In The Supreme Court of Bermuda

CIVIL JURISDICTION
2001: No. 232

BETWEEN:

SHAWN KNIGHT
(suing on behalf of himself and GINA KNIGHT)

Plaintiff

-v-

DWIGHT EUGENE WARREN

-and-

WENDIE PATRICIA WARREN
(sued on their own behalf and on behalf of all the owners of property located at Lot 9 Perry Drive, Warwick)

Defendants

JUDGMENT
(In Court)

Date of Trial: March 16, 17 19, 22, 2010
Date of Judgment: April 27, 2010

Mr. Eugene Johnston, Trott & Duncan,
for the Plaintiff

Mr. Nathaniel Turner, Attride-Stirling & Woloniecki,
for the Defendants

Introductory

1. The present case, objectively viewed, cried out for resolution by means other than a traditional civil trial. The dispute arises out of an informal contract between friends under which the Plaintiff agreed to complete the construction of the house he had agreed to sell to the Defendants. The absence of a clear contract created a legal morass which cool heads and a mediated or negotiated settlement could have sidestepped in the interests of achieving cost-effective pragmatic result. Hot heads (particularly on the Plaintiff's part) appear to have prevailed with the claim and counterclaim being presented at trial on the improbable basis that each side was 100% right and the other side 100% wrong.

2. The Plaintiff's Amended Statement of Claim sought contractual damages from the Defendants in the amount of $330,000. The Defendants' Amended Defence and Counterclaim sought $255,024.30 by way of damages for breach of contract. It was essentially common ground that the parties agreed that the Plaintiff would be paid $400,000 to complete the relevant works and that $100,000 of the funds borrowed by the Defendants for this purposes were applied by the Defendants themselves towards the purchase of materials. Accordingly, the controversy turned on whether the Plaintiff's gross claim of approximately $300,000 was liable to be reduced by virtue of various breaches of contract on his part so that he was only entitled to receive some $50,000, the Defendants disputing liability for (a) the $15,000 originally payable to the Plaintiff when the construction was completed by virtue of his alleged failure to complete in accordance with the Contract, and (b) the Plaintiff's additional paintwork claim.

3. In addition to deciding what the terms of the contract, clearly partly oral and partly evidenced by writing, were, the Court is required to determine what breaches of contract (if any) occurred. Mr. Johnston for the Plaintiff also objected on hearsay grounds to the admission in evidence of various receipts and invoices used by the Plaintiffs to compute their own damages claim. The documents in question were of a type routinely admitted by consent in civil proceedings, possibly following the modern English practice under evidential rules which are generally regarded as having abolished the hearsay rule in relation to the admission of documentary evidence in civil cases. This objection was raised at the commencement of the trial but I reserved my decision on this difficult admissibility issue until the present Judgment.

The Pleaded cases

4. The Plaintiff's pleaded case can be shortly summarised. By a written agreement dated July 28, 2006, he sold Lot 9, Perry Drive, Warwick ("the Property") to the named Defendants and three other persons for $1,185,000. By an oral agreement the Defendants agreed to pay the Plaintiff $15,000 when the incomplete house

("the House") on the property was completed ("the Purchase Agreement"). By an agreement made partly in writing and partly made orally between June 1, 2006 and July 28, 2006, the Plaintiff and the Defendants agreed the Plaintiff would complete the House for $400,000 ("the Completion Contract") [1]. The Plaintiff alleges that he was contractually required to carry out the following specific work itemised in paragraph 7.2 of the Statement of Claim:

> "*7.2 the Plaintiff would:*
>
> *7.2.1. Slate and whitewash the roof of the Residential Unit;*
> *7.2.2. install both interior and exterior doors and windows on the Residential Unit;*
> *7.2.3. tile the Residential Unit throughout;*
> *7.2.4. complete all electrical work in the Residential unit consisting more particularly in the installation of all wiring, lights and switches;*
> *7.2.5. install sinks, bulbs, water pumps, water heaters and plumbing fixtures in the Residential Unit;*
> *7.2.6. install cabinets and erect ceilings in the Residential Unit;*
> *7.2.7. install a working cesspit servicing the Residential Unit;*
> *7.2.8. prime both the inside and outside of the Residential Unit in preparation for a top-coat of paint.*
> *7.2.9. complete all work at the Residential Unit approximately 3 months after receiving the said payment of $400,000.00 was made available to the Plaintiff for draw-downs.*"

5. It is the Plaintiff's case that he began work in or about September 2006 but the initial agreement was modified by the parties on or about October 20, 2006 by (a) reducing the payment due to the plaintiff from $400,000 to $300,000 (to allow the defendants to purchase their own tile and cabinets), and (b) by replacing the Plaintiff's right to make periodic draw-downs with a right to payment post-completion of the work. The Plaintiff completed the required work on or about May 31, 2007, in accordance with the plans save where modifications were agreed. The Defendants failed to pay the agreed $300,000 and further failed to pay the Plaintiff the $15,000 he incurred through the additional expense of hiring painters to apply the top coat of paint to the House.

6. The Defendants in their Amended Defence and Counterclaim averred that the Completion Contract was "*entered into...based upon various oral representations made by the Plaintiff to the Defendants and based upon the design plans...provided by the Plaintiff. The Completion Agreement was effectively a*

[1] The Statement of Claim defines the incomplete building more formally as the "Residential Unit" and the contract as the "Completion Agreement".

design and build lump sum contract" (paragraph 7). In terms of what work the Plaintiff was contractually required to perform, the Defendants alleged in paragraph 9 as follows:

> "*9. Paragraph 7 of the Statement of Claim is denied. The Completion Agreement included the following express terms;*
>
> *a. The Residential Unit would be completed to a "turnkey" standard, that is, that the key could be turned and everything would be ready.*
>
> *b. The Property would be constructed using plans provided by the Plaintiff to the Defendants prior to the Completion Agreement.*
>
> *c. The Plaintiff was responsible for labour and materials required to complete the Residential Unit.*
>
> *d. The Residential Unit was to be completed in three months by no later than December 2006.*
>
> *e. The Defendants would obtain a $400,000 loan "the Loan" from the Bank of Butterfield ("the Bank") to finance the Completion Agreement upon the understanding that the Plaintiff would obtain draw downs from the Loan "the Drawdown Facility".*
>
> *f. The Plaintiff was responsible for Contactors All Risk Insurance.*
>
> *g. The Plaintiff was to complete the following elements of the Residential Unit;*
>
> *i) First Floor Slab*
>
> *ii) Upper Floor Walls and Belts*
>
> *iii) Roof carcase and finish*
>
> *iv) External plastering*
>
> *v) Internal plastering and ceilings*
>
> *vi) Doors, hardware and windows throughout*

vii) Carpentry and joinery throughout

viii) Tiling and finishes throughout

ix) Painting and decorating throughout to include external painting

x) Electrical installation throughout

xi) Plumbing installation throughout

xii) Air conditioning installation throughout

xiii) External works generally – to include boundary wall construction, entrance pillar construction, soak away pit construction, external staircase Construction, external asphalt driveway, soil and seeding and horticultural landscaping ..."

7. Issue is joined on various matters. The most important appears to be the following issues. It is denied that the Completion Contract was amended to defer the Plaintiff's payment entitlement until the works were finished. It is averred that "*the Plaintiff could have drawn funds from the Loan using the Drawdown Facility at any time having taken the appropriate steps with the Bank*" (paragraph 13). The Defendants aver that the Plaintiff requested them to travel to Florida to buy materials to enable completion to occur by December 2006, and they were compelled to expend their own monies (over and above the $100,000) to do so. It is denied that the Plaintiff completed the works in accordance with the contract by May 31, 2006 and averred that the Defendants completed it themselves. As far as the painting costs claim for $15,000 is concerned, it is averred that this was the Plaintiff's responsibility and that the $15,000 completion fee was not due by virtue of the Plaintiff's failure to complete.

8. The Counterclaim (paragraphs 31-45) is based on various alleged breaches of contract on the Plaintiff's part. These may be summarised as follows:

   (a) failure to obtain Contractor's All Risk Insurance;
   (b) failure to purchase all materials;
   (c) failure to complete by December 2006;
   (d) breach of promise on March 21, 2007 to complete within seven days;
   (e) breach of implied term that the House would be of satisfactory quality;
   (f) breach of implied term that the House would be reasonably fit for occupation of the one and two bedroom units by family members and the three bedroom unit for rental purposes.

