's evidence (remarking the noticeable absence at the trial of Mr Farquharson or any of the subcontractors as witnesses) and that the judge had been correct to accept it.

[50] Ground (d), Miss Davis said, proceeded from a wrong premise, in that Campbell J did not accept that there was in fact an error in the original BQ. On ground (e), it was submitted that, even if the judge had accepted the lower figure of $5,320,000.00, based on the "uncorroborated evidence" of Mr Waller, this would not have affected his assessment of the amount due to Mr Robinson's estate. In any event, it was submitted, the judge had been correct to reject Mr Waller's evidence of "a verbal agreement as regards the contract price" and to accept "the only reliable evidence" before the court, which was that Mr Robinson's bid had come in at $6,034,610.00. On grounds (f) and (g), it was submitted that the trial judge had also been correct to accept Mr Miller's method of assessment of the amount due to the estate, particularly as "no alternative or contrary position" had been advanced by the Wallers in this regard. The judge had to come to a decision based on the evidence before him and he was entitled to conclude as he did, based on the evidence of the expert witness that the construction at No 3 would have been 80% complete by February 1999.

[51] Although Miss Davis did not refer to this specifically in her oral arguments, the executors' skeleton arguments also raised the issue of the reliability of the "undated, unsigned revised [BQ], which was not completed until after the death of the contractor".

[52] In a brief reply, Mr Earle sought to distinguish the authorities cited by Miss Davis, observing that, in the instant case, the learned trial judge had failed to make some important findings of fact on matters, such as, for example, the contract price, the accuracy of the original BQ, the items stated by Mr Waller to have been subcontracted,

and the like. Further, Mr Earle submitted, in the instant case there was some documentary evidence available against which to test the reliability of Mr Waller's evidence, which had not in any event been the subject of challenge at the trial on behalf of the executors. And finally, as regards ***Assicurazioni Generali SpA v Arab Insurance Group (BSC)***, Mr Earle pointed out that in that case the court was considering the English CPR rule 52.11(1), which provides that every appeal "will be limited to a review of the decision", as distinct from rule 1.16(1) of the Court of Appeal Rules, 2002 ('CAR'), which provides that an appeal "shall be by way of re-hearing".

The approach to issues of fact on appeal

[53] The grounds of appeal and the submissions in this appeal give rise primarily to issues of fact. It may therefore be helpful to focus from the outset, as Miss Davis invited us to do, on the approach that this court should take on an appeal from the findings of fact of a trial judge sitting without a jury.

[54] In ***Industrial Chemical Co (Jamaica) Ltd v Ellis***, the Board restated and reiterated (at page 304) the following well-known passage from the judgment of Lord Thankerton in ***Watt (or Thomas) v Thomas*** [1947] AC 484, 487-488):

> "(I) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion.

> (II) The appellate court may take the view that without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> (III) The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[55] In ***Assicurazioni Generali SpA v Arab Insurance Group (BSC)***, as Mr Earle pointed out, the court had under consideration the English CPR rule 52.11(1), which uses the slightly different word "review", as against the "re-hearing" on appeal contemplated by our rules (CAR rule 1.16(1)). But in that case, after acknowledging the difference between the old RSC Order 59 rule 3, which also spoke to a rehearing, and the new rule 52.11(1), Clarke LJ (as he then was) said this (at para. 15):

> "In appeals against conclusions of primary fact the approach of an appellate court will depend upon the weight to be attached to the findings of the judge and that weight will depend upon the extent to which, as the trial judge, the judge has an advantage over the appellate court; the greater that advantage the more reluctant the appellate court should be to interfere. As I see it, that was the approach of the Court of Appeal on a "rehearing" under the RSC and should be its approach on a "review" under the CPR."

[56] I would respectfully adopt that reasoning, which leads me to think that the following passage from Ward LJ's judgment (at paras 196-197) in that case is also relevant to the instant case:

"The trial judge's view inevitably imposes a restraint upon the appellate court, the weight of which varies from case to case. Two factors lead us to be cautious about interfering. First, the appellate court recognises that judging the witness is a more complex task than merely judging the transcript. Each may have its intellectual component but the former can also crucially rely on intuition. That gives the trial judge the advantage over us in assessing a witness's demeanour, so often a vital factor in deciding where the truth lies. Secondly, judging is an art not a science. So the more complex the question, the more likely it is that different judges will come to different conclusions and the harder it is to determine right from wrong. Borrowing language from other jurisprudence, the trial judge is entitled to 'a margin of appreciation'.

