



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
CIVIL DIVISION**

**G 88 of 2020**

- 1. NEIL PURTON**
- 2. MICHELLE PURTON**

**Plaintiffs**

**AND**

- 1. DAVID HOLDEN**
- 2. MICHELLE HOLDEN**

**Defendants**

**IN OPEN COURT**

**Appearances:** **Mr James Kennedy of KSG for the Plaintiffs and  
Mr Anthony Akiwumi of Etienne Blake for the Defendants**

**Before:** **Hon. Mr Justice Alastair Walters (Actg.)**

**Heard:** **17, 18, 19 November 2021**

**Draft Judgment circulated:** **9 December 2021**

**Judgment Delivered:** **17 December 2021**

**HEADNOTE**

*Breach of contract, illegality, Development and Planning Act, implied terms*

**JUDGMENT**

**Background**

1. This matter relates to a dispute between the Plaintiffs and Defendants over an agreement based on an offer to purchase real estate dated 29 May 2017 (the “Contract”). The Defendants offered to purchase from the Plaintiffs a house situated on Galway Quay in Crystal Harbour, Grand Cayman and registered with the Cayman Islands Land Registry as West Bay Beach North, Block 17A Parcel 47 (the “Property”). The offer was accepted by the Plaintiffs on the same date. The sale and purchase was completed on 31 July 2017.



2. The Contract not only provided for the sale and purchase of the Property but also provided that the Plaintiffs would, at their expense, carry out some building works (the “*Additional Works*”, as defined below) to the Property for the benefit of the Defendants. Some of the Additional Works were to be completed prior to the sale completing and some to be completed afterwards. A sum of US\$315,000 (the “Retention”) was retained from the purchase price for the Property in respect of the cost of the Additional Works and was held by the Defendants’ attorney pending satisfactory completion of the Additional Works. It is in relation to that part of the Contract that the dispute has arisen.
3. Of the parties, only Mr Purton and Mr Holden, the First Plaintiff and First Defendant respectively, have seemed to play an active part in the proceedings and they were the only lay witnesses to give evidence at trial.
4. I should say at this point that I believe that this is a case that was eminently suitable for resolution by way of mediation. When I asked counsel for the parties at the start of the trial whether there had been any attempts to mediate, they said that there had not. That, I believe was a missed opportunity.

### **The Proceedings**

5. The proceedings were commenced by way of a Writ and Statement of Claim issued on 28 May 2020. As mentioned above, the Additional Works included some minor works to the Property to be carried out prior to the sale completing. Those were installation of automated entrance gates, construction of a wall and side gate and filling and repairing any holes or damage caused by the Plaintiffs when moving out along with redecorating (the “Pre-Completion Additional Works”). These were carried out by the Plaintiffs prior to completion.
6. The remainder of the Additional Works involved the construction of a 3 car carport (the “Carport”) and an extension of the master bedroom (the “Master Bedroom Extension”). In the Contract, US\$65,000 of the Retention was expressly stated to be attributable to the cost of the Carport and US\$250,000 to the cost of the Master Bedroom Extension. No part of the Retention was expressed to be attributed to the Pre-Completion Additional Works, although that does not necessarily mean that the parties either expected that those works would be carried out for free or that they were to be paid for out of the balance of the purchase price as opposed to the Retention.



7. Both the Carport and Master Bedroom Extension required planning permission and building approval prior to being started. This is a two stage process with separate applications being made to the Central Planning Authority (“CPA”) for planning permission and, subsequent to planning approval being granted, to the Building Control Unit (“BCU”) for building approval. The planning approval process is governed by the Development and Planning Act (2021 Revision).
8. On 19 July 2017 Mr Purton applied for planning permission in relation to the Master Bedroom Extension. Planning permission was granted on 13 September 2017 and in November 2017 plans for the Master Bedroom Extension were submitted to the BCU. BCU approval was granted on 8 May 2018. In April 2018, the Defendants indicated that they wished to delay the works to the Master Bedroom Extension until 1 September 2018. By 1 August 2018 they had decided not to proceed with the Master Bedroom Extension. On 1 September 2018 the Defendants indicated through their attorney that they no longer wished to proceed with those works.
9. In April 2018 Mr Purton started construction of the Carport without obtaining the requisite planning permission or building approval and concealed the lack of permission and approval from the Defendants. The Carport was substantially completed by the third week of June 2018. Mr Purton attended to a number of extra finishing works requested by the Defendants and on 25 July 2018 requested payment for that part of the Additional Works. In September 2018, when the Defendants discovered that the Carport had been built without planning permission Mr Purton was, by agreement, given the opportunity to apply for planning permission and BCU approval after the fact (“ATF Approval”) with payment for the Carport deferred until that had been granted. ATF Approval was ultimately granted but the question of payment for the Carport got subsumed into an argument between the Plaintiffs and Defendants about the boundary lines for the Property.
10. None of the Additional Works have been paid for and the retention of US\$315,000 was released back to the Defendants by their attorney.
11. In summary, the Plaintiffs’ claim is for damages for breach of contract being US\$65,000 in respect of the Carport on the basis that ATF Approval was obtained and US\$250,000 in respect of the Master Bedroom Extension on the basis that by failing to allow the Plaintiffs to complete the relevant work the Defendants prevented them from receiving the US\$250,000 and thereby also getting paid for the Pre-Completion Additional Works.



12. The Defendants served a Defence and Counterclaim on 25 June 2020. The main grounds relied on by the Defendants by way of defence are as follows:
- 12.1 obtaining planning permission and BCU Approval was a condition precedent to starting the Carport and Master Bedroom Extension;
  - 12.2 the Plaintiffs owed the Defendants a duty of integrity/good faith;
  - 12.3 the Plaintiffs were obliged to complete the Pre-Completion Additional Works in accordance with the Plans and Specifications (as defined in the Contract) and that it was a condition precedent to the works that the Plaintiff would take all reasonable care not to encroach on property outside the boundary of the Property;
  - 12.4 it was an implied condition of the Contract that time was of the essence for completion of the Additional Works and the Plaintiffs failed to comply with this condition, and, in the case of the Carport, built an illegal structure;
  - 12.5 the Plaintiffs misled the Defendants in relation to the question of planning permission for the Carport and the Defendants had relied on the Plaintiffs representations to that effect;
  - 12.6 the Plaintiffs' fraudulent representations provide the basis for the Defendants' claim that the contract was rescinded;
  - 12.7 and/or that the Plaintiffs breached a duty of good faith in the performance of the Additional Works;
  - 12.8 the Plaintiffs conduct was illegal and allows the Defendants to rely on the legal principle of "*ex turpi causa non oritur actio*" (a plaintiff cannot pursue a claim for damages if it arises in connection with his own illegal conduct or wrongdoing);
  - 12.9 the Carport could not have been completed on 3 August 2018 because it was an illegal structure;
  - 12.10 the Plaintiffs were in repudiatory breach of the Contract; and,
  - 12.11 the Defendants were entitled to rely on the Plaintiffs' delays, breaches, misrepresentations, breached of their obligation of good faith/integrity when deciding not to proceed with the Master Bedroom Extension.
13. By way of counterclaim, the Defendants claim that the Carport was defectively constructed, is incorrectly placed on the Property, that the entrance to the Property itself is on adjoining land which the Plaintiffs did not own and that the National Roads Authority ("NRA") would not sanction a re-



parcellation or re-drawing of the boundaries to the Property because to do so would inhibit access to the Property and adjoining properties.

14. As a result, it is claimed that the Defendants have suffered loss which requires them by way of mitigation to regularize the boundary of the Property and re-construct the entrance to the Property requiring the removal of the Carport. Anticipated costs were stated to be CUS\$125,000 (paragraph 25 of the Counterclaim).
15. The Defendants also claim that because of the matters set out in their Counterclaim, including defective title and encroachment, the value of the Property was less than the price agreed to be paid in the Contract. They claim damages based on an alleged loss in value of the Property, the loss of opportunity for sale because of the matters pleaded in their Defence and a right to set off the anticipated costs of CUS\$125,000 (paragraphs 26 and 27 of the Counterclaim).
16. A relatively short Reply and Defence to Counterclaim dated 13 July 2021 was served on behalf of the Plaintiffs:
  - 16.1 admitting that planning permission and BCU approval was required in respect of the relevant Additional Works but denying that it was a condition precedent;
  - 16.2 denying that a duty of integrity/good faith was owed;
  - 16.3 averring that the Plaintiff was obliged to construct the automated gate in accordance with the Plans and Specifications and that the gate posts and relevant section of wall were already built before the gate was installed;
  - 16.4 denying that time was of the essence and that the Carport was substantially complete within 10 weeks;
  - 16.5 denying that the Carport was constructed illegally but averring that, even if it was, any illegality has been rectified by the Plaintiffs at their cost;
  - 16.6 denying that the Defendants were entitled to keep the amount of the Retention other than to apply it to completing the Additional Works;
  - 16.7 admitting that the Carport was constructed without planning permission but claiming that the Defendants are estopped from relying on any breach of contract by virtue of permitting the Plaintiffs to remedy the breach by obtaining ATF Approval, encouraging the Plaintiffs to spend money in so applying and that the



Defendants have been unjustly enriched to the extent that they have a properly constructed Carport which they have refused to pay for;

- 16.8 admitting that the Carport encroached on land adjoining the Property but averring that the Defendants have acted unreasonably in refusing to sign documents to enable the re-parcellation of the boundary of the Property to ensure that the Carport is within the boundary of the Property; and,
- 16.9 denying that any breach of contract had been pleaded with respect to the fact that a portion of the boundary features of the Property sit on adjacent land, caveat emptor and that the Defendants have failed to mitigate any loss if they have suffered any at all.

17. An order for directions dated 1 February 2021 was made by consent and provided for the exchange of witness statements and experts' reports and directions for trial.
18. The matter was due to come to trial in June of this year but that was adjourned because of the ill-health of Mr Akiwumi, the Defendants' counsel.
19. Prior to this trial the Court received trial bundles from the Plaintiffs' attorney and the Plaintiffs' written submissions. The Plaintiffs had included in the bundles the witness statement of Mr Purton dated 21 February 2021 and expert reports of a Mr David Groves dated 29 March 2021 and a Mr Frank Reed dated 5 April 2021.
20. Despite the directions that had been given on 1 February 2021, no witness statements were served on behalf of the Defendants and the Defendants had served no expert evidence. The Defendants' counsel failed to serve any written submissions for trial other than in support of an application to strike out the Plaintiffs' Statement of Claim, their Reply and Defence to Counterclaim and, if successful, seek judgment in the Defendants' favour.
21. The evidence before the Court at trial comprised the witness statement of Mr Purton dated 26 February 2021 which stood as his evidence in chief. He was cross examined by Mr Akiwumi. There was no witness statement prepared for Mr Holden. Mr Akiwumi indicated that he wished for the affidavit sworn by Mr Holden on 30 March 2021 in support of a strike out application to stand as his evidence in chief. This was agreed and when Mr Holden was called to give evidence, Mr Akiwumi proceeded with limited examination in chief mainly to ensure that Mr Holden's evidence



was directed to the issues before the Court rather than being focused on a strike out application. Mr Holden was cross examined by Mr Kennedy. The Plaintiffs' experts were called and cross examined briefly.

### **Facts and Evidence**

22. The Property had been built by the Plaintiffs as a home in which to live. The Plaintiffs had bought the land on which it was built in early 2013. After obtaining planning permission, the Property was constructed and a certificate of occupancy was granted on 1 July 2016 by the CPA.
23. Mr Purton is originally from England and has lived and worked in the Cayman Islands since 1996. He is a member of the Royal Institute of Chartered Surveyors and has been involved in the construction industry for over 30 years (25 of which have been in the Cayman Islands) as a quantity surveyor and construction manager specializing in project and construction management. Mr Purton is also a director and shareholder of a company called BCQS, a firm of property development and construction professionals with offices in the Cayman Islands and throughout the Caribbean. According to Mr Purton, BCQS are frequently instructed by high net worth clients to manage the build of large residential properties and he personally has been involved in the construction and renovation of approximately 100 properties in the Cayman Islands. He has built approximately 8 homes in the Crystal Harbour area where the Property is situated.
24. In his evidence, Mr Holden stated that in his dealings with Mr Purton, he drew some comfort from the fact that Mr Purton had such experience and reputation.
25. Mr Purton's evidence was that, in or around early 2017, the Plaintiffs were approached by a real estate agent, Mrs Cathy Williams of Williams2 Real Estate enquiring whether they might be interested in selling the Property. Although the Plaintiffs had not been actively looking to sell the Property, they informed Mrs Williams that they would consider doing so on the strict understanding that they would receive from the sale US\$6,000,000 in net proceeds. At that number, a sale would be attractive to them.
26. Mrs Williams indicated to the Plaintiffs that she had clients (the Defendants) who were interested purchasers. The Defendants had decided to relocate from England to the Cayman Islands in 2016 and commenced looking for a family home which they intended to purchase as a home in which they could live and also as an investment property. Their intention was to live in the new home



until their son was old enough to attend university and to then to resell the home. This is what they ultimately did with the Property which they re-sold on 1 September 2021. They have remained in the Cayman Islands living in another property that they own.

