# IN THE HIGH COURT OF SIERRA LEONE
# (COMMERCIAL AND ADMIRALTY DIVISION)
# FAST TRACK COMMERCIAL COURT

**CASE NO: FTCC 058/15**

**THE MATTER BETWEEN:**

**MIATTA KARGBO** -PLAINTIFF

AND

**SIERRA LEONE GUOJI CONSTRUCTION & INVESTMENT CORPORATION LIMITED** -DEFENDANT

YADA WILLIAMS & CO -COUNSEL FOR THE PLAINTIFF

RENNER-THOMAS & ASSOC -COUNSEL FOR THE DEFENDANT

**BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA JA**

**JUDGEMENT DELIVERED ON THE 20TH DECEMBER, 2016**

## INTRODUCTION

1. The Plaintiff entered into a contract dated 4th January, 2014 with the Defendant for the construction of a dwelling house for the Plaintiff at Tokeh in the Western Area of Freetown for a total contract price of USD 266,000.00. In addition to the construction of the dwelling house, the Defendant was to also construct a septic tank, generator room, fence, outside kitchen, wiring for solar water heater and finishing work. The Defendant was to complete the said works within a period of 16 months from the date of the first payment.

2. The Plaintiff paid the Defendant the total sum of USD 163, 800.01 before the commencement of construction. The Plaintiff contended that based on expert conclusion, the foundation of the structure built by the Defendant was gravely "poor" and wholly "defective" which made the entire building unfit and/or precarious for human habitation. When the Defendant failed to adequately rectify the defects, the Plaintiff instituted proceedings against the Defendant claiming the following:-

   a) General damages for breach of contract by the Defendant.
   b) Recovery of the sum of US$ 163, 800.01 paid by the Plaintiff to the Defendant because of defective performance of the contract by the Defendant.
   c) Special damages
   d) Interest pursuant to Law Reform (miscellaneous provisions) Act, Cap 19 of the Laws of Sierra Leone 1960.
   e) Costs.

## THE PLAINTIFF'S CASE

3. The Plaintiff called three witnesses all of whom gave both oral and documentary evidence.

4. The PW1, Miatta Kargbo was also the Plaintiff in this matter. She gave evidence of the existence of a contract with the Defendant executed on the 4th January, 2014 for the construction of a dwelling house for her at Tokeh beach for the sum of USD 266,000/00. On the 20th January, 2014, she made a first deposit of USD 45,454.55 and on the 24th January, 2014 made another deposit of USD 48, 545.46.

5. After the commencement of site mobilization etc, the Plaintiff and the Defendant started discussions regarding possible modifications to the plan to make the building a two (2) storeyed building. At that time, work on the foundation had not started.

6. On the 2nd March, 2014, modified drawings of the house plan to make for a two storey building were prepared and an estimate for the construction was sent to the Plaintiff by email.

7. Sometime in March, 2014, a verbal agreement was made that in lieu of payment for the extension and in view of the quality fittings the Plaintiff preferred, the Defendant would deduct the cost of plumbing fixtures, tiles, windows and doors already priced in the main contract and apply the said deductions to the cost of the two-storey extension. The said verbal agreement was later reduced into writing and signed by the Defendant and the Plaintiff on 9th September 2014.

8. After the completion of the foundation, issues were raised with the Defendant about the quality of the foundation work. This was acknowledged by the Defendant who agreed to fix it. This was not done and when the Plaintiff visited the site in November, 2014, she noticed visible defects in the pillars and block work at the site but the Defendants' representative on site, Mr. Shi Feng Liang assured her that a Chinese engineer would join the team to supervise the project to ensure a quality outcome.

9. In April, 2015, the Defendant requested payment for phase 2 of the project so that work would begin on arrival of the Chinese Engineer. The Plaintiff however requested that the defects would need to be completed before the commencement of phase 2.

10. At this point, the Plaintiff informed the Defendant that she would like an independent structural engineer to conduct a through assessment of the work already done. A firm of engineers was hired by the Plaintiff and when their report was made available to her, she instructed the Defendant to halt all work on site. She also consulted her solicitors who wrote to the Defendant inviting the latter to a meeting to discuss the said report. The meeting was held on the 12th August, 2015 and the Defendant's Manager present acknowledged issues of defects and requested subsequent discussions on how the defects could be rectified. This was followed by a letter from the Defendant dated 17th August,

2014 confirming the said acknowledgement and undertaking to correct all structural defects.

