TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

(CIVIL)

BVIHCV 2010/0218

BETWEEN:

YATES ASSOCIATES CONSTRUCTION CO. LTD.
Claimant /Ancillary Defendant

And

BLUE SAND INVESTMENTS LIMITED
Defendant/Ancillary Claimant

Appearances:

Terrance Neale with Patrick Thompson of Mc W. Todman & Co for the Claimant
Sydney Bennett QC with Dionne Boreland– Fearon and Michael Maduro of Harney Westwood & Riegels for the Defendant

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2012: June, 11-14; 25; Aug. 31

JUDGMENT

(Contract- Building contract partly written partly oral- claim for monies due and owing by contractor- whether contractor overcharged or unilaterally varied contract prices- defects- whether contractor in breach of its obligations at common law)

[1] **Joseph-Olivetti J**: - If you should go to Virgin Gorda in the Territory of the Virgin Islands one day soon you may visit the area of the serene Pond Bay. There you may chance to espy a seemingly splendid villa with cascading pools and breathtaking views of the tranquil waters of the bay. However, all is not as it seems as this villa, designed by an award-winning American architect, is the bone of contention in this lawsuit. The contractor

claimant, Yates Associates Ltd., ("Yates") claims $354,148.56 being sums allegedly due under a contract with the Defendant, Blue Sand Investments Ltd, ("Blue Sand") to build this villa. Blue Sand refutes that claim and counterclaims for sums in excess of 1.3 million dollars as damages for the costs of remedial works and loss of rental income on this palatial residence.

[2] **The Issues**

[3] The main issues for determination are: 1)whether Yates is entitled to recover from Blue Sand the sum of $260,837.38 in respect of Certificate No. 13 for work done under the contract or on a **quantum meruit** basis for work done ; 2) whether Yates is entitled to be paid $98,311.20 for the retention monies; 3) whether Blue Sand is entitled to set off against any sums found to be due and owing to Yates monies allegedly overpaid to Yates ($163,627.76) under Certificate No. 13; 4) whether Yates is liable in damages to Blue Sand for the sum of $1,104,747.37 for the costs of remedying defective construction works, 5) whether Yates is liable to Blue Sand for loss of rental income of $90,160.00, and 6) whether interest at a commercial rate is payable on any sum found to be due and owing.

[4] **The Main Facts**

[5] Ms. Christina Yates, Ms. Avaline Potter, Mr. Keith Pondt, Mr. Dwite Flax and Mr. Felipe Taylor, Yates' project manager and one of its directors gave evidence for Yates. Mrs. Lynn Hill and the Hills' New York based architect and friend, Mr. Jon Nathanson, testified for Blue Sand. The latter however did so via video link. Blue Sand also called several expert witnesses who testified and submitted reports – Mr. Erick Oeseburg, Mr. Mark Hodkinson,a chartered surveyor and Mr. Richard Taylor, a structural engineer.

[6] It is not disputed that in or around April 2007 Yates entered into an agreement with Blue Sand to construct a house on Blue Sand's property at Virgin Gorda being Parcel 100 Block No. 5042A Registration Section Virgin Gorda Central Registration in accordance with architectural designs and drawings to be supplied by Blue Sand. The pre-contractual discussions commenced in or about August 2006. The persons who acted on behalf of the respective companies in negotiating this contract were Ms. Yates for Yates and Mrs. Hill for Blue Sand although it would appear that Mr. Nathanson and Mrs. Hill's husband were present at some of the negotiations.

[7] Mrs. Hill's place of residence at all material times was New York, United States of America where she resided with her husband and fellow director, Mr. Fredrick Hill. They are both retired lawyers and it appears that Mrs. Hill specialized in construction law and that they are both engaged in business in the USA. Yates is a construction company based in Virgin Gorda with over 40 years experience in the industry. I say this to gauge the measure of the person we are dealing with here.

[8] These persons first met in 2005 or thereabouts when the Hills were contemplating the purchase and development of other property at Pond Bay which did not materialise. It appears that the Hills saw and liked the work done by Yates on several projects they had looked and determined to engage Yates on their new project.

[9] Such was their faith in each other that they did not draw up a formal contract. Instead, they relied on the oral representations of the persons acting on behalf of the parties and on a written budget estimate of $2,542,151.70 compiled by Yates between December 27 2006 - January 21, 2007 ("the Budget'). See Claimants' Agreed Documents, "CAD1 Tab 5.

[10] The Budget was formulated on the basis of blue prints and drawings drawn upon the instructions of Mr. Nathanson by Mr. Massicott, a civil engineer who was then employed by Yates. These blueprints and drawings, 31 in total, took several months to prepare and for ease of reference are called "the Massicott drawings" as issues relating to them arise later.

[11] No completion date was agreed upon but the parties contemplated that completion would take place within a period of 18 months from start up. Blue Sand paid an initial deposit of $250,000 and Yates commenced operations at the end of April 2007 prior to obtaining planning approval as Blue Sand was anxious to get started.

[12] I accept the evidence on behalf of Yates that the Massicott drawings were submitted to the Land Development Control Authority but found not to be in line with Blue Sand's licence to hold the land which seemed to speak to a single family residential property and therefore adjustments had to be made. In addition Mr. Nathanson required substantial

variations because of design changes requested by Blue Sand. See W/S of Ms Yates Trial Bundle "TB Tab. 18 para 9. By that time Mr. Massicott, had left Yates employ and so could not make the changes.

