IN THE SUPREME COURT OF NAURU

AT YAREN
CIVIL JURISDICTION **CV No. 14 & 18/2017**

BETWEEN **SECRETARY FOR JUSTICE**
on behalf of the Government of the Republic of Nauru

Plaintiff

And **Paul Hartman, Bunion Seymour And Belista Seymour,** trading as Jaytel Construction
Having its Registered Office at Meneng District

Defendants

Before: Chief Justice Filimone Jitoko

APPEARANCES:
Counsel for the Plaintiff: J. Lutui,
Office of the Secretary for Justice
Counsel for the Defendants: V. Clodumar,
Pleader

Dates of Hearing: 3, 4, 6 June and 6, 9 August 2019
Date of Judgment: 14 August, 2020

Catchwords: *Building Contract – Set contract cost – specified time for completion – Delay due to loss of workers to Regional Processing Centre – Delay in delivering of materials – work remain uncompleted – Frustration of Contract.*

JUDGMENT

Background

1. On or around July 2012, the Government of Nauru introduced, the Nauru Housing Scheme (NHS) to assist in the provisions of homes for its citizens. The scheme

incorporated a 3 bedroom housing or residence plan project, submitted by the Republic of Nauru Phosphate Corporation (RONPHOS)

2. The total number of houses proposed was 28 that is 2 for each for the 14 Districts of Nauru. In the end, the Government reduced the number of house to 26 because the 2 houses allocated for Denigomodu district was withheld as Cabinet was unhappy with the sites proposed by the landowners of the district.

3. The ownership of the 26 houses under NHS was opened to members of the public to apply for. In total, some 60 applications were received before the closing date on 10 August 2012. Out of total numbers of prospective applicants, 26 successful applicants were selected under the Scheme, two applicants from each of the 13 district.

4. For each of the 26 houses, Government had set aside forty thousand dollars ($40,000 AUD) as the total cost of construction of each, and the total sum of $1,120,000.00 was provided in for the Government budget to cover the costs. The scheme had a provision that all those successful applicants would not be given the $40,000 for their houses but the amounts were to be paid directly by the Government to the construction companies to build the house. Upon their completion, the houses were to be handed over to the Government, which in turn will give them to the individual owners. The owners upon taking possession of the houses will repay the Government the $40,000 it put up for the costs of their construction. The $40,000 was to be then considered as loan from Government to the successful applicants.

5. To help in the construction of the houses under the scheme, the Government chose six (6) construction companies (Contractors) namely, Eigigu Holdings Corporation, Jaytel Construction, Our Construction, Borderline Construction, Kibaba Construction, and DJ Construction to begin the project. Five of the six companies were awarded or allocated a house each, with Eigigu Holding Corporation given two (2); a total of 7 houses altogether in the beginning.

6. Payment of the contract price was set out under clause 8 of the Contract Terms and Condition as follows:

"(8) PAYMENT

(1) The Government must pay to the contractor the contract price by way of three progress instalments as follows:

(a) 60% of the Contract Price shall be due and payable within 7 days of signing the Contract;
(b) 30% of the Contract Priced shall be due and payable within 7 days upon satisfactory completion of the roofing; and
(c) 10% of the contract shall be due and payable within 7 days of Practical Completion."

7. The Contractor has agreed to fulfil the main obligations in accordance with this Agreement as per Clause (14) of the Contract Terms and Conditions.

8. There was provision of variation of Contract as set out under clause 7 of the Contract Terms and Conditions as follows:

"(7) VARIATIONS

(1) Any agreement to vary this Contract including to vary the plans and specifications for work to be done under this Contract, must be done in writing signed to each party to this contract prior to any work being commenced.

(2) The Government reserves the right to refuse an extension to the date for Practical Completion unless the Government Building Supervisor is satisfied that the delay was occasioned by circumstances beyond the control of the Contractor.

(4) Any request by the Contractor to vary the Contract by extending the date for Practical Completion shall:

(a) be made not less than two weeks prior to the end of the Agreed Building Period (Schedule 4)
(b) be supported by documentation justifying the delay.

(5) The Government does not agree to make any variations to the Contract which will result in any increase to the Contract Price."

9. Plaintiff has filed the present suit to claim damages for breach of contract by the defendant by not completing the construction of houses for Gabrissa Hartman and An-Adin Quadina.

PRE-TRIAL CONFERENCE

10. The parties agreed at their pre-trial conference to the following facts and issues for determination:

    1. Parties agreed that both matters, CV 14/2014 (Hartman) and CV 18/2017 (Quadina) are to be tried together as the issues for determination by the court are identical.
    2. Parties agreed that common bundle of documents will be prepared and filed by the Plaintiff prior to the trial.
    3. Parties agreed that Statement of Facts is to be prepared and filed by the parties, together with the common bundle of documents prior to trial.
    4. Parties agreed that the deciding issue to be determined by the court is if the construction contracts were frustrated.

AGREED FACTS

11. The parties filed the following as Agreed Facts:

11.1 In July 2012 the Plaintiff announced and rolled out the Nauru Housing Scheme "the scheme"). The scheme rendered housing construction assistance to successful Nauruan citizens who applied. The successful applicants would access funding from the plaintiff by way of loan.

11.2 However the funds were not given directly to the successful applicant, but it was given to a construction company who would have successfully tendered for the construction of the house of the successful recipient under the housing scheme.

11.3 The approved loan amount to a successful applicant and recipient of a completed house was $40,000 which the applicant was required to pay to the Plaintiff. The Plaintiff after accepting a tender from a builder would pay the

$40,000 to the builder for the construction of the house for the successful housing scheme applicant and recipient.