11. Acting on the advice of her engineers, the Plaintiff rejected the proposal of the Defendant to fix the defects and this was communicated to the Defendant in a letter dated 26th October, 2015. The Defendant replied to this letter on the 28th October, 2015.

12. Based on the response contained in the letter dated 28th October, 2015, the Plaintiff instructed her solicitors to institute legal proceedings.

**CROSS-EXAMINATION**

3. PW1 admitted visiting buildings already constructed by the Defendant before awarding them the contract. She stated that she made two payments before the commencement of the project. She recognized Exhibit A13-17 particular A14 dealing with payment terms and agreed that she did not pay the sum of USD 133,000 together as stipulated in the contract.

4. She insisted that she did not make any complaint during the mobilization phase as there were no technicalities involved. She agreed that she asked for the plan to be changed after commencement of construction.

5. When she was informed by an engineer on the neighboring site about the defects in the foundation, she made a complaint to the Defendant. She also found out after the partial construction of the roof that there were leaks and gaps in between.

6. She agreed making further payment in respect of phase 2 but refused to do so again after the existence of the defects had been established.

7. She did not agree that costs would be saved by stopping the work after finding out that the foundation was defective. She brought in her private engineer after the Chinese engineer had arrived in July, 2015.

8. She denied being indebted to the Defendant in the sum of USD 75, 600.

**RE-EXAMINATION**

9. PW1 clarified that the project was to be in various phases with deliverables. A letter of warranty was given to her by the Defendant.

**PW2-**

20. PW2- Joseph Orlando Mansaray, "a civil engineer". On the 2nd day of February, 2014, he signed a contract with the Defendant as site engineer and was immediately assigned to the Plaintiff's site. Construction work was started on the 9th February, 2014.

21. After completing the trench, he informed the Manager, Mr. Wang that they needed to use malting on the structure because they were building on sandy ground. He also advised that they should give the foundation a double ring after the malting and after completing the block work on the foundation. The Manager refused to authorize the works indicating that it was waste of materials and instructed them to dig the foundation no more than three feet which they did and they put in ball stones and "completed" the foundation work.

22. The witness testified that when the Plaintiff came to inspect in March, 2014, he repeated the concerns she had raised with Mr. Wang. He also informed her that instead of using ½ inch iron rods (10mm/12mm), the Defendant had used 3/8 iron rod columns.

23. He agreed been aware of the complaints made by the Plaintiff regarding the quality of the works.

24. The Defendant terminated his contract in April, 2014 because he was repeatedly complaining about the quality of work.

**CROSS-EXAMINATION**

25. PW2 replied that he had been a civil engineer for six years and was employed by the Defendant in February, 2014 and assigned to the Plaintiff's site. His duty was to execute the plan by constructing the Plaintiff's building.

26. He recalled raising concerns about the foundation with the Defendant's Manager, Mr. Wang. He also raised concerns about the quality of the work.

27. He admitted that his letter of employment was not in writing.

**RE-EXAMINATION**

28. The PW2 confirmed that his letter of termination was also not in writing.

**PW3**-Fredrick Bruce

29. PW3 is a Lecturer at Fourah Bay College and a structural engineer.

30. PW3 informed the Court that sometime in July, 2014 Fredrick Bruce and Associates were consulted by the Plaintiff to conduct a structural assessment of her building at Tokeh Beach. In August, 2014, PW3 and his team of engineers conducted inspection of the Plaintiff's building for about three days.

31. Their findings were complied into a report and forwarded to the Plaintiff –Exhibit A48.

32. The conclusions and recommendations were as follows:-

i. The work done on site does not resemble the one presented in the drawings. This however is not a serious problem but rather the failure to update the drawings to inform the workers on the ground and the client is. The question would be asked; what is being built?

ii. A building of this nature requires structural drawings which are not available on site, or one can even venture to say not available at all.

iii. Lack of proper supervision of the works on the site by the contractor's management team. This is the main cause of the poor quality contraction and the material strengths observed.

iv. The foundation type and size used in this instance was not the correct type.