9. The Defendants claim compensation for the cost of materials they purchased in excess of $100,000, the costs of completing the House and repairing defects, loss of rental income arising from the delay. These costs are particularised and assessed at $255,024.30, of which it appears that (a) $2890 is claimed for insurance costs, (b) $64,712.63 is claimed in respect of additional materials, (c) $119,021.63 is claimed in respect of completion costs and (d) $68,400 is claimed in respect of rental income[2].

The Plaintiff's evidence

10. The Plaintiff describes himself in his Witness Statement as a self-employed contractor who purchased the property on which he began to construct the House with his sister before 2002. His father-in-law was the foreman for the job. Having initially planned to occupy it himself, and commenced construction in accordance with C& M Designs plans dated September 16, 2002 ("the Plans"), he decided to list the property for sale with Larry Dunlop of Coldwell Banker Bermuda Realty for $1.2 with the partially completed House. He commissioned Woodbourne Associates to estimate how much completion would cost. Two estimates were provided, one $670,000, the other $421,000. The Defendants said their Bank would never lend them the higher figure, and said the Plaintiff's compromise offer of $500,000 was also too high. As the Plaintiff had already purchased many of the materials and was going to carry out the work himself, he eventually agreed to $400,000 as this was the most the Bank would lend to the Defendants.

11. The Plaintiff testified that the scope of the work he was required to undertake was defined in the June 1, 2006 letter which was written by Larry Dunlop, agreed to by the Defendants and then sent to the Defendants' banker. Although the list in the June 1, 2006 letter was non-exhaustive and had to be read with the Plans, the Plaintiff insisted that he was **not** obliged to agree to do the following work:

    (a) landscaping, because the Defendants' family were landscapers and they could do that work themselves;

    (b) applying the top coat of paint;

    (c) install air-conditioning or ceiling fans, which were not contemplated by the Plans;

    (d) a wet-bar in the main unit's bathroom, although the Plaintiff told the Second defendant that he would install this item if she could afford it;

    (e) wood flooring, because the June 1, 2006 provided for tiles throughout and he later agreed to install wood flooring at the Defendants' insistence on the basis that they would be paying for it.

[2] This breakdown is mine and does not appear in the pleading itself. My total is 4 cents less than the Defendants'.

12. Various changes (other than the wood flooring) were identified by the Plaintiff which he undertook at the Defendants' request. These included:

    (a) the Second Defendant's purchasing her own light fixtures in preference for those already purchased by the Plaintiff;

    (b) redesigning the kitchen to comply with the Second Defendant's request for the installation of a double oven;

    (c) agreeing to paint the House for an additional cost of $15,000 although not contractually obliged to do so;

    (d) applying for Planning approval to relocate the master bedroom in the main unit so that it faced the water.

13. The Plaintiff asserted that the December completion date was an estimate required by the Bank. Completion was not possible in December 2006 because the last container came in on December 6. He agreed that in March he said he would do what he could so that the one and two bedroom units could be occupied but denied agreeing to complete the House within a week. The Plaintiff contended that he completed the House by May 31, 2007 in reliance upon the Occupancy Certificate being issued on June 19, 2007. When the Defendants refused to pay him, he concluded that his good will had been abused and that the Defendants were greedily refusing to pay him what he had worked hard for and deserved.

14. Under cross-examination the Plaintiff admitted that he had initially purchased the land on which the House was subsequently erected for $250,000. He explained that in addition to the report produced in evidence, Woodbourne Associates initially prepared a report in February 2006. His contract with the defendants really started after he reached the wall-plate stage, which did not occur until September-October, 2006. The Plaintiff stated that he dealt mainly with the Second Defendant throughout the completion process. However, the contents of the June 1, 2006 letter were agreed at a meeting at Mr. Dunlop's office at which the First Defendant was present. In response to the Defendants' case being put to him, the Plaintiff responded, *inter alia*, as follows:

    (a) although the Plans generally applied to the contract, some things changed once the Defendants decided to purchase the property, Although blinds and a stone wall were contemplated by the Plans, these items could not be provided because of the cost;

(b) he was required to apply paint primer inside and outside the House, not paint and primer;

(c) the house was complete save for cable and telephone connections (which he was not responsible for and closet shelving was complete);

(d) cracks often appear on a roof within the first 6-12 months after construction and if notified the contractor will fix this free of charge. He only learned of this complaint after the commencement of the present proceedings. A water complaint which was made was dealt with;

(e) picture 3 was a pre-completion picture showing grout residue. In any event, he received no complaint about the tiles. The uncovered electrical socket shown in picture 9 was fixed before completion;

(f) he admitted there was a major delay over Christmas when Portuguese workers returned home and admitted generally being rarely at the site, insisting he called for daily reports;

(g) he denied promising the Defendants' daughter an intercom system. He also denied that the fact that Vivienne Power's rental valuation was done on the basis of there being air conditioning confirmed his agreement to install the same;

(h) he agreed that the Woodbourne Report contemplated insurance being taken out but retorted that as owner of the property he felt he could assume the risk of any losses. He took no position on whether he was required as contractor to take out insurance;

(i) he stated that the master bedroom shower door was not installed due to delivery problems and the kitchen countertops were not installed because the Second Defendant did not decide what she wanted;

(j) he admitted the materials the Defendants purchased cost $25,000-$35,000 but insisted that the sum was less than the $100,000 allocated to them to spend. He claimed to have spent $147,000 on materials and said he might be able to find receipts for the doors and windows. He nevertheless denied signing a letter (TAB 51 page 3) authorising the $100,000 drawdown, suggesting his signature had been forged;

(k) he stated that the Defendants agreed to his putting balustrades on top of the south elevation wall and denied this was significantly cheaper than completing with a solid wall.

15. Malcolm Lewis was the foreman on the job. His Witness Statement suggests that he had little direct communications with the Defendants about the work. However he deposed to personally unpacking each of three containers of goods shipped by the Second Defendant and asserts that the items in question did not arrive in a way which was synchronized with the progress of the construction work. He further stated that the Second Defendant took three months to decide what countertops she wanted. H denied ever receiving any complaints about the quality of the work.

16. Under cross-examination, Mr. Lewis admitted last acting as foreman in the 1980's to 1990's and to working most recently as a truck driver, labourer and skilled labourer. He stated that at the foundation stage work was carried out with the assistance of the Plaintiff's friends. At all material times there was a work crew for whom he completed timesheets. He insisted the Defendants got a turnkey standard, subject to what was agreed. He stated the Defendants knew the shower door was not there because he had to re-order it and the kitchen countertop was installed before the last inspection. The poor paint quality he attributed to insufficient paint being ordered and a subsequent batch not being exactly the same. As far as roof leaks were concerned, Mr. Lewis testified that while the House was settling leaks were fixed. After he left he was never asked to fix any leaks. As regards uneven plastering, he attributed this to the inevitable consequences of breaking out a wall to insert a window where none was initially planned.

17. The project foreman admitted that completion was six months behind schedule but suggested that this was not unusual for construction projects. By mid-December the roof had not been put on. There was a 1 ½ week delay in getting slate, which was not as easy to purchase as concrete blocks. Under re-examination Mr. Lewis admitted that he was told that the balustrades on the porch were "*½ inch out*". To get the House passed he put plexi-glass behind them as a protective shield to prevent the possibility of small children going between them.

18. Chris Anderson was the electrician on the project and in his Witness Statement he confirmed that the Plans made no provision for air conditioning. He also suggested that the Second Defendant purported to act as project manager. He denied any sockets were left uncovered when he finished his work. In his examination-in-chief he confirmed that he knew the First Defendant through football. He explained that BELCO installed electrical pipes to a meter box within the House, and that his responsibilities started from the meter box into the House. Installing air-conditioning would have required putting additional pipes into the concrete. A box on a wall was originally intended to be for an intercom, not for thermometers which would typically not be installed for domestic air-conditioning. Under cross-examination he admitted that various wall sockets for cable, data or telephone service were left uncovered by him. He insisted he did not leave the cover off as shown in Photo 9 as this was dangerous and would not have been passed by the electrical inspector. He confirmed that the Plaintiff paid him roughly $50,000 for his work and that extra work was done in connection

with installing equipment purchased by the Defendants and installing the double-oven, which took an additional two days work. He himself suggested installing recess lights due to the large size of the relevant room. I regarded Mr. Anderson as an independent witness.

