

IN THE SUPREME COURT OF BELIZE A.D., 2006

Claim No. 609 of 2006

BETWEEN

	(GUSTAVO RAMOS	CLAIMANT
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AND ((
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	(ANDREW HIGINIO	DEFENDANT

BEFORE: The Honourable Madam Justice Minnet Hafiz

Appearances: Mrs. Roberta Magnus-Usher for the Claimant
Mrs. Agnes Segura-Gillett for the Defendant

J U D G M E N T

Introduction

1. This is a claim for breach of construction contract made in writing and orally between the parties on or about 13th June, 2006. It concerns the construction of a house in Hopkins and the payment due under the said contract. Also, whether the contract was repudiated by the Defendant. The Claimant is a Building Contractor who operates primarily in Dangriga Town in the Stann Creek District, Belize. The Defendant is also a Building Contractor operating out of Dangriga Town.
2. It is most unfortunate in this case that there was no Engineer or Architect involved who could have valued the work done under the contract. In contracts for work of construction it is necessary to have an Architect or an Engineer design the work and prepare the contract documents. In

this case there was no plan and so no Architect or Engineer was involved. The contract documents were prepared by the Secretary to the Defendant, Ms. Annis Gordon who is a witness in this case.

3. The contract in writing which is a “labour only contract” lacks important provisions, one such being the method of payment. There is also no provision as to who would provide the equipment for the work to be done. Even further, at Case Management no order was made for an expert to give evidence as to the value of the work done which would have greatly assisted the court. The court is left with the evidence of the parties themselves who cannot agree on the value of the work that was performed.

The Pleadings

4. By amended Statement of Claim issued on 16th October, 2008, the Claimant pleaded that by a contract made in writing and orally on or about 13th day of June, 2006, he was sub-contracted by the Defendant for the construction of a 50' x 32' concrete one storey building. The contract was a labor only contract under which he was to be paid \$47,500.00 by the Defendant. He pleaded that he performed his obligations under the contract and was paid in installment, a total of \$16,500.00. He pleaded that as a result of being engaged by the Defendant he did not undertake any other building contract and further the Defendant promised him other jobs. He relied on the promise and acted to his detriment and loss.
5. The Claimant pleaded at paragraph 7 (a) that by a letter dated July 6, 2006 the Defendant sought to vary the contract by requesting additional work and also sought to unilaterally amend the contract by requesting that

works be done and paid for in stages, but the Defendant did not give the Claimant any opportunity to discuss the variation of the contract.

6. At paragraph 8 of his claim he pleaded that by letter dated 12th July, 2006 which he received on 13th July, 2006, the Defendant advised him that he would like to have a meeting with him before he continued with the work. At paragraphs 9 and 10 the Claimant pleaded that despite several attempts the Defendant did not meet with him and the Defendant engaged another person to complete the job, thereby committing a breach of the contract.
7. In the alternative the Claimant pleaded that the Defendant repudiated the contract and he accepted the repudiation. At paragraph 11 he pleaded that when the Defendant terminated the contract he had performed works valued \$20,000. but the Defendant only paid him the sum of \$16,500.00 and a balance of \$3,500.00 is due and payable for the value of the works completed at the time the contract was terminated.
8. The Claimant at paragraph 12 of his Statement of Claim, also claims for \$27,500.00 being the outstanding amount due under the contract, as a result of the unlawful termination. At paragraph 13, the Claimant claims for \$5,500.00 being the total cost of rental of generator and replacement cost of compactor which the Defendant agreed to pay.
9. The Defendant by an amended Defence admits that there was a written contract between himself but denied that there was ever any oral contract. He denied promising the Claimant other jobs and further that the Claimant was working on other jobs during the term of his contract.

10. The Defendant further admitted that he sent a letter to the Claimant dated July 6, 2006 but denied that the letter requested additional work. That the letter only seek to remind the Claimant that payments were to be made in phases.
11. The Defendant admitted requesting a meeting with the Defendant but denied that he refused to meet with the Claimant. He said it was the Claimant who failed to attend the meeting.
12. The Defendant denied paragraph 10 of the Statement of Claim and said that it was the Claimant who left the worksite without giving notice to the Defendant and without having completed the agreed job thereby breaching or alternatively repudiating the contract. He said the job remained abandoned for 5 days before he hired someone else.
13. The Defendant admitted paying \$16,500.00 to the Claimant but denied that the Claimant performed his obligations under the contract. He denied that the Claimant is entitled to the \$3,500.00 for the value of works completed and to the \$27,500.00 being the outstanding amount due under the contract. He also denied that he agreed to rent a generator from the Claimant and that he has no knowledge of a compactor being used at the site. In the circumstances, he denied that the Plaintiff is entitled to the sum of \$31,500.00.
14. **Issues to be determined**
 - 1) Whether the Defendant repudiated the contract.
 - 2) If so, whether the Claimant is entitled to the balance of the contract price or damages for repudiation of the contract.

- 3) Whether the Claimant is entitled to the sum of \$3,500.00 being the balance due on the value of the works completed.
- 4) Whether there was an agreement that the Defendant would rent the Claimant's Generator.
- 5) Whether there was an agreement that the Claimant would rent his vibrator to the Defendant and whether the Defendant agreed to replace the said vibrator after it broke.

Witness statements filed

15. The Claimant filed a witness statement and documents in support of his claim. He also filed two other witness statements, one from Irvine Augustine and the other from Wilson Castillo. The Defendant filed four witness statements with supporting documents in support of his claim, one from himself and the other three from Annis Gordon, Gerardo Arriola and Antonio Benavidez.

16. **Contract between the parties dated 13th June, 2006**

"Form of Agreement"

AGREEMENT made this 13th day of June 2006 between Mr. Andrew Higinio of #6 Bluefield Road, Dangriga Town (hereinafter called "the contractor") of the one part and Gustavo Ramos of Dangriga (hereinafter called "the Sub Contractor") of the other part.

