The Court of Appeal for Bermuda

CIVIL APPEAL No. 5 of 2010

Between:

SHAWN KNIGHT

Appellant

-V-

DWIGHT WARREN
and
WENDIE WARREN

Respondents

Before: **Zacca, President**
Evans, JA
Auld, JA

Appearances: **Mr. E. Johnston for the Appellant**
Mr. N. Turner for the Respondents

JUDGMENT

Date of Hearing: Friday, 19 November 2010
Date of Judgment: Tuesday, 23rd November 2010

EVANS, J.A.

1. The Appellant, Shawn Knight, is a builder and contractor. In early 2006 he and his sister were joint owners of a property on Perry Drive, Warwick, and he was building his dream house for himself on the site. He saw an opportunity to buy another site that he thought was even better suited for his purpose, and so he decided to sell the existing property with the half completed house on it. He obtained estimates from a firm of quantity surveyors, Woodbourne Associates Ltd., and on 7 April 2006 he advertised the property for sale through Bermuda Realty for a price of $1,200,000. The advertisement included-

> *"NB. The current asking price of $1.2 million for the property is based on the construction of the property to wall plate level only. The estimated cost to complete the construction of the house ... from wall plate is between $400,000 - $600,000. We have quantity surveyor reports in office for more information if needed."*

2. The property was described as "a proposed 2 storey three apartment family house", consisting of a split level main house with three bedrooms, a lower level 2-bedroom apartment, and a further 1-bedroom apartment, also on the lower level.
3. The Respondents, Dwight Warren and Wendie Warren, already knew the Appellant. They were excited by the advertisement, because they saw the prospect of combining the resources of various family members – themselves, Mr. Knight`s parents Adib and Maymunah Abdul-Jabber, and his brother and sister-in-law – so that the property could become a home which they all owned, something they had never had before. They contacted the Appellant and made no secret of their enthusiasm, or of the fact that their financial resources would be stretched if they were to obtain funds to buy the property. He showed them Plans for the site and the house he was building on it.
4. They approached the Butterfield Bank where they dealt with Mrs. Dorothy Smith. On May 31 2006 she advised them that the Bank had approved financing for them up to a maximum amount of $1,500,000 to assist them with the purchase "for your use". On the same day, Mrs. Smith wrote to Larry Dunlop, an agent acting for the Appellant, saying that the Bank`s clients were Mr. and Mrs. Knight and the family members referred to above, and informing him that the Bank had agreed "to provide financing to the above clients in the amount of $1,020,000" to assist them with the purchase.
5. Negotiations followed, involving the Bank as well as the parties to the proposed purchase, and it was not until 27 July 2006 that the Bank`s financing terms were finally agreed. The Sale and Purchase Agreement was signed on the following day, 28 July 2006. The sale price was reduced by $15,000 to $1,185,000, of which the Bank had agreed to advance 85%

($1,007,250) to the buyers. The total amount made available to them was the larger sum of $1,456,871, made up as stated in a later letter from the Bank dated 18 September 2008 and secured by a first registered legal mortgage on the property. The letter included one item, $421,000, which it described as "initial final costs from Woodbourne Associates Ltd. for the completion of the project".

6. Meanwhile, the Appellant and the Respondents had negotiated a construction contract under which the Appellant agreed to complete the house in return for a fixed sum payment of $400,000. That contract is the subject matter of their present, bitter dispute. They are agreed that a 'completion contract' was made, which became unconditional when the sale and purchase of the property took place on July 28. They are also agreed that the contract was partly in writing and partly oral. The issues are, first, when was the contract made, and secondly, what was it precisely that the Appellant was obliged to complete?

7. Relevant documents, in addition to those already referred to above, are, first, a letter dated 1 June 2006 addressed to Mrs. Smith at the Bank. It was headed "RE: Construction Project, #9 Perry Drive, South Shore, Warwick" and it read –

> *"This is a summary of completing the above project for the estimated sum of BD$400,000 (four hundred thousand dollars):*
>
> 1. *Completing the roof (consisting of slating and coating of whitewash)*
> 2. *Exterior doors and windows*
> 3. *Interior doors and windows*
> 4. *Tiling (throughout)*
> 5. *Electrical work (consisting of switches, lights and wiring)*
> 6. *Plumbing (consisting of sinks, bulbs, water pumps, water heaters and fixtures)*
> 7. *Carpentry (consisting of cabinets and ceilings)*
> 8. *Install pit with all lines connected.*
> 9. *All boundary walls.*
> 10. *Paint primer inside and out.*
>
> *The estimated completion of the above shall be three months from the date that funds are made available to the Project Manager."*

The letter was signed by the Appellant as "Project Manager".