[13] The required changes were made to the blueprints and drawings by Ms Avaline Potter, a British Virgin Islands based architect, acting on the instructions of Mr. Nathanson and these changes were incorporated into the Massicot drawings. Yates had sourced Ms. Avaline Potter for that purpose. Final drawings were submitted to Yates on or around May 28 2007 and those drawings were submitted to the Building Authority on 13 June 2007 by Yates and approved on 6 September 2007.

[14] I accept the evidence of Ms. Yates and Mr Felipe Taylor ("Mr. Felipe") to distinguish him from Blue Sand's structural engineer witness, that Yates began experiencing difficulties on the project very early in the construction phase and that this was primarily due to the fact that Mr. Nathanson proved to be an extremely difficult person to work with and that Blue Sand had left all owner decisions to him. See for example, Defendant's Agreed Documents, "DAD" p.331. Yates had disagreements with Mr. Nathanson even about construction methods. Ms. Yates felt this was in part due to the fact that he was not familiar with local construction methods, a very generous interpretation on her part I think having regard to his testimony and the tenor of some of his correspondence with Ms Yates, his principals and even third parties which were often acrimonious and smacked of intolerance to say the least. See CAD 1 Tab 53 email from Mr. Nathanson to Fabby Lighting where he stated- "... **many thanks for getting things right**. **it is refreshing given the misery of working with the local contractor there who neither reads drawings nor recognizes any details that are consistent throughout the project"**. Indeed, Mr. Nathanson testified that he had never worked in the Territory before and did not hold a work permit for him to be engaged on the project.

[15] Both Ms Yates and Mr Felipe testified to Mr. Nathanson giving instructions and then going back on them and when confronted, sometimes with his very sketches or working drawings, instead of admitting that he had erred he simply dealt with the matter by saying that he would have to live with their mistakes. Mr. Nathanson regarded this as mere

compromises he made. See CAD1 Tab 55. Mr Nathanson and indeed Blue Sand's position was that difficulties were caused mainly because of shoddy workmanship and unsupervised workers. Mr. Nathanson even went so far as to say that a foreman who came from Guyana, an English speaking country as everyone knows, did not understand English, a sorry allegation to say the least if it did not have such serious ramifications for the parties. If one were to give credence to Mr. Nathanson the site was a veritable Tower of Babel because workers spoke Spanish and other languages and could not understand each other but surprisingly the villa got built unlike the Tower of Babel and is listed for sale at a value in excess of 8 million dollars. I am constrained to say that for all these reasons on issues of credibility I preferred the evidence of Ms. Yates, Ms. Potter and Mr. Felipe to Mr. Nathanson's wherever they conflicted.

[16] Finally in view of these difficulties and to keep the project on track Yates requested that Blue Sand's directors, the Hills themselves become more involved in the project by making regular site visits and attending meetings. However they declined to do so. In addition, sometimes payments were not always made on a timely basis thus resulting in delays in the ordering of materials. See for example CAD 1 Tabs 30 and 33.

[17] Despite all these unforeseen difficulties the parties soldiered on together and Blue Sand and the villa was substantially completed in or around January 2010 when Blue Sand by its director, Mrs Hill went into occupation of the house and Blue Sand has been in possession ever since. However, all was not well from the inception despite the fact that Blue Sand held a photoshoot at the villa in early 2010.Having regard to the impressive qualifications of the Hills I hazard that that would not have been done had they not been satisfied with the state of the villa generally.

[18] Mrs Hill testified to a litany of defects allegedly found and this is an issue for determination which we will address in full later. Suffice it to say for now that Blue Sand brought some of these alleged defects to the attention of Yates, that Yates was allowed to and attempted to remedy them but that Blue Sand was dissatisfied and eventually asked Yates to cease all work which Yates did on or about June 20,2010 and handed in all keys in September.

[19] Prior to that however, on or about December 31, 2009, Yates had submitted to Blue Sand for payment its invoice dated December 31 2009 marked "Payment Certificate No. 13" totalling $260,837.36 for work done on site to date ("Certificate No. 13"). See CAD 1 Tab.78. They were not paid. They wrote on 7 July 2010 requesting payment with no better result and eventually their lawyers wrote on July 22. Blue Sand's lawyer responded with a holding letter on 6 August but nothing came of this except on September 6 Blue Sand's lawyers asked for the return of all keys which Yates attended too on September 6. They were then constrained to institute this claim on 20 September 2010.I now turn to consider the main issues.

[20] **Is Blue Sand Liable For Monies Claimed By Yates?**

[21] **First, monies claimed under Certificate No.13.** Blue Sand has admitted in their pleadings and in their written closing submissions (para 1.33 p. 21) that they accept that the sum of $191,616.92 is due and payable to Yates. Yates is therefore entailed to judgment on that sum subject to any subsequent findings on set off or counterclaim.

[22] However, with respect to the balance of the monies claimed Blue Sand claims that they made overpayments to Yates which should be set off from any monies remaining due under Certificate No. 13 as follows:-$163,627.76 in respect of unilateral changes to the Budget prices on items in the Budget and $90,160.00 in respect of design changes authorized by them which were not billed in accordance with the Budget prices.

[23] The first item of alleged overpayment is Ms. Potter's fees. It is not disputed that design changes were subsequently made by Blue Sand to the Massicott drawings and that Ms Potter, acting on the instructions of Mr. Nathanson revised them. Yates later billed Blue Sand $14.975.00 for Ms. Potters fees of $13,614.00, which included Building Authority fees of $1,125.00 and $594.00 for blue prints plus a Yates 15% mark up. Yates charge was presented in January 2009 and no issue was taken with it at the time. Ms. Potter's bill is at CAD 1 Tab 10. Blue Sand paid but now claims that they are entitled to the return of those monies as they paid under a mistake of law thinking they had an obligation to do so.