This recommendation has not come lightly but rather given the work done and the lack of vital information needed for the works and lack of proper supervision proffered on site. It is therefore recommended that the building be demolished and redone following laid down standards for construction of a storey building.

CROSS EXAMINATION

33. PW3 admitted making a mistake regarding the time he was consulted by the Plaintiff.

34. He agreed carrying out the inspection of the property but was not the first time he had been there. He had been there when the Defendant was carrying out remedial work.

35. PW3 got in contact with the Defendant's representative after his team had carried out the inspection; the conclusion of which was contained in Exhibit A53.

36. He agreed with Counsel for the Defendant that it was a possibility that the reason why he said the work did not reflect the drawing was because he had not seen the final

drawings. He however clarified that alterations could impact on the integrity of any structure. In that situation especially where the building was being constructed, the building would have to be demolished.

**RE-EXAMINATION**

37. The Defendant had the last say in the construction works. The defects would not be remedied because the machinery required to do so were not available in the country. The witness replied that when he visited the site, remedial work was ongoing. The slab had a deflection which the Defendant was trying to remedy by building walls around it.

**CASE FOR THE DEFENDANT**

38. **DW1**-Mohamed Arun Kamara

39. DW1 was an electrician employed by the Defendant and knew the Plaintiff. He accompanied her on her initial visit to the Defendant. He recalled that in the course of the construction, the Plaintiff requested changes to the structure on three occasions. DW1 also recalled a visit by the Plaintiff to the site in early 2014 when Mr. Bruce Hu of the Defendant Company told her that the span of the structure was too wide and a pillar should be constructed in the middle to support the weight of the ceiling but the Plaintiff refused to allow them to do so.

**CROSS-EXAMINATION**

40. DW1 agreed he had been an employee of the Defendant. He was aware of what transpired during construction of building.

41. DW1 agreed that the Defendant hired engineers in the persons of Ballah and Joseph.

42. He stated that he would not give instructions that would compromise the work. He however agreed that the construction company would have the final say in following to the advice of the Plaintiff.

43. DW1 agreed that it is normal for adjustments to be made to buildings during construction.

**DW2**-Daniel Ballah

44. DW2 was a civil engineer employed by the Defendant. He was responsible for supervising work on the Plaintiff's site.

45. He recognized Exhibit B8-25. They were building site plans. During the construction period, each time an adjustment was made, a new plan would be given to him. He recognized Exhibit B24 and B25 as the pictures of the building.

46. DW2 recalled that in January, 2015 they were asked to stop work and the reason given was that the Plaintiff had to pay some money. He explained that at this time, the construction of the roof had not been completed.

47. DW2 stated that the Plaintiff had not complained about the foundation only about the richness of the building blocks.

**CROSS-EXAMINATION**

48. The witness agreed that he was not a member of the Institute if Engineers and was therefore not an engineer. He was sent to the Plaintiff's site in May, 2015 but was not given Exhibits B24 and B25. The adjustments mentioned in B24 and B25 had not been done at the time he went to the site.

49. DW2 answered that there was a structural engineer on site in the person of a Mr. Johnson. He had the responsibility to allow any adjustment on the initial plan. He agreed that it was the decision of the structural engineer to use secret beams to carry the suspended slabs.

50. DW2 recognized Exhibit A64-agreeing that the suspended slab was kept in place by sticks.

51. The Plaintiff never complained about the foundation but only about cracks on the walls.

73. In construction contracts, the remedies normally allowed the Plaintiff could can only be assessed by reference to diminution in value or cost of reinstatement. In the instant case as I have already noted, the Plaintiff was is claiming both reinstatement and damages. In the leading case of EASTHAM BC-v-BERNARD SUNLEY & SONS LTD (1965) 3 ALL ER, 619 at 630 (1966) A.C. 406 at 434-435, Lord Cohen said:

*"The learned Editors of HUDSONS' BUILDING AND ENGINEERING CONTRACTS (8th Edition, 1959) say at page 319, that there are in fact three possible bases of assessing damages, namely, (a) cost of reinstatement; (b) difference in cost to the builder of the actual work done and work specified; or (c) the diminution in value of the work due for breach of contract. They go on (ibid): "there is no doubt that wherever it is reasonable for the employer to insist upon reinstatement the Courts will treat the cost of reinstatement as the measure of damages".* (Emphasis mine). I am therefore convinced that a party cannot claim cost of reinstatement and at the same time claim general damages for breach.