Whereas the Sub Contractor has been awarded the contract for the construction of one 50 x 32 upstairs and downstairs house. Works include Foundation, Ground Beam, Columns First Floor, interior & exterior walls, verandah and step with barristers, Installation of window, doors and

frames, installation of glass doors, Clothes closets, hip roof, sheetrock ceiling in bedrooms and bathrooms and hardwood ceiling in living room, dining room, kitchen and verandah. Downstairs ground level slab, interior and exterior block wall, plastering of interior and exterior wall one bedroom, one bathroom, utility room installation of doorframes and doors, installation of window.

(Hereinafter called "the sub contract works") in accordance with the conditions of Contract hereinafter described, and the specifications describing the works to be done.

And whereas the contractor has accepted the tender of the said sub contractor for the construction and completion of the sub contract Works:

Now it is hereby agreed as follows:

- 1. In this agreement words and expressions shall have the same meanings as are respectively assigned to them in the conditions of contract hereinafter referred to.*
- 2. This is a LABOUR only sub contract. The contractor shall on a timely basis provide all materials required for the execution of this contract.*
- 3. The Contractor hereby covenants to pay the sub contractor in consideration of construction and completion of the sub contract works the sum of forty seven thousand five hundred dollars (\$47,500.00).*
- 4. (Hereinafter referred to as ("The contract sum") or such other sum as shall become payable at the times and in the manner prescribed by the contract*

IN WITNESS hereto the parties hereto have set their respective hands the day and year:"

The Contract was signed by Gustavo Ramos, Sub-contractor and Andrew Higinio, Contractor.

Issue 1: Whether the Defendant repudiated the contract.

17. The claim is for damages for breach of construction contract made in writing and orally between the parties on or about 13th July, 2006 or in alternative the balance due under the said contract.
18. The first question to be answered is whether there was a breach by the Defendant which goes to the root of the contract. In paragraphs 5 to 10 of the Claimant's witness statement he stated what transpired between him and the Defendant. The evidence by the Claimant is that after he finished the height of the first level of the house the Defendant sent a letter to him stating that he should go to his office in Dangriga before continuing with the job.
19. **The letter of 12th July, 2006 states:**

"12th July, 2006

*Mr. Gustavo Ramos
Dangriga*

Dear Mr. Ramos,

In regards to the construction of Mr. Dean Sanberg house in Sittee Point I would like to inform you that we need to meet before you continue with any further work on the house.

If you have any problems you should feel free to confront me at the office and not employees outside of office.

Thanks very much for understanding.

Sgd: Andrew Higinio

*c.c. Antoinette Moore
Attorney-at-Law"*

20. The Claimant said that he was surprised when he received the letter because it was raining hard on that day and the road to Hopkins had been flooded, so they were unable to work on the site or even to travel to the site. He said he received the letter on 13th July at around 8:00 a.m. in the morning and about 9:00 a.m. he went to see the Defendant at his office in Dangriga. He said that when he got to the Defendant's office he was not there and he waited for about 15 minutes until he arrived. Mr. Ramos said that he greeted Mr. Higinio and asked him why he had sent for him. He said Mr. Higinio told him that he could not speak to him at the moment because he did not have the time and that he would call him on the phone at about 2:00 p.m. that evening. Mr. Ramos said that Mr. Higinio never called him so he called him about 3 p.m., 4:00 p.m., 5:00 and 6:00 p.m. but the Defendant's cell phone was off and no one answered his office phone.
21. Mr. Ramos testified that the following day was Friday and he called again for the Defendant but when he finally answered the phone he said he was not in Dangriga and stated that when he returned to Dangriga he would speak to him but he never called that day. Mr. Ramos further testified that he did not go back to the work site because he was waiting to speak to the Defendant as he had instructed.
22. The Claimant further stated that on Saturday at around 10:00 a.m. he went to the Defendant's office again but he was not there. Then on Monday he went to the Defendant's office again and he saw the Defendant who told him that he should go and see his attorney, Ms. Antoinette Moore as she had everything in her hands and that the Claimant should not go back to the work site as he has given the job to another contractor. He said he went to the lawyer's office twice on the 17th July but he did not see her and on the 18th July he went to seek legal advice.

23. In cross-examination, Mr. Ramos testified that he received the letter dated 12th July on the 13th July. He also said that he had asked the Defendant for time off to go to Belize City on the 12th July. In re-examination Mr. Ramos said that he could not go to Belize City because of the rain. He said that on the 12th and 13th it was raining. He also said that the last day he worked on the site was on the 11th July, 2006.
24. Mr. Higinio in paragraphs 13 to 18 of his witness statement gave his version of what transpired. He stated that on 12th July, 2006, the day after the pouring of the first floor and stairs, he went to the work site and discovered that neither Mr. Ramos nor his workmen were there. He said on the said day, being 12th July he wrote to Mr. Ramos requesting that he go into his office to discuss the job and whatever problems he had. This is the letter which is reproduced above.
25. The Defendant said he waited for Mr. Ramos to go to his office but he failed to show up. He further said that the work done by Mr. Ramos at this point consisted of excavation, casting of foundation, form work for columns and pouring of columns, tying of steel for foundation, ground beams, columns, first floor beam and the floor and stairs, preparation of decking for floor beams, floor and stairs and pouring of floor and stairs. Mr. Higinio said that since Mr. Ramos did not show any interest in completing the job, he contacted another contractor, Mr. Antonio Benavidez on 13th July, 2006, and he agreed to complete the job.
26. In further examination-in-chief, Mr. Higinio said that on 12th July, 2006 when he went to the worksite no one was there and he was not given any explanation as to why Mr. Ramos was not at work. He said up to now he cannot say why Mr. Ramos abandoned the job and that he did not fire Mr. Ramos. He also said that that it was about five to six days later that he got another contractor to finish the job. He further said that the

cement used for the job is ready mix and that it took four hours to dry. Mr. Higinio also said that it was raining but it was not bad and that work could go on.