19. Larry Dunlop was the Plaintiff's second independent witness. He was the real estate agent who negotiated the sale. In his Witness Statement he confirmed the Plaintiff's account of how the purchase price was dropped and the Completion Contract price was dropped to facilitate the financial constraints faced by the Defendants, He deposed that the Plaintiff knew the First Defendant from school and was eager to facilitate the sale to him. He also stated that the June 1, 2010 letter reflected all the Plaintiff was willing to do and was prepared by him (Dunlop), signed by the Plaintiff and sent to the Bank. In his oral examination-in-chief, he also confirmed that the First Defendant who worked at Parks Department agreed to do the landscaping in light of the Plaintiff dropping his contract price from $421,000 to $400,000. He also stated that this was a very unusual sale involving a partially completed home.

20. Under cross-examination, Mr. Dunlop admitted he did not remember whether he showed the June 1, 2006 letter to the Defendants or whether they agreed to it. He agreed the June 6, 2006 rental valuation letter represented to the Bank that the House would be air conditioned throughout and that most houses sold for $1.6 million would be air-conditioned.

The Defendants' evidence

21. The Defendants' main witness was the Second Defendant, Mrs. Wendie Warren. In her Witness Statement, she describes how she and her family came to purchase the property. After seeing the advertisement in early April during the Spring break, on April 6, 2006 she visited the Property (before contacting the agent) and discovered that she knew both the Plaintiff and Mr. Lewis. At this initial meeting they said the property was for sale at $1.2 million and the House would cost $400,000 to complete. This evidence was indirectly supported by the Witness Statement of Dorothy Smith, who deposed the $400,000 price-tag was the only figure ever proposed by the Defendants and was mentioned when they first came to the Bank on May 3, 2006. According to the Second Defendant, in early May she and the rest of her family met with the Plaintiff who said the House would look exactly as it was on the Plans. At this point a deposit had been paid to the agent although financing was sought and duly approved by the Bank on May 31, 2006. A Sale and Purchase Agreement was signed on July 28, 2006 with closing fixed for September. In the course of July during various site visits the Plaintiff explained what the house would look like, promising to install air conditioning throughout, provide a generator and described an intercom system to the Second Defendant's daughter. At one meeting with the Plaintiff and Kevin Bean-Walls, who appeared to be the sub-contractor, it was suggested that the Defendants travel

overseas to order certain materials. At another meeting, the female members of the Second Defendant's family were encouraged to select tile and cabinets.

22. On September 6 the purchase of the property closed and the Plaintiff was paid the balance of the $1,185,000 purchase price, which price had been reduced from $2 million on the understanding that the Plaintiff would be paid $15,000 upon completion of the House. Paragraph 34 of her Witness statement provides as follows :

> "*At this point we had purchased the property based on the fact that it was supposed to be built 'up to wall plate or up the belt', that Mr. Knight was responsible for paying for all the materials, that the construction was to mirror the Property on the plans provided, including that the Property would be nicely landscaped, that the three bedroom main apartment would contain a wet bar, shower bath, showers, a Jacuzzi, double fireplace, push button door bell, garage door with electric door opener, eating counter, vanities, railings with risers and treads on the steps, closet in the foyer and even appliances. All the apartments were to have tile/flooring throughout, air conditioning, a shower bath and the Property was to have blinds (also known as shutters.*"

23. The Second Defendant was promised by the Plaintiff on several occasions prior to closing that the house would be completed before Christmas 2006. The Bank's lending terms required that at least one family member occupy the House even if part of it was to be rented. So after closing, the Second Defendant requested the Plaintiff to complete the one bedroom apartment first so that her mother-in-law could move in. She purchased the bathroom and kitchen and this was installed in November by Solid Surface Fabrications. Although the flooring was shipped in August 2006, the Plaintiff never installed this and Wilfred Smith installed the flooring in the week of May 14, 2007. Wilfred Smith confirms that he installed wood flooring for $900. The Plaintiff, of course, contends that he agreed to install tile and if the Defendants wanted wood flooring they were to pay for it.

24. The Second Defendant implicitly rejects the suggestion that she insisted on having whatever she wanted throughout the completion process. She says they compromised and gave up their preferred Globe Stone tile and a locally designed kitchen plan and instead ordered from overseas as the Plaintiff requested. When she returned from Jacksonville Florida with quotes for various items, the Plaintiff approved them. On October 20, 2006, the plaintiff signed a joint request to the Bank to permit the Defendants to drawdown $100,000 to cover purchases for the kitchens, tiles, lighting, paint, drywall, railing and basic appliances. This was obtained based on estimates the Second Defendant brought back from Florida. After this the Plaintiff suggested ordering other items to be put on the same container to save costs, such as tubs, vanities and fixtures but these items were not included in the drawdown amount. The Second Defendant looked for the best price and discovered that it was cheaper to get faucets for the kitchens and

bathrooms throughout the House in pre-Christmas sales locally. Although the Plaintiff had supposedly already purchased plumbing materials according to the Woodbourne Report, in fact none had been purchased for the main apartment. The Second Defendant was able to make substantial savings through purchasing items such as the Jacuzzi, tile and cabinets abroad.

25. The two containers arrived on November 29 and December 16, 2006 but work had stopped altogether in November despite promises by the Plaintiff to do outside work pending their arrival. Work re-started in December, but the workers left from December 19 until mid-January. The Second Defendant details various requests made by the Plaintiff for her to purchase things for him personally and for the House; in February 2007 she purchased ceiling fans for all three apartments. Thereafter delays worsened until in May 2007 the Second Defendant states that she hired workers to complete the work. The $300,000 remaining in her account was frozen pending the resolution of the dispute between the parties. She first saw the June 1, 2006 letter when it was shown to the Second Defendant by her lawyer on June 19, 2007.

26. In her oral evidence the Second Defendant testified that she had been a teacher at Bermuda Institute for three years. She confirmed that she kept a detailed record of all the transactions she entered into in relation to the completion project, and that these documents were contained in the trial bundles.

27. Under cross-examination she stated that she took pictures of the House after March 2007. She agreed that she had described the property as "a diamond in the rough", but insisted that she was "really taken for a ride". She admitted requesting a second drawdown from the Bank on June 18, 2007 before the account was frozen without obtaining the Plaintiff's consent. The Plaintiff agreed to purchase the insurance but took too long so she purchased it instead. The Second Defendant also insisted that the Plaintiff had promised air conditioning, as confirmed by the rental valuation. He also promised a wet bar and to install a wood floor for her mother-in-law. She agreed that Mr. Lewis was often at the site but not after March, 2007. The main apartment was initially rented for $5800. Under re-examination the Second Defendant testified that the tenants moved in on October 1, 2007 and that she found them after listing the apartment for only one day on E-moo.

28. The First Defendant, Dwight Warren, is the husband of the Second Defendant. In his Witness Statement, he deposed that he attended Warwick Secondary School with the Plaintiff. He confirmed his wife's account of the early April meeting at the property when the Plaintiff said the House would be exactly as shown in the plans and the absence of any negotiations about the completion costs. However he made the further points that (a) the Plaintiff failed to produce a detailed contract although this required by the Bank, and (b) "*once Mr. Knight had received his $1,185,000.00 there were subtle changes in his communication and work ethic*" (paragraph 18). In addition he stated that the plaintiff had planned to use a Mr.

Burchall to do the landscaping but in March 2007 started hinting that the first Plaintiff should do this work. He denied agreeing to do this work himself because he only drives for the Parks Department and had no landscape design experience. In June 2007 the Plaintiff told him that he (the Second Defendant) was responsible for landscaping. They hired a company to lay the topsoil and he was forced to do the rest. At an unpleasant early June 2007 meeting with the Plaintiff, the Plaintiff revealed that he had painted the House and that he expected to be paid $15,000 based on the June 1, 2006 letter, which the Defendants had not previously seen or heard of. The painting could have been done for free.