8. On 23 June 2006 Jason Copson wrote to the Bank as Senior Quantity Surveyor on behalf of Woodbourne Associates, enclosing a Report that was dated June 2006 but which he had submitted to the Appellant in March/April, referred to in the 7 April advertisement. As the covering letter explained, the total normal cost of the construction of a new dwelling was approximately $1,275,500. There was a breakdown of those "Forecast Overall Costs" (page 2). Page 4 was an "Approximate Budget Estimate" of the "Forecast Cost to Complete" the existing part-completed construction which showed $670,000 as the cost if an outside

contractor was used. Page 5 was headed "Forecast cost to complete owner acting as contractor" and it gave the estimated cost to the Appellant if he, as owner, completed construction for himself. The total was $421,500.

9. Apart from two documents obtained for the Bank which can be considered separately, the above represented the documentary part of the agreement reached between the Appellant and the Respondents. Their oral evidence was to the effect that when they received the Bank`s letters dated 31 May 2006, and the Appellant knew that the amount the Respondents could pay for completion costs was limited by the advance that the Bank was willing to make to them, over and above 85% of the purchase price, he agreed to complete the construction works for a total cost of $400,000. That was the lower figure of the $400/700,000 range he had included in the April advertisement and which he had based on the Woodbourne Report he received then. The Appellant said that that agreement led to his signing the letter dated 1 June 2006 which he addressed to Mrs Smith at the Bank, containing an estimate of $400,000 as the cost of "completing the above project" followed by the list of 10 items, quoted above. The letter, however, was not addressed or copied to the Respondents. The Appellant contended that the letter "was effectively a schedule of works which would constitute completion of the Residential Unit".

10. At that stage, the Bank became directly involved in the negotiations between the two parties. Its approval of a $1,500,000 advance to the Respondents by its letter to them dated 31 May 2006 was subject to a number of express conditions, including –

> *" – Confirmed fixed quote of project to completion from contractor for $400,000.00 over #9 Perry Drive Warwick with confirmation from the quantity surveyor Woodbourne & Associates.*
>
> - *Signed and accepted Offer Letter adhering to the construction guidelines."*

11. That led to Jason Copson`s letter on behalf of Woodbourne Associates to the Bank dated 23 June, which began "We have been asked by Mr. Knight to estimate and advise you of the cost of completion of the above project" and the Report was redated June 2006 though in the same terms as the original (April) version, and it was addressed to the Appellant ("For Mr. Shawn Knight").

12. Another of the Bank`s requirements was "Reputable opinion of rental value for #9 Perry Drive, Warwick", and the Respondents obtained a Report from Crisson & Co. Ltd. Real Estate dated 5 June 2006. This included "Projected Rental Income" for each of the parts of the building, described as "Upper apartment", "Lower 1 bedroom" and "Lower 2 bedroom"

respectively. A further Rental Valuation from Bermuda Realty was sent to both parties on 6 June 2006.

13. The findings made by Kawaley, J. as to the making and terms of the completion contract were set out in paragraphs 38 – 41 of his Judgment. The main ones are in paragraph 38 –

> *"38. The parties clearly agreed that the Plaintiff would complete the House for approximately $400,000 at some point prior to the execution on July 28, 2006 of the sale and purchase agreement in relation to the property including the incomplete house. It seems likely this was agreed in principle before May 31, 2006 when the Bank apparently approved the Defendants` financing for the purchase of the property as a whole, and was finalised on or after June 1, 2006 letter prepared by Larry Dunlop. The contract was clearly made partly orally and was partly evidenced in writing and the June 1, 2006 letter, which was not signed by the Defendants or even addressed to them, cannot be viewed as embodying the full terms of the Completion Agreement. To some extent the agreement was reflected in the Plans, the Woodbourne Report (as prepared for the Bank on June 23, 2006) and whatever modifications to the initial agreement occurred after the work commenced."*

14. The principal ground of appeal addressed to us in Mr. Johnston`s written and oral submissions on behalf of the Appellant was that the Judge`s conclusions were wrong in law. The Appellant`s case is that the contract was concluded by an oral agreement on or before 1 June 2006 and that its terms were set out in the letter he wrote to Mrs. Smith at the Bank on that day. The letter contained what he said was an exhaustive list of the items he was required to complete. The oral agreement, he said, could be interpreted by reference to the Plans which were available to the parties at that time, but the Woodbourne Report formed no part of it; that was only produced, and for the Bank`s purposes, later.