[24] Blue Sand submitted in summary that the contract provided for $10, 000.00 for "blue prints, drafting, engineering", as expressed in the Budget, item 6, that they had paid that sum and that they had no obligation to pay any further sums as the changes effected by Ms. Potter were warranted by the incompetence of Mr. Massicott in doing the initial drafting and blue prints. They relied on the evidence of Mr. Nathanson in this respect. Further, that Yates had invoiced separately for $660.00 for building department fees, and that in any event Yates was not entitled to add the 15% mark up as the parties had never agreed to that.

[25] Ms. Yates testified that item 6 in the Budget was for the work done to the date of the Budget and that the revisions subsequently made by Ms. Potter were as a result of substantial design changes that Mr Nathanson requested and were not attributable to the incompetence of Mr. Massicott and amounted to extra work. Ms Potter who was the one who worked closely with Mr Nathanson on the drawings supported her and I find Ms. Potter eminently more credible than Mr Nathanson. I therefore do not accept Mr. Nathanson's evidence that the changes were necessary because of Mr. Massicott's incompetence. Instead I prefer the evidence of Ms Potter and Ms Yates which is supported by the documentary evidence. Mr. Nathanson's demeanour in court helped no doubt by the fact that he did not appear in person did little to refute the poor impression formed of him from his correspondence and in short I put small store on his testimony throughout this case.

[26] I find that substantial changes were made at the request of Mr. Nathanson acting on behalf of Blue Sand. He required those changes to confirm with his architectural vision of the project and to accommodate his client and they were not due to any shortcomings by Mr. Massicot.It is noted that these changes were such that they impacted on the project to such an extent that subsequently Yates incorporated them into a revised budget dated January 6, 2009 which appears to have been utilised by the parties thereafter. Blue Sand was therefore liable to pay Ms Potter's fees and is not entitled to a refund.

[27] In respect of the mark up Ms Yates testified that it was agreed between the parties from the inception that Yates would charge a 15% mark up on all items and services provided

on the project and that had been taken account of in the Budget prices. Mrs Hill denied that there was any such agreement. Ms Yates could not point to any specific meeting where that concept had been articulated and agreed upon but that is not surprising as the negotiations took place over a period of several months and a formal contract was not drawn up. Further, Ms Yates testified also that this contractor mark up was customary in the trade and that the prices quoted in the Budget reflected this as there was no separate item for contractor's profit. Ms. Yates said that if the contractor did not charge a mark up then there was no profit for the contractor on such a contract

[28] I have perused the Budget and note that there is not a separate item for contractor's fees or profit and it must follow, unless Yates were building **gratis**, that the parties agreed on fees or profit for Yates and that as Ms. Yates testified these were built into the Budget prices. I therefore accept Ms. Yates evidence that this mark-up was agreed or alternatively that in any event the 15% contractor mark up was customary or notorious in the trade here in the Territory and is to be treated as a term implied by custom into the contract. That this custom is a notorious one is supported by the report of Mr. Hodkinson, who made such an allowance in his report. See Tab 4 Expert Bundle B. It is telling that neither party took issue with him on that. I add that on the whole this contract can be regarded as a costs plus percentage contract as described in **Emsden's Building Contracts and Practice 8th edn** Para. 3 p. 9.

[29] It can be readily inferred from all the circumstances that the additional fee to the planning authorities billed for by Ms Potter was in respect of the plans having to be resubmitted and therefore Blue Sand is not entitled to a credit or set off for that sum.

[30] I now turn to the other items of alleged overcharge which were very helpfully set out in detail and addressed by both counsel in their closing submissions. But first I must resolve the issue of whether or Mr Nathanson had real or ostensible authority to make design changes and order variations in the works and agree terms of payment on behalf of Blue Sand as that issue is central to the alleged issues of overcharging.

[31] **Was Mr. Nathanson authorised to act on behalf of Blue Sand to request and agree on variations etc ?**

[32] In law, an architect has such authority as is entrusted to him by the owner under their contract. And the implied authority of an architect or engineer in private practice does not include the authority to make a contract with a contractor or to vary or depart from the concluded contract. See **.J.L. Builders & Son v Naylor and Naylor [2009] EWCA Civ. 1621. P.16.** However, **Hudson's Building and Engineering Contracts 1^{1th} edn.** Para. 2.064 states: "It is however, important to determine the exact legal and practical limitations of this rule. **In the first place, an owner who by some conduct or statement has misled a contractor into thinking that the architect has full authority may well be held either actually to have authorised the architect to contract on his behalf or, if not, to have clothe him with ostensible authority to contract.** This of course would depend on the particular facts of the case but does not detract from the general principle that an architect even instructed to obtain tenders, has no ostensible authority to conclude a contract and strong facts would be needed to rebut this presumption". And **para 2.065** is equally instructive: "**secondly an owner who knows what his architect has done, and stands by and allows the work ordered to be carried out, will be held to have ratified the contract made by the architect, or to have impliedly promised to pay a reasonable price for the work."**

[33] Therefore whether or not an architect is to be held to be clothe with greater authority by the owner depends on the particular facts of the case. It is not disputed that during the course of the construction phase of the project Mr. Nathanson visited the construction site on a regular basis, usually every five or six weeks for the purpose of reviewing the progress, making design changes, inspecting the quality of workmanship and generally ensuring that construction was consistent with the approved drawings. His testimony was substantially to that effect and he would have us believe that that was his sole role. However, I find that Mr Nathanson was held out by Blue Sand as having a far bigger responsibility than he would have us believe. See for example Defendants Agreed Bundle; "DAB" p. 331 referred to in para. 14 hereof. And in fact he did so act in accordance with that. He himself speaks to making "suggestions" on construction to meet design interest. See TB Tab.18 paras 17 and 18.

