THE FAIR TRADING COMMISSION

BEFORE THE BOARD OF COMMISSIONERS

IN THE MATTER of the Consumer Protection Act, 2010;

THE FAIR TRADING COMMISSION
VS.
FRUITFUL BUILDERS
(Rep herein by Mr. Kenneth Zialor)

Case No: CPA.15.274

Complainant – Ms. Lindy Fitch
Respondent – Fruitful Builders

QUORUM:
Mr. Victor Pool – Presiding Chairperson
Mr. Philippe Chong-Seng – Commissioner
Mrs. Jenna Thelermont – Commissioner
Mr. Michael Nalletamby – Commissioners

For the Complainant
Mr. Ziggy Adam –Legal Officer (FTC)

Respondent – Absent

RULING

[1]The Commission registered a complaint from one Ms. Lindy Fitch of Cascade, Mahe on the 5th of November, 2015 against Mr. Kenneth Zialor, of La Louise, Mahe, a Class II contractor trading as Fruitful Builders. The complaint was to the effect that Ms. Fitch (complainant) had paid to the Mr. Zialor (respondent) the total sum of SR.230,000 as part payment for the construction of her house at La Gogue. The complainant claimed that the works done by the respondent was not according to the approved plan and in addition there was now necessity for a retaining wall given the poor workmanship exhibited by the respondent when cutting the terrace. Ms. Fitch now seeks a refund of the sum paid to the respondent due to substandard works and an order directing the respondent to bear the cost of constructing a retaining wall.

[2]The Commission investigated the matter and to settle the matter, a case was filed before the Board of Commissioners for the contravention of Section 40(1)(a)and (b) of the Consumer Protection Act, 2010 which states as follows:-

> *"**40(1)** Subject to this Part, where a supplier undertakes to perform any service for or on behalf of a consumer, the supplier shall –*
>
> *(a) perform that service in a timely manner and give to the consumer timely notice of any unavoidable delay in the performance of the service;*
> *(b) perform the service in a manner and of a quality that persons are generally entitled to expect;*
>
> *having regard to the circumstances of the supply and any specific criteria or condition agreed between the supplier and the consumer before or during the performance of the service."*

[3]The Board of Commissioners convened on several occasions in relation to this matter. When the parties appeared for a first mention the respondent did not dispute the claim and was willing to settle the matter. The respondent intimated that he would refund the complainant the sum paid to him and the fee of the retaining wall minus the cost of the preliminary work done on site. The complainant agreed. The respondent was given time to provide an estimate for those preliminary works. After several sittings and fair amount of negotiations it was agreed that the respondent was to refund the complainant the sum of SR.500,000. The Board adjourned to have an undertaking properly drawn up. On the day for the signing of the undertaking the respondent refused to sign the same claiming that after further consideration he felt that he would be unable to make payments as stipulated therein. The case was therefore fixed for hearing.

[4]On the date scheduled for hearing the respondent did not appear. Mr. Ziggy Adam, Legal Officer of the Fair Trading Commission moved that the case be heard *exparte* pursuant to Rule 12 of the Fair Trading (Procedure for Conduct of Hearings) Rule, 2011. The Board being satisfied that a summon was issued on the respondent and that several attempts were made to contact the respondent, the Board therefore granted the *ex-parte* application. Mr. Adam called several witnesses in support of the complainant's case who all attested that works done on site by the respondent was not according to the approved plan. The complainant gave evidence to the effect that she paid the respondent a total sum of SR.230,000 after agreeing that he would build her two

bedroom house with the option to later add the third bedroom as per the approved plan. This did not require a shift in the house's position on site like the respondent did. Further, the complainant stated that the respondent excavated the earth on site in a manner that created an undercutting near the road side consequently requiring the construction of a retaining wall which was unnecessary before. She was quoted SR.322,000 for the said wall by a contractor of which the Board was provided with the quote. Ms. Fitch stated that she had to completely demolish the work done by the respondent which cost her SR.13,000 and had a new contractor rebuild her house as per the approved plan. Ms. Fitch concluded by explaining to the Board that she was currently in arrears in paying the new contractor and the substandard work done by the respondent has caused her to incur extra cost. She prayed that the Board rules that she be refunded the money she paid and the cost of demolition and building of the retaining wall.

[5]The testimonies of other witnesses of the complainant supported the complainant's claims. Mrs. Natalie Edmond, Principal Analyst of the Fair Trading Commission produced to the Board the report of a site visit conducted by the case handler on the 16th November, 2015 who was under Mrs. Edmond's supervision when working at the Commission. The site visit report (CE4) was accompanied by photographs taken of the site (CE5) depicting the observations made on site which matched what Ms. Fitch had complained about. In addition Ms. Dolores Barrack, an analyst of the Fair Trading Commission, testified that she accompanied the case handler to a location at La Louise in an attempt to locate the respondent who was being evasive with the Commission. In turn, Mr. Alf Esparon, Principal Engineer of the Seychelles Planning Authority testified that he was also present at the site visit conducted on the 16th November, 2015 and even previously it was observed that site preparations and earth cuttings had been undertaken in an excessive and disorderly manner resulting in the creation of an embankment at the rear of the property and adjacent to the public access road. Mr. Esparon also produced a letter dated 3rd December, 2015 (CE10) he sent to the Fair Trading Commission whereby he further explained that it was also noticed that the house had not been set-out as per the approved site plan but rather closer to the said embankment consequently causing deviation of the approved floor layout due to lack of sufficient ground to effectively accommodate the proposal as initially approved. The complainant and contractor were instructed to stop all works on site until revised plans reflecting what was being built on site had been submitted and approved by the Seychelles Planning Authority. The complainant was also advised to seek the services of a licensed civil engineer to design and submit details of a retaining wall required to support the exposed embankment. Mr. Esparon also pointed out to the Board that there was also a need to build a smaller retaining wall at