29. The Defendants requested mediation through their former lawyers Myron Simmons in 2007 and Fozeia Rana-Fahy (then of Appleby) in 2008 without success. Under cross-examination, the Second Defendant stated that he did not recall mentioning doing the painting or landscaping himself. He denied that the Plaintiff told the Defendants that he would not sell the property if they were going to rent it out.

30. Melvina Warren is the sister of the First Defendant. She confirmed that the Plaintiff promised at an initial meeting to complete the House in accordance with the Plans and specifically mentioned blinds. She also confirmed the July 2006 meeting described by the Second Defendant when the Plaintiff invited the two ladies to select items to be purchased for the interior of the House. Additional matters she mentions include (a) the fact that the bathroom socket had no cover (this was put on by her husband); (b) the French doors of their bedroom had no screens. The sliding door had no latch (the latch was fixed by Mr. Lewis), and (c) in March 2008 they discovered there was no pipe through which telephone lines could run. Ms Warren stated in her oral evidence that she is a school counsellor and under cross-examination insisted that there were sockets uncovered when she moved into the two bedroom apartment in June, 2007.

31. Maymunah Abdul-Jabbar is the mother of Dwight and Melvina Warren. In addition to confirming other family members' description of a May 2006 meeting with the Plaintiff, her Witness Statement records the Plaintiff promising in July 2006 that there would be air conditioning throughout and he would supply a generator for stormy months. He promised other things which he did not deliver such as a roof outside her kitchen door. On her frequent visits to the work site in the latter part of 2006, there was rarely any effective management in place. After her daughter-in-law had installed a kitchen and bathroom in the one bedroom apartment she was eager to move into with her husband, Mrs. Abdul-Jabbar stated that all that remained to complete her unit was for the Plaintiff to install a wood floor which had been delivered in August 2006. This was not done despite the increased urgency for her to move in after the death of her husband on March 21, 2007. She eventually moved in on June 20, 2007, finding electrical outlets uncovered.

32. In her oral examination-in-chief, Mrs. Abdul-Jabbar stated that she worked as a Nurse's Aide at the King Edward Memorial Hospital. She stood by the key elements of her Witness Statement when cross-examined, and in re-examination stated that the House was not completed to turnkey standard.

33. The extra work done by William Fray (railings and kitchen cabinets) and Wilfred Smith (wood flooring) was supported through their Witness Statements.

34. Patrick Topley, a Quantity Surveyor of Trent Construction Consulting, prepared a September 16, 2008 Report for the Defendants identifying various construction defects. He was accepted as an expert, being obviously qualified as such. Under cross-examination he admitted that ideally one would visit a site as soon as possible after the work had been finished; he had not examined the House until September 16, 2008. Under cross-examination he agreed that normally the wiring for air conditioning would be installed at the beginning of the construction process. He stated that a wet bar was shown on the Plans for the first floor, he disagreed that balustrades and a solid wall would cost the same, he rejected the suggestion that the Planning rules on the minimum space between balustrades had recently changed, he agreed the Plans did not show shrubs and trees. He stated he saw about a dozen sockets uncovered when he visited the House, but agreed that for inspection purposes electrical sockets would be the main concern. Under re-examination the expert confirmed that he did not resile from anything in his Report and that in his opinion the House was not completed to turnkey standard. To the Court he indicated that he believed that the cost of blinds was included in the estimated cost for "doors etc." in the Woodbourne Report.

Findings: the terms of the contract and the Defendant's non-completion Counterclaim

35. The absence of a written contract in relation to such an unusual real estate bargain entered into between friends makes determining what the parties agreed extremely difficult. It is true that even in large scale projects with supposedly comprehensive written agreements, disputes about what was agreed often arise. But these disputes are usually at the margins of the agreement, or restricted to specific aspects of the construction project. Construction disputes typically turn on whether the work was done to the requisite standard. In the present case, the entirety of the contract appeared to be in dispute. However, the reality is, in my judgment, that the broad parameters of the contract were common ground with controversy turning on whether specific matters were or were not agreed. In addition, of course, there are controversies turning on whether or not the work was done to the requisite standard.

36. Nevertheless, the evidence was not clear on a variety of issues in controversy and so brief mention must be made of the burden of proof. The Plaintiff bears the general burden of proving that he is entitled to the sums he claims and that he performed the work he contracted to do. But as far as the Counterclaim is

concerned, the Defendants bear the burden of proving the breaches of contract of which they claim.

37. In general terms I approached the Plaintiff's personal testimony with some caution in light of his unabashed bitterness towards the Defendants. Although I found the Defendants to be generally more credible than the Plaintiff, I have also sought to find wherever possible some independent support for their self-interested testimony against a former friend who they feel badly let them down.

The main terms

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 that 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 when the Plaintiff confirmed his agreement by signing the 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.

39. I see no need to resolve the dispute as to how the $400,000 figure was arrived at; whether at the initial April meeting between the parties, as the Defendants suggest, or by way of downward concession by the Plaintiff, as he suggests. If he promised before signing the June 1, 2006 letter for the Bank to complete the House in accordance with the plans for $400,000, he may have promised many things in seeking to close the sale of the property for $1.2 million which did not form the subject of a legally binding agreement. The June 1, 2006 letter clearly states that the $400,000 completion price was an estimate, and the Woodbourne Report produced for the Bank on June 23, 2006 provided an "APPROXIMATE BUDGET ESTIMATE" of $421,500. The financial reality must have been that the Bank agreed to provide sufficient credit to the Defendants to expend up to $400,000 on completion. The Plaintiff agreed to complete within these restrictions because he stood to gain $1.15 million for the sale of the property as a whole. But it was mutually understood that the actual costs of completing the House fell to be taken into account, and the builder and the prospective homeowners had to either (a) stay within the budget estimate, or (b) the Defendants would have to obtain additional financing from the Bank.

40. Accordingly, I reject any suggestion that the Plaintiff was required to complete to the standard expected by the Defendants even if the actual costs of so doing far

exceeded the $400,000 estimate. To give business efficacy to the contract, I find that the parties agreed by necessary implication that precisely what work would be done and what fixtures and fittings would be installed was subject to ongoing review to ensure that the actual costs did not materially exceed the initial estimate without the Plaintiff being compensated appropriately. In the event the payment mechanism under which the Defendants drew down $100,000 to purchase materials and the Plaintiff agreed to defer payment until completion of the House (to save the defendants interest charges) seemingly created a situation where: (a) the builder was required to fund the completion work out of the purchase monies; and (b) the builder was deprived of any opportunity to generate a profit through fully controlling the expenditure on the project. Jason Copson's Witness Statement indicates that the Woodbourne Report estimate was based on a zero profit. This may have contributed to the way the parties' relationship deteriorated over the course of the project.

41. At the outset it was envisaged that the Plaintiff would be recompensed for materials and labour as the project went along. In or about October 2006 he agreed that the Defendants need not draw down on the $300,000 facility to save them interest exposure. This meant that the Defendant himself had to fund the costs of both labour and materials[3] when he had not originally planned to do this. Rather than insisting on the original bargain or advising the Defendants that he was in difficulties, if such was the case, it appears he allowed the project to drift towards a standstill, nursing the sense of grievance which he only seemingly articulated in the context of these proceedings.

Air conditioning

42. It is common ground that the Plans did not contemplate air conditioning and that air conditioning was not installed by the Plaintiff. Defendants are adamant that the Plaintiff promised to provide air conditioning and contend that this contractual obligation is evidenced by the rental valuation supplied to the Bank for the Plaintiff by Vivienne Power (now Craig) which provides a value based on air conditioning. I do not find this valuation to be reliable evidence as to what the parties agreed, even though I see no reason to disbelieve the Defendants' evidence that the Plaintiff verbally promised to install air conditioning before the closing of the sale and purchase agreement.

43. The evidential question is whether this Court can find on a balance of probabilities that the parties agreed that the extra work would be done to install pipes and wiring for air conditioning in a structure which was built from inception with no such wiring in place. If, as the Defendants contend, agreement in principle was reached in April for the House to be completed in accordance with the Plans, air conditioning would be an additional feature which would require express agreement. Mr. Anderson the electrician states in his Witness Statement

[3] In fact it appears based on the Counterclaim that the Defendants themselves ended up purchasing most finishing materials.

that he told the Second Defendant that the House was not piped for air conditioning. She asked for both air conditioning and ceiling fans. The Second Defendant herself (Witness Statement, paragraph 64) purchased ceiling fans at the Plaintiff's request. This suggests that the parties reached a compromise and agreed on the installation of ceiling fans instead of air conditioning and there is no clear evidence that the demand for air conditioning was pursued by the Second Defendant after the ceiling fans were purchased in the first two months of 2007.