[34] Having regard to the evidence, in particular that of Ms Yates and Mr. Felipe and the voluminous and sometimes contentious correspondence exchanged between, Mr. Nathanson, Ms. Yates and Mrs. Hill I find that Blue Sand held Mr. Nathanson out as their representative to **make all decisions relating to all aspects of the project** and that Yates was entitled to so rely and act on all such instructions and representations. The scope of his authority in this case thus exceeded the usual scope of authority implied at law in architects. In short I find that he was clothe by Blue Sand with ostensible authority to act on their behalf on all aspects of the project including making variations, agreeing prices and contracting with third parties.

[35] Now I turn to **Certificate No 13** Line **Item 7 (a) -insurance all risk extension**. Blue Sand at trial withdrew their claim for $11,054.00. See their closing submissions para 3:10.

[36] **Line Item 13 - Backfill and compact area plus 100 yards tarris/soil above house.**

[37] The Budget provided for a lump sum of $1,000.00 for this. Yates invoiced $6,789.18. Ms. Yates testified that this increase was due to the increase in the scope of work as authorised by Mr. Nathanson, which Mr Nathanson contested, and that the figure quoted in the Budget was an allowance. Ms. Yates testified that in any event that the price was a fair one and was based on the amount of work actually done.

[38] Learned Counsel for Blue Sand submitted that even if the word **'allowance'** was used it signified nothing as the Budget was an offer which Blue Sand had accepted and thus its terms became contractually binding therefore could not be varied unilaterally. They relied on the case of **Crowshaw vs. Pritchard** [1899] 16TLK 45.

[39] In the Budget it is to be observed that in many instances the word **allowance** does appear in the Budget as it does at this item. The Budget itself does not define that term and I must consider what the parties understanding of that term was from their evidence. I find in the context of this case that the parties intended by the use of the word **'allowance'** to signify that the actual scope of work and thus the accompanying costs were not known at that stage and thus the costs estimated would be subject to change. In fact the rubric under item 13 describes the scope of the work and what, having regard to Ms. Yates' evidence, was actually done was far different from the work described in that allowance. This case is thus different from **Crowshaw**. The intention of the parties was that work/ items for which an allowance was made and also variations or extras would be charged at the same rates set out in the Budget **wherever possible**. Thus, they even recognized that the Budget costs might not necessarily be applicable to all extras or even to items for which allowances were made.

[40] I find that this significant change in the scope of work was authorised by Mr. Nathanson and that in the circumstances the parties can be deemed to have agreed to pay more for it. It can thus be regarded as a new contract whereby if no price was agreed a reasonable price was payable. One can infer in the circumstances an agreement to pay a reasonable price. I therefore find that the price was reasonable and Blue Sand is liable to pay that sum.

[41] **Line item 47- pool foundations and back room foundations**. Yates charged $6797 for raising the pool slab. Blue Sand denies liability for that. Ms. Yates says that it was necessary to do so because of Mr. Nathanson's faulty design. Mr. Nathanson denies that and says this was necessary

because Yates made the foundations too deep. I find the evidence of Ms Yates more credible and therefore Blue Sand is liable for that amount.

[42] **Line Item 122 – Walls**. Blue Sand claim $2534.11 as monies overpaid on this Item. I find that the Budget provided for block work to be billed at $22 per sq.ft. See CAD Tab 5. Item 12 e. However, Yates billed at $26.00 per sq. ft. This was not an allowance and therefore even if additional work was requested and done then the Budget rates must apply unless Yates could show that the rate was not applicable and that a different rate was agreed or could be implied from the course of dealing between the parties .

[43] First, it is not disputed that this wall was not in the original scope of the project as encompassed in the Budget and that this was a change requested by Mr. Nathanson. I accept Ms. Yates and Mr. Flax's evidence as to the reason why this wall was built and that it could not be deemed as necessary for the completion of the house. It was built on the boundary line principally to protect the neighbouring property of Mr. Dwite Flax, as a result of Mr. Nathanson changing the layout of the driveway. Mr. Flax permitted the wall to be built on the basis that he be allowed to supply the concrete and do the excavation and Mr. Nathanson agreed to that. This was in 2008. The different rates charged reflected the charges imposed by Mr. Flax which exceeded the Budget rate. I accept that initially Yates did tender an estimate for the wall in June 2007 in which $22 per sq. ft. was quoted and which Blue Sand accepted, see CAB Tab 10 ultimate page, but I find that this was superseded by the arrangements Mr. Nathanson acting as Blue Sand's agent made with Mr. Flax. The claim for an overpayment for this therefore fails.

[44] **Footings** Blue Sand claims an overcharge of $2,714.00. The estimate of 28 June 2007 provided for $23.60 per sq. ft. to cast footings but Yates billed at $28 per sq ft. I accept Ms. Yates evidence that this change in price was due to fact that this was additional work in respect of the Flax's wall referred to above, and that it was more expensive as more labour intensive as they had to use wheelbarrows to gain access to the area as the house had already been built. No doubt, Blue Sand through Mr. Nathanson knew this in all the circumstances and can be taken to have acceded to it and to paying reasonable costs incurred. The costs cannot be regarded as unreasonable. The claim therefore fails.