15. Mr. Johnston submitted that the Judge had accepted this contention, by his finding it was "agreed in principle before May 31" that the Appellant would "complete the House for approximately $400,000". If there was a contract at that stage, he submitted, its terms could not be altered by later events, such as the production of the Woodbourne Report, unless there was a formal variation of the pre-existing contract, which the Judge did not find and which the evidence did not support.

16. In our judgment, this submission must be rejected. There is no reason in principle why an "agreement in principle" or an outline agreement (or one which, in Mr. Johnston`s phrase, establishes the "parameters of the contract") cannot be expanded as more detailed terms are added to it, or as an already agreed skeleton is fleshed out. That is not strictly a process of variation, and there is no doubt that the Court can have regard to what was said and done by

the parties, when the agreement is partly oral and partly in writing, up to the time when they agree that their bargain is complete (as Lord Hoffman made clear in *Chartbrook v. Persimmon Homes* [2009] 1 AC 1101).

17. In the present case, it is necessary to bear in mind the relationship between the two contracts that were being negotiated between the two parties at the same time, namely, the sale and purchase agreement for the property and the Appellant`s undertaking to complete the construction of the house. Neither was of any use to either party until both agreements became binding, and although it was theoretically possible for the parties to agree the completion contract first, subject to a condition that it would not become binding until the sale and purchase contract was also signed, in practice it was far more likely that they would intend to conclude both contracts at the same time. They were agreed "in principle" by about 1 June 2006 but they were free to negotiate further terms, without formal "variation", until they intended that the agreement should become formally binding between them. That on the face of it was not until 28 July 2006, and there is no suggestion that it was on any intermediate date.

18. In our judgment, therefore, the proper inquiry is to ask, what had the parties agreed as to the completion contract, when they signed the sale and purchase contract on 28 July 2006? Was their agreement on about 1 June 2006 intended as a legally binding contract on the terms of the Appellant`s letter to the Bank, or had that agreement evolved in the course of their further discussions with and through the Bank? It appears to us that there is only one answer to this question, and essentially it was the answer the Judge gave, in the paragraph from his judgment we have quoted above.

19. This ground of appeal therefore is dismissed, but we should add that, despite the apparently fundamental nature of the issues raised by it, it appears to have been directly relevant only to two relatively small items that are in dispute between the parties. First, the Appellant claims an additional payment of $15,000 for the cost of painting the exterior of the house, in addition to his claim for a lump sum payment under the completion contract. The additional claim was dismissed by the Judge for the reasons he gave in paragraphs 63 and 64. The 1 June letter was expressly limited to the priming coat ("10. Paint primer inside and out"), but the Woodbourne Report suggested that all painting fell within the contract, and he held that the latter prevailed. For the reasons given above, we hold that he was entitled so to hold. Secondly, the Respondents` Counterclaim included $900 as the cost of completing the installation of wooden flooring in the lower 1-bedroom apartment. The 1 June letter included "4. Tiling (throughout)" but the Judge held "On balance I am satisfied that the

parties did agree that the one bedroom apartment would have wooden flooring which would be purchased and installed by the Plaintiff." (para.46). That was a later, oral agreement, and clearly the Judge was entitled to make that finding.

20. Before dealing with the remaining issues raised by the Appeal and Cross-Appeal we should set out briefly the later history of the project. The Appellant began work in September 2006 (Witness Statement para. 22) and difficulties between him and the Respondents, especially Mrs. Warren, soon began. A particular problem arose in relation to the purchase of tiles, kitchen cabinets, "bathroom vanities" and other materials which the Appellant had not already acquired. He accepted that he was liable for the cost of materials, as part of the $400,000 he would receive from the Respondents and which they would draw down from the Bank, and he suggested that he would allow them to personalise their home by buying these items, which he would install. So it was agreed that the Respondents could draw down $100,000 from the Bank and purchase the materials themselves, leaving $300,000 to be paid to the Appellant in due course. This was embodied in a letter to Mrs. Smith at the Bank dated October 20th. 2006 requesting a drawdown of $100,000, made up as to $75,000 approx. by "tile and kitchen cabinets locally and overseas" and the balance for other materials, as listed. The letter was signed by Mrs. Warren and apparently by the Appellant also, though the latter suggested at one stage of his evidence that the signature was a forgery. That remarkable allegation was not pursued, and in any event it was agreed between the parties that the arrangements then made had the effect of varying the completion contract, so that the amount due to the Appellant for the work he had contracted to do was reduced to $300,000. He also agreed not to require any payment until the work was complete.