27. At the time, Mrs Williams was liaising with the Defendants through their local attorney, Mr George Giglioli. The Defendants viewed the Property a number of times after which Mrs Williams advised the Plaintiffs that the Defendants wished to make an offer to purchase the Property. Mr Purton reminded Mrs Williams that the Plaintiffs expected to receive a net sum of US\$6,000,000 from a sale.
28. As part of the transaction, on completion of the sale, Mrs Williams would receive a sales commission from the Plaintiffs. Mr Purton's evidence was that he believed that Mrs Williams had informed the Defendants that the price of the Property was US\$6,300,000, the extra US\$300,000 being her commission.
29. During the negotiations over the price of the Property, the Defendants indicated through Mrs Williams, that if they bought the Property they wished for some building works and renovations to be carried out to it. Those works, which I will refer to as the "*Additional Works*", being the term used to describe them in the Contract, involved:
  - 29.1 construction of the Carport;
  - 29.2 the Master Bedroom Extension;
  - 29.3 installation of automated gates;
  - 29.4 construction of a fence and side gate on the west side of the Property; and,
  - 29.5 filling and repair of holes and damage caused to finishes by the Plaintiffs when moving out.
30. Mr Purton was given a verbal description of what it is that the Defendants wanted by way of the Additional Works and was asked for an approximate cost. He gave an estimate to Mrs Williams of US\$120,000.
31. As part of the negotiations over price, Mr Purton's evidence was that with the price to be paid by the Defendants remaining the same, Mrs Williams agreed to cut her commission from US\$300,000 to US\$180,000, the Defendants would pay US\$120,000 for the Additional Works, leaving a net sale price of US\$6,000,000 being paid to the Plaintiffs.



32. This led to a written offer to purchase being made dated 9 May 2017 by the Defendants to the Plaintiffs (the “9 May Offer”). The 9 May Offer was made by the Defendants through Mrs Williams who sent the offer to Mr Purton by email on 11 May 2017. The 9 May Offer was made based on a standard form of contract used by members of the Cayman Islands Real Estate Brokers Association. The price offered was set out in clause 3 of the offer and was US\$6,300,000. That comprised an initial US\$100 being paid with the 9 May Offer (clause 3 (a)), a further deposit of US\$199,900 to be paid within 7 days of acceptance of the offer by the Plaintiffs (clause 3 (b) (I)) and, a further US\$115,000 upon satisfaction of conditions precedent to which I refer below (clause 3 (b) (II)). That left a balance pursuant to clause 3 (c) of US\$5,985,000 to be paid on closing. After deducting the amount of US\$120,000 (being the estimate for the cost of Additional Works) and the commission of US\$180,000 due to Mrs Williams (to be paid pursuant to clause 23 of the offer), the Plaintiffs would have been left with US\$6,000,000 as they required.
33. The 9 May Offer was made on the basis of a 31 July 2017 closing date. Besides what are “boiler plate” clauses, the 9 May Offer was expressed to be subject to conditions set out in clause 5 by reference to “*Addendum A*”.
34. The wording of Addendum A is set out below.

“Addendum A

- A. This Offer to Purchase is subject to the following conditions and terms. To the extent that any of the following provisions contradict the terms of the Offer to Purchase the following conditions and terms prevail.

**Conditions Precedent**

The sale and purchase of the Property is subject to the following conditions precedent (“the Conditions Precedent”): -

- A.1 The Purchaser exchanging contracts for the sale of their property, 112 Widney Manor Road, Solihull, England prior to 31 May, 2017;
- A.2 The Vendor providing replies (satisfactory to the Purchaser) to the Purchaser’s preliminary enquiries such replies to be provided within 30 days of the Vendor's acceptance of this offer.
- A.3 The Vendor and Purchaser agreeing Plans and Specifications prior to 31<sup>st</sup> May 2017.
- B. Upon satisfaction of the Conditions Precedent the Purchaser shall so advise the Vendor.
- B.I In the event the Conditions Precedent are satisfied the Purchaser shall pay a further payment of US\$115,000.00 (which shall be a payment towards the Purchase Price) and be applied towards the



costs of the Additional Works. In the event the Vendor fails to complete the said payment together with the deposition [sic] paid here with shall be refunded to the Purchaser.

- C. In the event the Conditions Precedent are not satisfied by the dates set forth in clauses A.1 and A2 above the Purchaser shall advise the Vendor in writing upon receipt of which notice the Vendor shall cause their agent to release and pay all monies paid by the Purchaser hereunder to the Purchaser whereon this offer to Purchase shall be at an end and neither party shall have any claim in respect hereof.
- D. The Additional Works are:-
  - D.1 Construction of a 3-car Carport in the location shown on the plan of the property according to the Plans and Specifications;
  - D.2 The construction of an extension to the master bedroom according to the Plans and Specifications;
  - D.3 The installation of automated gates according to the Plans and Specifications;
  - D.4 Construction of a wall and side gate on the west side of the property according to the Plans and Specifications;
  - D.5 Filling, repair and redecorating any holes or damage caused to finishes in the Property by reason of removing artwork and/or decorations.
- E. All the Additional Works shall be carried out and completed at the cost of the Vendor.
- F. The Additional Works shall be completed within 8 weeks of the date on which the Purchaser advises the Vendor the Conditions Precedent have been satisfied (or waived by the Purchaser).
- G. In the event any Additional Works have not been completed within the said period the Purchase Price shall be abated by such amount calculated by reference to the rate of interest and basis calculation as set out in clause 17(2) of the Offer to Purchase until such time as the Additional Works are completed.
- H. The Vendor Warrants: -
  - H.1 The house constructed on the Property has been constructed in a proper and workmanlike manner;
  - H.2 The said house complies with all planning permissions and building control requirements;
  - H.3 The Additional Works shall conform in all respects to the Plans and Specifications;
  - H.4 The Additional Works shall be constructed and completed in a proper and workmanlike manner and in compliance with all planning permissions and building control requirements;
  - H.5 The said house and the Additional Works to be free of any defects. In the event any defect is found in the construction of the said house or the Additional Works within one year of completion the Vendor, at their cost, shall cause any defect to be made good provided always any such defect has not been caused by the Purchaser or any guest, workman or licensee of the Purchaser.
- I. Upon completion of the Additional Works the Vendor shall advise the Purchaser and allow the Purchaser and/or his surveyor to inspect the Property and the Additional Works to ensure they have been completed and are in proper working order.



- J. In the event the Purchaser or their surveyor find any deficiencies they shall provide the Vendor a list of any such deficiencies which the Vendor shall remedy (at their cost) prior to completion.
- K. The Purchaser purchase absolute title to the Property free and clear of all encumbrances save for the restrictive agreements noted on the Land Register relating to the Property.”

35. If the Conditions Precedent were satisfied, the expressed intention of the Defendants was that a further payment of US\$115,000 would be paid to the Plaintiffs as part of the purchase price but related to the cost of the Additional Works (clause B1). All Additional Works were to be carried out and completed at the cost of the Vendor (Clause E) because the Vendor/Plaintiffs were being paid to do them as part of the purchase price.

36. Mr Purton responded to Mrs Williams by email the same day and said:

*“Hi Cathy,  
I have had a read through this (but still need to chat with Michelle) but thought I would let you know that it looks like we are good with everything except the following points:-*

- ...  
2. *Conditions Precedent A.2- Can we make this so that any enquiries and answers are provided by 31st May 2017. Reason being I want to be 100% certain before I start the extension and car port works which I will gear up and be ready to go for by 1st June (or once the second deposit is received). If I have started work and then in the unlikely event the Purchaser does not like the answer to one of the enquiries they can in theory pull out and I will have the works underway.*

*So just need to tweak the wording here to read by 31st May.*

...  
...

- 9. *Clause H.2 and H.4. - I agree with the works listed and will do a great job as I take great pride in my work. However to be clear we do not have time to go through Planning for formal planning permissions and building control approval for the car port or the extension - this will take about 4-5 months plus a couple of months to build. They will be designed by the same structural engineer who designed the house and constructed as we agree but I will do so without formal approvals. In my experience and opinion there will not be an issue with planning or building control if we just get it done as it is within the set back etc but I want to be clear that this will be done without such formal approval being in place. I have already spoken to the engineer and he can be working on drawings next week so that we can be ready to start 1st June.”*

37. A number of matters referred to by Mr Purton in his email are issues (not arising specifically from this email) that featured greatly in cross examination at trial. Those are:



37.1 The time that it was likely to take to obtain planning permission for the Additional Works, to the extent that it was necessary. As can be seen from paragraph 9 of his email, his estimate was that it will take about 4-5 months to obtain and then another couple of months to build the relevant elements of the Additional Works.

37.2 His suggestion, that to save time, the planning process be ignored altogether as, in his experience, he did not think that would be an issue in proceeding without formal planning permission.

38. An email from Mr Giglioli to Mrs Williams dated 18 May 2017 reads as follows:

*“Dear Cathy*

*“I refer to your email of 12th May to which I have now received Dave's instructions. I apologise for the delay however, I was away from the island over the weekend and the issues are not insignificant.*

*The real issue is proceeding without planning permission and the risk of, at least, having to make an after-the-fact application and pay the associated penalties. (In my experience · where the CPA is of the view that lack of planning permission was intentional and deliberate they do not make it easy to obtain an after-the-fact permission). Furthermore, in the event planning permission was not granted it would give rise to a plethora of problems not least the property's value and its marketability. Finally at this price a property should be totally “issue - free”.*

*The Holdens are prepared to proceed in substantially the form discussed (satisfaction of the conditions precedent by the end of the month; completion of the purchase at the end of July) however, completion of the Additional Works to take place within 8 weeks after all planning permissions have been granted. In light of completion of the Additional Works being deferred after completion of the purchase the suggestion is that the Holdens pay a deposit (to be held by Williams2) of US\$225,000 with the balance at completion of the purchase subject to a retention of US\$315,000 (5%) which would be held by us to be paid to the Purtons upon satisfactory completion of the Additional Works. In connection with this point I have also brought in an 'end date'. If the Additional Works get hung up then the Retention would be kept by the Holdens. We have suggested 3 months after the grant of planning permission as that date.*

*I believe this suggestion stays largely within the scheme that has been discussed to date and also caters to both the Purtons' financial requirements as well as the concerns of the Holdens who will have closed on the purchase while the Additional Works are ongoing.*



*I have also made amendments to the offer and the special conditions to take in these provisions. You will note the gates and side wall are to be finished prior to completion.*

*I should be grateful if you would discuss them with the Purtons and let me know whether or not they are acceptable.”*

39. Mr Giglioli’s email must have been forwarded to Mr Purton by Mrs Williams. On 19 May 2017, Mr Purton replied to Mrs Williams as follows:

*“HI Cathy,  
Thanks for the email and amended conditions. There are a couple of Issues that I see as issue which we can easily resolve*

- 1. So we are all clear, the correct procedure for us to carry out the bedroom extension and car port construction is as follows*
  - A) Prepare architectural plans and elevations*
  - B) Notify adjoining neighbors by registered post- Section 15(4) notice*
  - C) Wait 21 day period and assuming no objections then submit for planning approval (takes about 2-3 weeks)*
  - D) Once approved, this will be subject to an application for a Building Permit.*
  - E) We then submit architectural, structural, electrical and mechanical (no plumbing) plans to Building Control*
  - F) The Building permit approval process of these plans will take about 6-8 weeks minimum*
  - G) Once the permit is approved and issued (normally a 1-2 week process to Issue after approval) we may then start work.*

*Items A-G above will take at least 16 weeks in my experience.*

*Therefore any reference in the conditions should refer to Building Permit approval and not Planning Approval as I cannot commence work until a Building Permit is issued.*

- 2. I am happy to get this process underway asap and once all approved undertake the work and complete within 8 weeks of the Building Permit being issued. I am also happy to coincide the works when it may be convenient to the Holdens as they will be in occupation at the time. Most of the work can be done outside and it is really the break through of the walls in the master that will be disruptive. They may want to be "away" for a few days when this Is done. I can seal off the bedroom and just need access to this area.*

*....”*



40. Based on Mr Purton's estimate of timing it appears that he was of the view that from the beginning of the planning process to completion of the Additional Works would take around 6 months.
41. During the course of 22 and 23 May 2017 there were various emails exchanged as part of the negotiation over the amount of deposit to be paid and the extent to which part would be released to Mr Purton to fund the Additional Works.
42. On 23 May 2017, Mr Purton emailed Mrs Williams and said:

*"Hi Cathy,*

*As discussed, we will agree to a US\$315,000 retention on the following basis:*

- 1. Funds are held in escrow (I assume by Giglioli)*
- 2. In the event that neither the car port or bedroom extension receive planning approval the \$315k will revert to the Holdens*
- 3. In the event that the bedroom extension does not receive planning approval \$250k will revert to the Holdens*
- 4. In the event that the car port does not receive planning approval \$65k will revert to the Holdens*
- 5. In the event that planning permission is obtained but the Holdens decide not to go ahead with the bedroom extension \$250k will revert to the Purtons.*
- 6. In the event that planning permission is obtained but the Holdens decide not to go ahead with the car port \$65 k will revert to the Purtons.*
- 7. It is acknowledged that the planning and building permit application process may take 4-5 months however once Issued works will be commenced immediately and completed in 8-10 weeks*
- 8. On completion of the car port the Purtons will receive \$65k*
- 9. On completion of the extension the Purtons will receive \$250k*

*I will do everything I can to start the works as soon as possible and can complete in less than 8 weeks but I just want to be covered In the event of any unforeseen issues. I also have no control over the time taken by Planning or Building Control so want to be covered for this time frame.*

*I do not really see any Issues with getting these works done but just want to be sure we are all on the same page and have covered every eventuality."*

43. On 25 May 2017, Mr Giglioli sent an email to Mrs Williams asking whether Mr Purton would be agreeable to using US\$5,985,000 less the value of any furnishings as the consideration for the property on the transfer. In the Defendants' view, it made no difference to the Plaintiffs who gets US\$5,985,000 for the property and US\$315,000 for the works if they are completed but it did make a US\$15,000 difference in stamp duty to the Defendants.



44. In cross examination Mr Holden was asked by Mr Kennedy whether Mr Giglioli had sent this with Mr Holden's approval. He said that he had and I assume, therefore, that all of Mr Giglioli's correspondence that was material was sent with Mr Holden's approval.
45. Matters progressed and on 29 May 2017, the date that the offer was made which was the foundation for the Contract Mr Giglioli wrote to Mrs Williams as follows:

“ ...