27. In cross-examination, Mr. Higinio was asked where he was on the 12th July, 2006 and his answer was that most of the time he is out in the day, not one specific place but all around in Dangriga. He said that he cannot be in the office all day. When Mrs. Usher asked him why he did not remain in his office so that he can see the Claimant, he said that he was there but Mr. Ramos did not show up. He admitted that he did not spend the whole day in the office.

28. Mrs. Usher also asked the Defendant why in one day he had another contract to finish the job and he said that he had to do it because he had an agreement with the owner to finish the house. Mr. Higinio was also asked about the date of the contract he signed with Mr. Benavidez, the other Contractor. He said it is dated 13th July, 2006. In further cross-examination he was asked what time on July 12th he sent the letter to Mr. Ramos and he said sometime during the day and that the reason why he asked Mr. Ramos to go to his office was because Mr. Ramos had it all over Dangriga that he was not going to return to finish the job. He said he heard it from several people on the street. In cross-examination he testified that he never met Mr. Ramos after he sent the letter of 12th July, 2006. He denied telling Mr. Ramos that he was leaving for another job and could not speak to him on the 13th July, 2006. Further, he denied that on 17th July, 2006 he told Mr. Ramos that he had nothing else to say to him and that he should speak to his attorney. He was asked why he copied the letter of the 12th to Ms. Antoinette Moore and he said that she is his immediate attorney for small things around Dangriga. He thereafter said that he did not have any problem with Mr. Ramos but he just wanted to be on the safe side.

29. Mr. Higinio in further cross-examination explained why in the letter of 15th June he told Mr. Ramos to maintain a small crew until he can settle off with Mr. Sanberg. He said that Mr. Ramos had a large amount of people working and he did not need so much people and he asked him to have a small crew so that he could maintain the work and money among themselves. He said when Mr. Dean Sanberg left the country he gave him a small amount of money and he does not want a situation where Mr. Ramos brings a payroll and he did not have the money to give him. He also admitted that he had money for only one phase of the work and that he was not concerned about the house going up too fast but was concerned that he would run out of money.
30. In examination-in-Chief of Mr. Wilson Castillo, he testified that he was asked by Mr. Higinio's worker to take a letter to Mr. Ramos but he did not take it because he said that is not his job. He said on that day it was raining very bad so he did not want to take the letter.
31. Annis Gordon, Secretary/Assistant of the Defendant testified that she prepared the letter of 12th July, 2006 to give to Mr. Ramos. She said that Mr. Ramos met her at a Hardware Store and he told her that he was not going back to finish the job. She said from that conversation she gathered that he was upset because Mr. Higinio did not give him the \$6,500.00 which he requested for the pouring of the floor. She said that Mr. Ramos told her that after he made payments to his workers he was left with only \$148. to \$168. for himself. Ms. Gordon further said that Mr. Higinio asked her to write a letter to Mr. Ramos asking him to go into the office to discuss the matter but he never showed up or called the office. She said that since Mr. Ramos never showed up and they had a contract to finish the job by November they decided to get Mr. Benavidez to complete the house.

32. In cross-examination by Mrs. Usher, Ms. Gordon was asked when she prepared and sent the letter of July 12th, 2006 telling Mr. Ramos not to continue the works. She said "in the afternoon". She also admitted that it was raining on the said day being 12th July, 2006.
33. Ms Gordon was also asked in cross-examination why she prepared a letter telling Mr. Ramos not to continue with the work. Her answer was that Mr. Higinio believed that Mr. Ramos was going to go back to work and so she told him in the letter not to go back to work until they discussed it.
34. On a balance of probabilities, I find the evidence of the Claimant, Mr. Ramos credible. I find Mr. Higinio to be a very untruthful witness. It can be seen from the evidence as a whole that Mr. Ramos was a contractor who took his job seriously and Mr. Higinio himself said that he did not have any problem with Mr. Ramos but he just wanted to be on the safe side that is why he sent a copy of the letter to his lawyer.
35. I find the evidence of Mr. Ramos credible that he received the letter dated July 12th on the morning of 13th July, 2006 and that he went to see Mr. Higinio around 9:00 am that morning but Mr. Higinio refused to see him by giving an excuse that he was busy . I also believe Mr. Ramos that he tried to contact Mr. Higinio on the following day which was a Friday and also on the Saturday but Mr. Higinio was unavailable. I believe the Claimant continued to be persistent and went again to see Mr. Higinio on the Monday but consistent with his disrespectful behaviour, the Defendant refused to see the Claimant and instead informed him that he has another contractor and he should not go on the worksite.

36. Mr. Higinio has given a lame excuse to show to the Court that it was Mr. Ramos who abandoned the job. He said that when he went to the worksite on the morning of the 12th July he did not see anybody there and Mr. Ramos did not give any explanation as to why he was not there. I find Mr. Ramos was speaking the truth when he said that Mr. Higinio gave him a day off to go to Belize City on the 12th July but he was unable to go because of the rain. The evidence from several of the witnesses showed that it rained on the 12th July, 2006. Further, it is not disputed that Mr. Ramos and his crew cast the first floor on the 11th July, 2006.
37. Even further, the evidence shows that it is expected that the floor would need some time to dry before work can continue. I find it unreasonable in the circumstances for Mr. Higinio to conclude that Mr. Ramos did not show any interest in completing the job and so he had to hire another contractor. This other contractor was hired on the very next day being the 13th July, 2006. This is just one day after the 12th July and without speaking to Mr. Ramos. Mr. Higinio was untruthful when he said in examination-in-chief that about five or six days later he got another contractor to finish the job. See also paragraph 12 of Mr. Higinio's amended defence where he pleaded the job remained abandoned for 5 days. However, in his witness statement at paragraph 18, he stated that the Contract was abandoned on 12th and on 13th another Contractor was hired because he could not afford any delays.
38. Further, Mr. Higinio said that he had a concern about delay yet the evidence shows otherwise. Mr. Ramos worked very quickly and there was no complain of delay. Rather the complain was of the speed at which he was working and Mr. Higinio was having a problem to cope with the speed because of financial constraints. He admitted that he had money only for the first phase of the work and he was concerned that he was running out of money.