Bearing these matters in mind, the appeal court conducting a review of the trial judge's decision will not conclude that the decision was wrong simply because it is not the decision the appeal judge would have made had he or she been called upon to make it in the court below. Something more is required than personal unease and something less than perversity has to be established. The best formulation for the ground in between where a range of adverbs may be used – 'clearly', 'plainly', 'blatantly', 'palpably' wrong, is an adaptation of what Lord Fraser of Tullybelton said in G v G (Minors: Custody Appeal) [1985] 1 WLR 642, 652, admittedly dealing with the different task of exercising a discretion. Adopting his approach, I would pose the test for deciding whether a finding of fact was against the evidence to be whether that finding by the trial judge exceeded the generous ambit within which reasonable disagreement about the conclusion to be drawn from the evidence is possible. The difficulty or ease with which that test can be satisfied will depend on the nature of the finding under attack. If the challenge is to the finding of a primary fact, particularly if founded upon an assessment of the credibility of witnesses, then it will be a hard task to overthrow. Where the primary facts are not challenged and the judgment is made from the inferences drawn by the judge from the evidence before him, then the Court of Appeal, which has the power to draw any inference of fact it considers to be justified, may more readily interfere with an evaluation of those facts. The

judgment of the Court of Appeal in The Glannibanta (1876) 1 PD 283, 287, seems as apposite now as it did then:-

> 'Now we feel, as strongly as did the Lords of the Privy Council in the cases just referred to [The Julia 14 (1860) Moo P.C. 210 and The Alice LR 2 PC 245], the great weight that is due to the decision of a judge of first instance whenever, in a conflict of testimony, the demeanour and manner of the witnesses who have been seen and heard by him are, as they were in the cases referred to, material elements in the consideration of the truthfulness of their statements. But the parties to a cause are nevertheless entitled, as well on question[s] of fact as on questions of law, to demand the decision of the Court of Appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions, even though it should always bear in mind that it has neither seen nor heard the witnesses, and should make due allowance in this respect."'

[57] I therefore approach the task of evaluating Campbell J's judgment with the caution imposed by these authorities firmly in mind. The learned judge had the undoubted advantage of seeing and hearing the evidence of Messrs Waller and Miller, the main protagonists on each side of the dispute in the case and this court should accordingly be slow to interfere with his conclusions unless it unmistakably appears from the evidence that he failed to make proper use of that advantage. An unusual feature of this case is, of course, that Mr Waller's evidence as to the events which led to the entering into of the contract, as well as the progress of the construction of No 3 right up to the time of Mr Robinson's death, stands completely alone and without

contradiction from any other oral evidence. But this makes it particularly important, it seems to me, to guard against what Lord Oliver of Aylmerton characterised in ***Industrial Chemical Co (Jamaica) Ltd v Ellis*** (at page 309) as "the fallacy, sometimes propounded from the Bar, that because the sworn testimony of a witness cannot be directly contradicted by that of another witness or by contemporary documents, it must necessarily be accepted as truthful by the judge regardless of his assessment of the credibility of the witness". It equally seems to me, albeit perhaps in a different sense, that Mr Miller's expert opinion evidence as to the state of completion of No 3 at the date of Mr Robinson's death, which is also not opposed by any contrary expert evidence, must attract a similar caveat.

The issues

[58] The issues that arise on this appeal can conveniently be dealt with in three broad groups. Firstly, was the learned judge correct to reject the Wallers' claim for overpayment in its entirety? Secondly, was the judge correct to accept the executors' counterclaim for damages? And thirdly, was the judge correct in his assessment of the damages due to the executors? Each of these groups in turn subsumes its own set of issues, all of which call for a consideration of the evidence that was before the judge and a testing of the soundness of his conclusions.

The Wallers' claim

[59] For the purpose of assessing this claim, although some of the discussions between the parties in the immediate pre-contract period may be relevant, nothing

turns on what happened after the last certificate was issued, save of course as regards the judge's stated reason for rejecting the claim, which is that there was no evidence that Mr Robinson had seen and agreed the revised BQ before his death.