***Removal of substantially in clause G***

*In an earlier email Neil had suggested 8 to 10 weeks from the grant of all permissions in order to carry out this work. Dave decided, in order to make matters simpler, to agree the longer period so hopefully this should not be an issue.*

*We do not understand where Neil is coming from however, the last thing the Holdens want is to invest over US\$6 million in a property the construction of which is only substantially completed.*

*We have an option. On the one hand Neil and I can spend the next few days forging a page and a half of language that deals with substantial completion and payment. On the other hand we leave the provision with completion taking place within 10 weeks of the permissions being granted. If problems are encountered with the Additional Works and Neil keeps the Holdens up-to-date with any delays and the steps being taken to cure them I am sure they will act in a reasonable fashion and if there is need to extend the 10 week period on account of unavoidable delay such as weather or a delay in supplying goods etc. that there should be no difficulty with this. The Holdens will be living at the house so keeping them up-to-date should not be difficult.*

***The Holdens deciding not to go ahead with the bedroom/Carport***

*We are somewhat concerned that every time the conditions are commented on they also seem to be extended in reply. We do not believe we need to put in the language sought here particularly in light of the latest amendment (which effectively gives rise to a separate obligation to construct the Carport and bedroom extension for US\$315,000.00 – an obligation distinct from the sale of the house). Simply put, if the Holdens were to back out of the extension/Carport or either of them, Neil would have a claim in damages.”*

46. It can be seen that during the course of the negotiations, despite Mr Purton's concerns about ensuring language in the Contract to provide that he received the full amount of the purchase price if he performed or was ready to perform his part of the obligations, that language was not included expressly. Similarly, despite the Defendants' concerns about planning permission and building



permits being obtained prior to completion of the relevant Additional Works, obtaining those was not expressed to be a pre-requisite to the Additional Works commencing.

47. The other matter that seemed to get lost in the negotiations was allocation from the sum of US\$315,000 for payment for items D3 – D4 in the Pre-Completion Additional Works. The US\$315,000 itself was a figure that Mr Purton felt was overinflated and did not accurately represent the cost to him of carrying out the Additional Works. His estimate as can be seen from the correspondence referred to above was that they would cost approximately US\$120,000.
48. Mr Purton was also concerned about the 10 week deadline to complete the Additional Works after planning permission was granted. His evidence was that he took much comfort from Mr Giglioli's email of 27 May 2017 in which Mr Giglioli indicated that he was sure that the Defendants would be reasonable in relation to that and any extension required as long as Mr Purton kept them apprised of any delays. In his witness statement Mr Purton said that, as a result, he thought that the risk with the enhanced consideration for the Additional Works was minimal. He was adamant, however, that he would not have signed the Contract if he thought that there was a risk that the Defendants could decide not to proceed with the Additional Works and keep the Retention leaving the Plaintiffs receiving less than the net US\$6,000,000 that they had insisted on.
49. The Contract comprised an offer to purchase which was made on the 29 May 2021, again using the standard form CIREBA offer. The payment provisions had changed and now referred to a purchase price of US\$5,985,000 (clause 2) being broken down between a US\$100 initial deposit paid with the signed offer (clause 3(a)), an additional deposit which was stated to be provided for in Addendum B (clause 3(b)), and the balance of the purchase price \$5,984,900 paid on completion (clause 3(c)).
50. Completion was still set for 31 July 2017 but otherwise the standard CIREBA terms did not change materially. Addendum A set out the conditions to purchase by way reference to Addendum B.
51. Addendum B provided as follows:

*“A This Offer to Purchase is subject to the following conditions and terms. To the extent that any of the following provisions contradict the terms of the Offer to Purchase the following conditions and terms prevail.*



### **Conditions Precedent**

*The sale and purchase of the Property is subject to the following conditions precedent ("the Conditions Precedent"):* -

- A.1 The Purchaser exchanging contracts for the sale of their property, 112 Widney Manor Road, Solihull, England prior to 14<sup>th</sup> June, 2017;*
- A.2 The Vendor providing replies (satisfactory to the Purchaser) to the Purchaser's preliminary enquiries such replies to be provided prior to 14<sup>th</sup> June 2017.*
- A.3 The Vendor and Purchaser agreeing Plans and Specifications prior to 14<sup>th</sup> June 2017.*
- A. Upon satisfaction of the Conditions Precedent the Purchaser shall so advise the Vendor.*
- B. In the event the Conditions Precedent are not satisfied by the dates set forth in clauses A.1 – A.3 above the Purchaser shall advise the Vendor in writing upon receipt of which notice the Vendor shall cause their agent to release and pay the Deposit paid by the Purchaser hereunder to the Purchaser whereon this offer to Purchase shall be at an end and neither party shall have any claim in respect hereof.*
- C. The Additional Works are:-*
  - D.1 Construction of a 3-car Carport in the location shown on the plan of the property according to the Plans and Specifications;*
  - D.2 The construction of an extension to the master bedroom according to the Plans and Specifications;*
  - D.3 The installation of automated gates according to the Plans and Specifications;*
  - D.4 Construction of a wall and side gate on the west side of the property according to the Plans and Specifications;*
  - D.5 Filling, repair and redecorating any holes or damage caused to finishes in the Property by reason of removing artwork and/or decorations.*
- D. All the Additional Works shall be carried out and completed at the cost of the Vendor.*
- E. Apart from the works described at D.3, D.4 and D.5 above, the Additional Works shall be completed within 10 weeks of the date on which planning permission and building permit approval have been granted in respect of the Additional Works. The works described at D.3, D.4 and D.5 shall be carried out and finished before the Completion Date.*
- G. In the event the Additional Works set forth at D.1 and D.2 are not completed within 10 weeks after the grant of planning permission and building control permits the Purchaser may keep out of the Retention and apply towards the cost of completing the Additional Works US\$65,000.00 in respect of the Carport and/or US\$250,000 in respect of the extension to the master bedroom in which case neither party shall have any claim against the other under this Agreement.*
  - H.1 Upon completion of each of the Additional Works the Vendor shall advise the Purchaser and allow the Purchase and/or his surveyor to inspect the Property and the Additional Works to ensure that they have been completed and are in proper working order.*



- H.2 *In the event the Purchaser or their surveyor find any deficiencies they shall provide the Vendor a list of any such deficiencies which the Vendor shall remedy (at their cost) prior to completion.*
- H.3 *Upon satisfactory completion of the Additional Works specified at D.1 prior to the date in clause G the Purchaser shall cause US\$65,000 of the Retention to be paid to the Vendor in respect of the car port.*
- H.4 *Upon satisfactory completion of the Additional Works specified at D.2 prior to the date in clause G the Purchaser shall cause US\$250,000 of the Retention to be paid to the Vendor in respect of the master bedroom.*
- I. *The Vendor Warrants: -*
- I.1 *The house constructed on the Property has been constructed in a proper and workmanlike manner;*
- I.2 *The said house complies with all planning permissions and building control requirements;*
- I.3 *The Additional Works shall conform in all respects to the Plans and Specifications;*
- I.4 *The Additional Works shall be constructed and completed in a proper and workmanlike manner and in compliance with all planning permissions and building control requirements;*
- I.5 *The said house and the Additional Works to be free of any defects. In the event any defect is found in the construction of the said house or the Additional Works within one year of completion the Vendor, at their cost, shall cause any defect to be made good provided always any such defect has not been caused by the Purchaser or any guest, workman or licensee of the Purchaser.*
- J. *The Purchaser purchases absolute title to the Property free and clear of all encumbrances save for the restrictive agreements noted on the Land Register relating to the Property.*
- K **1.1 Purchase Price**  
*The total purchase price is US\$6,300,000 (Six Million Three Hundred Thousand United States Dollars) apportioned as to US\$5,985,000.00 (Five Million Nine Hundred and Eighty-Five Thousand United States Dollars) for the Property and US\$315,000 (Three Hundred and Fifteen Thousand United States Dollars) for the Additional Works.*
- 1.2 Manner of payment**
- a. *Initial deposit paid on signing of this Offer to Purchase for which receipt is hereby acknowledged US\$100.00*
- b. *Additional deposit due 7 days from acceptance of offer:US\$214,900.00*
- c. *The balance of the Purchase Price for the Property (US\$5,770,000.00)*
- d. *shall be paid and delivered to the Vendor or his authorized agent at Completion*
- The price of the Additional Works shall be paid as described in this Addendum “B”.*



52. As can be seen, the paragraph lettering and numbering went somewhat awry during the negotiation and mark up period. Although dated 29 May 2017, the offer was actually signed by the Defendants on 31 May 2017 in England. The offer was accepted by the Plaintiffs on 29 May 2017.
53. The Conditions Precedent were satisfied and on 23 June 2017 Mr Giglioli wrote by email to Mrs Williams confirming that to be the case. The Condition Precedent at A.2; referred to the provision by the Defendants of replies to the Purchasers' preliminary enquiries. The enquiries were made on 7 June 2017 and the replies provided on 8 June 2017.
54. The condition at A.3 was satisfied by the provision by Mr Purton to Mr Holden of the Plans and Specifications, being a series of photographs, sketches and extracts from building plans that had been annotated by Mr Purton based on his conversations with Mr Holden to illustrate and set out the general scope of the Additional Works.
55. Mr Holden was cross examined about this and confirmed that the condition had been satisfied. Both Mr Purton and Mr Holden agreed in evidence that the Plans and Specifications were not architectural or engineering drawings and that those technical drawings were to be produced after the Conditions Precedent had been satisfied.
56. Additional Works D.3, D.4 and D.5, the Pre-Completion Additional Works were also completed by Mr Purton prior to completion as provided for in the Contract.
57. Having received confirmation that the Conditions Precedent had been satisfied, Mr Purton then had the responsibility of engaging an architect and structural engineer to prepare the technical drawings to submit to the CPA and BCU. Mr John Doak ("Mr Doak") was engaged as the architect and Bolas Engineering Ltd ("Bolas") as the structural engineers. Both had been involved with the design and construction of the Property when it was built.
58. Mr Purton's evidence was that when the plans for the Carport were being drawn up by Mr Doak it became apparent that, if built as proposed, the structure of the Carport would fall outside the boundary of the Property and on to adjoining land. Mr Purton was cross examined about this in some detail. He explained that in the Crystal Harbour area where the Property is located, the roads are still owned by Land Ltd, the original developer of the area. The roads are laid out so that there is generally a strip of land between the edge of the road and the boundary of the various houses and



undeveloped plots of land (the “Road Reserve”). The Road Reserve is owned by Land Ltd and anyone accessing a home or plot of land in the area has to cross over the Road Reserve to get from the road to the home or land and vice versa. Mr Purton further explained that Road Reserve is normally adopted and maintained by the homeowner and that many property owners (including owners of homes build by Mr Purton) take some liberties with the boundary of their properties when it comes to construction of driveways and boundary walls and that they often encroach on to the Road Reserve. Mr Purton indicated that, to his knowledge, this is not a state of affairs that has been objected to by Land Ltd.

59. The proposed Carport would, therefore, if built as drawn, encroach onto the Road Reserve.
60. Mr Purton’s evidence was that when he was taking site measurements, presumably for the Additional Works, it became apparent to him that, when building the Property, he had inadvertently also extended the front wall of the Property so that it fell outside the front boundary of the Property and onto the Road Reserve. He said that this was not something that was known to him prior to meeting with Mr Doak for the purposes of preparing plans for the Carport.
61. Mr Purton was asked by Mr Akiwumi about the replies to preliminary enquires that had been provided by him 8 June 2017. A number of these touch on boundary and planning issues. In relation to enquiry 1.3 *“Is the Vendor aware of any past, present or likely proceedings in respect of any breach of planning restrictions whether by means of stop notice, enforcement notice, or otherwise? If so, please give details.”* Mr Purton had answered *“No”*. In relation to enquiry 1.4.1 *“[Please supply copies of:] any planning permission relating to the use of the property or any part thereof or to any buildings now on or to be built on the property, or to any demolition of buildings on or formerly on the property”*. Mr Purton had replied *“I have requested from Architect but certificate of occupancy provided.”*
62. In his evidence Mr Purton stated that the consequence of the encroachment of the proposed Carport onto the adjoining land was that he did not believe that the Carport would be granted planning permission. He had therefore decided to proceed with the Carport without first obtaining planning permission or BCU approval. Mr Purton seems to have rationalized that decision on the basis that the driveway and boundary wall had been in place since the Property was finished and the Property had been given final approval by the CPA and BCU. He was of the view that the encroachment



was not visually obvious so instead of bringing the issue to anyone's attention he thought it best just to go ahead and build the Carport.

63. This decision was taken by Mr Purton despite being aware that during the negotiations over the Contract Mr Holden had rejected the idea of ATF Approval and wanted all of the Additional Works to proceed with the necessary planning permission and BCU approval. Mr Purton describes his decision as a mistake. That mistake was compounded by the fact that he did not disclose this state of affairs, or his plan, to Mr Holden.
64. At that point Mr Purton decided that he would proceed to build the Carport at the same time as the Master Bedroom Extension once planning and building approval for the latter had been received.
65. The application to the CPA in respect of the Master Bedroom Extension was made by Mr Doak on 19 July 2017. When the plans for the Master Bedroom Extension were being prepared it was discovered that the additional floor area would take the size of the Property outside the maximum permissible site coverage for the site by 0.56%. Despite being a small difference, it did mean that an application had to be made to the CPA for a planning variance with notice being given to owners of adjoining properties. That application was made on 18 August 2017.
66. Immediately after the application for planning permission had been submitted, it appears that Mr Purton wrote by email to Mrs Williams and informed her that this had been done. Mr Purton's email was sent in response to a sequence of emails that started with an email from Mr Holden to Mr Giglioli on 20 July 2017 enquiring about progress with the planning process. In particular Mr Holden made reference to the email from Mr Purton dated 19 May 2017 in which Mr Purton outlined the process for obtaining planning permission and a building permit and estimated that it would take at least 16 weeks to obtain the approvals necessary to start building works. Mr Giglioli sent an email to Mrs Williams on 20 July 2017 asking about the drawings for the Carport and for an update in relation to the planning process for that part of the Additional Works. Mrs Williams must have forwarded that email to Mr Purton who, as mentioned above, replied to her confirming that the planning application had been made for the Master Bedroom Extension. He also confirmed that he was waiting for the drawings for the Carport to be sent to him by the architect. He further confirmed that he wanted to get the planning approval for the Master Bedroom Extension first and then make the application for the Carport separately as he would likely have to send planning notifications for the Carport to neighbouring residents.