11.4 The $40,000 amount was based on initial plans and costing prepared by RONPHOS. The RONPHOS costing did not include gutter and roof flashing, the supply and installation of tiles to laundry and bathroom areas, and cesspit and septic tank.

11.5 CV 14/2014 (Hartman) and CV 18/2017 (Quadina) were two successful applicants under the Housing Scheme.

11.6 Jaytel Construction Company was one of several construction businesses that applied to the Plaintiff to be awarded construction contracts for construction of houses under the housing scheme for a fixed price of $40,000. Overall under the housing scheme, Jaytel Construction was awarded seven houses to construct.

11.7 The Second Defendant was the proprietor of Jaytel Construction Company ("the company"), as endorsed on the business license issued for the business on 31 July 2012. The third defendant was the proprietor of Jaytel Construction Company, as endorsed on the business licenses issued for the business on 30 August 2013, 14 November 2014 and 13 November 2015. The First Defendant was a beneficial owner of the company.

11.8 On 12 September 2012 the Secretary to Cabinet wrote to the First Defendant for the company, attaching a draft construction contract and bill of quantity and inviting his agreeability to the terms and conditions of the draft contract before 14 September 2012.

11.9 On 15 November 2012, the Second Defendant was engaged by the Plaintiff by consultancy contract as the Nauru Housing Scheme Project Manager ("project manager") who was responsible, amongst other things with overseeing and supervising the construction of all houses under the Nauru housing scheme.

11.10 On 6 February 2013, the Second Defendant as project manager wrote to the Secretary to Cabinet, recommending that his company and other construction companies, who were currently constructing houses under the scheme, be awarded a further two to three houses at the same time to be completed in 5 months.

11.11 On 13 February 2013, the construction contract for the construction of the house of Gabrissa Hartman at Ijuw was signed between the Plaintiff and the company. The contract was signed by the First Defendant on behalf of the company.

11.12 The date provided under the contract for completion of the construction of the house was 4 months from the commencement date which was 20 February 2013. The contract also provided that the date of practical completion of the construction was 24 June 2013. The contract price was $40,000. Clause 7(5) of the contract terms and conditions provided that the Plaintiff does not agree to make any variations to the contract which will result in any increase to the contract price.

11.13 The first payment of 60% in the sum of $24,000 for the construction of the Hartman house was processed on 13 February 2013 and subsequently paid out to the First Defendant on behalf of the company.

11.14 On 19 February 2013, the Second Defendant as project manager wrote to the Secretary to Cabinet requesting that his company be awarded two additional houses to build. The request was approved on 20 February 2013.

11.15 On 22 February 2013, in response to requests from the construction companies who requested an increase to the contract price to cater for variations in prices of materials, the Plaintiff approved to increase the funding for the construction of a house under the scheme from $40,000 to $44,000 per house which was a 10% increase in the contract price.

11.16 On 26 February 2013, the construction contract for the construction of the house of An-Adin Quadina at Meneng was signed between the Plaintiff and the company. The contract was signed by the First Defendant on behalf of the company.

11.17 The date provided under the contract for completion of the construction of the house was also 4 months from the commencement date which was 5 March 2013. The contract also provided that the date of practical completion of the construction was 28 June 2013. The contract price was $40,000. Clause 7(5) of the contract terms and conditions also provided that the Plaintiff does not agree to make any variations to the Contract which will result in any increase to the contract price.

11.18 The first payment of 60% in the sum of 24,000 for the construction of the Quadina house was processed on 27 February 2013 and subsequently paid out to the First Defendant on behalf of the company.

11.19 At this point, a total of five contracts were awarded to the company under the housing scheme to construct houses, inclusive of the Hartman and Quadina houses.

11.20 On 7 May 2013, the First Defendant for the company wrote the Second Defendant as the project manager, requesting early payment of the second installments for the five houses to pay for freight for the materials on route to Nauru on shipping containers; for salary of workers; and for bricks.

11.21 Of equal date the Second Defendant as the project manager wrote the Secretary to Cabinet assuring that the materials purchased by the company for the construction and completion of all the houses are on a ship and is scheduled to arrive in Nauru on 10 May 2013, and requested that the request for payment of the second installments be granted to ensure the successful continuation and completion of the houses before the deadlines.

11.22 The second installment payment in the sum of 13,200 each for the construction of the five houses was processed on 10 May 2013 and subsequently paid out to the company.

11.23 On 1 July 2013, the First Defendant on behalf of the company wrote to the Secretary to Cabinet, requesting an extension for 6 months, from 1 July 2013 to 31 December 2013 to complete the construction of all five houses. The First Defendant cited the reason for the request as due to delay in arrival of materials from abroad as they were forced to purchase from abroad due to the rise in material prices within Nauru.

11.24 On 12 July 2013, the Secretary to Cabinet wrote to the First Defendant approving his request for an extension to complete the five houses. The new deadlines were 31 September 2013 for 2 houses and 30 November 2013 for three houses.

11.25 On 2 July 2014, the First Defendant wrote to the Secretary to Cabinet, explaining the reasons for the delay in the completion of the four remaining houses, at the time, being constructed by the company. He cited two specific reasons being:

the loss of workers to the Regional Processing Centers and the delay in delivery of concrete blocks from local companies.

11.26 On 8 August 2014, a meeting was convened between representatives of the Plaintiff and the construction companies with outstanding buildings, which was attended by the First Defendant for the company. He cited the reasons for the delay in construction of the houses as: lack of tradesman and local materials; loss of workers to the regional processing center; and the new tax system, and he requested the Plaintiff to revise the current contract to cover new issues arising after the contract signing.