[60] I begin by considering the circumstances in which the original BQ came into being. There is no question that the original BQ was in the first place the work of Mr Brown, the quantity surveyor engaged by the Wallers for the purpose of preparing a draft BQ. Despite Campbell J's doubts whether Mr Robinson would have played any role in assigning costs to the various activities listed in the original BQ, Mr Waller's evidence suggests that in this regard the settling of the original BQ, as indeed the administration of the contract, did not follow an entirely orthodox course. Thus, while the cover page of the original BQ bears the date "April 1998", the very next page, which summarises the activities necessary for the purpose of (A) "Site Preparation and Substructure Works", and (B) "Superstructure Works and Finishes", is dated June 1998. Although no explanation for the different dates was proffered in evidence, they do tend to suggest, as Mr Earle submitted, that the original BQ was still incomplete as at the latter date, which is around the time that Mr Robinson would have become involved. When one adds to this the fact that, throughout the document itself, the actual quantities appear to have been inserted by pen, as well as Mr Waller's evidence that some of the quantities were in fact inserted by that means by Mr Robinson himself (as well as Mr Farquharson), the suggestion that Mr Robinson may have had some involvement in the finalisation of the document does not strike me in these circumstances as being all that farfetched.

[61] Be that as it may, however, I doubt that a conclusion on this point is ultimately crucial to the resolution of the dispute between the parties, since the real question is not, assuming for the moment that there were errors in the original BQ, who made the errors, but whether there was an agreement between the parties to deal with the situation created by them in the manner indicated by Mr Waller.

[62] A comparison of the original and the revised BQs (as set out in Appendix D to Mr Miller's report) shows the value of the work up to the end of the relevant period, using the original BQ labour rates for steelwork, to be $2,402,402.00, as against $1,869,410.50, using the revised BQ rates. Looking at the two documents, it is clear that the difference of $532,991.50 between these two figures is largely accounted for by (i) a substantial reduction in the actual quantity of steel used in the substructure and the superstructure of the building and (ii) the adjustment of the labour rate for steel work from the $18.00 per kg shown in the original BQ to the $17.00 per kg applied in the revised BQ. (In addition, Mr Earle pointed out, the revised BQ showed that quantities other than steel were also overestimated in the original BQ as well, notably block work in the external and internal walls, estimated in the original BQ at 1500 square metres, and shown in the revised BQ to be 500 square metres.)

[63] As we have seen, Mr Miller declined to take the revised BQ into account in his analysis, purely on the basis of his consideration that "the labour rate cannot be changed in any [BQ] item unilaterally". Be that as it may, the Wallers' claim was not based on a unilateral change in the labour rate, but on Mr Waller's evidence that the

downward reduction in the rate was the subject of an agreement with Mr Robinson from the very outset of the construction. In addition to Mr Waller's uncontradicted evidence that there was such an agreement, the contention derives clear support from the information supporting Certificate No 2, which, as Mr Earle demonstrated, showed that $17.00 per square foot was the rate that was being used for steel work by Mr Farquharson, who prepared the certificates on behalf of Mr Robinson and who, on Mr Waller's evidence, was present when the agreement to reduce the labour rate for steel work from $18.00 to $17.00 per kg was made.

[64] Curiously, Campbell J did not address this issue in his findings at all. Indeed, the learned judge undertook no analysis of the revised BQ, for the purpose of comparing it with the original BQ, but premised his judgment entirely on his finding that, the revised BQ not having been communicated to Mr Robinson before he died, "he would not then have a chance to comment on the assessor's finding". I am inclined to agree with the learned judge that there was no evidence that Mr Robinson had seen the revised BQ, far less that he considered and agreed with its findings, before he died. However, it seems to me, with the greatest of respect, that this was hardly the point, since there was no evidence that such an agreement had been stipulated for by either Mr Waller or Mr Robinson as a precondition to their acceptance of Mr Farquharson's findings. Mr Waller's evidence was that the parties had agreed, at Mr Robinson's suggestion, that Mr Farquharson should conduct a review of the original BQ, on the basis that "whoever was to benefit most from the findings of the review would be the party responsible for the payment of Mr. Farquharson". Mr Farquharson was obviously qualified, perhaps

uniquely so, to undertake this review, since he had not only had an input in the finalisation of the original BQ, but had also functioned as the quantity surveyor on the project and the person who was responsible for the preparation of the payment certificates. In these circumstances, what was required of the trial judge, in my view, was a careful consideration of Mr Waller's evidence, on the one hand, with a view to determining its credibility, and of the revised BQ, on the other, with a view to assessing its reliability in all the circumstances, including the fact that Mr Farquharson did not testify at the trial.