74. It has been argued that the cost of reinstatement was only allowable where:

1) The Employer intended as a matter of probability to rebuild if damages where awarded.
2) That it was reasonable between the Employer and the contractor so to do. (See the RUXLEY Case)

75. In his submission, Counsel for the Plaintiff argued that the building constructed by the Defendant was unfit for human habitation and therefore unfit for purpose. In support of this, he cited the case of GREEVES-v-BAYNHAM MEIKLE (1975) I WLR, 1095. The Defendant's counsel on the other hand argued that the Plaintiff requested several variations to be made to the structure of the Plaintiff's building after construction work had commenced and was well underway. He contended that such changes when implemented were largely the cause of the several defects to the building. Counsel concluded that such defects could however be remedied by the Defendant.

76. I observed that Counsel for the Defendant made several references to Chitty Volume 1. Counsel must pay more attention to Volume 2 as it deals with specialty contracts. Construction contracts fall within that category. The rules governing construction contracts though falling within general principles have special rules and practice that entitled them to separate treatment. The case of GREEVES-v-BAYNHAM MEIKLE exemplifies that distinction which was cited by Counsel for the Plaintiff.

7. I agree with Counsel for the Plaintiff with regards to the principles laid down in GREEVES. A contractor had a common law obligation to produce designs that were fit for purpose. *"He will also have an identical liability for both workmanship and materials if a contractor designs and constructs under the contract then the standard of care to be observed by the contractor would be raised to the standard of "fitness for purpose". It must be reasonably fit for the intended purpose previously made known to him by the Employer."* (Greeves –v- Baynham Meikle)

The case of GREEVES offers some insight into upgrading of liability from reasonable skill and care to that of fitness for purpose. The case is in particular good, for example, with regard to the application of strict liability and "fitness for purpose." The importance of this case does not lie in the Defendant held as being negligent, but more in the fact that the Court ruled that even if negligence had not been proved, then the Defendant would still have been held liable for the design. (Emphasis mine)

**APPLICATION OF THE LAW TO THE FACT**

In determining this issue, I have relied heavily on the testimonies of the experts provided by both the Plaintiff and the Defendant. I must commend both of them on their professionalism reflected in the quality of their conclusions. PW2, Mr. Fredrick Bruce tendered a report with clear recommendations on what should be done in the circumstance. The DW4, Mr. Freddie Jones, undoubtedly a highly competent civil engineer did not provide a clear guide to the Court to assist it in determining the issue in dispute. I note from their respective testimonies that they did not have access to vital

documents like all the plans nor given the opportunity of meeting with the other side. Their reports were therefore very independent and ought to be treated as such. The other witnesses' testimonies were mainly factual with only disputes on technical issues. They would therefore not be central in determining the issue in dispute.

30. Based on the foregoing, I hold that the recommendations of PW2 were reasonably consistent with the various admissions made by the Defendant. The only point of divergence was that the Defendant held itself out as capable of correcting the defects whilst the Plaintiff insisted that only demolition/reinstatement would solve the problem.

As I stated earlier, based on the totalistic evidence adduced, in particular that of PW2, I hold that reinstatement would be the best remedy open to the Plaintiff.

**GENERAL DAMAGES**

The law on this point is very clear. I have already cited the case of EASTHAM BC and the dictum of Lord Cohen to the effect that whenever it was reasonable for the employer to insist upon reinstatement, the Court would treat the cost of reinstatement as the measure of damages. This view was reinforced in McGregor on Damages 18th Edition paragraph 2-018 at page 36 as follows:-"*The claimant cannot also recover in addition to the basic loss which is intended to represent the cost of his bargain, an expense he had incurred in preparation or part performance. If he recovers for the loss of his bargain, it would be inconsistent that he should in addition recover for expenses which were necessarily laid out by him for its attainment.*" Applying this principle to the instant case, if this Court orders reinstatement, it would not proceed to award general damages. General damages would only be awarded if the loss sustained by the Plaintiff did not extend to the need to reinstate. Damages would also be granted if what was required was further work to achieve conformity with the contractual terms.

83. I must caution on this point as Lord Jauncey did in the RUXLEY ELECTRONICS case that in the normal case, the Court had no concern with the use to which the Plaintiff puts an award of damages for loss which had been proved.