11.27 In a further meeting on 1 September 2014 which was attended by the Second Defendant, and he requested government to revise the contracts and consider a 30% increase, due to lack of bricks and lack of tradesmen. Mr. Dexter Brechtefeld, the Project Manager and Chairperson of the meeting informed the construction companies that all outstanding construction were to be completed by 31 December 2014.

11.28 On 27 October 2014, the Director of Special Projects, Mr. Dexter Brechtefeld in two separate letters, wrote to the First Defendant, and informed him that his request on a meeting on 16 October 2014 for an additional 30% to the original housing project fund allocation to complete the Hartman and Quadina Houses, have been denied.

11.29 In a meeting on 31 October 2014 which was attended by the Second Defendant, he further requested government to revise the contracts and consider a 30% increase so that he can employ more workers to complete the outstanding buildings.

11.30 On 31 December 2014, the Director of Special Projects, Mr. Dexter Brechtefeld in two separate letters, wrote to the First Defendant, and informed him that the same date was the deadline to complete the construction of the Hartman and Quadina houses.

11.31 On 7 March 2016, the Second Defendant wrote the Director of Special Projects, Mr. Dexter Brechtefeld and informed him of the reasons for the delay in the completing the Hartman and Quadina houses which were due to: materials have increased in costs; house project time frame not practical; and the Refugee Processing Center has affected labour and tradesmen.

11.32 On 7 May 2015, the Director of Special Projects, Mr. Klenny Harris, wrote to the Secretary to Cabinet attaching a report prepared by Mr. Clint Deidanang on his assessment of the incomplete houses under the housing scheme and the reasons.

11.33 To date $37,200 for each of the Hartman and Quadina houses has been fully paid to the company.

11.34 Both Gabrissa Hartman and An-Adin Quadina have not commenced repaying their loans for $40,000 each, as the construction of the houses have not been completed."

ISSUES

12. The following issues are to be determined by the Court.

1. Was there Agreement on the $40,000 Construction Contract Price?

2. Was there Representation by the Defendants to the Plaintiff on the Inadequacy of the Contract Price?

3. Was there an Obligation on the Part of the Plaintiff to review and revise the Contract Price?

4. Was there Substantial Change to the Price of Contract as Suggested by the Defendants that Radically Rendered the Contract Different from the Original?

5. Was the contract frustrated and were the defendant entitled to abandon the contract?

GENERAL CONSIDERATION

13. It is important, in considering the legal positions of the parties' visa'vis the issues raised above, to re-visit the important and relevant provisions of the contract.

Relevant Provisions of Terms and Conditions of the Contract

14. The contract between the Government and Jaytel Construction, the contractor, for the construction of the Gabrissa Hartman house is identical in its terms to that between the Government and the contractor, for the construction of the An-Adin Quadina house.

15. The relevant provisions maybe summarized as follows:

1. Clause 1- Main Obligations
   - (i) Contractor has agreed to be engaged, to provide the works on the terms and conditions of the contract
   - (ii) Contractor has fully informed itself on all aspects of the Government's requirements and has:
     - (a) Submitted an offer; and
     - (b) Represented that it has the requisite skills and experience to meet those requirements.
   - (iii) Contractor will carry out and complete the works in accordance with the contract.

2. Clause 4 – Warranties

   The contractor guarantees that work will be performed in a proper and workmanlike manner in accordance with the plans and specifications.

3. Clause 6 – Building Period

   The agreed building period is 60 days from the commencement date (7 days from the signing of the contract), subject to extension of time under Schedule 4.

4. Clause 7 – Variations
   - (i) Plans and specifications of work may, with agreement of parties, be varied
   - (ii) Extension of Practical Completion date may also be varied
   - (iii) There is no variation allowed to an increase in the $40,000 contract price.

5. Clause 8 – Payment

   By instalments of:

(a) 60% of contract price within 7 days of signing of the contract,

(b) 30% of the contract price within 7 days upon completion of the roofing, and

(c) 10% of contract price within 7 days of Practical Completion.

6. Clause 9 – Practical Completion

   When the contractor gives written notice to the Government of the completion of works and Government Building Supervisor gives completion certificate.

7. Clause 11 – Liquidated Damages

   If the contractor defaults and does not reach Practical Completion, it is liable to pay 50% per day until Practical Completion or to a maximum of $4000 amount in damages.

8. Clause 17 – Disputes

   (i) In case of dispute between the parties, there be first direct negotiations between the contractor and the Building Supervisor

   (ii) If unresolved, matter to be referred to the Chief Secretary who may appoint an arbitrator.

9. Clause 19 – Termination

   (i) In case of serious breach by either party, there is obligation to remedy the breach but if it continues within 5 days thereafter, the other party may, by written notice, terminate the contract

   (ii) A serious breach includes, *inter alia,* failure to reach Practical Completion.

Jaytel's Contractual Obligations

16. The first defendant, Paul Hartman, as the purported beneficial owner of Jaytel Construction Company, had signed on behalf of the company, the contract to build Gabrissa Hartman's house on 13 February, 2013 and the contract for An-Adin Quadina's house on 26 February, 2013 respectively. In so doing he was representing himself and

the company to the Government that not only do they fulfil all the requirements under Clause 1 of the Contract Terms and Conditions but, specifically and importantly, they possessed the "requisite skills and experience" to "carry out and complete "the necessary works required to complete the buildings within the time allowed and the resources allocated.