21. Work proceeded slowly, and relations between the parties, formerly warm, degenerated into the antagonism and bitterness that has marred these proceedings from the start. Originally intended for completion by December 2006, the work continued until 19 June 2007 when the Appellant left the site. The Judge found that it should have been completed by 31 March 2007 and that the Appellant was liable in damages for delay beyond that date. The Appellant demanded payment of the reduced lump sum figure, $300,000, plus a further $15,000 which the Respondents had agreed to pay him on successful completion of the works. The Judge rejected the latter claim and it was not pursued in this appeal.

22. The Writ was issued on 3 March 2008 and the Statement of Claim was served on 1 April 2008. The present Respondents served their Defence and Counterclaim on 28 April 2008, The Counterclaim was for damages under various heads. These were as follows –

Para.48	Additional materials purchased by them
Para.52	Cost of completing the Residential Unit
Para.55	Loss Arising from Delay
Para.60	Work not of Satisfactory Quality
Para.63	Outstanding Work Yet to be Completed,

and Particulars of Loss and Damage were given (unfortunately, not corresponding entirely to the above heads) totalling $172,406.

23. Between then and the commencement of the trial, on 16 March 2010, the Respondents gave notice of increases to their Counterclaim, but the pleading was not formally amended until the first day of the trial. The revised figure was $255,024. The Judge awarded the Appellant $300,000 on his claim, but the two additional items of $15,000 each were disallowed. The Respondents succeeded as to $140,066 of their Counterclaim, and the Judge gave judgment in favour of the Appellant for the balance of his claim, in the sum of $159,933. The Judge rejected the Appellant`s claim for interest on the sum awarded to him, from 1 June 2007 until the date of the Judgment.

24. The Notice of Appeal raised a number of issues, some of which were withdrawn by a Supplementary Notice dated 11 November 2010, shortly before the appeal hearing, which also added two fresh grounds. Counsel relied on five grounds at the hearing, one of which he later abandoned. That left four grounds, the first of which concerned the making of the contract and defining its terms (the "Construction Argument") to which we have already referred. The remaining three grounds were concerned with (1) the admission of certain documents as allegedly hearsay evidence (the "hearsay argument"), (2) the damages awarded for loss of rental income, following the delay in completion of the project (the "rentals" issue), and (3) the Judge`s failure to award pre-judgment interest on the net amount he awarded to the Appellant (the "interest" issue).

The hearsay argument

25. This barren argument should have found no place in civil proceedings of this sort, but the Appellant through Mr. Johnston insisted on raising it before the Judge, who devoted no less than 8 pages of his judgment to it, and he has raised it again as an issue in this appeal.

26. We dismiss it as a ground of appeal for the simple reason that no issue as to hearsay evidence does arise. The documents in question were not tendered as evidence of the truth of statements contained in them. They played a much more limited role.

27. The documents were described compendiously as "invoices and receipts" and were produced by the Respondents but only, Mr. Johnston told us, shortly before the trial. Their

general nature was as follows. The Respondents claimed as damages, sums which they alleged they had paid to suppliers, local and overseas, for materials and equipment they had ordered and had delivered to the site. They produced receipted cheques as proof of payment, together with invoices and receipts from the suppliers in question. Their evidence was, 'these are the sums we have paid for the goods we needed to order for delivery to the site'. The objection raised by Mr. Johnston was that the invoices and receipts should have been regarded as hearsay evidence and as such they were inadmissible except under statutory provisions, upon which the Judge relied.

28. The invoices and receipts would properly be regarded as hearsay evidence if they were relied upon as evidence of the truth of their contents, that is to say, as statements by the suppliers of the items in question that they were in fact ordered and paid for by the Respondents. But that was the evidence of the Respondents themselves. They said that they had placed the orders and had paid for them, as evidenced by the cheques they produced (and which it seems were not objected to). The invoices showed why they had paid those sums of money to the suppliers in question. They were not produced as evidence from the suppliers that the order was received and the goods were delivered. That evidence might have been called for, if those facts had been in dispute. As it was, the Respondents relied upon the first-hand evidence they themselves gave.