[45] **Top Beam** Blue Sand claimed that it overpaid monies on this item. The Budget price for the top beam was $41.24 per sq ft. which according to Ms. Yates contemplated a beam of 12"x 8". The beam actually installed was 16" x 8". Having regard to the dealings between the parties and the manner in which the project was carried out it is inconceivable that such a change would have been made without the eagle eyes of Mr. Nathanson seeing it and him agreeing to it and to the resultant increase in costs. I therefore find in the particular circumstances of this case that the principle in **Tharsis Sulphur and Copper Company Ltd vs. Mc Elroy & Sons [1873] 3 App.** Cas.1040[1] relied on by Blue Sand cannot apply and that Blue Sand is liable for that cost.

[45] **Painting** Yates conceded that the amounts claimed for $3,395 and $1,222 for painting wall and plaster were not due as the work had not been done. It follows therefore that those sums so paid are recoverable from Yates.

[1] In **Tharsis** it was held that if a contractor undertook to carry out works and later discovered that the works could not be completed without a variation and if he does the work without obtaining the variation then he is not entitled to recover the additional cost.

[46] **Excavation** Blue Sand say they were over charged by $6,829.00 for this. The Budget provided for a rate of $21 per cubic yard and Yates billed on a time and materials basis resulting in an overcharge of $6829.00.This is so. Yates testified that the contract rate was based on normal excavation but this referred to the Flax wall and the agreement made by Mr. Nathanson with Mr. Flax for Mr. Flax to do the excavation. The price charged reflected Mr. Flax's charge plus a 15% mark up. Having regard to my findings on the Flax wall and the mark up this sum was properly due and payable by Blue Sand.

[47] **Columns.** Blue Sands say Yates charged at a different rate from that in the contract resulting in an overcharge of $265.01. This is indeed so. However, I accept Yates' explanation as to this variation and the reason for the different rate applied and find that it is to be implied having regard to the course of dealings that a reasonable price would be paid. The price was not unreasonable and Blue Sand is liable for this.

[48] **Line Item 126 – Termite Treatment for foundation.** Blue Sand paid BVI Pest Control for this service directly in May 2008 and states their willingness to assist Yates to recover the sum if Yates had paid as well as Yates was not contractually bound to pay for this service. Blue Sand did not attempt to disprove that Yates had paid. I accept the evidence of Ms. Yates that Yates paid that sum to BVI Pest Control and that Blue Sand must reimburse them as the monies paid on their behalf.

[49] **Line Item 127 – Tile Work**. Yates charged $6.000 per sq.ft. for this work and the contract price was $3.40. See Budget item No.28 Tab 5 CAD. Yates testified that the contract price in the Budget was based on a particular type of tile and that the extra costs were incurred because Blue Sand changed the tiles to Chinese stone which was

substantially more difficult to work with. It is not disputed that the change was requested by Blue Sand and that the costs of working with such tiles were significantly greater. As a result I find that the parties know the significance of the change and could not have intended the contract price to apply or that there be no additional charge and that as no price had been agreed on, it is to be implied that work was to be billed at a reasonable price. I accept the evidence of Ms. Yates that the price charged was reasonable and Blue Sand's claim is rejected.

[50] This case can be distinguished on its facts from **Tharsis** as there it was the contractor who requested the change to fulfil his obligations to execute the works in accordance with the design and not the owner. And one cannot in any event say that Chinese stone was necessary to complete the house as per the design to deprive Yates of payment as in **Williams v Fitzmaurice** (1858) 34 cited in **Emden's op.cit p. 136** See also op.cit at p. 135 (B) as to what constitutes a variation for which the employer is liable.

[51] Blue Sand dispute liability to pay for the additional 1000 sq. ft. of tiles as contingency for cut and wastage. This claim is founded as in every such contract, it is normal to allow for wastage and cut. See Mr. Hodkinson's report which makes a similar provision.

[52] **Line Item 128 – Windows and Doors.** Blue Sand say that instead of charging at per unit basis as per contract that Yates charged on a time and materials basis resulting in higher costs and that they overpaid. I accept the evidence of Ms Yates as to the reason for this change which entailed Blue Sand requesting custom made articles and the extra work that caused which far exceeded what was anticipated in the Budget. For the same reasons stated in relation to the Chinese stone this claim fails.

[53] **Overcharge in respect of the 15% mark up on materials supplied by owner.** This reflects the arguments on the Potter mark-up and my decision as to Yates right to charge that mark up applies here equally. This claim must fail. In any event I note that subsequently, after issue was taken with the charge by Blue Sand that the parties negotiated and as a result Yates agreed to reduced their mark up on those specific materials to 10% which Blue Sand paid. Blue Sand cannot now seek to upset that arrangement as they must be taken to have been aware of their rights when they disputed the charge and later compromised it.

[54] **Retention monies**. Yates claim for what it termed retention monies in the sum of $98,311.20 being sums due under the contract for work already done but not billed but left on account with Blue Sand for the purpose of remedying any defects in construction. They claim this less a reduction for legitimate defects estimated at $25,000.00

[55] In law retention monies only become due and payable if the period agreed upon for remedying defects has expired and there are no defects. If defects are found and not remedied by the contractor then the owner is entitled to use the retention monies towards putting right these defects. See **Emden's** op.cit p. 129 para. B. Thus this issue must await our determination on defects.