17. The contractor had furthermore acknowledged that it has fully informed itself of the requirements under the contract, including the contract price of $40,000 under Clause 8 before it submitted its offer and signing the two contracts. It is worth noting also that prior to the signing of the contracts; the first defendant had earlier confirmed that Jaytel was satisfied with the terms of the housing scheme in his 20 August letter to the Government saying:

    "I Paul Hartman, owner of Jaytel Construction Company have accepted all the terms of the new Nauru housing scheme and would like 60% cash upfront to help us commence with the housing project without any delay."

18. More particularly as to the Draft Bill of Quantity, which sets out the job description and materials required for the construction of the building, the first defendant, in reply to the Secretary of Cabinet's letter on 12 September 2012, querying whether the first defendant was agreeable to the contract and the Bill of Quantity, Mr. Harman responded at the bottom of the letter with the notation:

    "I Paul Hartman agree all the terms and condition of the Housing scheme contract."

Was there Agreement on the $40,000 Construction Contract Price?

19. This is a question of fact and law.

20. The defendants argue that the company was never consulted on the costing of the houses. "The figure of $40,000 was determined solely by the plaintiff and the Engineering Department, RONPHOS Corporation."

21. The contractor further emphasized that it never approved nor represented to another that the $40,000 costing was adequate. It was not consulted, nor did it participate in the costing exercise. It instead relied on the figures given by the plaintiff as adequate. Further, the defendant submitted that they had made representations, both oral and in writing, to the plaintiff arguing that the construction price of $40,000 was inadequate. This was after they have completed building their first two (2) houses.

22. The plaintiff for its part claims that the costings for each of the houses were set out in a detailed schedule, which all the construction companies that bid, including Jaytel, had obtained copies of. The company was free to check and work out its own costings to compare to the schedule and more importantly to the overall contract price of $40,000. Yet, notwithstanding its own experience in the building industry and the opportunity to consult with independent quantity surveyors and such like, the defendants went ahead and voluntarily signed the tender documents of its own free will.

23. It is very clear from the evidence before this court, that both the first and second defendants have extensive experience in the construction industry. The first defendant Paul Hartman identified before the court as the manager of Jaytel construction company, although he had in various correspondence between the Government and the company, signed his name and represented himself as the owner of the company.

24. While he possessed no professional qualification he stated in evidence that he had wide and extensive experience, more than twenty (20) years in building houses in the construction industry.

25. The second defendant Bunion Seymour, according to his evidence, is the owner of Jaytel construction, with his wife and the sister of the first defendant, who succeeded to became the owner of the company around 2013. The second defendant had attended the Fiji National University and attained a Trade Diploma in Building, on a two year program. Prior to attending the Fiji National University, Mr. Seymour was employed for five (5) years by the Republic of Nauru Phosphate Corporation (RONPHOS) first as a

tradesman then as a supervisor. Upon his return from Fiji University studies in 2011, he re-joined RONPHOS, as an assistant engineer.

26. It was sometime soon after he re-joined RONPHOS, that Mr. Seymour learnt that the Government was interested in RONPHOS blueprint for its own housing scheme. The blueprint is titled: "RONPHOS NAURU HOUSING SCHEME- 3 BEDROOM RESIDENCE PLAN PROJECT." It was subsequently used as the model for the Governments very owns housing scheme. The blueprint Table of Contents set out in great details the costs including the Bill of Quantity. A bill of quantity is normally the document that is used in tendering in the construction industry detailing materials, parts and labor costs, including the timeframe of the construction to be completed.

27. What is most significant in the compilation of the Bill of Quantity details that was submitted by RONPHOS to be used by the Government, was the fact admitted by the second defendant Mr. Seymour. When cross-examined by the plaintiff's counsel, that Mr. Seymour conceded that he himself played a very active role in the preparation of the Bill of Quantity and specifically, the estimates of cost of materials, the schedule, (meaning the four (4) phases towards completion) and the timeframe. The actual completion timeframe of the contract were part of the new "blue print" to be used by the Government.

28. In his evidence, Mr. Seymour revealed that the total estimate of the costs of the blue-print based on the RONPHOS model when he discussed the model with the Government was approximately sixty thousand dollars ($60,000). Government representative had negotiated and beaten down the estimate from $60,000 to $40,000. To enable him to depress the estimate to $40,000, Mr. Seymour excluded from the costings in the bill of quality items on page 7 of the blueprint specifically items:

    14. Concrete septic tank
    15. Water- tank 5000ltr and base
    16. Plumbing connection.

17. Tiling

18. Site Work

These items essential to the building for it to be completed and became habitable, were not included in the costs submitted by Mr. Seymour in the attempt to reduce the contract cost to $40,000.

29. It is with these background facts which Mr. Seymour, as the owner of Jaytel Constructions was well aware of, that the company, through the first defendant, Paul Hartman, accepted the terms of the contract as evident from his correspondence of 20 August 2012 and 12 September 2012. The contracts formally signed on 13 and 26 February 2013, to build the two houses for Gabrissa Hartman and Adin Quadina respectively, represented the final acts in the contract negotiations.

30. On 16 November 2012, the second defendant was appointed as the Government consultant for the new housing project. He was still the owner of Jaytel Construction Company whilst he took on his new role as the consultant and supervisor of the housing project.

31. In this case, the Court is satisfied that the defendants had willingly entered into the agreement with the full knowledge of the terms and conditions of the contract including the contract price of $40,000.00, and by signing it are legally bound to adhere to its terms. The defendants were not at any time coerced into signing the contract.