29. Before us, Mr. Johnston raised two further points. He said that the Respondents as witnesses had been asked only about a sample of the transactions in question; they had not dealt with every single one. But the Transcript showed that that sensible course was adopted by Mr. Turner, counsel for the Respondents, with the Judge`s approval and without objection from Mr. Johnston.

30. Secondly, he said that the Respondents had to prove that the goods referred to had been delivered to the site. But the suppliers` invoices and receipts were no proof of that, and they added nothing to the Respondents` own evidence that that was the reason why the orders were placed, the goods were delivered and the moneys were paid. We regret the proceedings were protracted in this way.

Rentals

31. This is best dealt with, as it was by counsel, at the same time as the Respondents` Cross-Appeal regarding the amount of damages awarded to the Respondents under this head, and we shall do the same.

Interest

32. The usual practice, in a case where it has been adjudged that the Plaintiff is entitled to recover a sum of money which was due to him from a time before he issued the Writ, is to include in the amount for which judgment is given, a sum representing interest on the principal amount from a date and at a rate determined by the Judge to reflect the circumstances of the case. In short, the Judge has a discretion as to what sum, if any, to award under this head.

33. Here, the Judge to declined to make an order, on the following ground –

> *"Taking into account the fact that the Defendants sought mediation and this was seemingly rebuffed by the Plaintiff, I would award no pre-judgment* interest……."(para.95).

That was a provisional view, however, and there was a later hearing concerned with the issues of interest and costs. In paragraph 2 of his second judgment, the Judge said this –

> *"No grounds for exercising the Court`s discretion with respect to pre-judgment interest in a different way to that contemplated by me on April 27,2010 was advanced by the Plaintiff`s counsel; the Defendants` counsel supported my provisional view which I* confirm ……".

34. This issue was raised only by the Appellant`s Supplementary Notice of Appeal, dated 11 November 2010, and we should first determine whether we should entertain it at this stage. There was no formal objection to the Supplementary Notice, and we ascertained that Mr. Turner, counsel for the Respondents, was prepared to deal with it at the hearing of the appeal. We therefore proceed to consider it on its merits.

35. A further difficulty for Mr. Johnston was the impression he gave to the Judge, as shown by the passage from the second judgment quoted above, that he had not taken issue with the Judge`s provisional view. He told us that he did make submissions which the Judge ought to have taken into account. We are conscious that this is a matter of some general importance, and it is one which we should allow the Appellant to raise in this appeal.

36. The first question is whether the reason given by the Judge, that the Appellant had rebuffed an offer of mediation, was a sufficient ground for depriving him of interest that otherwise would have been awarded. We are clear that it was not. The evidence he had in mind was Mrs. Warren`s Witness Statement – "In October 2007, various attempts were made to arrange a meeting with Mr. Knight to settle this matter with Mr. Dunlop unofficially mediating between the parties. Mr. Dunlop set the date for October 19th 2007 for us all to meet. We all agreed. However, Mr. Knight did not show up……The meeting never took place."

37. It has been recognised by judgments of the Court of Appeal for England and Wales that a party`s willingness to attempt mediation, or his refusal to do so, may be a relevant matter affecting the Court`s order as to the parties` costs. But we are not satisfied that the same criteria apply when the Court exercises its discretion with regard to interest as part of the judgment amount. Different considerations apply. The Costs Order may very well be affected by the parties` conduct after and even before the proceedings were issued. But the award of interest on the net amount which the Judge has held the Plaintiff was entitled to receive depends on the fact that the Defendant has kept him out of that amount of money throughout the currency of the dispute. For that reason, the rate of interest may reflect the cost of borrowing that amount, not just the lower rate which the money could have earned if the Plaintiff had been able to invest it at the material time.

38. A further consideration with regard to the refusal of mediation is that to deprive the Plaintiff of all interest, even from the date when the mediation might have occurred, implies that the mediation would have been successful to the extent that the Plaintiff would have recovered not less than the amount for which judgment was later given. That may or may not be a proper inference on the facts of a particular case, but it would be a major assumption for the Court to make.

39. Mr. Turner argued that interest on the judgment amount was about the same as on the sum awarded to the Respondents on the Counterclaim, and that the two cancelled each other out. But if the claim and counterclaim are separated in this way, the claim succeeded in the sum of $300,000, and the final result arithmetically is the same.