[56] **Is Blue Sand entitled to damages for remedying alleged defects?**

[57] As a result of defects in construction alleged to have been found when they entered into possession in or about January 2010 Blue Sand claim damages of $1,104,747.37 for remedial works. To establish their claim they relied on the evidence of Mrs. Hill and several expert witnesses- Mr. Erik Oeseburg (Pools), Mr. Richard Taylor and Mr. Mark Hodkinson, who testified to defects found and costs of remedying them . Mrs. Hill catalogued some of the defects allegedly found in photographs which she submitted to the court, which ran the gamut from leaking roofs, leaking swimming pools, slippery stone floors ,so called "disco lights" because of their intermittent flashing,(Mrs. Hill had seemingly retained her sense of humour)

peeling paint to termites in cabinets and destruction of plants. Additionally Blue Sand alleged that the villa evidenced defects to the electrical, plumbing, mechanical and other systems.

[58] Before I go further I note that Yates through Ms. Yates in her oval evidence has accepted liability for defects and therefore no issue arises.

[59] **The law** Before I consider the several areas of alleged defects it is helpful to look at a contractor's obligation in law as this contract made no express reference to the duties imposed on the contractor and therefore we must imply the common law duties to give commercial effect/efficacy to the contract.

[60] In law, the contractor has a dual obligation to carry out and complete the works in accordance with the contract. **See Hudson's Building and Engineering Contracts 11th ed. Vol. 1 para 4 – 003**. And where owner's designs are used, (as it was substantially in this case) then the contractor's obligation is to complete to design. And in that case the contractor does not owe any duty in regard to its subsequent performance, safety, durability or suitability after completion provided the work has been carried out using proper standards of materials and workmanship in exact accordance with the design. See op.cit. para. 4.004.

[61] However, where contractor design is employed the contractor has a duty to ensure that the design is practicable and reasonably fit for the particular purpose. See **Building Contracts D. Keating 4th edn. P. 41**

[62] I shall now consider each item of alleged defective work separately bearing in mind that generally Yates worked to the designs supplied by Blue Sand except perhaps in relation to the roof which I shall address next as it is the most substantial item claimed for. However, a preliminary issue has to be determined having regard to the parties' contention which is, who prepared the designs for the roof and whether Yates had held themselves out as

being able to provide the services of structural engineers.

[63] I find that when Blue Sand originally determined to build a villa on a different lot of land from Parcel 100 in Virgin Gorda namely a waterfront lot at Pond Bay that they had employed Systems Engineering as structural engineers on that project so why did they not do so here?. Mrs. Hill denied that costs was a factor and testified that this was because Ms. Yates had indicated to her that Yates had structural engineers on staff. Ms Yates denied this. In resolving this I have had regard to the testimony of Mrs. Hill, Mr. Nathanson, Ms Yates, Ms. Potter and Mr. Felipe. I prefer the evidence of the Yates witnesses as they were more credible. I find that Yates did not hold themselves out as having structural engineers on staff and so to act as structural engineers on the project as well as contractors and that Blue Sand being satisfied that the project was well within Yates 'competence declined to employ structural engineers to reduce costs. I find it impossible to infer from Budget item 6 – "**Blueprints drafting and engineering- $10,000.00"** that this encompassed structural engineering fees**.** Having regard to the considerable value of this project as it is common knowledge that structural engineers usually charge on a percentage of the works basis.

[64] In my judgment the truth of the matter is that Blue Sand expected Yates to build in accordance with the standards prevailing in the industry in the Territory, that they had seen the work done by Yates on other notable projects here and that they were satisfied that Mr. Nathanson's plans and designs incorporated work that could easily be done by Yates. Therefore, they did not see the need for structural engineers and they wished to avoid what they deemed the unnecessary costs of hiring one. I therefore find that Yates did not

hold themselves out as being able to supply structural engineering expertise on the project but that in any event they held themselves out as being able to construct the villa to design and to prevailing industry standards dehors designs and that Blue Sand's relied on them to so build.

[65] **Now to the roof/roofs**. First, I find that the parties intended that Yates would in general construct roof/roofs similar to those on the condominiums Yates constructed at Olde Yarde and in particular construct the same rafters ridges, fascia and inside finishes. There was some dispute about Blue Sand's ownership of an Olde Yarde condominium but that is of little significance; what is of import is that Mr. and Mrs Hill and indeed even Mr. Nathanson were very familiar with Yates' work at Olde Yarde and the parties contemplated the same roof structure. I also find that Mr. Nathanson working with Mr. Massicott had produced drawings dealing with beam details and roof framings details. Exactly from which one of them structural details originated is not clear but I tend to think from Mr. Massicott in his capacity as Yates engineer usually involved in Yates construction projects.

[66] On the issue of leaks I accept the evidence of Mrs. Hill which was supported by her own photographs and the evidence of Mr. Taylor that the roofs, (totalling 6) leaked. I thus reject the evidence of Ms Yates that the roofs did not leak.

[67] The defects to roof shingles and roof which according to Mr. Tayor resulted in that situation were set out in his report which was based on two site visits on 14 September 2010 and 18 May, 2011. Ironically on both days the weather was dry. I interject to say that I found Mr. Taylor both experienced and knowledge in his field and that he understood thoroughly his duties to the court as an expert witness. I could not say the same of Mr. Oeseburg however although it is no fault of his that he was not briefed about an expert's duty to the

court and that he is not as experienced in his field. I accept Mr. Taylor's findings both as to defects and cause and also his opinion on how such defects could be rectified.

[68] In summary, he found defects in the structure which in his opinion would lead to leaks and the failure of the roof as it could not sustain design hurricane winds (category 4 hurricanes). I note in particular that he reported observing 3" by 8" rafters with spans in excess of the recommended standard set out in the Uniform Building Code (U4BC) for hurricane loads in the area. He however conceded in cross –examination that the UBC is not applicable here.