[65] However, despite the fact that Mr Waller's evidence was clearly critical to several of the issues which he had to decide, the learned judge made no findings on any aspect of it. It accordingly seems to me that this is a case in which it can be said that the learned judge failed to make proper or full use of the advantage of having observed Mr Waller as he gave his evidence and in which it is therefore open to this court to interfere with his findings and, if necessary, substitute its own. Mr Waller's evidence was to a large extent supported by the documentary evidence and was not in any way disturbed by the vigorous cross-examination to which he was subjected. On the basis of that evidence, I would therefore accept that (i) the parties did agree to a reduction of the labour rate for steel work from $18.00 to $17.00 per kg; (ii) by the time of Certificate No 3, there was a considerable amount of steel left unused, suggesting that the requirements for steel had been overestimated in the original BQ; and (iii) Mr Waller and Mr Robinson agreed that this was so and that a review of the original BQ

would be undertaken by Mr Farquharson, with a view to the parties making any adjustments which were found to be necessary.

[66] Which brings me then to the final question on this issue, which is whether the Wallers' claim based on the alleged overpayment was made good on the evidence. I should say at once that, although we were referred by Mr Earle in this context to the stirring language of unjust enrichment (see para. [43] above), it is clear that the claim against Mr Robinson's estate does not rest on the basis of that doctrine, which is more readily applicable to cases in which money belonging to one person comes into the hands of another, in circumstances in which it is "against conscience" that the recipient should be allowed to retain the funds at the expense of the true owner. On the pleadings and on the evidence, the Wallers' claim was entirely based on the agreement between the parties referred to in the preceding paragraph.

[67] Despite the lacuna in the evidence occasioned by the fact that Mr Farquharson, for reasons which remained unexplained, took no part in the trial, it seems to me that his assessment was to a substantial extent validated by Mr Miller's corrected revised BQ. As I have already pointed out (at para. [32] above), this showed that, even applying the original BQ labour rate, there was a reduction in the scope of the works, which resulted in a "corrected total value" of the works of $1,883,699.50, as against the total shown by the revised BQ of $1,869,410.50. Put another way, Mr Farquharson's revised BQ, using the adjusted labour rate for steel work of $17.00 per kg, indicated a variance of $532,991.50 from the original BQ figure of $2,402,402.00, while Mr Miller's corrected revised BQ, using the unadjusted rate of $18.00 per kg, showed a variance of

$518,702.50 (a figure, in the language of ground of appeal (c) at para. [40] above, "in the region of [the sum] claimed by the [Wallers]"). In yet other words, both Mr Farquharson's revised BQ and Mr Miller's corrected revised BQ suggested that, as at the end of the period covered by Certificate No 3, there had in fact been a fairly significant reduction in the scope of the works.

[68] In arriving at the amount actually paid by the Wallers during this period, I think that I must give them credit (which Mr Miller's analysis did not) for the cash advance of $200,000.00 paid to Kariba in early August, during the period following Mr Robinson's unfortunate accident. This evidence, although challenged by counsel for the executors in cross-examination, was, like much of Mr Waller's evidence, not countered by any other evidence called on their behalf. But it also derives clear support from the fact that, in settling the amount of $1,087,027.00 claimed on Certificate No 2, the $200,000.00 was taken into account, without demur, in computing the payment due to Mr Robinson (see para. [21] above). On the other hand, it seems to me that it is not necessary for the purposes of this exercise to take into account either the mobilisation advance of $470,000.00 or the monthly repayments of $94,000.00, since these were already taken into account in computing the net balance due to Mr Robinson on each of the certificates. It is, in any event, common ground that the amount advanced was fully repaid in Certificate No 4.

[69] On this basis, the total amount paid to Mr Robinson by the Wallers for the period covered by Certificate No 3 was $2,301,990.00, made up of payments of $582,000.00 (Certificate No 1), $1,087,027.00 (Certificate No 2) and $632,963.00 (Certificate No 3).

From the total payments of $2,301,990.00, I would subtract $1,869,410.50, which is the total value of the works up to that point as shown by the revised BQ (applying the $17.00 per kg labour rate for steel, to which I have found that the parties agreed), for a total figure overpaid as at Certificate No 3 of $432,579.50. Thereafter, Certificate No 4 was, as has been seen, settled in full and, by agreement between Mr Waller and Mr Robinson, advance payments were made by the former against the latter's actual claim in respect of work done (including the "little something" for contractor's profit). It therefore seems to me that, naturally subject to the executors' counterclaim, to which I shall now come, the sum of $432,579.50 represents the true value of the claim for overpayment.