40. We hold, therefore, that the Judge was wrong to disallow pre-judgment interest for the reason that he gave. We further hold that the judgment should include interest on the net amount awarded to the Plaintiff after deduction of the Counterclaim. We award interest at the statutory rate from 1st February, 2008 until the date of the judgment. To that extent, the Appeal is allowed.

CROSS – APPEAL

41. The Respondents contended that the amount awarded on the Counterclaim should be increased, in six respects. One, a claim for $7,475 was referred to in paragraph 59 of the Judgment but was not included in the Judge's calculation of how much was due to the Respondents, in paragraph 84. The Appellant has not disputed that that was an oversight and that the amount awarded on the counterclaim should be increased by that figure ($7475).

42. (a) **Contractors` All Risks Insurance**

When the Appellant began the completion works, the Respondents became concerned that he had not taken out Contractors` All Risks Insurance which would protect them, as owners of the property, as well as himself against third-party claims. They said that he kept putting it off, and on 16 October 2006 they took out a policy themselves, at a cost of $2890.

43. The Judge accepted Mrs. Warren`s evidence that she believed the Appellant was responsible for taking out the insurance, but he held "there is no satisfactory evidence that the Plaintiff was contractually required to take out the insurance policy…." (para.62).

44. Mr. Turner argued by reference to the Woodbourne Report, which he submitted was a relevant contractual document, that the "Forecast Overall Costs", that is, the estimated total cost of constructing the whole building, included express items for "Insurances and Preliminaries" (totalling $83,969) as well as "Overheads and Profits (Compounded)" at a rate of 12.5%. He accepted that the relevant estimate totalling $421,500 for completion by the owner acting as contractor did not include the "Overheads and Profits" item from the earlier page, but he submitted that the contractor`s obligation to insure nevertheless was included in it. As a matter of construction, we reject that submission, and in any event, we see no ground for displacing the Judge`s finding of fact, quoted above.

Landscaping

45. The grounds of the property were landscaped after completion of the building by the First Respondent, Mr. Warren, who apparently carries on business of that kind. The Respondents claim $16,000 as damages from the Appellant on the ground that he was required by the terms of the completion contract to do that work. They rely upon the allowance of $12,000 for "Horticultural Landscaping" in the Woodbourne Report`s calculation of "Total Overall Costs" i.e. the estimated cost of constructing the whole building, which they say was included in the "External Works Generally" item of the "Forecast Cost to Complete Owner acting as Contractor" totalling $421,500 that was forwarded to the Bank. The item was costed as $28,736. The Plans showed figuratively some items such as palm trees in the garden, which supported the Respondents` suggestion that landscaping was included in the completion works. However, this item did not appear in the Appellant`s summary letter dated 1 June 2006.

46. There was a conflict of evidence on this point (Judgment para.53). The Judge found that the parties did not include landscaping in the Completion Contract, and that there was "no suggestion that during the course of the project the parties agreed that the plaintiff would do the landscaping work" (para.54).

47. There is no ground which would justify overturning these findings of fact. If the Judge`s decision was based on his interpretation of the contract, we hold that it was correct.

Blinds

48. Here, the Respondents relied primarily on the original Plans. They showed the building with not less than 20 windows, all equipped with external shutters and blinds. The Judge found the evidence unsatisfactory as regards this item of the Counterclaim (paragraphs 47 – 51). It appeared that the Appellant might have purchased and installed blinds for the lower two apartments, and that the claim related only to the upper 3-bedroom apartment. That might suggest that he had undertaken to provide them for the upper apartment as well, but as the Judge said, "the oral examination at trial and cross-examination of the Plaintiff did not suggest that this is what happened. The Defedndants` case, it seemed to me, was put on the basis that no blinds were installed at all" (para.51). The number of blinds also affected various calculations as to whether the Woodbourne Report figures included these blinds, or not.

49. The Judge concluded "On balance I find based on the available evidence (and even if I am wrong in understanding the evidence to be no blinds were installed on the House at all) that the purchase and installation of blinds has not been proved to have been part of the Completion Agreement." He was clearly correct to place the burden of proof on the Respondents, and there is no basis on which this Court could properly hold that his finding was wrong.