67. On 13 September 2017 planning approval was granted for the Master Bedroom Extension allowing Mr Purton to move to the next step of preparing construction drawings and then apply to BCU for a building permit.
68. On 23/24 November 2017 there was an exchange of emails between Mr Holden and Mr Purton. Mr Holden asked for the drawings and plans for the Carport. He also indicated that the start of January 2018 for the commencement of the Carport would be acceptable and asked for an update in relation to the Master Bedroom Extension. Although it is not entirely clear from the emails, Mr Purton's evidence was that he had sent Mr Holden the construction drawings for the Master Bedroom Extension on 24 November 2017. Mr Purton's evidence was that as he did not receive any comment on the construction drawings from Mr Holden they were submitted to BCU.
69. On 27 November 2017, Mr Purton advised Mr Holden that planning approval had been obtained for the Master Bedroom Extension although the letter to that effect had not been received. Mr Purton confirmed that the final construction drawings had been received by BCU and were scheduled for review on 22 December 2017. Mr Purton's email indicated that he had attached the drawings.
70. On 27 February 2018, Mr Holden sent an email to Mr Purton asking him to meet him at the Property to discuss Mr Purton carrying out some further works to it.
71. During that meeting Mr Purton mentioned to Mr Holden that a structural column or pillar was included in the construction drawings for the Master Bedroom Extension. He said that Mr Holden seemed surprised and so Mr Purton re-sent the drawings to Mr Holden on 2 March 2018.
72. The inclusion of a structural pillar or column was not acceptable to Mr Holden because it would be in the livable space of the bedroom. Mr Purton discussed the issue with Bolas and on 6 March 2018 confirmed to Mr Holden by email that a solution had been worked out to eliminate the column and the structural engineer was to update the drawings. Mr Holden replied on 6 March 2018 saying "Great news" and asking questions about the further works to the Property.
73. Mr Purton's evidence was that in April 2018 Mr Holden spoke with him and requested that the work to the Master Bedroom Extension be delayed until 1 September 2018. Apparently Mr Holden



told Mr Purton that there were family reasons and travel plans that meant it did not suit them to have the work started sooner.

74. The next email in evidence is dated 25 April 2018 from Mr Giglioli to Mr Purton and states:

*“Dave Holden spoke to me yesterday about your discussion last week. I understand that all of the approvals are in hand for the Carport and that you have started work on that. I also understand from Dave that you are resubmitting the amendment for the bedroom extension necessary to move the [column] and that the works on the extension will start on 1<sup>st</sup> September with an estimate of five weeks to complete the works. I should be grateful if you would confirm this understanding and also provide us with copies all the approvals for Dave’s files. At the time that contracts were negotiated and exchanged I do not think it was on any one’s horizon that these issues would still be alive almost a year later. In light of this, I should be grateful if you would confirm our understanding that the provisions of Addendum “B” to the offer to purchase dated 29th May 2017 remain in effect. Clearly, in light of the turn of events since last May and what I understand you and Dave agreed last week, the timeframe in clause “G” needs to be amended. Once we have seen the state of the approvals we can determine how best to deal with this.”*

75. Mr Purton’s evidence was that he agreed and confirmed that to Mr Giglioli.
76. On 12 April 2018 Mr Doak sent Mr Purton a copy of the notification from the CPA that the drawings for the Master Bedroom Extension had been approved and that the building permit would be issued shortly.
77. Mr Purton’s evidence was that because Mr Holden wanted the work on the Carport started as soon as possible he commenced that work on 23 April 2018. Mr Purton stated that he had substantially completed the Carport by the third week of June 2018.
78. On 4 May 2021, Mr Giglioli emailed Mr Purton asking for an update on the planning approvals. Mr Purton replied on 7 May 2018 and said that he would send a copy of the approval which covered the Master Bedroom Extension and Carport. He mentioned a problem obtaining a copy from BCU but suggested that he would have the paperwork by the end of the week. He also mentioned that the provisions of clause G of Addendum B needed to be amended since it was agreed that the Master Bedroom Extension would not start until 1 September 2018. He added that the Carport was almost finished. He was waiting for some louvre panels which were going to take another couple of weeks. He told Mr Giglioli that he wanted to get paid for the Carport when that had been done.



79. On 8 May 2018 the BCU formally issued the building permit giving approval for the Master Bedroom Extension works to commence.
80. On 14 May 2018 Mr Giglioli again asked for copies of the approvals. Mr Purton replied on 18 May 2018 attaching a copy of the BCU permit which he misrepresented as covering the Master Bedroom Extension and Carport. He indicated that the Carport was almost completed and that the Master Bedroom Extension would start on 1 September 2018 as agreed.
81. After what Mr Purton described as substantial completion of the Carport in the third week of June 2018, Mr Holden asked him to carry out some extra finish work to conceal some bolts that were on the top of Carport and visible from the Property. Mr Holden also asked him to move a light fixture.
82. On 25 July 2018, Mr Purton sent an email to Mr Giglioli indicating that construction of the Carport was complete and asking for payment of the agreed amount of US\$65,000.
83. Mr Giglioli replied to Mr Purton on 27 July 2018 indicating that he was taking instructions from Mr Holden, that he would make payment as soon as Mr Holden approved it and asked for Mr Purton's bank details.
84. On 31 July 2018 Mr Holden emailed Mr Giglioli asking whether he had checked that Mr Purton had obtained the correct planning permissions before making a payment to him.
85. On 1 August 2018 Mr Giglioli sent an email to Mr Holden saying that he had the impression that once the light fixture had been properly repaired/re-decorated that Mr Purton would be paid the US\$65,000 and that Mr Purton would then be advised that he was not going to be doing the Master Bedroom Extension. It seems, therefore, that a decision has been taken by the Defendants prior to 1 August 2018 that they would not be proceeding with the Master Bedroom Extension.
86. Mr Giglioli's email continued to point out that he had looked again at the BCU permit that Mr Purton had sent on 18 May 2018 and had realized that it was for the Master Bedroom Extension only and did not include the Carport. As he said to Mr Holden, "*It is now clear that Neil never sought permission in respect of the Carport.*"



87. After including in his email an extract from CPA meeting minutes relating to the property Mr Giglioli said as follows:

*“What is clear from the minutes (apart from there being no reference to the Carport) is that the house extension would exceed the site coverage slightly. A variance was granted in respect of this so that was not an issue- however, it seems clear that probably because of this Neil omitted the car port (which I believe is about 612 sq ft). This would have been a further excess of the site coverage.*

*So far as I am aware Neil has not provided any other Building permit or approval other than the one he copied on May 18.*

*If that is the case it therefore is clear that he went ahead and did the Carport without Planning Approval. There are a number of potential consequence to that. One is the possibility that Planning will require its removal. Alternatively, they can call for “an after the fact application”. Such an application comes with a penalty of 5 times the ordinary fee. If nothing is done within the next 3 years then there is nothing Planning can do about it and the only possible issue is if a purchaser from you wanted a copy of the permission for the car port – the very position we sought to avoid at the outset!*

*From a practical standpoint I doubt there is anything that can be done to remedy the situation. Neil is in a fairly precarious position with Planning (which also has oversight of those involved in construction and affected by the Builders Law) already. If an attempt is made to put this matter right, Neil will probably be shown in a particularly bad light (he made an application for the extension when correspondence will show beyond doubt that was part of an agreement to do extension and Carport; he deliberately made no reference to the Carport (no doubt to minimize the amount he exceeded site coverage) and having received permission for the extension he plugged ahead with a totally unpermitted and unheralded construction). It looks exceedingly shaky and I suspect that Neil wishes he could somehow accelerate time to get the 3 years behind him.*

*The salient points are:*

*At the outset we made it clear we wanted properly approved constructions on the property. We specifically rejected his proposal just to go ahead and build the extension and Carport. After much delay you have now been put into precisely the position you did not want to be in, and made as much, clear last year.*

*As far as the Law and Regulations are concerned, the only way this matter can be put right is for Neil to make an after the fact application and pay the penalty. Whether permission will be granted or not is wholly beyond me. There are a host of reasons why it should not (it is a larger construction in terms of area and probably also needs a set-back variance; there are the circumstances I have set out above which will probably antagonize the Authority and, if rumor is correct, there is Neil’s involvement). I therefore doubt Neil will be prepared to put it right. He may also not be able to even if he is persuaded to make the application.*

*In light of the above you may wish to re-think whether he is to be paid at all until you have a proper grant of permission in respect of the Carport.”*

88. On 2 August 2018, Mr Purton reminded Mr Giglioli that the relocation of the light and repair work to the Carport had been carried out and that it was finished. He asked when he was going to be paid. He also made reference to a conversation that he had had with Mr Holden the previous week



during which Mr Holden had indicated that the Defendants were unsure whether to proceed with the Master Bedroom Extension.

89. Mr Giglioli replied on 3 August 2018 indicating that Mr Holden confirmed that the work on the Carport had been finished and raising the question of the planning permission for the Carport, asking again for copies of the relevant approvals.
90. Mr Purton responded on 6 August 2018 suggesting that he was under the impression that the submission to CPA and BCU was in respect of both the Carport and the Master Bedroom Extension when he knew full well that it was not.
91. Ultimately after being chased by Mr Giglioli by email, Mr Purton sent an email to him dated 27 August 2018 saying: *“Unfortunately it appears that the car port was not included on the planning submission even though I have it on my drawings (which were sent to David) – it appears that there may have been a misunderstanding between me and the architect with the submission. I will therefore need to obtain retrospective approval, this may take a few weeks but I will put this in hand. I really don’t see this as an issue but clearly if you want to withhold funds then that’s fine and I will take care of this.”* Mr Purton asked for confirmation as to whether the Defendants would be going ahead with the Master Bedroom Extension and then raised the question of the release from the Retention of the amount held back for that work.
92. Mr Giglioli replied on 1 September 2018 thanking Mr Purton for bringing him up to date, confirming that the Defendants did not wish to go ahead with the Master Bedroom Extension.
93. On 18 October 2018 Mr Giglioli wrote again to Mr Purton asking for an update on planning permission for the Carport. He went on to say that the Defendants had decided not to go ahead with the Master Bedroom Extension in light of the difficulties that they had encountered with the Additional Works. He adds that *“You will recall that these were originally expected to have been completed by the end of September 2017 (8 weeks after completion)”*. On that basis Mr Giglioli advised Mr Purton that the Defendants had requested that he return to them the US\$250,000 of the Retention attributable to the Master Bedroom Extension.



94. It is notable at this stage that the Defendants were well aware of the estimate given by Mr Purton that the time to obtain all necessary approvals was going to be at least 16 weeks after completion. Mr Holden repeated Mr Purton’s estimate in his email of 20 July 2017 to Mr Giglioli.
95. Unsurprisingly, there was then a lengthy exchange of emails between Mr Purton and Mr Giglioli about the negotiations leading up to the Contract and what the parties understood their respective positions to be, much of which found its way into the pleadings.
96. What Mr Giglioli did say at the end of his email dated 30 October 2018 to Mr Purton was that “[w]hilst we shall continue to hold the retention in respect of the Carport we shall be returning US\$250,000 to [the Defendants] on account of the bedroom extension”.
97. Mr Purton instructed KSG attorneys and they wrote to Mr Giglioli on 10 December 2018. In that letter they accepted that Mr Purton had failed to comply with the contractual requirement to obtain planning permission and building control permits for the Carport and that he was not entitled to payment of the US\$65,000 at that point in time. There was also discussion about the Carport being removed at Mr Purton’s expense and an offer was made to allow Mr Holden to keep the US\$65,000 if the Carport was removed. However, it was made clear that Mr Purton did not agree to the Defendants keeping the Carport and the US\$65,000. The Carport was not removed.
98. In an effort to regularize the front boundary of the Property, on 12 April 2019, Mr Greg Abernathy a licenced land surveyor wrote to the Registrar of Lands indicating that there was a desire to re-parcel the common boundary of the Property (parcel 47) and the Road Reserve (parcel 344). This was approved on 1 May 2019 subject to planning approval and all interested parties giving their written consent. On 11 June 2019, KSG attorneys wrote to Mr Giglioli enclosing an application to re-parcel the common boundaries between the two properties on the basis that permission had been granted by the Registrar of Lands and consent was forthcoming from the owner of parcel 344. The letter went on to say that Mr Purton had already held preliminary discussions with the Director of Planning and had been informed that ATF Approval for the Carport should be granted once the re-parcellation is completed. Mr Purton was to bear the costs of the ATF Approval. The Defendants were asked to sign and return the application. This was done on 22 July 2019.
99. It appears that the CPA was aware of the issue relating to the boundary. In an email dated 24 September 2019 from a planning assistant, Mr Egbert Jackson to Mr Eduardo Bernal at Arco



Architectural Services Ltd (presumably acting for Mr Purton), Mr Jackson indicated that the plans received from Arco Architectural Services Ltd would have to go to the CPA for consideration because:

“THE ATF APPEARS TO STRADDLES OVER THE PROPERTY BOUNDARY AND UNTO 17A344 (ROAD PARCEL) [the Road Reserve] ? **Please confirm.**”

1. NEED TO **NOTIFY ALL ADJACENT PARCELS 17A46, 17A48 & 17A344** FOR **“AFTER-THE-FACT CARPORT WITH SETBACK VARIANCE”**; please upload a copy of each notice, registered mail receipts etc., to OPS.
2. WRITE **LETTER FOR CPA FOR SETBACK VARIANCE AND OVER SITE COVERAGE VARIANCE**; PLEASE UPLAD TO OPS.”