39. The letter of 12th July, 2006 is also further evidence that the Defendant did not want Mr. Ramos to continue with the contract. The Defendant said Mr. Ramos had it all over Dangriga that he was not going back to finish the job. This is hearsay and Mr. Higinio should not have acted on this and get another contractor one day after. Further, the letter to Mr. Ramos was not to seek an explanation as to why the Claimant has abandoned the job. It was a letter to stop him from working until they meet. But, the evidence shows that Mr. Higinio had no intention of meeting with Mr. Ramos as he avoided him every time he tried to see him.
40. The evidence of Ms. Gordon confirms the letter to Mr. Ramos was prepared in the afternoon of the 12th and sent out on the said day. However, she could not say when Mr. Ramos received the letter. I believe her evidence that Mr. Ramos told her he had a problem with his last payment. However, I do not find her evidence credible that Mr. Ramos told her he was not going back to work. Ms. Gordon prepared the letter and failed to mention this important piece of information in the letter. In fact, she said in cross-examination that Mr. Higinio believed Mr. Ramos was going back to work so that is why she told him not to go back to work.
41. In the circumstances, I find that the contracting of another contractor by Mr. Higinio to finish the job is in fact a repudiation of his obligations under the contract which entitled Mr. Ramos to treat the contract as discharged. I find that there was a repudiation of the contract dated 13th June, 2006 by the Defendant, Mr. Higinio. The last day of work for the Claimant was on the 11th July, 2006 when the floor was cast and the Defendant hired another contractor on the 13th July, 2006 without speaking to Mr. Ramos. The breach is serious as it goes to the root of the contract. That is, the repudiation of the contract amounts to a breach of a primary obligation of the contract. The Claimant at this point had a right to treat the contract

as discharged. The Defendant, being the repudiating party has an obligation by operation of law to pay damages to the Claimant.

Issue 2: Whether the Claimant is entitled to the balance of the contract price or damages for repudiation of the contract.

Measure of Damages

42. Mr. Ramos is entitled to recover for the loss of the benefit that the performance of the contract would have brought to him and the price of the work already done or the value of the work that was performed.

Halsbury's Laws of England, 4th Edition, (Re-issue) Volume 4 (3) at paragraph 173 states:

173. Contractor's right to damages

.....

Where the employer repudiates the contract after the work has been partially performed, and the contractor is unable to sue under the contract for the price of the work done, the damages will generally be measured as the loss of profits on the unfinished balance, plus the value of the work done at contract rates.

See also **Chitty on Contracts 28th Ed. Vol 2, para 37-200** cited by Mrs. Usher.

***Withdrawal of work.** Although the general rule may be altered or displaced by the terms of the contract, the contractor has a legitimate expectation and contractual right to carry out the work contained in the contract. The employer cannot generally remove work from a contractor in order to have that work carried out by a third party. The contractor will be entitled to recover by way of damages for the loss of profit element on the work withdrawn, by reason of the reduced amount of turnover. In assessing such a claim for loss of profit, the court will have to consider whether the work was indeed profitable, as well as assessing how far (if at all) the loss of profit on the particular item of work reduced the overall position of the contractor's business.*

43. Under general damages, the Claimant claims for the balance due under the contract or in the alternative he has claimed for damages for repudiation of the contract. It seems to me that the balance due under the contract is not sustainable. The balance of the contract price could not have been the gains or profits Mr. Ramos would have expected if he had performed the contract. He had to pay his crew for their labour.

44. In the case of **Fidel Antonio Pertillo v. Anna Rodas BLR Vol 4** at page 205 cited by Mrs. Usher, the learned Judge found that the Defendant breached the contract with the Plaintiff for the construction of the building, which was an entire contract. The Judge as submitted by Mrs. Usher awarded the balance of the contract price that the Plaintiff would have received had the Defendant not breached the contract. Learned Counsel,

Mrs. Usher however, did not mention what the Judge said immediately after that finding. In my view, what follows next is important.

The Learned Justice Barrow at page 213 paragraph 3 said that,

“I suspect that all of this sum would not have been profit for the Plaintiff as he would probably have had to pay workers but the Defendant did not put that position to the Plaintiff and I do not think that I should assume that conclusion.”

45. The position in the case at hand is different. There is evidence that the Claimant had workers as shown by the Worksheet. See Exhibit “G.R. 2”. He had to pay them for their labour. Therefore, the balance of the contract price cannot be the appropriate remedy. In my view, the appropriate remedy would be damages for repudiation of the contract which is the alternative claim made by the Claimant.
46. For repudiation of a building contract the damages would be the loss of profits. See paragraph 42 above. However, the Claimant has not brought any evidence before the court to prove his loss of profits. Learned Counsel, Mrs. Usher for the Claimant in her written submissions stated the profits would have been \$10,000. I cannot with respect see the basis on which learned Counsel arrived at \$10,000. when the Claimant did prove what his profits would have been.
47. Mr. Ramos has also testified that he lost jobs as a result of taking the contract from Mr. Higinio. He made bare statements that he lost a job from Martinez that would have paid him \$8,000. and a job to build a fence for Mr. Williams valued between \$10,000. and \$15,000. Again, he did not say what his profit would have been from these offers. In any event,

loss of profit is only on the contract with the Defendant and not other contracts that he might have been given.