Air Conditioning

50. There was no provision for air-conditioning either in the original Plans, or in the Appellant`s Summary Letter dated 1 June 2006, or in the Woodbourne Report. Nor did the part-completed building, as it was when the Appellant undertook to complete it, contain the necessary provision for air-conditioning as an integral part of the structure. The Respondents asserted that the Appellant orally promised to install it, before the closing of the sale and purchase agreement (28 July 2006) and the Judge "saw no reason to disbelieve that evidence" (para.42). But, after considering the Respondents` arguments based on the rental appraisals, undertaken for the Bank, he concluded "Accordingly, I am unable to find on a balance of probabilities that the parties entered into a concluded and legally binding agreement that the Plaintiff would install air conditioning as part of the Completion Agreement within the original $400,000 estimate." (para. 44).

51. That conclusion in our judgment is unassailably correct. Mr. Turner explained to us that the absence of structural provision in the part-completed building did not mean that air-

conditioning could not be included in it, by means of additional pipes and external ducting and the like. But that seemed to reinforce, in our view, the Judge`s conclusion that, whatever promises the Appellant may have made, there was no basis for holding that the Completion Contract was intended to include that extra work, at no extra cost to the Defendants.

Rentals

52. We are concerned here with the Appellant`s contention that no damages should have been awarded, on the ground that as a matter of law the alleged damage was too remote a consequence of the breach of contract for any damages to be recovered, and with the Respondents` Cross-Appeal claiming that the amount should have been greater than it was.

53. The claim was made on the basis that the Appellant was in breach of contract by reason the delay in completion after 31 March 2007, which the Judge found was the date required by the contract as a matter of law. We were told that the Appellant left the site on 19 June 2007 and that the Respondents` family members moved into the lower floor apartments before the end of that month. The upper 3-bedroom apartment, however, had been advertised for letting to third parties, and it was not competed (by the Respondents, to make up for the Appellant`s failure to do so) until 28 September 2007. The tenants, who had agreed to pay $5.800 permonth rent, moved in at once, on 1 October 2007.

54. The claim as pleaded in the Counterclaim was not clearly expressed. Under the heading "Rent Loss" the Particulars read

> 3 bedroom apartment from January to October (as amended, originally, June) at $5,800 per month $52,200 (9 months)
>
> Mayumunah Francine Abdul Jabbar`s rent from January to June 2007 at $1400 per month $8400 (6 months) [That was Mr. Warren`s mother who moved into the 2-bedroom apartment, sadly alone because her husband had died in the meantime.]
>
> Jamal Alan Vincent Warren`s [Mr. Warren`s brother's] rent from January to June 2007 at $1300 per month $7800 (6 months)

55. Mr. Turner explained that these claims were put forward on two different bases. The Respondents never moved into the 3-bedroom apartment. They intended to buy it as an investment property, and they advertised for a tenant as soon as they could, on 1 June 2007. Within a day, the advertised rent of $5,800 per month was agreed. Mr. Warren`s mother and his brother and sister in law did move into the lower two apartment in June 2007, and the claim was for rent they had paid to their previous landlords for the months of April, May and June when they were waiting for their apartments to be completed.

56. Taking first the remoteness issue, the legal test is common ground between the parties. The Judge described it as follows – the question is "whether the loss was a type of loss for which [the Defendant to the claim i.e. the Appellant] *can reasonably be assumed to have assumed responsibility"* : *Transfield Shipping Inc. v. Mercator Shipping Inc.* [2009] 1 AC 61 at 73G (per Lord Hope)." Mr. Johnston`s submission on behalf of the Appellant is that he had been unaware that they proposed to rent out the property to third parties; they told him that they wanted it for their own occupation, so that all the family would be together under one roof. Therefore, he submits, he could not be taken to have assumed responsibility for the loss of commercial rents which the Respondents would have received from third parties.

57. This turns the issue into a question of fact: what did the Appellant know about the intentions of the Respondents, up to the time when the Completion Contract was made? There was documentary evidence that the Bank required professional appraisals of the rental value of the three properties, but that could have been, it was suggested, because the Bank was contemplating that it might have to let out the property if the Respondents defaulted on their loan and the property was repossessed. But any rental income the Respondents obtained from third parties was relevant to their ability to service the loan, and at one stage of the negotiations the Bank insisted that at least one of the three apartments was to be occupied by a family member, not all three leased out at the same time.

58. It is unnecessary, however, for this Court to weigh the evidence on this issue. The Judge found in terms "The Plaintiff admitted that he knew that the Defendants were proposing to rent the upper unit" and that he "may reasonably be assumed to have accepted responsibility for any loss of rental income suffered by virtue of his breach of contract by failing to complete the House within a reasonable time"(para.89). There is no reason to doubt that the Judge was correct with regard to the Appellant`s admission, and on that basis his conclusion was one that he was entitled to draw.