100. KSG wrote again to Mr Giglioli on 21 October 2019 indicating that because of an issue raised by the NRA, it was necessary to re-draw the proposed common boundary slightly and sent an amended re-parcellation application for signature by the Defendants.
101. By this time Etienne Blake had been instructed by the Defendants in place of Mr Giglioli. They asked for an explanation of the position of the NRA and also raised an objection to the amended boundary plan because it would still leave part of the front wall of the Property and the gateway outside the boundary of the Property. KSG attorneys replied explaining that the NRA had expressed concerns about road access for fire and garbage trucks. The NRA wanted to ensure that access was not impeded by the front wall of the Property which is on a cul de sac. KSG mentioned that the NRA had noted in a letter that “...many of the other parcels abutting that cul-de-sac are also encroaching onto the cul-de-sac and will contribute to preventing unimpeded circulation of emergency and sanitary service vehicles”.
102. Ultimately the re-parcellation took place based on a plan prepared by Mr Holden, although because of the objection of the NRA, it still left part of the front boundary wall and gates outside the amended boundary of the Property.
103. ATF Approval for the Carport was granted by the CPA and a building permit issued on 28 February 2020. A final planning inspection took place on 18 March 2020 and a certificate of fitness issued on 14 April 2020.
104. As part of the ATF Approval process, Bolas provided a letter dated 16 January 2020. It states that:  
*“Based on our on-site investigation, for what is visible, we find that the existing Carport structure has been built per the referenced set of signed structural plans.*”



*For the portion of the structure that was not visible, we note that we did not observe any visible major cracking or deflection, which might be indicative of structural distress.*

*We find that the Carport structure was properly built as per the referenced set of structural engineered plans.”*

105. After the dispute with the Defendants arose, Mr Purton did re-submit the amended structural drawings for the Master Bedroom Extension and those drawings were approved.
106. A final twist to the facts is that, as mentioned earlier, on 1 September 2021 the Defendants sold the Property for US\$7,909,700, approximately US\$1,300,000 more than the price agreed to be paid when they bought it. No application was made to amend the pleadings to reflect either this or the granting of AFT Approval.

### **Expert Evidence**

107. As mentioned earlier, the Plaintiff called two expert witnesses. The first was Mr David Groves (“Mr Groves”), a Chartered Quantity Surveyor and Managing Director of DDL Studio Ltd. He has over 32 years’ experience in surveying and construction consulting, 24 of which had been spent in the Cayman Islands.
108. His instructions were to assess the cost of construction of the proposed Master Bedroom Extension including both labour and materials at market value including overheads and profit element as of 3 August 2018. He also was instructed to assess the cost with regards to the Master Bedroom Extension of all associated services including professional fees of architects and surveyors and of pocket disbursements to the CPA and BCU as of 3 August 2018 and 14 April 2020, to the extent that there was any difference. His evidence was not challenged. He estimated that as at 3 August 2018 the cost of constructing the Master Bedroom Extension was CI\$73,371 with professional and statutory fees of CI\$11,006 with a total of CI\$84,377. He estimated that as at 14 April 2020 those costs would have been CI\$81,956 and CI\$12,293 respectively with a total of CI\$94,249.
109. Mr Groves did note that a full site visit had not been possible so his estimates were prepared using the design information provided to him.
110. In cross examination he agreed that it was necessary to have obtained planning permission and BCU approval prior to commencing the Master Bedroom Extension and the Carport. Ultimately, this is an issue that is not in dispute as between the parties.



111. The second expert was Mr Frank Reed ("Mr Reed"). Mr Reed is an engineer and in the past has been a member of the Institution of Civil Engineers, UK (M.I.C.E.) and a registered Professional Engineer of Bermuda (P.E.). He is currently a member of the Professional Engineers of Ontario (Canada) (P.Eng). He has experience with substantial construction projects in all of those countries as well as in the Cayman Islands.
112. He had been instructed to provide structural engineering evidence in relation to the Property. Mr Reed was also unable to gain access to the Property and his report was prepared based on a visual inspection of the Carport from the boundary.
113. Mr Reed covered three items in his report. The first was a vertical crack that was apparent between each of the reinforced concrete beams forming part of the Carport and the existing wall of the house to which it was attached. Mr Reed commented that the shape of the most noticeable crack was narrow at the bottom, widening towards the top and indicated to him that there was or had been rotational movement between the beams and the wall of the house. He commented that:

*"Any addition to an existing structure, particularly after a significant period will probably differentially settle with respect to the existing structure (even if founded on rock – although this would be extremely minimal). It is not unusual in the Cayman Islands for primary structural elements to be founded on rock while secondary structures are founded on engineered fill (particularly with regards to later additions). This is likely the case in this instance (I have not reviewed any drawings relating to the existing house structure, so have been unable to confirm this).*

*The connection of structural elements that are funded on non-homogenous soils will result in differential settlement. With this knowledge, the engineer can provide design details that will mitigate and allow for this. One method is to provide sufficient reinforcement to resist the tensile and bending forces and thus reduce the potential for visible cracks. Another method is to provide a detail that allows for the movement – in such a way that prevents the potential for cracking in brittle materials such as masonry and concrete. It would appear from the Bolas drawings that the former approach was used.*

*The concrete pad foundations provided in the Bolas drawings are in my opinion generous, providing an area that exceeds the requirements of the design loads and called-off allowable bearing soil capacity; thus, mitigating the differential settlement potential. The foundation notes on the Bolas drawings state that "...the owner/contractor should retain the services of a professional geotechnical engineer to provide soil testing and verifying that material on which foundations bear has at least the above capacity." I have no knowledge if this was provided. There is no reference to a geotechnical report, and I have not seen one. This would likely have provided guidance on foundation options for primary structures, secondary structure and road and parkways."*



114. He continued to say that:

*“Bolas verifies that even without the embedment of the top and bottom beam rebar into the existing 8” CMU wall that the steel bearing seat, as designed, would be adequate. I agree with this – in fact, this is how I would have designed it, but with a flexible movement joint isolating the existing 8” CMU wall from the new concrete beam.*

*It is my opinion that the cracks are not serious and not a life-safety issue. They are in my view minor, this type of interface crack is common in the Cayman Islands, and it is relatively simple and inexpensive to remediate ..... I would propose that the Defendant’s suggestion relating to further confirmatory investigation “further independent confirmatory investigations as to the sufficiency of the Carport’s foundations will have to be undertaken, which require: (i) the excavation of a 10ft pit in the centre of the driveway to the Property and/or; (ii) the jackhammering of the concrete slab adjacent the Carport; both of which would result in significant cost and inconvenience” would be excessive in the extreme, especially when the fix for a crack would be relatively simple.*

*It is my view that minor remediation measures may be implemented. It is my view that the design and construction does not fall below the standard of the ordinary skilled man exercising and professing to have these special skills.”*

115. The second issue was whether the design depth used on the “CB1” beam located at the west and east side of the Carport with a span of 34 feet was shallower than the minimum required by code. In his opinion the computed deflection of the beam based on the beam design depth used was well within code limits. He explained that the Carport roof structure, in construction terms, is very light. The beam also passes in “Bending” and “Shear”. Visually, from the photographs observed and by drive by, there appeared to be no obvious signs of excessive deflection. In his view no remediation measures were needed.

116. Finally, he dealt with whether the beam design deflection at service load levels was in excess of the maximum permitted by code. His opinion was that beam deflections and related beam depths are interlinked and based on his opinion in relation to the second issue, his position in relation to both the second and third issues is the same.

117. In conclusion, Mr Reed stated that:

*“It is my opinion that the car port, as designed and constructed, is to code and follows generally accepted local construction and engineering practices. It appears that the only observable questions relate to Asserted Deficiency I with the presence of two (possibly four – I was only able to verify two) cracks, which in my opinion are minor and not life safety issues. I believe that differential settlement has occurred initiating rotational movement, inputting the stresses that resulted in the cracks, but from the size of the cracks this would appear to be minor. As noted earlier in the report other factors may have exacerbated the cracks or be the cause.*



*Remediation of the cracks would, in my view, be simple inexpensive (this should be verified by a registered cost consultant as this is outside my area of expertise), and should be completed within a few days, with little inconvenience to the occupier.*

*Asserted Deficiencies 2 and 3, as noted earlier in the report are, from a structural viewpoint, inter-related. The asserted deficiencies suggest that these do not meet code requirements. It is my opinion, that they do and that my responses above validate this opinion."*

118. Mr Reed's evidence was not challenged. He was cross-examined briefly. He was asked whether in his opinion there would have been the less rotational movement if the foundations for the Carport had been constructed using piles, the same method that was used for the house. He agreed that here would have been less.
119. He was asked about the concrete pad foundations for the Carport and, in particular, the pad on the farthest south west corner of the Property nearest the Road Reserve. It was put to him that the pad in question abutted the boundary wall. He was asked whether the boundary wall provided any support for the pad. Mr Reed said that he didn't know if the wall and pad were connected and pointed out that generally a pad would not be connected to a wall. He explained that the load from the Carport was downwards on the pad. He was asked what might happen to the pad if the wall was removed. His answer was that he did not believe that anything would happen because the pad is 4ft deep and the load from the Carport was downwards on the pad.
120. Mr Purton was called to give evidence before the experts and, for timing reasons, Mr Holden was called after the experts. Both Mr Purton and Mr Holden were combative and argumentative witnesses, each at times putting their own questions to opposing counsel. I had a good opportunity to observe their demeanor and put the personalities to the correspondence. I felt that neither was as candid with their evidence as they should have been.

### **Mr Purton**

121. Mr Purton was cross examined at some length by Mr Akiwumi about the question of planning permission for the Carport. Many of the questions went over the documented chronology that I have set out above so I have not repeated that part of his oral evidence.
122. Mr Purton accepted that he had deliberately not obtained planning permission before he started the Carport and that he had been untruthful with the Defendants and Mr Giglioli about that. He accepted that as a member of the Royal Institute of Chartered Surveyors he had a professional obligation of



integrity which he had breached in this case. He accepted that he had made a mistake and should have told the Defendants about the lack of planning permission sooner.

123. It was put to Mr Purton, and he agreed, that the effect of paragraph E of the Contract was that he should have obtained planning permission and BCU approval prior to building the Carport or starting the Master Bedroom Extension and that it was a legal requirement to obtain planning permission before starting construction. He further agreed that he had warranted in clause I.4 of the Contract that the Additional Works would be constructed and completed in compliance with all planning permissions and building control requirements and that in building the Carport without planning permission and a building permit he had put the Defendants at risk of an enforcement notice from the CPA.
124. Mr Purton was asked about the drawings for the Master Bedroom Extension and in particular the column included in the first set of drawings that were submitted to BCU. He was asked why he didn't submit amended plans in February 2018 when Mr Holden indicated that the column had to be removed from the drawings. His answer was that he did not submit amended plans immediately because he did not want to interrupt the BCU approval process. He explained that in such circumstances it is better to wait for the BCU approval of the original plans and then submit any amended plans after that had been done. To interrupt the process before approval can lead to greater delays. He also pointed out that the fact that he had received BCU approval for the Master Bedroom Extension meant that he could have started the Master Bedroom Extension and dealt with the amendment to the plans after that if it had not been for the delay requested by Mr Holden. His position was that if Mr Holden had said in February 2018 that the amended drawings should have been submitted to BCU, Mr Purton would have told him to wait until after BCU approval of the original plans has been obtained. Indeed, in an email that he sent to Mr Holden on 9 April 2018 he advised Mr Holden that he would submit the amended plans once the BCU permit was issued. After BCU approval was given he didn't submit the amended drawings to BCU because Mr Holden had indicated that he wished to delay the Master Bedroom Extension until 1 September 2021.
125. It was put to Mr Purton that in 2017 when the Contract was signed, he was aware that part of the front wall encroached onto the Road Reserve. Mr Purton said that he might have "possibly" have known but would have had to get a surveyor to confirm the extent of any encroachment. I have to say that I am not convinced that this was a complete answer and it is this area of Mr Purton's evidence that was most troubling.



126. In the context of clauses I.1 and I.2 of the Contract Mr Purton was asked why he did not disclose at the time the Contract was signed that part of the front wall encroached on adjoining land. He said that the issue had not come to his attention and that as far as he was concerned, it was not an issue to be concerned about. When discussing the Carport with Mr Holden prior to the Contract being signed it did not occur to him that there might be a boundary encroachment problem. Mr Purton said that, if it had occurred to him, he would have told Mr Holden. He said that the first time it came to his attention was when Mr Doak started work on the drawings. It was put to him, however, that despite his previous evidence that he would have told Mr Holden about the boundary issue if it had occurred to him, he didn't tell Mr Holden when he definitely became aware of it.
127. Mr Purton accepted, that in discussions with Mr Holden he didn't tell him that part of the front walls encroached on the adjoining property and that therefore the automated gate would also encroach on the Road Reserve.
128. Mr Purton was asked about a note on the structural engineer's drawings for the Carport which mentioned commissioning a soil analysis to ensure that the structure was correctly designed. Mr Purton accepted that he had not obtained one when the drawings for the Carport were prepared. His evidence was that he had obtained a soil analysis when the Property was originally built and the same structural engineers had designed the structure of the Property so the soil condition was already known.
129. It was put to Mr Purton that even after the re-parcellation, part of the foundation pad on the south west side of the Carport was still outside the new boundary. Mr Purton said that he couldn't answer that and would need a surveyor to confirm whether that was correct or not.