The executors' counterclaim

[70] Before looking at the evidence on the counterclaim, I must say a word about how the counterclaim arose on the pleadings. The executors' pleaded case, it may be recalled, was that, upon Mr Robinson's death, the Wallers "wrongfully terminated and or frustrated the Contract by their own actions in not allowing the contract for the building of their home to be completed by the Executors of Mr Glasford Robinson deceased after his death". It is on this basis that the executors therefore counterclaimed for, among other things, a declaration that the contract "subsisted for the benefit of [Mr Robinson's] estate and was wrongfully terminated by the actions of [the Wallers]", damages for breach of contract and loss of profits (see para. [10] above).

[71] This was the case put to Mr Waller in cross-examination, in which it was suggested to him that "[b]y taking over the site you were in breach", and that, by his actions, he "made it impossible for making the estate complete the contract [sic]". Although it was also put to him that he owed the estate money, no basis was posited for this suggestion, beyond a further suggestion, which he denied, that "you did not pay Robinson for work that was done from November to February".

[72] When she was cross-examined, Mrs Lee Clarke-Bennett also confirmed that the executors were "counterclaiming against the Wallers for failure to allow the executors to continue the contract with the Wallers".

[73] It will also be recalled, that what Campbell J actually found, contrary to the executors' contention, was that the contract was in fact terminated by Mr Robinson's death. It follows from this finding, from which there has been no appeal, that the learned judge was not in a position to – and did not - make the declaration sought by the executors that the Wallers had breached the contract by "wrongfully" terminating it after Mr Robinson's death. This naturally begs the question, it seems to me, whether, in the light of this finding, there was thereafter any basis upon which the court could make an award of damages to the executors on the counterclaim. No doubt appreciating this difficulty, the learned judge went on to express the view that the contract was terminated "only from time of the death, so that any right of action which has accrued to either party remains enforceable" and, presumably on this basis, went on to consider and make an award of damages to the executors on the counterclaim. However, I am bound to say, with the greatest of respect to the very experienced trial

judge, that I have considerable difficulty in accepting that this approach was open to the court, in the light of the fact that the single basis of the executors' claim for damages was that the contract was wrongfully terminated by the Wallers.

[74] Nevertheless, there is no appeal by the Wallers on this point and the appeal was certainly conducted on both sides on the basis that, subject to quantum, an award of damages on the counterclaim was a possibility open to the judge. I therefore propose to approach the Wallers' appeal against the judge's award of damages on the same basis.

[75] The first important question was that of the contract price, which Mr Miller determined to be $6,046,290.00. His evidence as to this stood in contrast to Mr Waller's evidence that, although Mr Robinson's original tender had been $6,046,290.00, the parties had ultimately settled on a contract price of $5,320,000.00. Mr Waller accounted for the difference between these two sums by his evidence that there was an agreement between the parties that the painting, electrical and mechanical works, including the garage door, would be subcontracted and therefore not included in the contract.

[76] In addition to being uncontradicted in any way (Mr Waller having been, as the learned trial judge himself observed, "the only person who gave evidence that was privy to the formation of the contract between himself and the Contractor"), Mr Waller's evidence derived support from the certificates, from which, as Mr Miller observed when he gave evidence, one "can come up with work done by the contractor". Mr Miller was

able to confirm that (a) up to Certificate No 4, the total amount of measured electrical work was the relatively insubstantial figure of $22,500.00 ("I would expect a more substantial sum for electrical works up to Certificate #4"); and (b) "[t]here was no evidence to show that painting work was done by Mr Robinson up to Certificate #4".

[77] Mr Miller, on the other hand, based his conclusion on the contract price purely on the basis of the original BQ. But, by his own admission, he did not take into account – indeed, it appears that he may not even have had the necessary information – any of the detailed discussions subsequent to Mr Robinson's tender to which Mr Waller had referred. He was not aware that a building contract could be partly oral and partly written, as both parties agreed and Campbell J accepted that the contract in this case was. Further, he was not aware that there was a dispute as to the correctness of the original BQ (a startling admission, in the light of what the claim in respect of which he was asked to provide expert advice was about in the first place). He readily accepted that if, as Mr Waller testified, there was a subsequent agreement between the parties that the painting, electrical and mechanical works, including the garage door, among other items, were to be subcontracted and therefore not included in the contract, this would lower the contract value in a labour only contract.