48. Since there is no evidence of the amount of loss of profits before the court but there is evidence that the Claimant had done a substantial amount of work on the building as testified by the Defendant himself, it is likely that he would have seen his profits at the end of the contract. The Court in such circumstances can award nominal damages.

In **McGregor on Damages 13th ed at para 295** it is stated:

Nominal damages may also be awarded where the fact of a loss is shown but the necessary evidence as to its amount is not given. This is only a subsidiary situation, but it is important to distinguish it from the usual case of nominal damages awarded where there is a technical liability but no loss. In the present case the problem is simply one of proof, not of absence of loss but of absence of evidence of the amount of loss.”

49. In this case at hand, there is loss of profit but there is no evidence of the amount of that loss of profit.

Also, in the case of **Sandra Perez v Commercial Free Zone Management Agency** BLR Vol. 4 at page 195 Barrow J. at page 202 stated:

*“Nominal damages, as was confirmed in the decision of the Privy Council in **Greer v Alstons Engineering Sales and Services Ltd. (Trinidad and Tobago) 2003 UKPC 46** is used in two senses. It is more commonly understood to mean a token or minimal amount, such as*

one dollar or one hundred dollars. But it also means an amount that may be awarded when the fact of loss is shown but the necessary evidence as to its amount is not given. In such a situation it is said that though the loss may be unquantified it is the duty of the court to recognize the loss by an award that is not out of scale; see paragraph 9.”

50. The Court must therefore make an award that is not out of scale. I have looked at the testimony of Ms. Annis Gordon on how she arrived at the cost of materials for the home and the labour and the the percentage paid to the Claimant for labour. She said that 60% of the material cost is labour. That 70% of that 60% is for the labour cost for Mr. Ramos. The labour cost in this contract for the Claimant was \$47,500.00. It means that the Defendant's profit would have been 30% of the labour cost. I don't expect the sub-contractor, who is the Claimant to make the same profit as the Contractor, the Defendant. But, it helps me in arriving at a figure that is not out of scale.

51. In my view, taking into consideration the evidence before the court and in particular the figures given by Ms. Gordon, I think an award of \$6,000. as nominal damages would not be out of scale. I therefore award the sum of \$6,000.00 as nominal damages.

Third issue: Whether the Claimant is entitled to the sum of \$3,500.00 being the balance claimed on the value of the works completed.

52. The work has been partially performed and Mr. Ramos has claimed for \$3,500. being the balance due on the work performed as he was paid \$16,500.00.
53. The Claimant at paragraph 16 of his witness statement said that on 13th July, 2006 he had completed works valued at \$20,000.00 but the Defendant only paid him \$16,500.00 leaving a balance outstanding of \$3,500.00. He did not disclose any documents showing how he arrived at the value of the work although an order was made at case management to make standard disclosure. The reason for this is because there was nothing to disclose as will be seen from the evidence.
54. This matter was first heard on 20th October, 2008 and adjourned to 23rd October, 2008. The matter was not heard on the adjourned date. It was heard instead on 17th February, 2009. When the Court resumed on that date there were some additional disclosures which were dated 23rd October, 2009. Further, there was an additional disclosure dated 17th February, 2009. The disclosure dated 17th February, 2009 is for '*Valuation of works for construction of one house. Hopkins 30 x 50 ft...*' See Exhibit "**G.R. 5**".
55. In examination-in-chief the Claimant was asked by his Counsel, Learned Mrs. Usher the following: "*Mr. Ramos, on 17th February, 2009, you also caused to be executed a document disclosing the valuation of works for the house in Hopkins?*" To which he replied, 'Yes'. In cross-examination by Mrs. Gillet the Claimant was asked when did he prepare Exhibit "G.R.

5” showing the value of the works. He replied that, “*At the last hearing I was asked about the value of work and so I prepared the document.*” He was then asked how he arrived at a claim for \$20,000.00. when he filed his claim in 2006. He said that he knows what he would charge for each part and it is based on his manual work and labour. See Exhibit ‘GR. 5’ which gives a break down of the work done and the cost of the labour.

56. I find it necessary to comment on Exhibit ‘G.R. 5’ a document that was disclosed as an afterthought. **Part 28 of the Supreme Court (Civil Procedure) Rules 2005** provides for Disclosure and Inspection. Rule 28.12 provides for duty of disclosure to be continuous during proceedings. But this rule should not be misused as the Rule speaks only of documents that comes to a party’s notice at any time during the proceedings. The document headed ‘*Valuation of works for construction of one house. Hopkins 30 x 50 ft...*’, Exhibit “**G.R. 5**” as can be seen from the evidence was prepared after the Claimant was asked on the first day of the trial how he arrived at the value of his work. This document did not exist before as the Claimant has made it clear in his evidence when this document was prepared. Learned Counsel has misused this rule though I have no doubt it was with good intentions so as to assist the court with the valuation of the work done. Had expert evidence been ordered at Case Management, I believe this would not have been necessary. This shows the importance of Case Management.
57. In any event, Exhibit ‘GR 5’ turns out to be a very interesting document. At the top the document it is headed, ‘Completed’ which meant work completed. Underneath of that, there are 12 items listed and the value for each one. The grand total is \$20,000. The tenth item is for, ‘*Rent truck and pump for mixing foundation*’ - \$ 3,000.00.’ At the bottom of the document the following sentence is written in bold letters:

“N.B. Contractor (Ramos) paid for Rental of Truck that mixed and poured cement. This was Mr. Higinio’s responsibility.”