44. By way of contrast, no witness for the Defendants states that the parties reached a definite agreement to break open walls to install air conditioning pipes having calculated how much this additional work would cost and how much delay would be caused. There was no suggestion that these costs were included in the Woodbourne Report estimate. 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.

Laying wooden floors for one bedroom apartment

45. I accept the Plaintiff's case that he initially agreed to install tiling throughout. However he himself concedes that he opened the door to negotiating changes to the bare bones list of what he was to do which was set out in the June 1, 2006 letter. Although he contends that he agreed alterations on the basis that the Defendants would bear the costs of anything not in the June 1, 2006 letter, I am not satisfied that this was formally agreed between the parties. The informal nature of their arrangements lent itself to genuine misunderstandings on each side; Mr. Lewis' evidence that the Plaintiff was inclined to agree to do things against his own financial interests mirrored Mrs. Abdul-Jabbar's evidence that he would refer to her as "Moms", and promise to do various things which he did not do.

46. A unilateral promise to perform work not included in the Completion Contract is not a legally enforceable contract, however. The Defendants can only complain if the Plaintiff failed to perform work which either (a) fell within the ambit of the original Completion Agreement, or (b) was additional work both parties agreed he would perform with no extra charge as if it were included in the original agreement. 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. I see no reason to doubt the Second Defendant's evidence that the Plaintiff himself provided the funds in or about August 2006 from which the wooden flooring was purchased and delivered. Had no agreement been reached in this regard, the Plaintiff ought to have installed tiles as he contends was initially agreed. All the evidence before the Court suggests that the Plaintiff left the relevant floor in an unfinished state which entitled the Defendants to take remedial action by hiring someone to lay the wood flooring and to hold the Plaintiff liable for that expense.

External blinds/shutters

47. The Defendants claim $21,000 for purchasing and installing blinds and are supported in this respect by the expert opinion of Mr. Topley. The Plans show a house with blinds, but the Plaintiff insists he never agreed to install blinds. In my judgment the evidence as to whether the Completion Agreement concluded in or about June 2006 included the costs of blinds is unclear.

48. Mr. Topley in answer to the Court suggested that the Woodbourne Associates estimate for "*Doors, hardware and windows*" ($66, 916, less $30,000 for materials on site) probably included the blinds, but this seemed little more than a guess on his part. Jason Copley, the author of the Report, was not called to explain this item which is not covered in his Witness Statement as he was abroad. However he states he only saw roofing material on site when he visited on June 22, 2006 and was merely told by the Plaintiff that he had purchased $40,000 worth of carpentry and joinery (cabinets and countertops). The Plaintiff implied that he inflated what he claimed to have purchased to assist the Defendants to meet their tight budget in one of the most credible parts of his testimony. The Defendants did not suggest that the blinds were included in the materials already on site; on the contrary they seemingly purchased blinds after the Plaintiff left the site and did not suggest that they had been purchased for the House and then misappropriated.

49. This means that if the Woodbourne estimate of $36,916 for completion under the line item "*Doors, hardware and windows*" did include blinds which had not already been purchased, over 50% of this line item would have been attributable to the costs of purchasing and installing blinds alone. If this was the case, one would have expected Jason Copley to have said as much. In any event, if blinds were included in the $66,916 estimate, whether assumed to have been pre-purchased or not, this would mean that the doors, hardware and windows (excluding blinds) for a substantial three-apartment dwelling, excluding blinds, would have been estimated by Woodbourne Associates to be purchased and installed for no more than $45, 916. Such a modest sum seems improbable to me, in the absence of direct evidence on the issue, in relation to a residence which appears from the Plans to have approximately 20 external windows, and possibly as many as five balconies, many of which would probably enjoy glass sliding or French doors.

50. When the Second Defendant's Witness Statement is scrutinized, however, it appears that the $21,000 claimed in respect of blinds or shutters relates only to the upper three-bedroom apartment (paragraph 88). The photographs taken by Mr. Topley and showing blind-less windows relate only to that upper apartment. This supports the view that the Woodbourne Report's $66,916 estimate for "doors, hardware and windows" cannot sensibly be read as including the purchase and installation of windows, doors and blinds for the entirety of such a substantial dwelling.

51. The fact that the Plaintiff seemingly purchased and installed blinds for the other two apartments would provide compelling support for the proposition that he did promise to install blinds for the entire House. This inference would be justified even though this cost had not properly been budgeted for and the Plaintiff may well have felt that he was doing the Defendants a favour. However the oral examination at trial and cross-examination of the Plaintiff did not suggest that this is what happened. The Defendants' case, it seemed to me, was put on the basis that no blinds were installed at all.

52. It is for the Defendants to prove that the contractual term they contended was breached was in fact a part of the Completion Contract. 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.

Landscaping

53. What was agreed on the landscaping front is somewhat unclear because (a) the Plans do not explicitly deal with landscaping, yet (b) the Woodbourne Report estimate does make provision for those costs under the heading of total overall costs. The Plaintiff contends the First Defendant agreed to the landscaping to save costs, while the latter denies any cost-related negotiations took place. Larry Dunlop somewhat tentatively said he thought the reduction of the completion price from the $421,000 estimate of Woodbourne to the $400,000 actually agreed was due to the First Defendant agreeing to do the painting and landscaping.

54. Since the First Defendant ended up doing the landscaping himself in any event, the $16,000 claimed is not a recoverable loss. But to the extent that any finding on what the parties agreed is required, I would find that the parties did not include landscaping in the Completion Contract. It is noteworthy that the Woodbourne Report's relevant estimate of completion costs with the owner acting as contractor (like the Plaintiff's June 1, 2006 letter) fails to mention landscaping altogether. This strongly suggests that when the Bank finally approved financing for the Defendants in July, the $400,000 allocated towards their obligations under the Completion Contract was not intended by the Plaintiff or the Defendants (acting through their agent for these purposes, the Bank) to be applied towards landscaping work. There is no suggestion that during the course of the project the parties agreed that the Plaintiff would do landscaping work.

Wet bar

55. The Defendants contend that the Plaintiff promised to install, amongst other things, a wet bar during visits to the property in July 2006. They claim $2100 for the costs of completing this item. The Plaintiff contends he said he would install this item if the Defendants could afford it. Mr. Topley opined that a bar was contemplated by the Plans although no plumbing for a sink was evident in the Plans. In the relevant area he found evidence suggesting that the Plaintiff had prepared for plumbing but never completed the installation of the bar.

56. The Bank pre-approved financing on May 31, 2006, received the Plaintiff's June 1, 2006 letter and the June 23, 2006 Woodbourne Report before finalising financing on July 17, 2006 and notifying the Defendants of same by letter dated July 27, 2006. By July the Completion Contract had on any sensible view of the evidence been concluded subject to financing being finally approved. By their own account at this juncture the Defendants' eagerness to proceed had been made obvious. If the Plaintiff promised to give the Defendants extras during July, these were gratuitous promises with no consideration being offered by the Defendants in return so as to create a legally enforceable contract.

57. However, the bar was contemplated by the Plans and was partially installed (albeit by incomplete plumbing work not on the Plans). On balance, I find that the Defendants have very narrowly proved that the Plaintiff was obliged to install a wet bar under the Completion Contract.

Miscellaneous other completion items

58. I see no reason to reject the evidence of the Defendants and prefer it to the Plaintiff's in respect of all other items which they contend required further work on in order to complete the House in accordance with the original Completion Contract. His insistence that the House was completed in various respects not dealt with below (e.g. closets) was simply not credible. I also accept the expert opinions of Mr. Topley as to the quantum of the completion costs, namely:

    (a) trenching extra pipe for cable ($1300);
    (b) tile for patio ($8,353);
    (c) closet shelving and rail ($2000).