### **Mr Holden**

130. As mentioned above, a witness statement was not prepared for Mr Holden so an affidavit sworn by him in March 2021 was agreed to stand as his evidence in chief. It was also agreed that Mr Akiwumi would, to a limited extent, examine him in chief to update and focus his evidence better on the issues at hand.
131. Early on in that process Mr Akiwumi asked Mr Holden to explain why he had not paid Mr Purton. After recounting briefly some of the facts already covered, Mr Holden mentioned that after it became apparent that the Carport had been built without planning permission, Mr Purton had



offered to remove the Carport. Mr Holden said that he declined that offer because he said that he wanted the Carport.

132. He said a number of times whilst giving his evidence that after the issue with lack of planning permission became apparent they were forced to sit and wait whilst that problem was resolved by way of the ATF Approval. He added that it was during that time that the cracks appeared that were the subject of Mr Reed's report.
133. Mr Holden said that, as it sits today, if he wrote a cheque for the Carport he would be paying for a structure part of the foundation of which sits outside the boundary of the Property as do part of the walls which surround that part of the foundation. A soil investigation was not done when the Carport was built and if the wall next to the foundation of the Carport had to be removed because it encroached on the Road Reserve then something would have to be done to prevent the foundation of the Carport from subsiding. He added that the Carport was not constructed to his satisfaction. All of this was said despite Mr Holden being aware of and having heard the evidence of Mr Reed.
134. After being asked about this by Mr Akiwumi, he added that at the point that the Carport was completed, it was to his satisfaction but subsequently he found out about the lack of planning permission and the issues with the part of the foundation being outside the boundary and he then was not satisfied.
135. Mr Holden was asked whether there was any connection between the Carport and the decision by the Defendants not to go ahead with the Master Bedroom Extension. He said that there was a point at which it reconfirmed their views; they had been lead to believe that it would take 5-6 months to get planning permission and instead it took 11 months.
136. In cross examination, Mr Holden accepted that the price that they agreed to pay for the Property was US\$6,300,000 and that the price didn't change between the initial offer and the final offer. All that changed was how the price was apportioned between the Property and the Additional Works.
137. Mr Holden was asked by Mr Kennedy about the email from Mr Giglioli dated 25 May 2017 in which Mr Giglioli suggested for stamp duty purposes using the figure of US\$5,985,000 less the value of furnishings as the purchase price for the property with the US\$315,000 for the Additional Works separated. Mr Holden denied that was the only reason the US\$315,000 was split out. He



maintained that the main reason was to ensure that US\$215,000 was attributed to the Master Bedroom Extension and US\$65,000 to the Carport. The aim of doing that was to provide some protection to the Defendants.

138. Mr Holden was taken to the correspondence between Mr Purton and Mrs Williams prior to the Contract being signed. He said that he did not recall having seen all that correspondence but did confirm that he had seen Mr Purton's email to Mrs Williams dated 23 May 2017 dealing with his concerns about how the US\$315,000 would be applied. Mr Holden also confirmed that the email sent by Mr Giglioli on 29 May 2017 was sent with his approval.
139. Mr Holden confirmed that because of the delays that had occurred he had not approached any other contractor to carry out the Master Bedroom Extension.
140. Mr Holden was asked what his position would have been if, the day after the Contract was signed, the Defendants had told Mr Purton that they did not wish to go ahead with the Master Bedroom Extension and the Carport. He accepted that, in such a case, the Plaintiffs would have had a claim against the Defendants for the amount of US\$315,000 less the cost of the relevant Additional Works.
141. When asked about the ATF Approval for the Carport, Mr Holden expressed his incredulity that that process could have been completed when part of front wall of the Property and, in his view, part of the foundation of the Carport still remained outside the boundary. In his view, the Carport remains an illegal structure.
142. Mr Holden accepted when it was put to him that the Carport was substantially complete by 21 June 2018 and that he was then using it. Mr Holden accepted that if planning permission and BCU approval had been in place when Mr Purton asked for payment for the Carport, he would have been paid. However Mr Holden maintained that he believed that the agreement was that the Carport and Master Bedroom Extension would both be completed within a 10 week period. Because the Carport took 8 weeks to substantially complete and a further 5 weeks for remaining items to be done, there was no way that the Master Bedroom Extension could be completed within the same 10 week period.



143. Mr Holden accepted that after it became apparent that there was no planning approval for the Carport, Mr Purton had kept him informed of progress with the ATF Approval. However Mr Holden maintained that even after the ATF Approval and the re-parcellation everything was still not to his satisfaction because of the residual boundary issue and that he had no obligation to pay Mr Purton for the Carport or automated gates despite otherwise being satisfied with them.
144. Mr Holden was asked about the offer by Mr Purton to remove the Carport. He said that his preference was to keep the Carport and get ATF Approval for it. He was asked whether to satisfy the terms of the Contract ATF Approval was needed. He agreed that it was but only if the Carport was within the boundaries of the Property.
145. When it was put to him, Mr Holden did not accept that the Pre-Completion Additional Works were part of the Additional Works and seemed to be of the view that the cost of that work was included within the amount of the US\$5,985,000.
146. Mr Holden accepted that there was no evidence before the Court that supported his contention that the foundation pad for the Carport was still outside the boundary of the Property.
147. Mr Holden was taken to paragraph 25 of the Defendants' Counterclaim. He conceded that Mr Purton had paid for the re-parcellation of the Property and further conceded that the Defendants had not re-constructed the entrance to the Property and had not incurred the cost of removing the Carport. He did, however, say that he had reduced the price of the Property when selling it to reflect the issues with the Carport and the boundary.
148. Mr Holden accepted that there was no longer a claim for the matters pleaded in paragraphs 26 and 27 of the Counterclaim in that title to the Property was not defective, there was no loss in value and there was no lost opportunity to sell it.
149. Mr Holden was asked about the submission to BCU of the amended structural plans for the Master Bedroom Extension. Mr Holden said that he had asked Mr Purton to submit them straight away. Mr Holden said that he was concerned by the length of time that it had taken BCU to process the original plans and didn't want any further delay. He also didn't want to run the risk of BCU turning down the amended plans and wanted the amended plans approved before construction was started on the Master Bedroom Extension. Mr Holden accepted that he had not said to Mr Purton that



unless the amended plans were submitted to BCU straight away then the Defendants would pull out of the Master Bedroom Extension.

150. Mr Holden accepted that, prior to finding out about the lack of planning permission for the Carport, he had asked Mr Giglioli to tell Mr Purton that the Defendants did not wish to go ahead with the Master Bedroom Extension.

151. When it was put to him that pulling out of the Master Bedroom Extension was wrong, Mr Holden said that the lead up to the decision not to proceed with that work was based on the length of time it had taken to get BCU approval for the Master Bedroom Extension, the fact that Mr Purton had not submitted the amended plans to BCU and that the Carport took 8-13 weeks to complete and not the 2-3 weeks that Mr Purton had originally estimated. After living in the Property for a year the Defendants were not prepared to carry on with the Master Bedroom Extension and suffer further delays. When they found out that the Carport had been built without planning permission and BCU approval it cemented their decision 100% that they would not proceed with the Master Bedroom Extension.

152. Towards the end of his cross examination, in answer to questions from Mr Kennedy, Mr Holden summarized the reasons why he was not paying for the Carport and the Master Bedroom Extension. The Carport was not to his satisfaction because:

- it has cracks;
- the depth of the structural beam;
- there had been no soil investigation and there was a question about the foundations;
- part of the foundation was outside the boundary; and,
- part of the wall encompassing the foundations of the Carport was outside the boundary.

153. In relation to the Master Bedroom Extension they were not paying because:

- of the length of time that it took to get planning permission and BCU approval;
- the Carport was not completed until June 2018;
- the amended structural drawing for the Master Bedroom Extension had not been approved by BCU by the time they advised Mr Purton that they were not going to proceed with these works; and,



- Mr Purton had been dishonest about planning permission and BCU approval for the Carport.

154. In re-examination Mr Akiwumi asked Mr Holden about the sale by the Defendants of the Property and whether there had been at a loss suffered. This had not been covered in his examination in chief so I allowed Mr Kennedy to cross-examine Mr Holden on this. Mr Holden said that he had approached the prospective purchaser and had “come clean” about the issues relating to the Carport and boundary. Mr Holden said that before an offer to purchase had been received he offered the prospective purchaser a discount of US\$50,000. The prospective purchaser countered and asked for US\$65,000, which apparently was agreed.
155. The fact that Mr Holden sought to suggest that he had felt obliged to raise the boundary question with the new owners prior to an offer even having made and discounted the price accordingly struck me as a very odd state of affairs. Having heard Mr Holden explain what had happened, I was left with the feeling that he had tried to create a “loss” (being the discount in the price) to further justify not paying for the Carport.
156. Mr Holden accepted that there was no evidence before the Court to substantiate that.

### **The Plaintiffs’ submissions**

157. At the beginning of this judgment I set out a summary of each of the parties’ pleaded cases. The Plaintiffs’ written submissions prepared for trial set out their position as follows.
- 157.1 Notwithstanding the Defendants’ decision not to proceed with the construction of the Master Bedroom, they had retained the US\$250,000. This was a breach of contract because under Clause G of Addendum B, the Defendants could only keep the US\$250,000 if the Master Bedroom Extension was not completed within 10 weeks of the grant of the permissions. They argued that it is an implied term of Addendum B that the Defendants must allow the Plaintiffs to construct the Master Bedroom Extension following the grant of the permissions because performance of the Contract could not take place without the co-operation of the Defendants. Reliance was placed on the case of *Sanderson Ltd v Simton Food Products Ltd* [2019] EWHC 442 (TCC) at paragraph [25], in which it was said:



*“The Contract required close collaboration between the parties to define the Defendant’s business requirements, identify the action necessary to digitise and automate the Defendant’s production and accounting processes, implement the Claimant’s electronic system and ensure that the Defendant’s employees were properly trained in the use of the system. In the absence of specific contractual provision requiring the parties to cooperate with one another in this way, a duty to do so would be implied. In the Interpretation of Contracts (5th edition) (2011) at Para 6.15, Sir Kim Lewison enunciates the principle that “where performance of the contract cannot take place without the cooperation of both parties, it is implied that co-operation will be forthcoming”. This principle is consistent with the authorities to which he refers, including the observations of Lord Blackburn in Mackay v Dick (1881) 6 Ap Cas 251 at 263. It also survives the recent guidance of the Supreme Court in Marks & Spencer v BNP Paribas [2016] AC 742 in which the tests of necessity and obvious inference have been re-stated. In the absence of express contractual provision to the contrary, I am thus satisfied that a duty of cooperation is to be implied in the present case.”*

157.2 The Plaintiffs submit that the Defendants cannot now rely on their wrong (the breach of the implied term) and allege that the Defendants have failed to perform their obligations under Clause G. The Plaintiffs referred to the case of *TMF Trustees v Fire Navigation Inc* [2019] EWHC 2918 (Comm) At [42]: *"The authorities referred to above demonstrate that the prevention principle "excuses" a breach where performance was prevented by the other party's breach, giving rise to a defence to liability for the breach itself, not merely defence by way of a set-off."* The Plaintiffs position is that they were ready and willing to perform their obligations and build the Master Bedroom Extension following the grant of planning permission and BCU approval. The Defendants are therefore not entitled to keep the US\$250,000 pursuant to Clause G and are in breach of contract.

157.3 The Plaintiffs argue that clause G requires that, where the Defendants are contractually entitled to retain the US\$250,000 (which the Plaintiffs say is not the case here), that sum is to be *"appl[ied] towards cost of completing the Additional Works"*. The Defendants have not done so and have simply kept the money in breach of contract.

157.4 The Plaintiffs assert that the assurance given to the Plaintiffs by Mr Giglioli on the 27 May 2017, namely that *"if the Holdens were to back out of the extension/carport*



*or either of them, Neil would have a claim in damages", was an underlying assumption on which the parties conducted dealings and induced the Plaintiffs to enter into the Contract. It is not fair or just they say to allow the Defendants to now go back on this assurance and they are estopped in doing so. See *Republic of India v India Steamship Co* [1997] 4 All ER 380 at 391 per Lord Steyn, 'It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption ..."*

- 157.5 It is put on behalf of the Plaintiffs that if these breaches were material and repudiatory breaches of the Contract that demonstrates the Defendants' intention to abandon and to refuse to perform their obligations. The Plaintiffs refer to test for repudiatory breach as explained by the English Court of Appeal in *Eminence Property Developments Ltd v Heaney* [2011] 2 All ER (Comm) 223 at [61], per Etherton LJ: "*So far as concerns repudiatory conduct, the legal test is simply stated, or, as Lord Wilberforce put it, 'perspicuous'. It is whether, looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract. [62] Secondly, whether or not there has been a repudiatory breach is highly fact-sensitive. That is why comparison with other cases is of limited value. The innocent and obvious mistake of Mr Jones in the present case has no comparison whatever with, for example, the cynical and manipulative conduct of the ship owners in The Nanfri. [63] Thirdly, all the circumstances must be taken into account in so far as they bear on an objective assessment of the intention of the contract breaker. This means that motive, while irrelevant if relied upon solely to show the subjective intention of the contract breaker, may be relevant if it is something or it reflects something of which the innocent party was, or a reasonable person in his or her position would have been, aware and throws light on the way the alleged repudiatory act would be viewed by such a reasonable person. So, Lord Wilberforce in the Woodar case ([1980] 1 All ER 571 at 574, [1980] 1 WLR 277 at 281) expressed himself in qualified terms on motive, not by saying it will always*



*be irrelevant, but that it is not, of itself, decisive. [64] Fourthly, although the test is simply stated, its application to the facts of a particular case may not always be easy to apply, as is well illustrated by the division of view among the members of the Appellate Committee in the Woodar case itself.”*

- 157.6 In consequence, in connection with the Master Bedroom Extension, the Plaintiffs submit they are entitled to damages for breach of contract. Their position is that based on the principle that damages should be assessed on the basis of putting the innocent party in the same position as if the contract had been performed. (See *Robinson v Harman* (1843-60) All ER Rep 383), those damages should be assessed as the money due to them under the Retention (US\$250,000), less the money that would have been spent building the Master Bedroom Extension (estimated at US\$80,328.35). The Plaintiffs claim that they are therefore entitled to damages of US\$169,671.65 in respect of the Master Bedroom.
158. In respect of the Carport, the Plaintiffs say that construction was completed on the 3 August 2018. There was a delay in obtaining planning permission and BCU approval, however the consequence of the grant of ATF Approval means that the Carport was completed pursuant to Clause D and all warranties had been satisfied pursuant to Clause I. The time obligation under Clauses E and G had been met, because the Carport had been completed within 10 weeks of the grant of ATF Approval.
159. Consequently, they argue there had been satisfactory completion of the Carport prior to the date in Clause G, and so the Defendants were required under H.3 of the Contract to cause US\$65,000.00 of the retention to be paid to the Plaintiffs.