[78] These sharply contrasting positions in the evidence plainly cried out for careful analysis and a clear finding as to the contract price, particularly given the central role that it would play in Mr Miller's assessment of the amounts owing to Mr Robinson's estate. The learned trial judge undertook no such analysis, but rather accepted, albeit

purely by implication, Mr Miller's evidence, apparently on the basis that "[h]is opinion falls squarely within his field of expertise". In my view, the judge fell into error in so doing and again failed to make proper use of the advantage of his having seen and heard the witnesses as they gave their evidence. Despite Mr Miller's obvious attempt to bring his best professional judgment to bear on the matter in arriving at his conclusions, it seems to me that his evidence was subject to the clear limitation that his was a purely retrospective review of the project, undertaken some years after the actual events in question and without full knowledge of all the relevant facts.

[79] I therefore consider that, in the light of the clear indications in the evidence that a number of items had been removed by agreement between the parties from the scope of the contract, the balance of probabilities strongly favoured Mr Waller's evidence that the agreed contract price was $5,320,000.00.

[80] The other key element in Mr Miller's assessment of the amount outstanding to Mr Robinson's estate, which was also accepted without discussion by the learned judge, was his estimate that by February 1999 the construction at No 3 would have been "about 80%" complete. This was, of course, purely as a result of, as he put it, a "guesstimate", based on the volume of work in months one, two and three and a "projection" of what it would have been thereafter. Mr Miller had no discussions with the Wallers about the terms of the arrangements between the parties ("I did not think it prudent to do so") and therefore had no idea what the arrangements between them were for the period following Certificate No 4. Further, he did not know when the work

on No 3 was actually completed. Although he did a "cash flow" projection, it was not made available to the court for its consideration.

[81] A major part of the difficulty with Mr Miller's evidence on this aspect of the matter is that it was not foreshadowed in any way, either in the pleadings or in his report. There is therefore no record in the judge's notes of the evidence of any question or suggestion having been put to Mr Waller on the state of completion of No 3 at the time of Mr Robinson's death and there was certainly no challenge to his evidence that he and his wife actually moved in to the house in December 1999. In these circumstances, it seems to me that, again, Mr Miller's evidence required careful assessment in the light of those and other factors. Included in those factors, hardly least of all, was the fact that, on his own evidence, Mr Miller was engaged in a largely hypothetical exercise, unaided by any discussion with Mr Waller on the basis of Mr Robinson's remuneration or any information as to what had happened on the construction site between Certificate No 4 and February 1999. While the judge's observation (see para. [39] above) that the total of the sums requested by and paid to Mr Robinson during the December 1998 to February 1999 period "amounted to less than the monthly average for payments made under the certificates" may have reflected a view that the project must have been underfunded during that period, it could equally have meant, as Mr Earle pointed out, that the work on the site had slowed down, due to factors such as the onset of the Christmas holidays (which is, Mr Miller had agreed, "usually slow - it is a Caribbean problem").

[82] Regrettably, instead of carrying out this exercise, the learned judge proceeded to accept Mr Miller's wholly speculative evidence, without either analysis or reservation. In my view, even if was open to the judge to consider the counterclaim in the light of the executors' pleaded case and his clear finding on the reason for the termination of the contract, it should have been supported by evidence evaluating (a) the progress of the work on the site between Certificate No 4 and Mr Robinson's death and (b) the extent of the work that it was necessary for the Wallers to undertake in the period following Mr Robinson's death for the purpose of completing the construction of No 3. In the absence of any such evidence, I am clearly of the view that the learned judge's reliance on Mr Miller's "guesstimate" was in the circumstances misplaced, given the well known principle of the law of damages that a claimant is required to prove his loss and not, "so to speak, throw them at the head of the court" (per Lord Goddard CJ in ***Bonham-Carter v Hugh Park Hotel Ltd*** (1948) 64 TLR 177, 178). There having been no other basis in the evidence for the counterclaim, I accordingly consider that the judge's award of damages to the executors was not justified by the evidence and must therefore be set aside.

Conclusion

[83] In the result, I would allow the appeal and set aside the judgment of the learned trial judge. I would also enter judgment for the appellants (i) on the claim, in the sum of $432,579.50 and (ii) on the counterclaim. The appellants should have their costs in this court and in the court below.

PHILLIPS JA

[84] I have read in draft the judgment of my brother Morrison JA. I agree with his reasoning and conclusion and have nothing to add.

MCINTOSH JA

[85] I too have read the draft judgment of Morrison JA and I agree with his reasoning and conclusion.

MORRISON JA

ORDER

Appeal allowed. Judgment of the learned trial judge set aside. Judgment entered for the appellants (i) on the claim, in the sum of $432,579.50 and (ii) on the counterclaim. Costs in this court and in the court below to the appellants to be taxed if not agreed.