[69] Mr. Mark Hodkinson testified as to the cost of correcting the defective works indentified by Mrs. Hill and Mr. Tayor in the manner recommended by Mr. Taylor. In respect of the roofs he was of the view that they would have to be removed and rafters and shingles redone to remedy defects identified. He estimated the costs of doing so at $326,132.40 plus a 28% mark up to include contractor's profits 15%, preliminaries assumed at 8% and design risk contingency at 5%.

[70] Having found defects in the roof the vital question is whether these defects resulted from breach of Yates's breach of their common law duty**.** Ms. Yates said that in the course of the construction Mr. Nathanson visited the site regularly and that the roof was built to his design specifications and in accord with the Ole Yard condos roofs. Crucially she said specifically that Mr. Nathanson did not want counter flashings as they conflicted with his design and therefore they did not use counter flashing.

[71] In cross examination Mr. Nathanson was tasked specifically with the issue of the counter flashing. He said categorically that counter flashing was never proposed. (Inadequacy

of the counter flashing was a major cause of leaks as found by Mr. Taylor) I find it very difficult to believe that Yates, 40 years in the construction business in the Territory having done significant projects here as referred to by Ms. Yates in para 2 of her witness statement would build a roof with shingles and omit counter flashing. I prefer her evidence to that of Mr. Nathanson on this and conclude that he rejected counter flashing.

[72] On review of all the evidence I find that the roof design was primarily that of Yates and that they had a duty to ensure that the roof /roofs constructed were fit for the purpose. They failed to do so. One does not expect newly built roofs to sag or leak, whatever codes they are built in accordance with. They must be fit for the purpose and patently this roof / roofs were not.

[73] However, part of the reason for the leaks and the structural failure of the roof was Mr. Nathanson's rejection of counter flashing, his approval of a "'z splice" in the ridge beams, his rejection of a steel plate between the timber ridges and also his rejection of a concrete beam at roof level as they did not fit into his conceptual designs. As I have found he acted as Blue Sand's agent throughout, Yates was told to do what he said and therefore Yates in complying with his instructions cannot be expected to be responsible for the entire costs of putting matters right. I therefore find it fair that they pay **three- quarter**s of the costs of remedying the roof subject to my findings on opportunity given to Yates to remedy defects.

[74] **Pools.** In respect of the pools I prefer the evidence of Ms. Yates to that of the expert witness Mr. Oeseburg for t he reasons already advanced. I find that the pool leaks and that the most likely cause is the incorrect placement of the skimmer which position was specifically directed by Mr. Nathanson, again to meet his design concepts. Therefore, no liability can attach to Yates for that. Yates however are responsible for replacing the Diamond Brite. They are not responsible for entrapment device as that had not being

industry standard at the time the pool was built. As Yates have proffered no figures for remedying defects except a global sum of $25,000.00 the costs of making good the defects found attributable to Yates are to be awarded and calculated on the values given by Mr. Hodkinson. Having regard to those items in Mr. Oeseburg's report.

[75] Blue Sand also complained of faulty exterior coatings, leaking windows, main house parking, termites, absence of vent in the laundry room, faulty terrace, drainage slopes, gutters, faulty coating on tower roof decks, faulty bathroom floor drains, faulty coating on the pods, faulty pool plumbing, pool electricals and failing retaining walls.

[76] Most of these defects, some quite minor despite the length of the list have been proved by the evidence of Mrs .Hill and Mr. Taylor except for main house parking and the retaining wall and those items already addressed. In respect of the retaining walls. I accept the evidence of Ms Yates rather than Mr. Taylor as to why the retaining walls in particular were constructed as they were and that in any event they have not failed. I also accept her evidence that there is no significant fault with the parking area.

[77] With respect to the electrical wiring it was approved by the BVI Government inspector thus signifying that it was in compliance with the standards here. I am aware that in law such a certificate is not definitive as to whether or not a contractor has met his/ her contractual obligation. I find in the absence of any express obligation to work to another standard that the prevailing industry standard here was applicable and that Yates generally fulfilled its obligation in relation to the electrical system. However, it cannot be denied there was a problem with the "disco lights' and that the industry standard here was applicable and that Yates were given the opportunity to put it right and were unable to do so. They are therefore liable for that.

[78] Yates accepted that there were termites because an infected piece of plywood had been

used for cabinet doors and was willing to remedy that. They were not allowed to. It was a simple thing to do and therefore only the basic costs based on Mr. Hodkinson's figures without mark-up a or contingencies is allowed for that item.

[79] Yates seems to accept some liability for using the wrong paint on exterior walls. I find them wholly liable as I am not satisfied that Mr. Nathanson did not specify the exact type of paint as he was concerned with the colours (that is what usually mock -ups are concerned with) and that Yates ought to have seen that they were applying wood stain to walls. They did not and are wholly liable for the costs of remedying same.

[80] I accept Ms. Yates evidence on the low water pressure and do not find Yates responsible. I do not find them at fault for either for failure of the gutters which on Ms Yates evidence which I accept can properly be attributed to Mr. Nathanson's design failures. Likewise, the laundry room vent which Mr. Nathanson objected to.

[81] Yates accepted responsibility for the incorrect sloping of the terrace. I note that Yates later offered a solution to rectify it but that Blue Sand appeared to have accepted it but later changed its mind as being no longer acceptable one has to assume. Yates is responsible for the costs of putting it right as per Mr. Hodkinson's costs.