### **The Defendants’ Submissions**

160. The Defendants argue that the claim should not succeed because Mr Purton breached the terms of the Contract in terms that I have set out earlier in my judgment.
161. The Defendants reject the Plaintiffs’ claim in relation to the Carport because by the time Mr Purton proposed a solution by way of the ATF Approval:



- 161.1 when the proposal was made, the Plaintiffs were already in breach of the Contract, having failed to construct the Carport in the requisite time;
  - 161.2 the proposal did not resolve the Carport problem at all because the foundation for one of the pads of the Carport still protruded outside of the boundary of the Property as a consequence of it being elevated above road level;
  - 161.3 the re-parcellation of the boundary still left part of the front gateway outside of the boundaries of the Property;
  - 161.4 the NRA would not agree to any realignment of the Property boundary that makes good the Carport and the front gateway;
  - 161.5 part of the front boundary wall, as constructed by the Plaintiffs prior to the sale of the Property, was also outside of the boundaries of the Property and the Plaintiffs' proposal did not redress their breach of warranty in this regard;
  - 161.6 in any event, the proposals were ex post facto the termination of the Contract as particularised in the Defendants' attorneys' letter of 27th November 2018.
162. The Defendants reiterated their allegation that the Contract was illegal. Their position is that with it being accepted that planning permission and BCU approval were required before the Master Bedroom Extension and Carport was started, it ought, as a matter of public policy to be offensive to the principle of justice / legality to permit the Plaintiffs to succeed in their claim. The Defendants rely on the case of *Patel v Mirza* [2016] UKSC 42 (to which I refer in more detail below).
163. In relation to the Master Bedroom Extension, the Defendants claim that there is an “unbreakable” connection between the breaches of contract by the Plaintiffs with regard to the construction of the Carport and the Defendants' decision not to proceed with the Master Bedroom Extension. This is a contention that is at odds with the evidence given at trial.
164. On a number of occasions in the pleadings and during trial the Defendants mention that Mr Purton owed various obligations to the Defendants, they have been variously described as obligations of candour and a duty of integrity/good faith. It has not been pleaded specifically and it has not been argued that, as a matter of law, such obligations arose in relation to the performance of the Contract or that such duties, if they arose, were breached and that, as a result, the Defendants suffered loss. On that basis I do not treat them as anything more than factual criticisms of Mr Purton's conduct. In cross examination, Mr Purton rightly accepted that his conduct fell short of what would be



expected of a member of the Royal Institute of Chartered Surveyors and the issue has not been put any higher than that.

165. The Defendants argue that Clause E of Addendum B to the Contract imposes conditions precedent on the Additional Works; namely, a requirement to obtain planning permissions and building permit approval (what I will call “Pre-Construction Requirements”) before starting any works. The Defendants also argue that the clause makes time of the essence in that it states that “...*the Additional Works shall be completed within 10 weeks of the date on which planning permission and building permit approval have been granted ...*”. The Defendants argue that the Court should interpret the Contract accordingly or imply such terms.
166. The Defendants urged the Court to interpret the Contract in a way that is consistent with their case. Reliance was placed on the English case *Arnold v Britton* [2015] UKSC 36 (10 June 2015) in which Lord Neuberger articulated principles of contractual interpretation.

*“15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to “what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions. In this connection, see Prenn at pp 1384-1386 and Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen) [1976] 1 WLR 989, 995-997 per Lord Wilberforce, Bank of Credit and Commerce International SA (in liquidation) v Ali [2002] 1 AC 251, para 8, per Lord Bingham, and the survey of more recent authorities in Rainy Sky, per Lord Clarke at paras 21-30.”*

167. The Defendants also referred to the case of *In Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 898 at 912-3.
168. The Defendants’ position in relation to Clause G in Addendum B to the Contract is that Plaintiffs were required to have complied with the Pre-Construction Requirements. The subsequent issuance of the AFT Approval was after the Defendants had terminated the Contract and the Plaintiffs are



estopped from asserting that they were permitted under the terms of the Contract or otherwise to take any steps post-termination in connection with compliance with the terms of the Contract.

169. In conclusion, the Defendants maintain that the AFT Approval was obtained post-termination of the Contract, the Carport is still outside the boundary of the Property, planning permission ex post facto is contrary to the condition precedents in Clause E and there is no certificate of occupancy in relation to the Carport, although the AFT Approval was given.

### **Review of Facts, Law and Decision**

170. As I mentioned earlier in my judgment, the pleadings were not amended to deal with the AFT Approval and, more importantly, to deal with the sale of the Property by the Defendants.

### **Illegality**

171. In my view, the first question is whether the Defendants can rely on the doctrine of illegality as part of their defence. The doctrine of illegality was addressed by the Honourable Chief Justice in *Ahmad Hamad Algosaibi and Brothers Company v. Saad Investments Company Limited (in official liquidation) and Others* [2018 (3) CILR 1]. The Chief Justice referred to the decision of the English Supreme Court in *Patel v. Mirza* [2016] UKSC 42 which explained the doctrine as follows:

*“The majority of the Supreme Court concluded that there were policy reasons for the common law doctrine of illegality as a defence to a civil claim: (i) a person should not be allowed to profit from his own wrong-doing; and (ii) the law should be coherent, not self-defeating, and should not condone illegality. Whether allowing a claim would be harmful to the integrity of the legal system depended on a tripartite test: (i) whether the purpose of the prohibition that had been transgressed would be enhanced by denying the claim; (ii) whether denying the claim might have an impact on another relevant public policy; and (iii) whether denying the claim would be a proportionate response to the illegality. Within that framework, a range of factors might be relevant and it was not helpful to prescribe a definitive list. That said, the courts could not decide cases in an undisciplined way and a principled and transparent assessment had to be made. Potentially relevant factors included the seriousness of the conduct, its centrality to the illegal agreement, whether it was intentional, and whether there was disparity in the parties’ respective culpability. Punishment for wrongdoing is the responsibility of the criminal courts. The civil courts are generally concerned with determining private rights and obligations, and they should neither undermine the effectiveness of the criminal law nor impose additional penalties disproportionate to the nature and seriousness of any wrongdoing. The courts had to abide by the terms of any relevant statute, but they are to have regard to the considerations of policy and the nature and circumstances of the illegal conduct.”*



172. The agreement under consideration in *Patel v. Mirza* was for the use of a “spread betting” account to speculate on the price movements of Royal Bank of Scotland plc shares. The speculation was to be based on inside information that Mr Mirza was to obtain from contacts that he had at the bank. The agreement was said to be plainly contrary to the prohibition on insider dealing in s.52 of the English Criminal Justice Act 1993. Mr Patel paid Mr Mizra GBP620,000 which it was agreed Mr Mizra would use to fund the spread betting account. The agreement could not be carried out because the inside information failed to materialize. Mr Mizra failed to return the money to Mr Patel and Mr Patel sued him for a claim in unjust enrichment. The majority of the Supreme Court concluded (in its lead judgment delivered by Lord Toulson) that a claimant who satisfies the requirements of a claim in unjust enrichment should be entitled to the return of his money or property and such a person should not prima facie be debarred from recovering money paid or property transferred by reason of the fact that the consideration which had failed in whole or in part was unlawful consideration; and that, since an order for restitution of the money paid by Mr. Patel to Mr. Mirza would merely return the parties to their previous position before the conclusion of the illegal agreement and prevent the defendant Mirza gaining by unjust enrichment, such an order should be made.
173. In relation to the question of whether the Contract can be said to be illegal as claimed by the Defendants in their defence, thereby debarring the Plaintiffs’ claim as a matter of public policy, the Plaintiffs say that the Contract expressly contemplated compliance with rules of the Cayman Islands with respect to planning and building control. It further made payment expressly dependent upon the granting of those permissions. They say that the Contract was legal, the issue is the manner of performance by the Plaintiffs. They add that Plaintiffs are not making a claim for payment based on an illegal act. Mr. Purton accepted that he would not get paid for the Carport until the necessary planning and building permissions had been obtained.
174. In my view, the Contract was clearly written to be and intended to be a contract that complied with the laws of the Cayman Islands. It was nothing like the agreement in *Patel v. Mizra* which could only be completed by committing the criminal offence of inside trading. It certainly cannot be said that the conduct of Mr Purton in proceeding with the Carport without planning permission and building approval was professional in any respect. His unprofessional conduct was compounded by then being untruthful about that fact when dealing with Mr Giglioli and the Defendants. There is, however, no evidence that his conduct itself is or was illegal and no evidence was before the Court as to the consequences of his conduct from the perspective of the Development and Planning



Act (the “Act”). However, I think that because the question of illegality has been raised in the context of that Act I should set out what I see as the relevant provisions and consider the implications of those to the facts of this case.

175. S.13 of the Act provides that subject to the terms of the Act or any regulations made under it, permission shall be required for any development of land. S.15 of the Act provides for applications for planning permission to be made and sets out the powers of the CPA in relation to whether or not to grant permission and, if so, on what terms.
176. S.18 (1) provides that if it appears to the Director of the CPA that there has been development of land without the grant of planning permission or in breach of a condition of such permission then, within 5 years of that development being carried out of the condition being breached, “*if the Director considers it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section*”. An enforcement notice may under s.18 (3) require that steps are taken to restore the land to its condition before the development work took place and may require demolition or alteration of any buildings or works or the discontinuance of any use on the land. Under s.18 (6) if an application for permission to retain the buildings or works or continue the use of the land then the operation of the enforcement notice is suspended until that is determined. Similarly, under s.18 (7) the effect of the notice is suspended pending any appeal against the notice.
177. Under s.21 (1) of the Act, where an enforcement notice has been served and not complied with then the owner or occupier of the land in question commits a criminal offence and is liable on conviction to a fine of CI\$5000.
178. It seems to me clear that simply proceeding to construct a building without first applying for planning permission is not, in itself, illegal or a criminal offence. The offence only arises if an enforcement notice has been served and has not been resolved or appealed successfully, and, only then, if the notice is ignored. These are matters for the CPA in accordance with the provisions of the Development and Planning Act. The evidence was that no action was taken by the CPA and, indeed, the AFT Approval was forthcoming so as at the date of trial, (being when the question of illegality should be decided (*Knight v Knight* [2019] EWHC 915 (Ch) at 106)), there was no illegality.



179. On the basis of the above, I do not find that there is any illegality in relation to the Contract as alleged by the Defendants and relied on for the purposes of their Defence and Counterclaim.

### **The Contract**

180. Much has been said by the parties about the Contract, what it means, what terms should be implied into it, how it might be interpreted, whether it was breached and what the consequences of that might be

181. I start my analysis on the basis that the Contract provided for the conveyance of title to the Property from the Plaintiffs to the Defendants with whatever boundaries it had. In turn, the Property was conveyed on 1 September 2021 by the Defendants to its current owners with a slightly larger area of land as a result of the re-parcellation that was approved by the CPA. There has been no suggestion that the Defendants have been unable to convey good title.

182. The Defendants have sold the Property for a significant profit and, when he was cross-examined, Mr Holden accepted that they have not suffered a loss as claimed in paragraphs 25 – 27 of the Counterclaim which, in turn, means that the claim of set off in paragraph 28 of the Counterclaim, which relies on paragraphs 25 - 27 must fall away. In particular paragraph 26 included a claim for damages for loss caused by, inter alia, defective title and encroachment.

183. As I say, a number of approaches have been taken to the Contract. The Plaintiffs argue in the Statement of Claim that on a true construction of the Contract, Addendum B required the Defendants to permit the Plaintiffs to carry out the Additional Works. Alternatively, a term ought to be implied into the Contract that the Defendants must allow the Plaintiffs to carry out the Additional Works. In the event that the Contract contains no such express or implied terms then it should be rectified. Finally, the parties are estopped from denying that the Defendants are required to permit the Plaintiff's to carry out the Additional Works.

184. The Defendants argue that the Court should interpret the Contract so as to incorporate the Pre-Construction Requirements. They further claim that the Contract is subject to an implied term that time is of the essence in relation to the 10 week period in Clause G of Addendum B.