32. The claim that the price had been set and that the defendants had no choice is *"take-it-or-leave-it"* dilemma, according to defense counsel, is totally without merit. The company was being managed by the first defendant, who has had at least 20 years' experience in the construction industry. The owner of the company the second defendant, is a qualified buildings and construction supervisor and furthermore knew in details, as the person responsible for the costing of the materials and labour for this Government Housing Scheme, of the reduction of the estimate of Contract Price to

$40,000.00. A responsible company given all of these factors would have either negotiated the price to a realistic one or, failing that, would have walked away. The defendant did neither, but signed the contract instead.

33. As a matter of law, the requisites of a contract has been fulfilled. There was the call for tender and followed by the offer represented by the details in the terms and conditions of the agreement. The offer was accepted informally by the letters of the first defendant dated 20 August 2012 and 12 September 2012 notation as a footnote to the Secretary for Cabinet's letter, and the contract was formally sealed signed and delivered between the Chief Secretary on behalf of the Government and plaintiff, and Paul Hartman, representing the defendants company, on 13 February 2013 in respect of Gabrissa Hartman's house and 26 February, 2013 in respect of An-Adin Quadina's house.

34. Blackburn J in ***Smith v Hughes (1871) LR. 6 Q B 597 at p.607,*** sets out the test as to what constitutes an agreement, as follows:

    "If wherever a man's real intention maybe, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

35. The Court finds in all the circumstances, that in both fact and law, the parties had entered into legally binding contracts of 13 and 26 February, 2013 for the price of $40,000.00 each.

Was There Representation by the Defendants to the Plaintiff on the Inadequacy of the Contract Price?

36. This is a question of fact.

37. There is nothing in the evidence by the plaintiff or the defendants to point to the serious concern of the defendants on the contract price being too low, raised directly with the Government.

38. The only mention of the inadequacy of the contract price was the indirect reference in Mr. Seymour's report, as the Government's consultant, not as owner of Jaytel Company, in his report submitted in accordance with his responsibilities under his consultancy contract. Under Clause 3.1 of this contract "Terms of Reference" Mr. Seymour was required to:

> *"3(1) (f) provide weekly updates to Secretary for Cabinet regarding the progress of each of the houses,*
>
> *(g) Liaise with the Secretary for Cabinet in relation to any delays of issues".*

39. In furtherance of his duties specified, Mr. Seymour wrote to the Secretary to Cabinet on 6 February, 2013 stating:

> *"Some of the disadvantages encountered by these constructors which caused some slight delay in time are due to the unavailability of materials and price increase of materials on the island and also the constant unpredicted changes in our weather forecast."*

40. It is important to emphasize that Mr. Seymour was raising the issue of delay and building materials costs, as an agent of the Government, not as the owner of Jaytel Company.

41. In any case, Mr. Seymour did not elaborate on the building materials concern, but proceeded to, in the same report, request for the payment of the third instalment funds, representing the 10% final and balance of payment of which under the contract, was only payable seven (7) days from the practical completion date.

42. To compound the issue of the third and final payment, Mr. Seymour in the same letter requested for an extension of two (2) weeks of the contract to allow Jaytel to complete the houses.

43. The Government according to the Agreed Facts (Para 11.15 herein) acting out of the concern raised by its consultant in his 6 February, 2013 report, decided to increase the contract price by $4,000 to $44,000. This was confirmed when Mr. Seymour assured the

Court in his evidence that he was responsible for the Cabinet increasing to contract price by $4,000. There is no evidence notwithstanding the Agreed Facts Concession by the plaintiff, to show that the Government had acted to increase the contract price as a direct result of any of the construction companies' efforts to review it.

44. The completion date (Date of Practical Completion) for Gabrissa Hartman's house was 24 June, 2013; An-Adin Quadina's house on 28 June 2013. Except for Mr. Seymour's report I have referred to above, there is no evidence of any direct approaches made by the defendant's company, on the contract price during the life of the two contracts. On the contrary, the only relevant contacts between the defendant company and the Government before the Date of Practical Completion, June 2013, was from the first defendant, Paul Hartman in his letter dated 7 May 2013, addressed to Mr. Seymour as Consultant, requesting the payment of the second installment contract price, not only in respect of the two houses belonging to Gabrissa Hartman and An-Adin Quadina, but payments of the second installment for all the ten (10) houses, at various stages of construction that were being built by the defendant company.

45. Counsel for the defendant submitted that the construction company was finding it difficult to complete the various housing units and they had contracted to build because of the shortage of funds, that they introduced a system colloquially referred to as "**the borrow – fund system**".

46. The "**borrow-fund system**" describes a scheme whereby the company relies on the advance instalment payments to the new housing units to enable it to complete the phases of the other houses. This means for example, the payment and the utilization of contract money earmarked for Unit B to complete Unit A, and the instalment payments scheduled for Unit C is used to complete Unit B and so on.

47. The system obviously is incompatible with the terms of the contract. We will come back to this issue. It is sufficient from all the evidence before the court for it to conclude that at no time was there any serious attempts made by the defendants to discuss directly

with the Government the issue of the contract price being insufficient to cover the total cost of the building of the houses. There were no request or even a demand for a review of the contract price, notwithstanding the prohibition set out in the contract terms. The defendants merely raised their concern, whilst requesting advance payments of instalments to cover the shortfall.

48. What actually was happening on the grounds, the Court believes, was that the defendant realizing that they were running short of funds to continue with the construction of the homes they were building, were not only using the borrow- fund scheme to get the additional funds, but were also, at the same time, asking for the Government to award them new contracts for additional houses so that they would be able to quickly access the 60% contract price stage 1 payment. As early as February 2013 the defendants through the Consultant were asking for allocations of two (2) additional houses even though they were still struggling with the funding for their then current houses.