59. There remain the issues as the quantum of damages, raised by the Respondents. As for the 3-bedroom apartment, the Judge said that the measure of damages was the fair market value of the apartment at the end of April 2007. He assessed that as $5000 per month, taking into account the evidence of a rising market from the 2006 figures of $3800-$4300 per month and the rent achieved by the Respondents "as soon as the apartment was advertised" which was 31 May 2007. He awarded that figure for four months only, because he considered it "highly improbable that there would have been no delay at all between completion in accordance with the Contract and the beginning of the tenancy" (paras. 90-91). The four months, therefore, were from 1 June to 30 September, when the tenancy in fact began.

60. The Respondents invite us to increase the rental figure to $5,800 per month, and to increase the period to six months, the full period from 31 March until 30 September. But the Judge explained his decision in some detail, and there is no obvious error in the figures he used or as to the questions that he asked. This Court could not properly interfere with his conclusions on these questions of fact.

61. In regard to the 2- and 1-bedroom apartments, however, the situation is different. The Judge awarded no damages, because "these two items of loss have not been properly proved" (para.85). He said that the loss of rent calculations were not explained, and that because both family members had moved into the accommodation, "A more plausible claim might have been to seek compensation for the rental payments they themselves made during the period of unacceptable delay, but that claim was not explicitly advanced" (para.86, with reference to the claim in respect of the 2-bedroom apartment). Similarly, he said that Mrs. Abdul-Jabbar`s evidence did not support a finding as to any extra rent she had paid (para.87).

62. Here, there appears to have been a misunderstanding of the claim being made in respect of the family members. The elliptic terms of the pleading, quoted above, perhaps made this inevitable, for the reference to "rent" in connection with their claims had to be understood differently from the claim for "Rent Loss" in respect of the 3-bedroom apartment. It appears that this difference was never made to clear to the Judge, as it was not to us until a late stage of Mr. Turner`s submissions. He also produced receipts for the rent the family members paid for their previous accommodation covering the period April/June 2007, which he said were in evidence at the trial.

63. That being the evidence, and now that it is established that the claim in respect of the family members was advanced, albeit obscurely, on the basis that damages were sought for the cost of additional rent they paid for other accommodation in respect of the months of April, May and June 2007, it appears to us that the claim should succeed in a total sum of $8,100 (3 months at $1400 pm and 3 months at $1300, respectively). To that extent, we hold that the Cross-Appeal succeeds.

Conclusion

64. The overall result, therefore, is that the Appeal succeeds to the extent that the Appellant is entitled to recover an additional sum of $20,000.00 approx. by way of interest, and the amount awarded on the Counterclaim is increased by a total of $15,575 ($8,100 plus $7,475.00 which was admitted). This result does not begin to justify the additional costs that

the parties have incurred, and (subject to any submissions that may be made) we order that each party shall bear its own costs of the appeal.

65. The enormous costs of these proceedings are a sad reflection on the way in which they have been conducted and on the apparent inability of the Courts to restrain litigation on such a wasteful and unnecessary scale. Cases occur where the parties, particularly perhaps when they are individuals, not corporations, are so antagonistic towards each other that not even the wisest counselling by their legal advisers can prevent their cases, even unmeritorious cases, coming to the Courts. When that does happen, it is all the more important for the Courts themselves to take some measure of control, in the interests of efficient case management and to make best use of the limited resources of the Courts themselves.

66. In the case of building contracts and similar contractual disputes, it is notorious that the proceedings cannot be handled efficiently and cost-effectively unless the issues are clearly defined and the mass of detailed evidence of costings and the like is marshalled and related to them, by means of a Scott Schedule or in some other way. That should be done by the parties themselves, well before the case comes to trial. It was not done here. If the parties do not do it, or fail to do so in good time, we hope that the Courts will take it upon themselves to give firm and clear Directions, whether or not the parties have asked for them, so that the burden on the trial Judge and the burden of costs for the parties will both be reduced.

67. The Appeal and the Cross-Appeal therefore are each allowed in part. The judgment on the claim is increased by including interest at the statutory rate on the sum of $144,358 from 1st February 2008 until the date of the judgment. The judgment on the Counterclaim is increased by $15,575 to $155,642. Subject to any further submissions that may be made, there is no order as to the costs of the appeal and cross-appeal.

Signed

Evans, JA

Signed

I agree Zacca, President

Signed

I agree Auld, JA