the front of the property considering that the front part of the property mainly consisted of soft and loose ground which was filled from the earth cuttings undertaken. Mr. Esparon concluded by stating that although presently issues with the house have been ironed out and construction is complete the state of the land remains the same and so do the recommendations of the retaining walls. Mr. Lester Quatre, Quantity Surveyor was also called on behalf of the complainant. He produced his report dated 20th November, 2015 whereby he evaluated works done by the respondent at SR.103,668 being the cost for site preparations and some foundation work.

[6]For the conclusion of the complainant's case Mr. Adam submitted in writing that the complainant has sufficiently proven her case based on the documentary and oral evidence provided to the Board. That the Board should rule in favour of the complainant and order that the respondent refunds the total amount paid to him save for the cost of site preparation given that the rest of the work done by the respondent was substandard and had to be completely demolished due to the directive given by the Seychelles Planning Authority. In addition that the respondent bears any associated costs to building the retaining which was previously not required. Mr. Adam also prayed that the Board awards damages to the complainant in accordance to Section 76(2)(d) of the Consumer Protection Act, 2010.

[7]The Board has deliberated on the matter at hand and is of the view that the evidence adduced before it is overwhelming to the fact that the respondent's conduct was unprofessional, substandard and unacceptable. The respondent exhibited poor workmanship and showed no regards to the approved plan as he wrongly positioned the house and worse he turned the land into a hazardous property causing great additional cost to rectify the site (See CE4, CE5, CE6, CE10, CE11, CE12). The Board of Commissioners therefore finds the respondent to be in contravention of Section 40(1)(b) of the Consumer Protection Act, 2010.

[8]When making orders following its findings the Board has taken into account several factors. Firstly, the Board of Commissioners takes notice of the behaviour of the respondent from the outset of this case. The Board held lengthy negotiations with the respondent in relation to matter and made many attempts to meet the respondent half way but in the end he refused and retracted the undertaking he had agreed to enter into. The Board also takes note that the respondent is not a first time offender given that the Board dealt with the same respondent in case number CPA.15.178. Further, the respondent was summoned to appear for hearing of the present case but he failed to attend. Even so after that the Board gave him the opportunity to file any written

submission he may wish in relation to this case and he failed to do so. Consequently, **the Board hereby orders the respondent, Fruitful Builders, represented herein by Mr. Kenneth Zialor to refund to the complainant, Ms. Lindy Fitch, the sum of SR.198,000** [price paid (Sr.230,000) minus cost of site clearing (Sr.32,000)] as per the Quantity Surveyor's report produced (CE1). The Board has not entertained the cost of other works done by the respondent as per the quantity surveyor report as those works were substandard and had to be demolished by the complainant as directed by the Seychelles Planning Authority. **On the same point the Board hereby orders the respondent to refund to the complainant the cost of demolition being SR.13,000** (See CE12). Moreover, the Board is of the view that the respondent should bear all the associated costs to building the retaining wall which is now a necessity due to the respondent's actions and poor workmanship. **Therefore, the Board orders the respondent to pay to the complainant the sum of SR.322,000 being the cost of building the retaining wall** (See CE11).

[9]For clarity purposes below is an illustration of the calculation of sums owed to the complainant by the respondent to be paid **not later than ninety (90) days from the date of this ruling.**: **Sr.198,000 + 13,000 + Sr. 322,000 = SR.533,000.**

[10]Additionally, after assessing the gravity of the consequences of the respondent's actions in this case the Board shall exercise powers granted under Section 67(1) of the Consumer Protection Act, 2010 and impose **a fine in the sum of SR.20,000** to be paid by the respondent after he has refunded the sum owed to the complainant.

[11]**All payments mentioned are to be made to the office of the Fair Trading Commission.**

[12]At this juncture the Board would like to bring to the attention of the Commission to immediately bring this case to the attention of the Licensing Authority and also the Seychelles Planning Authority to take a serious determination as to the competence of the licensee. The Board is appalled by such unprofessionalism and unbecoming character of the complainant and herby calls on the relevant authorities to ensure that necessary action is taken to ensure that the public is protected from the licensee.

[13]The parties are free to appeal against this ruling to the Appeal Tribunal *(See Section 44 of the Fair Trading Commission Act, 2009 and Section 77(1) of the Consumer Protection Act, 2010).*

[14]We rule accordingly.

Pronounced by us on this 8th day of September, 2017.

Mr. Victor Pool
Presiding Chairperson

Mr. Philippe Chong-Seng
Commissioner

Mrs. Jenna Thelermont
Commissioner

Mr. Michael Nalletamby
Commissioner