49. It was only after June 2013 date of Practical Completion of the Contracts had passed, and with the extensions of two (2) weeks granted on 6 February 2013 and the serious concern of the Government of the construction of some houses not being completed as highlighted in the Consultant's progress report, that the defendants and the other construction companies taking part in the project, began any serious and meaningful discussions with the Government on the inadequacy of the contract price.

50. To compound the matter further the first defendant, Paul Hartman, on behalf of Jaytel Company, requested in his letter to the Secretary to Cabinet of 1 July, 2013, an extension of six (6) months in all of the company's building projects.

51. In his response to Paul Hartman's letter of 1st July, 2013 for 6 months extension of Jaytel Company's Contracts, the Secretary to Cabinet granted extension of two (2) houses to 31 September 2013 and three (3) houses to 31 November, 2013. At the same time the

Secretary to Cabinet warned the company that the Government will invoke the liquidated damage provisions under Clause 11 of the contract, should the company fail to complete the project on the Practical Completion dates. The follow-up Progress Report tabled by Mr. Seymour, as Consultant, stated that the project was progressing well.

52. From July 2013 until July 2014 it appears, from the dearth of correspondence and or evidence produced by either parties into Court, that no further concerns were raised. It was only on 2 July, 2014 in a letter from Mr. Hartman to the Secretary of Cabinet, did the issue of delay raised with particulars as to the causes namely, the unavailability of materials and the loss of skilled labour to Topside RPC. Mr. Hartman formulated and submitted a schedule of dates of Practical completion, on August 2014 to April 2015 for the remaining four (4) housings in the defendant's care. It was at this moment, the Court believes, that Government concluded that it had a serious problem with the real possibility of incomplete houses in its Housing Scheme Project.

53. The Government's concern gave rise to the convening of meetings of 8 August 2014, 1 September 2014 and 31 October 2014 between the plaintiff represented by Dexter Brechtefield, Government's Project Officer, and the representatives of the building contractors including Paul Hartman for Jaytel Company at the first meeting and Mr. Bunion Seymour for the second and third.

54. These meetings finally provided the proper forum in which the problem of rising costs and transportation of building materials to Nauru as well as the shortage of workers and loss of skilled tradesmen to Topside RPC, were raised and discussed. Even then the points of continuing to completing of the remaining houses under the old conditions had already passed. A late submission by Mr. Seymour at the 1 September 2014 meeting and again on 31 October, 2014 for a 30% increase in contract cost, were refused by Mr. Brechtefeld.

55. Mr. Paul Hartman when asked by defense counsel at what point in time did he realize that the contract price of $40,000 was an *"underestimate"*, answered that it was in April 2013 when the report was being prepared for Cabinet on the progress of the housing scheme. The report of 28 April 2013 stated that Jaytel Company still had five (5) houses to complete; four (4) were at Phase 1, whilst the fifth had the foundation laid. Yet at no time, following this realization, did Paul Hartman directly approach the Government to discuss the insufficient Contract price and the rising costs of building materials.

56. In the Court's view, while it accepts that there may have been informal approaches, including discussions initiated by the defendants, that the contract price was inadequate, no formal or written complaint or, concern were made by the defendants and referring specifically to the remedy provisions under the contract, until much later, when the plaintiff was on the verge of terminating the contract.

Was there an Obligation on the Part of the Plaintiff to Review and Revise the Contract Price?

57. This is a question of law.

58. Clause 7 of the Contract deals with variation is pertinent. In particular Clause 7 (5) stipulates that *"The Government does not agree to make any variation to the Contract which will result in any increase in the Contract Price."*

59. On plain reading of this provision one is apt to draw the conclusion that is amounts to an absolute prohibition. However, on further reading of the provisions of Clause 7 (1) it would, in the Court's view, suggest that Clause 7 (5) is a restriction, not a prohibition. Under Clause 7(1), the parties, that is, the Government and Jaytel Construction may vary this contract *"if both parties are in agreement*" and is in writing and signed by them. It is significant to note that the Government unilaterally decided to vary, on 22 February, 2013 the price of the contract on its own Consultant's Report.

60. Was there any obligation on the part of the Government to review the contract and specifically as to the price? The answer is that it is possible but only if the defendants had specifically requested it formally and in writing under Clause 9 (1) of the contract. There is no evidence that they had done so. It would seem to the court that the defendants had somehow convinced themselves that the $40,000 contract price was immovable because of Clause 7 (5), they did not make any attempt to invoke the provisions of Clause 7 (1) and instead opted for the "borrow- fund" scheme. The court emphasizes that at no time did the defendants ever attempt to use the provisions for variations under Clause 7 or the dispute provisions under Clause 17, to raise their complaints and dissatisfactions with the plaintiff on the conditions of the contract.

61. Merely raising the concern of the rising costs of building materials, albeit, through the office of the Government consultant, Mr. Seymour, does not amount to the defendants invoking their rights to negotiate a variation under Clause 7 of the contract. The defendants' rights recognized under the contract needed to be formally invoked by them before arguments can be advanced that the plaintiff was obliged to act or respond to the demand.

62. This was a written contract and the remedies when sought, ought to have been in writing pursuant to the contract provisions.

Was there Substantial Change to the Price of Contract as Suggested by the Defendants that Radically Rendered the Contract Different from the Original?

63. This is a mixed question of law and fact.

64. In his evidence the second defendant Bunion Seymour, stated that in his discussion with the Government officials leading to the adoption of the RONPHOS housing scheme blueprint by the Government, the total costings per house cost was discussed. He informed the Government officials that the RONPHOS total costs per unit were $60,000. The Government managed to negotiate the price downwards to $40,000, and Mr.