[82] Blue Sand also seek to set off monies allegedly expended by them to remedy some of these defects which were testified to by Mrs. Hill. Of course they can only recover for costs resulting from defects that I have found Yates responsible for and which costs they have proved. As the remedy for the disco lights was the fitting of transformers purchased from Baldasti and or Princess Quarters, those sums on their invoices related to lights, wiring and transformers are recoverable. See DAD 2 Tab 17 p.503 and defendants Supplemental Documents Tab 2.

[83] On the landscaping claim including the cactus, Ms Yates does not recall destroying the

cactus and her only issue seems to have been with the charges for that. However those charges do not strike me as unreasonable as Yates adduced no cogent evidence to that effect. Yates is therefore responsible for this item subject to issue of proper opportunity being given to effect repairs.

[84] **Was Yates Denied Opportunity To Remedy Defects**

[85] An owner cannot recover damages unless he/she has given the contractor an opportunity to remedy defects **.See Hudson's op.cit. para 5.080.** This contract did not have any express terms on defects liability period or retention monies for that matter. However, having regard to the scope of the project and the course of dealing between the parties, in particular that Yates allowed for retention monies by not billing for a percentage of work that was done at the time, it can readily be implied that they intended to make provision for some form of retention and a reasonable defects liability period. In all the circumstances I find that a reasonable period would be about 9 months. I am fortified in saying this as I note that Mr.Hodkinson in his report EB B Tab 3 p.10 considered as applicable a period of 6-12 months.

[86] As already noted, Mrs. Hill brought some of these alleged defects to Yates' attention when Blue Sand took possession of the villa in January 2010 and Yates were initially allowed to go in to remedy some defects .However, in June 20, 2010 Ms. Hill informed them that she was retaining an electrical engineer in addition to a structural engineer to review the villa and enumerated multiple alleged defects and she required them to cease all work which they did. However, Yates wrote a letter on July 7 2010, CAD 1 Tab 84 responding in detail to Blue Sand's allegations and reiterating their willingness to remedy legitimate defects. Blue Sand did not answer.

[87] I accept the evidence of Ms. Yates, which was not disputed, that Yates has always advised Blue Sand that it was willing to remedy any legitimate construction defects once given the

opportunity to do so

[88] I also accept, based on the evidence of Ms. Hill that Yates was given reasonable opportunity to remedy defects but they failed or were unable to do so and that Blue Sand had enough and called a halt in June 2010. This clearly was done on the basis that Blue Sand had lost faith in Yates ability to remedy the defects. I find that Blue Sand was entitled to do that as between the period of January to June 2010 Yates had addressed very few of the problems identified by Mrs. Hill and had not been able to deal with the exterior painting or for that matter the disco lights. I find that in all the circumstances that Blue Sands had lost faith in Yates and that their action in seeking alternative solutions was not unreasonable. **See Hudson op.crt. para.5-050.**

[89] **Rental income.** I reject this claim for loss of rental income of $90,160 for 23 weeks between 7 December 2009 to 30 April 2010. Blue Sand have not established that this villa was intended for rental and that Yates knew of this at the time they entered into the building contract. The basis for this claim as testified to by Mrs. Hill in particular in Appendix D of her W/S statement Tab 17 is wholly inadequate. See **Hadley v Baxter** as to the basis on which a contracting party can recover loss of profits on a contract.

[90] Indeed, when one looks **at the planning permission granted** to Blue Sand the purpose for which the villa was intended is stated as residential. Yates was privy to that document. Further the Non- Belonger's Licence under which Blue Sand was granted permission to own the land by the Government makes no mention of use for rental purposes and Yates was also aware of that. And, in the correspondence between Yates and Blue Sand, Blue Sand made reference to their "**guests**" not tenants. Further, Blue Sand gave no evidence that they had obtained or even applied for a trade licence to enable them to conduct rental business in the Territory or that they had attempted to engage property management agents to place their house for rental and that Yates was aware of that. One can also take judicial notice of the fact the Government grants licences to Non -Belongers to hold land here for a specific purpose as set out in the licence and that an owner so licensed cannot lawfully change that purpose without the express permission of the Government. This claim must fail. I see it as no more than a retaliatory measure similar to that taken by Ms.

Yates when she voiced her speculations as to cause of the breakdown in the relationship. Such reactions are I note are far from rear when a loving marriage founder and I regard them in that vein.-lightly.

[91] **Miscellaneous Charges**

[92] Yates has not proved what the charges for miscellaneous charges are on certificate number 13 and therefore they cannot recover those charges.

[93] **Commercial Interest**

[94] Both parties claim interest on monies found due and owing at a commercial rate which learned counsel for Yates proposed as 8% per annum. The contract is silent on interest and common law does not imply an intention to pay interest on monies due and owing under a contract or on damages arising for breach and no such intention can be inferred from the circumstances. Therefore neither party has a right to interest.

[95] **Prescribed costs**

[96] Each side is to have its prescribed costs.

[97] I regret that I am unable to summarise the several awards made herein and seek the kind assistance of both counsel in ensuring that the formal order to be drawn up correctly reflects the awards made and show the calculations wherever necessary.

[98] **Postscript**.

[99] Having regard to the fact that the counterclaim was in excess of $1.3 million dollars and to the well known complexity of building contracts this matter ought to have been placed before the commercial court. I raised this issue on the first day of trial and counsel for Yates advised that Blue Sand's application to the Commercial Court to hear the matter was refused and that the reason was not readily apparent. The parties were thus deprived of the expertise of that court to which they were entitled. As all was set for a 1 week trial I rushed in where angels fear to tread.

[100] I thank counsel for their well presented equally well researched and erudite closing submissions which proved invaluable.

Justice Rita Joseph-Olivetti
Resident Judge
Territory of the Virgin Islands