58. It can be seen at paragraph 11 of the Claimant’s Amended Statement of Claim that he pleaded that when the Defendant abruptly terminated the contract, he had performed works valued at \$20,000 but the Defendant only paid him \$16,000. Under the heading of ‘Special Damages’ he claimed \$20,000 less \$16,000. equivalent to \$4,000. In his witness statement he said that he was paid \$16,500.00 and that there was a clerical error in his amended Statement of Claim, under the heading of “Special Damages”. That the value of works completed should have been \$20,000. less payment received of \$16,500.00 leaving a balance outstanding of \$3,500.00 outstanding. The Claimant has not pleaded that he spent \$3,000. on the cement truck. No claim was made as special damages for this sum.
59. There was no mention also in the Claimant’s witness statement of the rental of the cement truck. What was pleaded is \$20,000 for labour less the amount that was paid. Exhibit ‘GR 5’ shows that the \$20,000. for work completed included \$3,000. for the cement truck. The rental for the cement truck in my view is not labour done by the Claimant. The Claimant in ‘GR 5’ acknowledge this fact as he explained that the rental of the truck that mixed and poured the cement is the Defendant’s responsibility. Therefore, I find that the labour claimed cannot be \$20,000. as pleaded but \$ 17,000. less the \$16,500. that was paid which leaves a balance of \$500.
60. The \$3,000. for rental of the cement truck should have been specifically pleaded and this was not done. It cannot be claimed under the guise of labour. Also, the Claimant should have proved whether he rented the truck with the permission of the Defendant which he has failed to do.

There is no doubt that a cement truck was used as evidenced by a photograph. See Exhibit "G.R. 6". However, Cement Mixers were provided by the Defendant whose evidence is that the floor could be cast without a cement truck. Further there is the evidence of Mr. Benavidez who said that it was possible to do the first flooring without the use of a cement truck. I believe that the floor could have been cast without the cement truck, however, it would have taken a longer time for the floor to be done with cement mixers as this would require more manual labour.

61. In my view, any rental of a cement truck which I agree would have been the Defendant's responsibility should have been done with the approval of the Defendant. Further, there must be evidence of the payment of the \$3,000. such as a receipt and to whom it was paid. In cross-examination the Claimant was asked by Mrs. Gillett whether he had the receipt for the \$3,000. that he was claiming for the rental of the cement truck. He replied that he lost a lot of documents. He was asked again whether he has the receipt and he answered, 'I don't'. There is no evidence of this payment and there is not even a name of the person or Company from whom the truck was rented. There is just this bare statement in Exhibit 'GR 5'. The Claim for the \$3,000. fails because of the failure to plead same. If it was pleaded then the Claimant would have had to prove that approval was given and provide evidence of payment of the \$3,000.
62. The court's finding as shown above is that the claim for labour should be a balance of \$500.00. The question is whether the Claimant is entitled to this balance of payment. To answer this question the court has to look at the method used to pay the Claimant. Was it by phase? Or was it every two weeks? Or was it whenever Mr. Ramos made a claim for payment?

The contract between the parties was signed on the 13th June, 2006. Thereafter the Defendant sent several letters to the Claimant which I will set out below.

Letters sent to the Claimant by the Defendant

15th June, 2006

*Mr. Gustavo Ramos
Dangriga*

Dear Mr. Ramos:

In reference to the construction of Mr. Dean Sanberg house there are a few things I would like to bring to your attention.

Firstly, a small problem of miscommunication happen a few days ago with the electrician whereby you informed him that you will be casting the First slab on Friday. The electrician had to call Mr. Sanberg to request money for his electrical material he was going to need. When the first slab will not be done until Mr. Sanberg return to Belize. Please do not inform Electrician or Plumber of work to be done without consulting me first.

Please note that Mr. Sanberg does not want his house in a month time. We have three months to complete the work. I would appreciate if would maintain a small crew until we can settle off with Mr. Sanberg. Please note also that payment will be made by stages and not by fortnights.

This is the way Mr. Sanberg will be making payment and the time period to complete these stages.

*First phase: Foundation, Ground Beam, columns, First Floor
(3 weeks).*

*Second phase: Interior & exterior walls, Verandah and step, banisters
on step and verandah, (2 weeks)*

Third phase: Roof and ceiling. (3 weeks).

A break down for the rest of the work will be done upon his return.

Attach is a copy of the contract please have someone read it to you so it can be signed and have work continued.

Sincerely Yours

Sgd: Andrew Higinio

The letter of the 6th July 2006 states:

“6th July, 2006

*Mr. Gustavo Ramos
Dangriga*

Dear Mr. Ramos:

I would like to bring to your attention that you had already withdrawn eleven thousand eight hundred and seventy five dollars from your contract sum leaving you with a balance of thirty four thousand one hundred and twenty five dollars and a retention of one thousand five hundred dollars which will be paid in two payment, fifty percent upon completion of house and the other fifty three months after house is completed.

Also I would like you to know that Mr. Sanberg is making payments by stages and you will have to get paid by stages also and not by fortnight payments.

<i>Contract sum</i>	<i>\$ 47, 500.00</i>
<i>Less Retention</i>	<i><u>\$ 1, 500.00</u></i>
	<i><u>\$46, 000.00</u></i>

First Stage

Foundation, Ground Beam, Column, First Floor and stairs \$16,000.00

Second Stage

Interior & Exterior walls, clothes closets, barristers on step
& Verandah \$ 4,000.00

Third Phase

Hip Roof, sheetrock ceiling in bedrooms and bathrooms
And hardwood ceiling in living, dining, kitchen and verandah \$12,000.00

Fourth Phase

Plastering of interior & exterior walls, installation of window

And doors with frames, installation of glass doors \$ 5,000.00”

63. The evidence is that the Claimant on an oral contract commenced work on the 5th June, 2006. Thereafter, the terms were reduced into writing by a contract dated 13th June, 2006 between the Claimant and the Defendant. This contract did not provide for a method of payment. The first letter dated 15th June, 2006 shows what should be done in the first phase but there was no value put on the labour for the said phase. The second letter shows what should be in the first phase, but this time stairs were added and for the first time a value of \$16,000. was stated for the manual labour. The works completed by Mr. Ramos was as shown in the first phase of the second letter.