Seymour agreed but in the Bill of Quantity, the reduction on the contract price is reflected in a special column under Costs of Materials, titled *"Additional work and Materials not included in the $40,000.00"* that included the Concrete septic tank, water tank 5000ltr and base, plumbing connection, tiling and site work. All of these items it must be emphasized are essential parts of a residential house. A separate costing exercise for these additional works and materials was made later by Mr. Seymour and he estimated the total costs at $8,868.00

65. In his evidence, the first defendant when asked what he estimates to be the costs of completing Gabrissa Hartman's and An-Adin Quadina's houses, he said that it will amount to approximately $70,000 for both houses.

66. That fact that the final costs of each house proved to be higher than the original contract price will not ***ipso facto*** make the Contract substantially different from that entered into by the defendants. The plaintiff, in accepting that Mr. Seymour's estimate as the Government's consultant on the housing project, may have decided that there was some merit in the consultant's assessment that there may be an underestimate of the contract price, so it had increased the price to $44,000. However, the risks of the final cost being higher, is always taken and accepted as foreseeable in a building contract, and the risk is assumed by the contractor in signing the contract. This possibility alone does not amount to a substantial change to the contract that it rendered it totally different from the original. The defendants promised to build the two houses and that remained their contractual obligation throughout. The higher price to pay to complete does not amount to a supervening event than renders the contract radically different from that which the defendants had undertaken by the contract: ***CTI Group Inc.v. Transclear SA.* [2008] EWCA Civ 856.**

67. There were other additional issues such as impossibility of performance and unconscionable conduct of plaintiff that defense counsel raised in his final written submissions. The rules of procedure does not permit the Court to consider such issues

however pertinent, if they had not been raised in the pleadings or argued in the course of the hearing.

Was the Contract Frustrated and Were the Defendants Entitled to Abandon It?

68. This is a mixed question of law and fact.

The Doctrine of Frustration

69. This case in the end, stands or falls on the issue of whether the contract to build the two(2) residences earmarked for Gabrissa Hartman and An-Adin Quadina at Ijuw and Menen Districts respectively, were frustrated and thereby discharging the defendant, Jaytel Construction Company, from its obligation to complete the construction of the said residences.

70. GH Treitel's "The Law on Contract"(5th Edition), sets out in great details the history of the doctrine from the time the law viewed most contractual duties as absolute, as illustrated in ***Paradine* v *Jane*** (1647) Aleyn 26, where the claim by a tenant that he had been dispossessed from the property by act of the sovereign's enemy and was therefore not able to meet his contractual obligation to pay rent, was dismissed by the court holding:

"When the party by his own contract creates a duty of charge upon himself, he is bound to make it good notwithstanding any accident by inevitable necessity, because he might have provided against it by the contract."

The law in ***Paradine*** has since been modified in cases of:

(i) Supervening illegality
(ii) Supervening destruction of the subject-matter
(iii) Commercial object of the contract has been frustrated.

71. Supervening illegality is when one of the parties' actions, in attempting to fulfil its contractual obligations, would be illegal under the laws of the contract. Thus in ***Atkinson***

v Ritchie (1809) 10 East 530, a charter party under which a British ship was required to load cargoes from a foreign port which became an enemy when war broke out between Britain and the country to which the port belonged was, on public policy grounds, deemed reason to discharge the charter party from its contractual obligations.

72. The supervening destruction of the subject matter as ground for frustration of a contract is illustrated in ***Taylor v Caldwell*** (1863) 3 B&S 826. The plaintiffs in the case, had contracted with the defendants for the hire of a music hall for concerts but the hall was burnt down before its use by the plaintiffs. The plaintiffs filed an action to claim damages, but the court held that he defendants were discharged from their contractual obligations by the burning down of the hall.

73. The third exception to the doctrine of absolute contracts, is where the commercial object of the contract is frustrated. The case of ***Krell v Henry*** [1903] 2 KB 740 illustrates the modification. The defendant had hired a flat in Pall Mall, London, for the days planned for the processions on the coronation of Edward VII, to witness the events. The contract was held to be frustrated when the processions were postponed due to the King's illness.

74. The courts are careful however to draw a line against including all events that may have not been anticipated, that is, such "uncontemplated turn of events" as frustrating a contract. Lord Simon in the House of Lords decision in ***British Movietone News Ltd v London and District Cinemas*** [1952] AC 166 at p. 185, said:

" The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – wholly abnormal rise or fall in prices, a sudden depreciation in currency, an unexpected obstacle to the execution, the like. Yet this does not itself affect the bargain which they had made."

75. The application by the court of strict liability for breach of contract, even if the supervening event, is totally beyond one's control, is seen in ***Lewis Emmanuel & Son Ltd v Sammut*** [1959] 2 Lloyd's Rep 629, where the seller of goods was held liable for not

being able to ship them, even though the lack of shipping space which he had reserved, was no longer available due to events entirely beyond the seller's control.

76. In this case, the defendants are claiming that the contracts to build the two (2) houses for Gabrissa Hartman at Ijuw District and An-Adin Quadina at Menen District, were frustrated by the "inadequate" construction price of $40,000 for each of the houses, given the escalating costs of materials and labour.

77. Further, they argued that in spite of representations made to the plaintiff that the Contract price was not enough to build and complete the two (2) houses in question, the plaintiff failed to respond. The defendants added:

"The plaintiff frustrated the contract by not responding to the correspondence made by the contractor within reasonable and by its refusal to renegotiate the construction price of the houses."