185. The approach that the Court should take to implying terms into contract was considered in *Primeo Fund (in official liquidation) v. Bank of Bermuda (Cayman) Limited and HSBC Securities*



*Services (Luxembourg) SA* [2017 (2) CILR 334] (Para 211). Justice Jones reviewed the relevant law and said:

*“The applicable principles relating to the implication of contractual terms were recently restated by the UK Supreme Court in Marks & Spencer plc v. BNP Paribas Secs. Servs. Trust Co. (Jersey) Ltd. (18). For a term to be implied, it must be reasonable and equitable; it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; it must be so obvious that “it goes without saying”; it must be capable of clear expression; and it must not contradict any express term of the contract. In the circumstances of this case it is important to bear in mind the passage cited from Lord Bingham, M.R.’s judgment in Philips Electronique Grand Public SA v. British Sky Broadcasting Ltd. (23) ([1995] EMLR at 482):*

*“The question of whether terms should be implied, and if so what, almost inevitably arises after a crisis has been reached in the performance of the contract. So the court comes to the task of implication with the benefit of hindsight, and it is tempting for the court then to fashion a term which will reflect the merits of the situation as they then appear. Tempting, but wrong . . . [I]t is not enough to show that had the parties foreseen the eventuality which in fact occurred they would have wished to make provision for it, unless it can be shown either that there was only one contractual solution or that one of several possible solutions would without doubt have been preferred . . .”*

186. In cross examination, Mr Purton accepted that he should have applied for planning permission and BCU approval before starting the relevant Additional Works and that was clearly how the matter had been left in the correspondence leading up to the Contract. The Contract could have been clearer about this although I suspect that no one envisaged that Mr Purton would proceed to build any of the Additional Works without the necessary planning and BCU approvals.
187. Based on the evidence, in my view the simplest and most appropriate approach to the Contract is to apply the analysis of Justice Jones in *Primeo*, I find that a term should be implied that obtaining planning permission and BCU approval was necessary prior to commencing the Carport and Master Bedroom Extension. Such a clause goes without saying and, in my view, gives business efficacy to the Contract. These then are the Pre-Construction Requirements that the Defendants argue arise.
188. The Contract provided in Addendum B as follows:



“K **1.1 Purchase Price**

*The total purchase price is US\$6,300,000 (Six Million Three Hundred Thousand United States Dollars) apportioned as to US\$5,985,000.00 (Five Million Nine Hundred and Eighty-Five Thousand United States Dollars) for the Property and US\$315,000 (Three Hundred and Fifteen Thousand United States Dollars) for the Additional Works.*

**1.2 Manner of payment**

- a. *Initial deposit paid on signing of this Offer to Purchase for which receipt is hereby acknowledged US\$100.00*
- b. *Additional deposit due 7 days from acceptance of offer: US\$214,900.00*
- c. *The balance of the Purchase Price for the Property (US\$5,770,000.00)*
- d. *shall be paid and delivered to the Vendor or his authorized agent at Completion*

*The price of the Additional Works shall be paid as described in this Addendum “B”.*

189. Despite the change to the structure of the Contract as proposed by Mr Giglioli, increasing the Retention and deducting it from the purchase price in clause 3 of the Contract, the intention of the Parties is clearly set out in clause K. The purchase price of the Property was US\$6,300,000, US\$315,000 of which was attributable to the Additional Works.

190. So what then of clauses E and G of Addendum B?

191. By way of a reminder, they provide:

*“E. Apart from the works described at D.3, D.4 and D.5 above, the Additional Works shall be completed within 10 weeks of the date on which planning permission and building permit approval have been granted in respect of the Additional Works. The works described at D.3, D.4 and D.5 shall be carried out and finished before the Completion Date.”*

*“G. In the event the Additional Works set forth at D.1 and D.2 are not completed within 10 weeks after the grant of planning permission and building control permits the Purchaser may keep out of the Retention and apply towards the cost of completing the Additional Works US\$65,000.00 in respect of the Carport and/or US\$250,000 in respect of the extension to the master bedroom in which case neither party shall have any claim against the other under this Agreement.”*

192. In relation to the question of the Carport and Master Bedroom Extension, I have to decide whether these provisions of the Contract are clear and, if they are not, what their natural meaning is. If they are still unclear then in, my view, I have to decide whether a term or terms should be implied.



193. There is no express obligation in the Contract along the lines of what Mr Purton had set out in various of his emails prior to the Contract being signed. His approach was that the price to be paid for the Property was US\$6,300,000. If planning permission and BCU approval for either the Carport or Master Bedroom Extension was not forthcoming then the respective components of the Retention would be paid to the Defendants. If it was forthcoming, and the Defendants decided not to go ahead with either or both of those parts of the Additional Works then the respective components of the Retention would be paid to the Plaintiffs less the cost of the relevant works. In cross examination, Mr Holden accepted that the price of the Property did not change between the different versions of the Contract and further accepted that if the Defendants had decided the day after the Contract was signed not to go ahead with the Carport or the Master Bedroom Extension then the Plaintiffs would have a claim against them. Mr Holden was fully aware of the position of Mr Purton in relation to the Retention and the significance of the Retention as part of the purchase price for the Property.
194. In my view, there was only ever one contractual solution to the question of how the Retention was to be dealt with. Based on the evidence before me, as set out above, the Additional Works were part of the purchase price of the Property and, in my view, they were either to be carried out and the relevant part of the Retention released accordingly or, if the Defendants changed their mind about part of the Additional Works and planning permission and BUC approval had been granted and not refused, then the relevant part of the Retention was to be paid the Plaintiffs less the value of the works in question. I find that a term to that effect is implied into the Contract.
195. The question then is whether a term needs to be implied into Clause E of the Addendum in connection with the period of 10 weeks, making time of the essence in that regard. In my view, the wording of that Clause is clear and no further term need to be implied into the Contract, indeed to do so would in my view be inconsistent with the way that the parties approached that time period. In his email of 29 May 2017, Mr Giglioli made it clear that if there were delays and the Defendants were kept up to date by the Plaintiffs then he anticipated that the Defendants would be reasonable about extending the period.
196. Clause G of the Addendum has featured in the cases of both parties. Having found that terms are to be implied into the Contract as set out above, in my view, having considered all of the evidence, the only sensible way to read Clause G is that if the Additional Works were not completed within 10 weeks of the grant of planning permission or BCU approval, whether through delay by the



Plaintiffs or a change of mind on the part of the Defendants, the Defendants could direct a portion of the Retention to completing them but not simply retain the Retention and either not complete the Additional Works or, as in this case, simply keep the money. To the extent that is not clear or is reliant on the terms that I have already implied then I find that a further term is implied into Clause G to that effect.

### **Carport**

197. As a result of my finding that there is a term to be implied into the Contract that the Plaintiffs had to obtain planning permission and BCU approval prior to commencing the Carport and Master Bedroom Extension, the fact that Mr Purton started the Carport without applying for and obtaining either amounted to a breach of that term of the Contract. The question then is how the parties conducted themselves after that breach occurred. In the pleadings and written submissions the parties have variously referred to the Contract being rescinded and repudiated but without developing the detail of those claims and submissions or the considering the consequences that might have flowed from either scenario.
198. Having considered the written and oral evidence it seems to me that whilst there was a breach of the Contract by the Plaintiffs, the Defendants took no action in relation to that in the context of the Carport. In my view, there is no evidence to support the claim that the Contract was terminated by the Defendants in September or October 2018 as they suggest. Quite the opposite, as Mr Holden said when he gave evidence, he wanted the Carport and was prepared to sit back and wait for Mr Purton to obtain ATF Approval, which he did. Mr Purton confirmed that he would wait until AFT Approval was given before he got paid the US\$65,000 from the Retention and the Retention continued to be held by Mr Giglioli.
199. The Defendants have raised an array of other issues in relation to the Carport which they say entitled them to withhold payment for it.
200. Having considered all of the evidence, I do not regard any of these issues as valid reasons why the Defendants are entitled to withhold payment for the Carport. I address each of them below.
201. Clauses H.3 and H.4 of Addendum B provide for payment for the Carport and Master Bedroom Extension upon “*satisfactory completion*” of the relevant works. Clause H.1 provides that upon completion of each of the Additional Works the Vendor shall advise the Purchaser and allow the



Purchaser and/or his surveyor to inspect the Property and the Additional Works to ensure that they have been completed and are in proper working order. Clause H.2 provides that in the event the Purchaser or their surveyor found any deficiencies they shall provide the Vendor a list of any such deficiencies which the Vendor shall remedy at his own cost prior to completion. Obviously the Carport and Master Bedroom Extension were to be built after completion but there was a remedy in the Contract for rectification for any defects in the Additional Works. Mr Reed, made it clear that the cracks at the joint between the Carport and house were superficial and easily remedied. The mechanism in Clause H.1 and H.2 provided a process for that to be done.

202. Mr Reed also dealt with the question of the beam in the Carport and confirmed that it was suitable for its purpose, was within code and did not require remediation.
203. Mr Purton explained the fact that a soil investigation was carried out when the Property was first built and that the same architect and structural engineers who designed the Property also designed the Carport. It has not been claimed that the foundations are substandard and no evidence was called to suggest that might be the case. Mr Reed did not criticize the foundations for the Carport. Bolas confirmed to the CPA that in their view the Carport had been built in accordance with the structural plans that they had prepared. Ultimately AFT Approval was granted for the Carport. In my view, nothing turns on the fact that no additional soil investigation was obtained when the Carport was built. There was no evidence before the Court that anything more than the AFT Approval was required in relation to the Carport. There is no evidence to suggest that the Carport was not completed in accordance with the Plans and Specification as defined in Addendum B and I find that it was so constructed.
204. Although Mr Holden was upset by the fact that the Carport was built without planning permission and BCU approval having been obtained beforehand, he was particularly upset by the issue in relation to the boundaries of the Property. That was very obvious when he gave his evidence. Ultimately, the Property was re-parcelled but a portion of the front wall and gate and, according to Mr Holden, part of the foundation for the Carport remained outside the boundary to the Property. For present purposes, I am not sure that anything turns on that and I come back to the fact that the Defendants bought the Property and title was conveyed to them. In turn, they have conveyed title to new owners. The Defendants have not suffered any loss. In fact, they have made a handsome profit from the sale of the Property. I do not find that the question of the location of the boundaries



to the Property has any bearing on the obligation of the Defendants to pay for the Carport. The Carport received ATF Approval and should be paid for.

### **Master Bedroom**

205. I have found that a term is to be implied into the Contract to the effect that the Additional Works were part of the purchase price of the Property and, in my view, they were either to be carried out and the relevant part of the Retention released accordingly or, if planning permission and BCU approval had been granted and the Defendants changed their mind, then the relevant part of the Retention was to be paid to the Plaintiffs less the value of the works in question.
206. It is not disputed that in February 2018 the Defendants initially deferred the commencement of the Master Bedroom until 1 September 2018 and subsequently decided not to go ahead with it at all. It is clear from the evidence that the final decision not to go ahead with it was taken by the Defendants before 1 August 2018 when it first became apparent to them that the Carport did not have planning permission or BCU approval.
207. Mr Holden explained in cross examination that the lead up to the decision not to proceed with the Master Bedroom Extension was based on the length of time it had taken to get BCU approval, the fact that Mr Purton had not submitted the amended plans to BCU and that the Carport took 8-13 weeks to complete and not the 2-3 weeks that Mr Purton had originally estimated. After living in the Property for a year the Defendants were not prepared to carry on with the Master Bedroom Extension and suffer further delays. The lack of planning and BCU approval for the Carport was the final straw for the Defendants but was not the reason for them taking the decision not to proceed with the Master Bedroom Extension, for which planning permission and BCU approval had been granted.
208. Mr Holden has sought to rely on the fact that Mr Purton did not submit to BCU the amended structural drawings as soon as they were prepared. Mr Purton explained that he thought it best to wait until BCU had approved the original set of drawings rather than interrupt that process. He also indicated that he could have started the Master Bedroom Extension as soon as the BCU approval was received and dealt with the amended plans subsequently. Mr Holden accepted in cross examination that he had not told Mr Purton that unless he submitted the plans straightaway there would be some consequence. Mr Purton explained in cross examination that after BCU approval was obtained he still did not submit the amended plans because the Defendant had put the Master



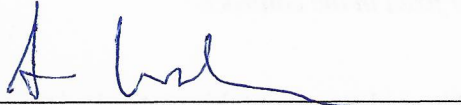
Bedroom Extension on hold. The Plaintiffs referred to the case of *Greater London Counsel v Cleveland Bridge & Engineering Co Ltd* 8 ConLR 30 at page 39 in which it was stated “*There is, moreover, a general principle applicable to building and engineering contracts that in the absence of any indication to the contrary, a contractor is entitled to plan and perform the work as he pleases, provided always that he finished it by the time fixed in the contract.*”

209. I have no reason to doubt what Mr Purton said in evidence about this particular issue and the timing of the submission of the amended plans. Mr Holden might have been concerned about not starting the Master Bedroom Extension without BCU approval of the amendments but there was no evidence given that suggested that Mr Purton’s approach was incorrect and, in my view, he was entitled to plan that work as he saw fit.
210. From the evidence it appears that the overwhelming reason the Defendants decided not to go ahead with the Master Bedroom Extension despite having planning permission and BCU approval was how long it had taken to get that far. They did not choose to retain a different contractor to do the works but simply chose not to go ahead with them and to keep that part of the Retention. In my view that was a breach of the term that I find is to be implied into the Contract. Having obtained planning permission and BCU approval for that work, their decision not to go ahead with the Master Bedroom Extension at all left them with one option which was to pay that part of the Retention to the Plaintiffs as part of the agreed purchase price for the Property less the cost of those works. By failing to do I find that the Defendants are in breach of that implied term and in breach of the Contract.
211. Having found as I have, I do not think that it is necessary to address any of the other arguments put forward by the parties.

### **Conclusion and Order**

212. For the reasons given above, I order that the Defendants do pay to the Plaintiffs the amount of US\$65,000 in respect of the Carport along with interest as claimed in the writ. I further order that the Defendants pay to the Plaintiffs the sum of US\$147,101.22 in respect of the Master Bedroom Extension (being the retained sum of US\$250,000 less US\$102,898.78 being the costs of those works as estimated by Mr Groves) along with interest as claimed in the writ.

213. In my view, neither party has been shown in a good light in these proceedings. My inclination is to order that each party pay their own costs but the parties are entitled to make submissions on that. Prior to making an order for costs the parties have 7 days from the date that this judgment is given to make brief written submissions on that issue. I will then provide a short ruling dealing with costs.



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**Honourable Mr. Justice Alistair Walters, (Actg.)**  
**Judge of the Grand Court**