59. However, I will consider further below the amounts not supported by Mr. Topley's estimates or that of the relevant service providers (such as Mr. Fray, $7475 for installing cabinets and inside railings) that they are entitled to recover.

Contractor's All Risk Insurance

60. I accept the Second Defendant's evidence that she believed the Plaintiff was

responsible for purchasing insurance but eventually did so herself when he failed to do so. The Plaintiff denied being obliged to take out such protection on the grounds that it was a matter for him if we wished to assume all risk of liability. This may well have been valid while he was the owner of the property; it ignored the potential liabilities the Defendants would assume once they purchased the property to any persons injured there.

61. The Woodbourne Report was initially prepared in February 2006 and contained various tables. In one, seemingly designed to justify the sale price of $1.2 million, the total costs of construction by the Plaintiff including a 12.5% profit element was set out including insurance and preliminaries costs of 8%. In the Table containing the estimate which forms the subject of the present dispute, no mention of insurance costs appears. This might be because Woodbourne assumed that the Plaintiff had already taken out insurance cover. In any event, when the Bank sent the terms of the lending to the Defendants on July 27, 2006, it required them to take out Contractors All Risk Insurance, which is inconsistent with any notion that the Bank either (a) expected the Plaintiff (with whom direct communications had taken place in June) to do so, or (b) understood that the Plaintiff had agreed to take out such insurance.

62. Mr. Topley accepted in cross-examination that in the context of the present unusual arrangements the most that could be said with certainty was that somebody had to purchase insurance. There is no satisfactory evidence that the Plaintiff was contractually required to take out the insurance policy in relation to which the Defendants counterclaim $2890. This item of loss has not been proved.

The Plaintiff's $15,000 paintwork claim

63. The Plaintiff disputed responsibility for the external paintwork at all, both in terms of his responsibility for it (based on the June 1, 2006 letter) and in terms of whether he actually did it at all. The Woodbourne Report allocated over $30,000 for "paintwork", although the June 1, 2006 letter supported the Plaintiff's argument that he was only required to apply primer. The Defendants accept that the Plaintiff asked for $15,000 to pay a painter which suggests that in his mind he was not obliged to paint the property. On the other hand it seems clear that he engaged someone to do this work and sought extra payment afterwards.

64. Since the $400,000 estimate was based on the assumption that the Plaintiff would paint the House in and out, on balance I find that the only inference that can properly be drawn from the proven facts is that painting fell within the scope of the Contract. The Plaintiff's claim for $15,000 in respect of this supposedly additional work is refused.

Findings: was the work done of a suitable quality?

65. The Defendants rely on the expert report of Patrick Topley of Trent Construction Consulting, who opined that the following remedial work was required because the unsatisfactory quality of the work done;

    (a)external paintwork ($6000);
    (b)internal paintwork ($3081);
    (c)roof cracks and an improperly sealed area requiring sealing ($4800);
    (d)balustrades to be replaced ($18,000);
    (e)face plates for cable boxes and empty electrical boxes ($600);
    (f)poor tiling installation and miscellaneous minor defects for which no remediation value is assigned.

66. I accept Mr. Topley's evidence and find that the Defendants' are entitled to damages for unsatisfactory interior and external paintwork.

67. It is clear that the balustrades were not built to the requisite safety standards and that to get through the Planning approval process the plexi-glass solution was creatively used as an interim solution. I accept Mr. Topley's opinion that these had to be replaced.

Extra materials for completion: what the Defendants are entitled to recover

Admissibility of invoices and receipts

68. Mr. Johnston for the Plaintiff objected to the admissibility in evidence of various invoices and receipts which were included in the trial bundle without prejudice to the contention that they were inadmissible on hearsay grounds. This argument seemed almost bizarre in the context of a civil trial because, doubtless with a view to saving the costs of proving admissibility, most documentary evidence of this nature is almost invariably admitted on a consensual basis.

69. The Defendants rely on the relevant documents to substantiate the quantum of their Counterclaim. Curiously, the Second Defendant's Witness Statement, drafted by her previous attorneys before Mr. Turner was retained, made no explicit reference to this documentation which she clarified in her oral evidence she had carefully retained. Although even the oral evidence about the documents was somewhat oblique, I am satisfied that the documents relied upon in support of the extra expenses (and which were not supported by direct witness testimony or expert opinion evidence) were produced in the ordinary course of business.

70. The Plaintiff's Counsel directed my attention to the relevant law. The starting point is section 27A of the Evidence Act 1905, which provides as follows:

> "27A .*In any civil proceedings a statement other than one made by a person while giving oral evidence in those proceedings shall be admissible as evidence of any fact stated therein to the extent that it is so admissible by virtue of any provision of this or any other Act or by agreement of the parties, but not otherwise.*"

71. Under Bermuda law there is a presumption that documentary evidence relied on for the truth of the statements contained therein is not admissible unless the party seeking to adduce it can bring the relevant material within the statutory exceptions. This is to be contrasted with the modern English position under section 1(1) of the Evidence Act 1995: "*In civil proceedings evidence shall not be excluded on the grounds that it is hearsay.*" In recent times Bermudian civil practitioners appear often to have agreed bundles of documents as if the hearsay rule had been abolished in Bermuda as well; Mr. Turner may be forgiven for feeling as if he had been "bushwhacked" by the present application, even though he was put on notice when the trial bundles were agreed that some challenge would be made to the admissibility of the "invoices". In any event, he did advance a legally coherent, albeit abbreviated, response to the exclusionary arguments.

72. Mr. Turner submitted that the invoices and receipts were admissible under section 27D of the Evidence Act, which provides as follows:

> "*(1) Without prejudice to section 27E, in any civil proceedings a statement contained in a document shall, subject to this section and to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence would be admissible, if the document is, or forms part of, a record compiled by a person acting under a duty from information which was supplied by a person, whether acting under a duty or not, who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty.*"

73. He submitted that the relevant documents fell within the ambit of section 27D(1), citing paragraph 58 of my Judgment in *Fidelity-v-APP China Group, Ltd* [2007] Bda LR 35:

> "*I also accept Mr. Hargun's submission that the telephone call record is not admissible under section 27D (1) as part of "a record compiled by a person acting under a duty from information which was supplied by a person, whether acting under a duty or not, who had, or may reasonably*

be supposed to have had, personal knowledge of the matters dealt with in that information and which, if not supplied by that person to the
20 compiler of the record directly, was supplied by him to the compiler of the record indirectly through one or more intermediaries each acting under a duty." The type of record which the statute applies to was classically described by Bingham J. (as he then was) in H v Schering Chemicals Ltd. [1983] 1 All ER 849 at 852:

> *'The intention of that section was, I believe, to admit in evidence records which a historian would regard as original or primary sources, that is documents which either give effect to a transaction itself or which contain a contemporaneous register of information supplied by those with direct knowledge of the facts.'* "

74. I accept this submission. Company receipts are classic examples of documents which give effect to a transaction, constituting (a) a record of payment received for a particular service compiled by a person (an employee) with a duty to the employer create an accurate record who either (b) had personal knowledge of the payment or (c) was told by directly or indirectly by someone with such knowledge that the payment had been made. Invoices are somewhat different, but will generally fall into the same category. Absent suggestions of forgery or the like, it seems absurd to require a litigant to incur the expense of bringing witnesses to Court, in relation to many of the present documents from abroad, to give oral evidence that they issued the receipt or invoice in question. It would be no less unreasonable in the context of the present case for witnesses to be required to give oral evidence of the circumstances in which the documents were made so as to justify their admission under section 27D(1). Yet Mr. Johnston insisted that this is what the Defendants were required to do. He found clear support for this submission in the following dictum of Megarry J in *Re Koscot Interplanetary (UK) Ltd; Re Koscot AG* [1972] 3 All ER 829 at 834:

> "In any case, all that I have here is a document prepared by an unidentified person or persons from, it seems, information supplied by unidentified persons who may or may not have had any personal knowledge of the matters in question. When it is sought to push a document in evidence, it may well be said that questions arise not merely on hearsay but also (if I may say so) on 'whosay'. I think that if a litigant wishes to put in hearsay evidence by virtue of s 4(1), he must establish in some way that the requirements of the subsection are satisfied. It will be observed that the phrase 'may reasonably be supposed' governs only the requirement of personal knowledge, and that the other requirements are not softened in this way. Thus I do not see how a document can be shown to be, or to form part of, 'a record compiled by a person acting under acting under a duty' unless there is some evidence of who that person was, and that he was subject to such a duty. In

saying that, I do not overlook s 6(2) of the Act, which was not debated before me."