The Court had already rejected the defendants' arguments, but even if were for one moment, accept it, did it amount to frustration?

78. The leading authority on frustration of a building contract is ***"Davis Contractors Ltd v Fareham Urban District Council [1956] AC 696:*** There the Contractors entered into a building contract to build 78 houses for the local authority for a fixed sum and within a period of eight months. The Contractors had qualified their tender with a letter stating that the contract was subject to the adequate supplies of labour when required. The Contract was not completed until 22 months later due to labour shortage. The Contractors claimed that the contract was frustrated and argued that they were entitled on a quantum merit, to the sum in access of the Contract price. The House Lords held that the letter by the Contractors submitted with their tender was not part of the contract. It further held that the contract had not been frustrated. The determination of whether a contract has been frustrated in the Court's view is to ask the question whether causes of delay or the delays were *"fundamental enough to transmute the job the*

Contractor had undertaken, into a job of a different kind, which the contract did not contemplate and to which it could not apply." (per Lord Reid at p.723)

79. In a building contract, the mere fact that there is risk of the costs being higher or less on that delay will result is not necessarily matters that can be rested on as elements of frustration. As Lord Reid stated in ***Davis Contractors Ltd (Supra) p.724:*** *"In a contract of this kind the contractor undertakes to do the work for a definite sum and he takes the risk of the cost being greater or less than expected. If delays occur through no one's fault that may be in contemplation of the contract and there maybe provision for extra time being given: to that extent the other party takes the risk of delay. But he does not take the risk of the cost being increased by such delay."* (emphasis added)

80. Lord Reid added that the fact the delay was greater in degree then was to be expected was of little consequence, concluding: *"It was not caused by any new and unforeseeable factor and event: the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract."* (emphasis added)

81. More to the point and very relevant to the circumstances of this case is the utterances of Lord Radcliffe in the same case at p731 as follows:

"Two things seem to me to prevent the application of frustration in this case. One is that the course of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials are not available was before their eyes and could have been the subject of special contractual stipulation. It was not made so. The other thing is that, though timely completion was no doubt important to both sides, it is not right to treat the possibility of delay as having the same significance for each. The owner draws up his conditions in detail, specifies the time within which he requires completion, protects himself by a penalty clause for time exceeded and by calling for the deposit of a guarantee bond and offers a certain measure of security to a contractor by his escalator clause with regard to wages and prices. In the light of these conditions, the contractor

makes its tender, and the tender must necessarily take into account the margin of profit he hopes to obtain upon his adventure and in that any appropriate allowance for the obvious risks of delay. To my mind, it is useless to pretend that the contractor is not at risk if delay does occur, even serious delay. And I think it is a misuse of legal terms to call in frustration to get him out of his unfortunate predicament." (emphasis added)

82. The contractor Jaytel Company owned by the second defendant, someone who is well qualified in construction and building industry, and who was instrumental in setting out the final details including the all important Bill of Quantity for the tender documents used by Government; and the first defendant, the manager of the company, and who has 20 years' experience in the same industry, both should have foreseen the possibility of delays due to shipment and transportation difficulties given the geography and distance of Nauru.

83. Both defendants should have foreseen also the possibility in the rise of the costs of building materials as well as the scarcity of skilled labour. They were well positioned and qualified to ask for the inclusion of an escalation clause in the contract, to protect them from rising costs in the industry. In all the circumstances of this case, the court shares the view of Lord Radcliffe in "***Davis Contractors Ltd (Supra)***," that it would be a misuse of the legal terms to call in the doctrine of frustration to get the defendants out of their legal obligations under the contracts.

84. In this case, the court is of the view that, the defendants are still legally bound by the terms and conditions of the two (2) contracts they had entered into with the Government of Nauru on the dates specified. The defense that the contracts have been frustrated for the reason that the contract price of $40,000 was too low and inadequate is without merit and is hereby dismissed.

85. Having concluded that the contract remains binding in the defendants, then it follows as a matter of course that they cannot opt out of the contract and their obligations under it.

REMEDIES

86. The plaintiff is entitled to the following reliefs;

    (i) Specific reliefs

    (ii) Damages

    (iii) Restitution

87. Under specific relief remedy, the plaintiff in this case, is entitled to demand the defendants undertake to complete the two houses. The plaintiff had not sought this remedy, understandably given the facts that the defendants are not in a financial position to complete the task.

88. As for damages, the plaintiff is entitled to claim liquidated damages as provided for under Clause 11 of the Contract and the Court finds that pursuant to Clause 11 (3), the defendants are liable to pay the plaintiff the sum of $4,000 in respect of each of the two houses.

89. The plaintiff furthermore is entitled to restitution, to enable it to claim back the total sum paid to the defendants in respect of the two uncompleted houses. The parties in the Agreed Facts accept that the plaintiff had fully paid $37,200 to the defendants for each of the two houses. The plaintiff is therefore entitled to the amount of $74,400 as restitution.

CONCLUSION

90. In the final, the court finds the defendants had, in failing to complete the houses designated for Gabrissa Hartman and An-Adin Quadina, in accordance with the Contract terms, had breached the terms of the said agreements and are liable to the plaintiff and are hereby ordered to pay as follows:

1. Liquidated Damages in the sum of $8,000 pursuant to Clause 11 (3) of the contracts.
2. Restitution in the total sum of $74,400 representing the instalments payments, already received and acknowledged by the defendant, in respect of the two houses.
3. Costs to the plaintiff to be taxed, if not agreed.

Filimone Jitoko
Chief Justice