In the letter of 15th June, 2006 the Defendant informed the Claimant that, “.... Please note also that payment will be made by stages and not by fortnights.” Further, the letter of 6th July, 2006 to the Claimant from the

Defendant states that “...Also I would like you to know that Mr. Sanberg is making payments by stages and you will have to get paid by stages also and not by fortnight payments.” In my view, these letters do not form part of the contract as there is no evidence that the Claimant agreed to be paid in stages.

64. It is clear from the evidence that there was an oral contract which was later reduced into writing. This contract did not provide for method of payment. The Claimant in cross-examination testified that he refused to sign the letter and did not agree to the terms. I agree with the submission of learned Counsel, Mrs. Usher that, “*At common law one party cannot unilaterally, validly vary the terms of the contract.*” **See Halsbury’s Laws of England, 4th Edition Vol. 9(1) page 759-760.**
65. The evidence of Mr. Ramos is that he did not agree to work or receive payment in stages as stated in the letter. I find Mr. Ramos evidence to be credible as the conduct of the parties shows that payment was not made according to the letters. Mr. Ramos evidence is that he collected pay every two weeks. See paragraph 5 of his witness statement. He also said in examination-in chief that he did not agree to the letters. He said that he was asked to sign the letters but he did not sign them. Mr. Higinio’s evidence is that the Claimant commenced work on the 5th June, 2006. He said that one week later the Claimant requested payment in the sum of \$5,000. and the sum was paid to him on the 15th June, 2006. See paragraph 4 of his witness statement. The Defendant said that on 30th June, 2006, the Claimant requested another payment of \$3,500. This as can be seen from the date is two weeks later. The Defendant said that though he was concerned at the speed in which the Claimant was depleting the funds he nevertheless paid the Claimant. At paragraph 9 of the Defendant’s witness statement he said that on 9th July, at the time of the pouring of the first floor and stairs, Mr. Ramos requested

another payment of \$6,500. He said he did not agree with this payment because the Claimant was not abiding with the payment schedule and he had collected more funds than was due at this phase of the construction. He said that on 10th July, 2006 he therefore paid Mr. Ramos \$5,000. and not the requested sum of \$6,500.00. An advance of \$3,000. was also given to the Claimant on May 8th 2008.

66. There is no dispute that the Claimant received \$16,500. The evidence before the court which includes photographs shows that the Claimant had built the foundation, beams, columns, steps on both sides and the first floor. Further, the evidence shows that Mr. Ramos received payments whenever he requested payments. He commenced work on the 5th June, 2006 and he received a payment on the 15th June, 2006. He then received a second payment on 30th June, 2006. Lastly, on the 10th July, 2006 he received a payment. Despite the letters written by Mr. Higinio that the payment will be made in stages, he paid him every two weeks and the last payment 10 days later. In cross-examination by learned Mrs. Usher, Mr. Higinio admitted that despite the letter stating that payment will be made in stages he paid every fortnight. He said he paid fortnightly because whenever Mr. Ramos finish a certain amount of work, he would need money to pay his workers otherwise Mr. Ramos workers would go after him and damage him.
67. There is also the evidence of Annis Gordon, the Defendant's secretary who said that the Claimant would present his payroll for the period and they would pay the amount. On a balance of probabilities, I believe the evidence of the Claimant that there was no agreement to pay by stages/phases as stated in the letters of Mr. Higinio. I find however, that payments were made in stages but not in accordance with the letters. It was done on a value basis every fortnight for two payments and on the last payment it was done in ten days.

68. The further question for the court is how does the court put a value on the work completed since there was no agreement to pay in stages as stated in the letters. The evidence by Mr. Higinio in cross-examination is that Mr. Ramos puts a value on his work. Mr. Higinio said he would ask Mr. Ramos how much he needs for his payroll and he would pay him as he knew him good and he never mistrust him. Thus, I find that Mr. Ramos determined the value on his work and Mr. Higinio paid the said amount.
69. There are twelve items listed in Exhibit "GR 5". The cost of the cement truck is not labour so that was deducted leaving a balance of \$17,000 less the \$16,500 paid. The cost of labour for the other 11 items were not challenged by the Defendant. Therefore, since there was no agreement to pay in stages as stated in the letters and Mr. Ramos puts a value on his own work and further since there was no challenge to the labour cost of the 11 items listed, I find that the balance of \$500. should be paid to Mr. Ramos for labour for the work completed.

Issue 4: Whether there was an agreement that the Defendant would rent the Claimant's Generator.

70. The Claimant claims for \$3,000.00 being the total cost of rental of generator for 20 days at \$150.00 per day. At paragraph 12 and 13 of the Claimant's witness statement he said that during the construction period the Defendant asked him to rent his generator for the Hopkins worksite as he had no means of electricity supply at the location and that he would pay the rental cost. He said that the Defendant did not have any security guards at the work site and so he had to transport the generator daily to and from the site. He further said that taking these factors into account

he told the Defendant that he would charge him \$150.00 daily for the rental of the generator and he agreed to pay that cost.