75. This *dictum* was strictly *obiter* as the main basis of Megarry J's decision was that the documents did not fall within the exception at all. However, Megarry J did not ignore section 6(2) of old English Civil Evidence Act 1968, which was not argued before him or before me. The Bermudian equivalent is section 27F, but the relevant subsection does not apply to section 27D(1) at all:

> "*(2) For the purpose of deciding whether or not a statement is admissible in evidence by virtue of section 27B, 27C or 27E, the court may draw any reasonable inference from the circumstances in which the statement was made or otherwise came into being or from any other circumstances, including, in the case of a statement contained in a document, the form and contents of that document.*"

76. Since our 1905 Act (as amended) generally closely tracks the English 1968 Act, the exclusion of the express statutory power to draw inferences in determining the admissibility of section 27D documents was either deliberately exclusionary or accidental. The latter seems somewhat improbable because section 27F (3) provides that inferences may be drawn in determining the weight to be attached to documents admissible under section 27 D (1). On the other hand, it is difficult to discern any rational policy reason as to why section 27F (2) applies only to 27B, 27C and 27E, while 27f (3) applies to 27B, 27C, 27D and 27E. The first two sections deal with witness statements and the last deals with computer records. If I were required to adopt a technical legalistic approach, I would go no further and rule that the relevant documents are inadmissible hearsay and the Defendants were required to incur the potentially significant expense of calling witnesses to prove that the requirements of section 27D (1) were made out.

77. However, in my judgment this Court ought not, unless clearly compelled to do so, sanction the conduct of litigation in such a financially irrational and unjust manner. I feel compelled to consider whether there are any other legally viable grounds on which documents which appear clearly to be potentially admissible can be admitted under section 27D(1) without the Defendants being required to jump through expensive evidential hoops constructed from an antiquated evidential rule. Section 27 provides as follows:

> "*27I (1) Provision shall be made by rules of court as to the procedure which, subject to any exceptions provided for in the rules, must be followed and the other conditions which, subject as aforesaid, must be fulfilled before a statement can be given in evidence in civil proceedings by virtue of section 27B, 27D or 27E...*

(3) Rules of court made in pursuance of subsection (1) —

(a) may confer on the court in any civil proceedings a discretion to allow a statement falling within section 27B (1), 27D (1) or 27E (1) to be given in evidence notwithstanding that any requirement of the rules affecting the admissibility of that statement has not been complied with, but except in pursuance of paragraph (b) shall not confer on the court a discretion to exclude such a statement where the requirements of the rules affecting its admissibility have been complied with;

(b) may confer on the court power, where a party to any civil proceedings has given notice that he desires to give in evidence—

(i) a statement falling within section 27B(1) which was made by a person, whether orally or in a document, in the course of giving evidence in some other legal proceedings (whether civil or criminal); or

(ii) a statement falling within section 27D(1) which is contained in a record of any direct oral evidence given in some other legal proceedings (whether civil or criminal),

to give directions on the application of any party to the proceedings as to whether, and if so on what conditions, the party desiring to give the statement in evidence will be permitted to do so and (where applicable) as to the manner in which that statement and any other evidence given in those other proceedings is to be proved; and

(c) may make different provision for different circumstances, and in particular may make different provision with respect to statements falling within section 27B (1), 27D (1) or 27E (1) respectively, and any discretion conferred on the court by rules of court made as aforesaid may be either a general discretion or a discretion exercisable only in such circumstances as may be specified in the rules...

(6) Nothing in this section shall prejudice the generality of section 62 of the Supreme Court Act 1905 [title 8 item 1] or any other Act conferring power to make rules of court."

78. So the Act envisages that Rules of Court may confer upon the Court a general or

special discretion to include evidence even if the requirements of section 27D (1) have not been strictly met. Order 38 has a provision for a hearsay notice to be given if section 27D (1) documents *are* admissible which do not appear to have been complied with. The following provisions impose another procedural impediment, albeit one apparently designed to avoid the need to call witnesses to prove admissibility:

> "***38/21 Notice of intention to give certain statements in evidence***
>
> *21 (1) Subject to the provisions of this rule, a party to a cause or matter who desires to give in evidence at the trial or hearing of the cause or matter any statement which is admissible in evidence by virtue of section 27B, 27D or 27E of the Act must—*
>
> *(a) in the case of a cause or matter which is required to be set down for trial or hearing or adjourned into court, within twenty-one days after it is set down or so adjourned, or within such other period as the Court may specify, and*
>
> *(b) in the case of any other cause or matter, within twenty-one days after the date on which an appointment for the first hearing of the cause or matter is obtained, or within such other period as the Court may specify,*
>
> *serve on every other party to the cause or matter notice of his desire to do so, and the notice must comply with the provisions of rule 22, 23 or 24, as the circumstances of the case require.*
>
> ***38/23 Statement admissible by virtue of section 27D of the Act***
>
> *23 (1) If the statement is admissible by virtue of section 27D of the Act, the notice must have annexed to it a copy or transcript of the document containing the statement, or of the relevant part thereof, and must contain—*
>
> *(a) particulars of—*
>
> *(i) the person by whom the record containing the statement was compiled;*
>
> *(ii) the person who originally supplied the information from which the record was compiled; and*
>
> *(iii) any other person through whom that information was supplied to the compiler of that record;*
>
> *and, in the case of any such person as is referred to in (i) or (iii) above, a description of the duty under which that person was acting when compiling that record or supplying*

information from which that record was compiled, as the case may be;

(b) if not apparent on the face of the document annexed to the notice, a description of the nature of the record which, or part of which, contains the statement; and

(c) particulars of the time, place and circumstances at or in which that record or part was compiled.

(2) If the party giving the notice alleges that any person, particulars of whom are contained in the notice, cannot or should not be called as a witness at the trial or hearing for any of the reasons specified in rule 25, the notice must contain a statement to that effect specifying the reason relied on."

79. Meeting these requirements in a case such as the present where goods have been ordered from overseas would add almost as much in terms of costs (assuming lawyer-time would be involved in compiling such an elaborate notice) as calling witnesses to prove that the section 27D(1) requirements are met. However, the Rules perspicaciously afford even more judicial discretion and flexibility in determining admissibility issues:

> "***38/28 Directions with respect to statement made in previous proceedings***
>
> *28 Where a party to a cause or matter has given notice in accordance with rule 21 that he desires to give in evidence at the trial or hearing of the cause or matter—*
>
> *(a) a statement falling within section 27B(1) of the Act which was made by a person, whether orally or in a document, in the course of giving evidence in some other legal proceedings (whether civil or criminal), or*
>
> *(b) a statement falling within section 27D(1) of the said Act which is contained in a record of direct oral evidence given in some other legal proceedings (whether civil or criminal),*
>
> *any party to the cause or matter may apply to the Court for directions under this rule, and the Court hearing such an application may give directions as to whether, and if so on what conditions, the party desiring to give the statement in evidence will be permitted to do so and (where applicable) as to the manner in which that statement and any other evidence given in those other proceedings is to be proved.*
>
> ***38/29 Power of Court to allow statement to be given in evidence***
>
> *29 (1) Without prejudice to section 27B(2)(a) and 27D(2)(a) of the Act and rule 28, the Court may, if it thinks it just*

to do so, allow a statement falling within section 27B(1), 27D(1) or 27E(1) of the Act to be given in evidence at the trial or hearing of a cause or matter notwithstanding—

(a)that the statement is one in relation to which rule 21 (1) applies and that the party desiring to give the statement in evidence has failed to comply with that rule, or

(b)that as failed to comply with any requirement of a counter-notice relating to that statement which was served on him in accordance with rule 26.

(2)Without prejudice to the generality of paragraph (1), the Court may exercise its power under that paragraph to allow a statement to be given in evidence at the trial or hearing of a cause or matter if a refusal to exercise that power might oblige the party desiring to give the statement in evidence to call as a witness at the trial or hearing an opposite party or a person who is or was at the material time the servant or agent of an opposite party.