**SPECIAL DAMAGES**

84. The principle that special damages must be pleaded had been largely followed by the Plaintiff. The items claimed could conveniently place under consequential losses. McGregor provides that in building contracts recoverable consequential losses should include such items as loss of use of the building during repairs and also loss of profits in appropriate circumstances. Physical damage caused by the defective nature of the building could also be recoverable. However claims had been unsuccessful for claims of an architects report investigating the defect-the case of JOHNSON-v-W.H.BROWN CONSTRUCTION (DUNDEE) Ltd (2000) BLR 243. According to McGregor at paragraph 26-017, in principle, it was said, the cost of taking technical and legal advice in preparation for a claim was not recoverable as damages. If this authority is to be followed, the Plaintiff's claim for special damages in respect of fees paid to PW2 would fail.

However, after comparing the facts of that case to the instant one, I hold that they could be distinguished. In the Johnson Case, the report was acquired in preparation for legal action but in the instant case, it was acquired for the purpose guiding discussions with the Defendant. The report was discussed and the Defendant agreed to carry out remedial work. The report of PW2 was therefore used in facilitation of the contract. Based on this analysis, I hold that the Plaintiff was entitled to special damages in respect of 7m paid to PW2.

As regards the second claim for rent, though pleaded by the Plaintiff had has not been proved. No sum was provided to guide the Court. This claim therefore fails.

**INTEREST**

87. There were generally two types of interest, common interest and the interest based on statute. The Plaintiff claimed interest pursuant to Section 4 of the Law Reform (Miscellaneous Provisions) Act, Cap 19 of the Laws of Sierra Leone, 1960. This provision which was ipsisima verba Section 3 (1) of the Law Reform (Miscellaneous Provisions Act 1934 of the United Kingdom. This provision conferred a general power to award interest in all cases. This section specifically referred to interest been simple. There should be no question of compounding the interest.

88. The general Rule is that the award of interest was discretionary. But to my mind, that discretion must be used judiciously. In building contracts, common sense would dictate that in economies such as ours, there would be rapid changes in prices of building materials. This would disadvantage a Plaintiff who was seeking to reinstate his/her property. The money paid for the defective construction might not be sufficient to rebuild the foundation. It follows that it would be just for me to exercise my discretion to award interest.

**COUNTER-CLAIM**

89. The Defendant claimed that by an agreement with the Plaintiff dated 4th January, 2014 the Plaintiff agreed to pay the sum of USD 133,000/00 before commencement of the project and a further USD 106,400,400/00 upon the competition of the roofing of the building. That this was completed on the 6th December, 2014 at which stage the Plaintiff had paid over to the Defendant on account the sum of USD $ 134,000/00.

90. The Defendant further claimed that the Plaintiff failed to pay the balance of the sum of £ 105,400/00 due and owing. But after repeated demands, the Plaintiff made a payment of USD $29,800/00 on the 28th April, 2015 leaving a balance of US $ 75, 600/00 which the Defendant was now counter-claiming for with interest.

**DEFENCE**

91. The thrust of the Plaintiff's case as stated in the statement of defence to counter-claim was that the Defendant did not complete the building of the structure nor the roofing of the same since the Plaintiff had complained of the foundation and superstructure long before December, 2014 and other structural defects in the roofing.

92. It was clear from both the counter-claim and the Defence thereto that the Defendant was claiming the contractual sum for the construction of the roof. To my mind, they could not. It had been proved by evidence of witnesses of both the Plaintiff and the Defendant that the roof had problems and did not meet specifications. In any event, it had been established that the foundation of the building was faulty thereby making any structure thereon unsafe for human habitation. In the circumstances, the Defendant's counter-claim fails.

**DECISION**

For the reasons given above, Judgment is given for the Plaintiff herein on both the Writ of Summons and the Counter-claim and I hereby Order as follows:-

1. Payment of the sum of US $ 163.800.00 by the Defendant to the Plaintiff.
2. Interest on the said sum at the rate of 2 percent per annum from 16th November, 2015 to date of Judgment.
3. Special damages in the sum of Le 7, 000,000.
4. Costs to the Plaintiff, such costs to be taxed.

Hon. Mr. Justice Sengu Koroma JA.