71. The Defendant's evidence is that at no time during the period Mr. Ramos worked for him did he discuss with him or agreed to pay him for the use of a generator on the work site. He said that he has his own generator and he would have used it if Mr. Ramos had expressed the need for one. Further, that if Mr. Ramos took his own generator to the work site, that was done by his own prerogative and he never agreed to pay him for that. See paragraph 19 of his witness statement. In cross-examination Mr. Higinio said that the Claimant wanted to commence the job immediately after he got the first payment but he told him to give him a little time because the owner has to provide electricity and water. In further cross-examination Mr. Higinio admitted to seeing a Generator on the site but said that the Claimant took it at his own free will. Further, he said that if the Claimant had asked him for a Generator he would have provided him with same. He said the Claimant never talked to him about the Generator. In re-examination Mr. Higinio was asked why there was no electricity when the Claimant commenced working and he said that the owner paid for the electricity and sent the receipt for him but, Belize Electricity Limited took a long time to connect it.
72. It can be seen from the evidence that the Claimant did not have a responsibility to provide electricity for the site. It was the owner but the electricity was connected after commencement of the job. On a balance of probability, I believe the evidence of the Claimant that there was an agreement for him to use his generator for the 20 days when there was no electricity on the worksite and to be paid \$150.00 daily. Mr. Higinio is a contractor and he has knowledge that there would be need for electricity when constructing a house. Mr. Ramos did not have to express the need for a Generator. Further, I don't find Mr. Higinio's evidence credible that

he told the Claimant to give him a little time so that the owner can put in the electricity and that it was the Claimant who wanted to commence the job early. I find the evidence of the Claimant credible that there was an agreement to rent the Generator at \$150.00 per day. Since the Generator was used for 20 days the Claimant is entitled to the sum of \$3,000.00.

Issue 5: ***Whether there was an agreement between the parties for the Claimant to rent his vibrator to the Defendant and whether the Defendant agreed to replace the said vibrator after it broke.***

73. The pleadings by the Claimant is that the Defendant verbally agreed to replace a compactor which broke down during the construction of the house. He claims \$2,500.00. The Defendant said he has no knowledge that a compactor was used at any time because no ground floor was constructed. The evidence by the Claimant is that whilst constructing the Defendant asked him to rent his compactor/vibrator as he needed to use his compactor at another work site in Santa Cruz. He said the Defendant went to his house to borrow the compactor. He said that he agreed to rent its use to the Defendant at a cost of \$40.00 daily. He said the contract was a labour contract only and so he did not have to provide any equipment. Further he said that on the 11th day of July, while being used to compact cement for the beams, the compactor broke. He said that it was the first day he used the compactor at the work site though he has used it before on his own construction projects and never had any problems. He said when he purchased the vibrator in 2005, he paid the sum of \$2,500.00 to a guy by the name of Miranda Martinez. See paragraph 14 of his witness statement.

74. The Defendant's evidence at paragraph 20 of his witness statement is that there was never any need for the use of a compactor at the stage of construction when Mr. Ramos commenced working on the house. He said that all the compacting work had been done on May 22nd by D.E.C. Sons Ltd.
75. In vigorous cross-examination of the Claimant it became clear to the Court that Mr. Ramos was referring to a vibrator as a compactor. This is evidenced also by photographs. A lot of unnecessary time was spent on whether the instrument used was a compactor or vibrator. The evidence as presented to the Court shows that a Compactor is used to compact the earth and is a much heavier and more expensive equipment. The Vibrator however is used to compact the cement and is a much smaller equipment and not so costly as a compactor. Though the pleadings by the Claimant shows that he was claiming for a compactor the amount claimed was for a Vibrator. In his evidence he referred to the Compactor as a Vibrator. Mr. Higinio was therefore correct in saying that no Compactor was used on the site. As a result, the Defendant did not address in his pleadings whether a vibrator was used. The photograph shows that the Vibrator was being used on the worksite. Mr. Wilson Castillo who was sub-contracted to build a water tank by Mr. Higinio said in his evidence that Mr. Higinio's Vibrator was being used on the worksite where he was building the tank. I therefore, have no difficulty in believing that Mr. Ramos used his Vibrator on the work site. I also believe the evidence of the Claimant that there was an agreement that Mr. Higinio would rent his Vibrator.
76. The question is whether the Claimant is entitled to the replacement cost of the Vibrator which he said the Defendant agreed to pay. Mr. Ramos evidence is that he agreed to rent the Vibrator to the Defendant at a cost of \$40.00 daily. That the Vibrator broke on the first

day when it was being used by Mr. Ramos, himself. He said the Defendant agreed to pay for the Vibrator. In cross-examination Mr. Ramos was asked by Mrs. Gillett how old was the Vibrator when he bought it second-hand. He said that it was in good condition and he had it about one year. Mr. Ramos said that the joint of the Vibrator was damaged and that replacement parts can be purchased but he has not done so. There is no evidence as to the condition of the Vibrator when it was rented to Mr. Higinio or how long the Vibrator was being used before Mr. Ramos bought same. Mr. Ramos said he used it many times on his construction site and it never broke down. This in my view, is not sufficient evidence that the Vibrator was in good condition. In any event, I don't find Mr. Ramos evidence credible that Mr. Higinio agreed to replace the Vibrator. In my view, Mr. Ramos would have been entitled to rent if the Vibrator had not broken down. Thus, I find that Mr. Ramos is not entitled to the replacement cost of the vibrator.

77. Conclusion

1. I find that the Defendant, Mr. Higinio repudiated the construction contract dated 13th June, 2006 which entitled the Claimant, Mr. Ramos to treat the contract as discharged.
2. I find that the Claimant is entitled to nominal damages in the sum of \$6,000.00.
3. I find that the Claimant is entitled to the sum of \$500.00 as the balance of payment for work performed.
4. I find that the Claimant is entitled to the sum of \$3,000.00 for the rental of the generator.

5. I find that the Claimant is not entitled to the replacement cost of the Vibrator.

78. Accordingly, the following order is made:

Damages is awarded in the sum of \$ 9,500.00 to the Claimant.

Interest in the sum of 6% per annum from 16th October, 2008 to the date of judgment.

Cost to be agreed or taxed.

.....
MINNET HAFIZ- BERTRAM
SUPREME COURT JUDGE

Dated this 9th day of June, 2009