80. So Order 38 rule 29 made pursuant to section of the Evidence Act gives this Court a discretion to admit documents under section 27D(1) of the 1905 Act in circumstances where the relevant notice requirements, and by necessary implication the formal requirements of the statute itself, have not been met. The fundamental duty of the Court is to afford both parties a fair trial under section 6(8) of the Constitution. As an "existing law" for the purposes of section 5 of the Bermuda Constitution Order, the Evidence Act itself must "*be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution*". And in applying any power under the Rules, the Court is required to have regard to the Overriding Objective enshrined in Order 1A of the Rules (Order 1A(2), which is essentially designed to give embed those fundamental fair hearing rights in the ordinary practice of the courts:

"1A/1 The Overriding Objective

1(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable —

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate —

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues; and

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

81. Having regard to the above principles in the context of a case that appears to me to be cost-sensitive, I exercise my discretion under Order 39 rule 29 of the Rules of the Court and the inherent jurisdiction to admit the invoices and receipts relied upon by the Defendants notwithstanding: (a) any failure to comply with Order 38 rule 21, 23; and (b) the absence of any formal application by the Defendants in this regard. The Plaintiff's application to exclude the documents is accordingly refused.

The Defendants' evidence on the cost of extra materials and completion costs not supported by expert evidence or direct service provider testimony

82. A Schedule of Defendants' Loss was adduced by the Defendants linking the particularized items claimed with documentary support in the Agreed Bundles. The line items not covered by direct testimony were 2-9, 12-16, 18, 20 and 23. Most of the supporting documents are invoices indicating a nil balance. I accept the evidence of the Second Defendant to the effect that she carefully documented amounts that were actually paid. Noting the fact that the Plaintiff did not challenge the sums claimed on arithmetical grounds, I have attempted to satisfy myself that the sums claimed are properly due and have rejected elements of the claim which appear to me to be clearly unsupportable.

83. I took into account Mr. Johnston's submissions about both section 27D of the Evidence Act and the weight to be attached to the relevant documents if they were held to be admissible. In my judgment, having regard to the Second Defendant's evidence and the undisputed fact that she was heavily involved in purchasing materials for the project as a self-appointed project manager, the relevant documents were on their face admissible and reliable to the extent that I have accepted the various heads of loss claimed.

84. I allow line items 2, 3 and 4. Line item 5 claims $9107.38; I am only willing to award (based on the referenced supporting documentation) $4413.77. I reject line I item 6 (Pembroke tile, $3244.18) altogether as this appears to me to be a duplication of amounts claimed under 3. I allow the claim at line item7 (bathroom borders) but reduce it from $4483.21 to $3223.61. I allow line items 11-16, 18 (I add an omitted 50 cents) and 20. However, the true amount for the garage door is $1591, not $1519, and the Defendants are entitled in addition to $395 which was omitted in respect of the pleaded loss of purchasing an opener for the said door. No supporting documentation is referenced for line item 23 (pipe line) so I refuse this claim for $2000.

Findings: damages for loss of rent claim

85. The Defendants counterclaim for rent under three separate heads. Firstly, and most clearly, loss of nine months commercial rent is claimed for the three bedroom upper apartment at the rate of $5800 for the period January to October 2007 ($52,200). Mrs. Warren explained in her oral evidence that the apartment was rented on eMoo at $5800, so this is the basis for the pleaded computation. Similar claims are made for a six month period in respect of the other two apartments, at the rates of $1400 per month (Maymunah Abdul-Jabbar) and $1300 (Jamal Alan Vincent Warren ($1300). These latter two items of loss have not been sufficiently proved.

86. Melvina Warren, Jamal's wife, states in her Witness Statement that they were planning to rent out the middle apartment and ended up deciding to move in after managing to handle their share of the mortgage payments and the costs of their rental accommodation. They moved in June, 2007. How the $1300 figure is calculated was not explained; in addition, I am not satisfied that if the House had been finished earlier they might not still have decided to move in. 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.

87. Mrs. Abdul-Jabbar's Witness Statement does not explain how her loss of rent claim is computed at all. She was always planning to move in, and so the only compensation recoverable in relation to the delayed completion of the lower apartment would be referable to any extra rent she paid during the period of any actionable delay. Her evidence supports no such finding.

88. Was there an actionable delay so that loss of rental income for the upper unit can be recovered by the Defendants? This was clearly, having regards the authorities cited by Mr. Johnston, not a contract under which time was of the essence with liquidated damages being payable for each day of delay. Nevertheless, I am satisfied that the initial target date for completion of the House was Christmas and thereafter the Plaintiff was required to complete within a reasonable time. Mr. Topley considered that it was impossible to reach a reliable conclusion as to the

reason for delays save for the delay in completing the roof until October, which in turn made it impossible for completion to occur by the end of December. Based on the evidence adduced at trial and making an admittedly rough and ready assessment, I find that the Plaintiff ought with reasonable diligence to have finished the House by March 31, 2007.

89. The right of the Defendants to recover loss of rental income was vigorously challenged. Mr. Johnston submitted rightly that the question as to whether loss of rental income could be recovered was "whether the loss was a type of loss for which [the Plaintiff] *can reasonably be assumed to have assumed responsibility*": *Transfield Shipping Inc-v-Mercator Shipping Inc* [2009] 1 AC 61 at 73G (per Lord Hope). The Plaintiff admitted that he knew the Defendants were proposing to rent the upper unit. He further knew during the period when he ought to have been accelerating the completion process that they were financially stretched, paying a mortgage for a property they had purchased in September and hoped to move into before Christmas. I find that he may reasonably be assumed to have accepted the 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.

90. However, in my judgement, the appropriate measure of damages is the fair market value of the apartment at the end of April, 2007. Although the Defendants were apparently able to obtain $5800 as soon as the apartment was advertised, this was far higher than the $3800-$4300 estimated rental value range provided to the Bank just over a year earlier. There is no expert evidence to suggest that the apartment would have rented immediately for the same generous rent they obtained in October had the House been completed by the end of March. It is also possible that the quality of the finish the Defendants obtained was higher, as the Plaintiff passionately argued, than what was contemplated under the initial Completion Contract. But the relevant legal question is not whether the quantum of loss was foreseeable but, rather, whether the type of loss claimed was foreseeable as naturally arising from the relevant contractual breach. Rental values were seemingly rising before the credit crunch bit in the summer of 2008. Doing my best on the basis of the available evidence, I assess the appropriate measure of damages for loss of rental income to be $5000 per month, roughly half-way between the upper 2007 estimated value and the actual rent obtained by the Defendants just over a year later.

91. If completion had taken place on March 31, 2007, it seems to me more likely that a tenant would have been able to actually move in no sooner than June 1, 2007 rather than on April 1. It seems highly improbable that there would have been no delay at all between completion in accordance with the Contract and the beginning of a tenancy. I therefore award the Defendants four months loss of rent at the rate of $5000 totalling $20,000.

$15,000 completion payment

92. I find that the Plaintiff was only entitled to receive the $15,000 completion payment upon successful completion of the Completion Contract.

Summary

93. Subject to the correction of arithmetical errors by counsel , I find that the Defendants' Counterclaim succeeds in part and they are entitled to deduct the following amounts from the gross sum of $300,000 to which the Plaintiff was entitled under the Completion Contract (his claims for additional sums totalling $30,000 being rejected):

Additional materials:	$55,431.34
Completion costs:	$64,635.59
Loss of rent:	$20,000.00
TOTAL:	$140,066.93

94. The net position is that the Plaintiff is entitled to receive $159,933, just under half of the $330,000 he claimed. The Defendants' Defence and Counterclaim under which they disputed $30,000 and cross-claimed $255,024.26 (a total of $285,024.26) has succeeded by just under 50%.

95. Unless either party applies to be heard as to interest and or costs within 28 days, I would make the following orders in those respects. 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 and award interest on the judgment debt pursuant to statute alone. As far as costs are concerned, I would have regard to: (a) the fact that the parties' respective claims have been successful approximately to the extent of 50% in each case; and (b) the fact that the parties appear to me to be equally responsible for contracting on an unclear basis which was highly likely to generate disputes of the type which gave rise to this litigation, I would make no order as to costs.

Dated this 27th day of April, 2010 _____
KAWALEY J