



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2008: No. 245

BETWEEN:

AINSLIE DANA STEEDE

Plaintiff

-AND-

PATRICK BEAN (1)

DENNIS VICKERS (2)

SPLASH SERVICES LTD (3)

Defendants

Dates of Hearing: Monday 5th – Friday 9th July 2010
Date Judgment Delivered: Monday 21st March 2011

Mr. Craig Rothwell, Cox Hallett Wilkinson
Mr. Llewellyn Peniston, Peniston & Associates
Mr. Kevin Taylor, Marshall Diel & Myers

for the Plaintiff
for the First Defendant
for the Second and Third Defendants

The Parties

1. The Plaintiff, Ainslie Steede (“Mrs. Steede”) is the owner of the residential property located at 21 Cataract Hill, Paget (“the Property”).
2. The First Defendant, Patrick Bean (“Mr. Bean”) is a very experienced building contractor.
3. The Second Defendant, Dennis Vickers (“Mr. Vickers”) is a plumber by trade.
4. The Third Defendant, Splash Services Ltd (“Splash”) is a limited liability company incorporated under the Laws of Bermuda (The Company). The Second Defendant Mr. Vickers is the President of the Company.
5. The Plaintiff claims damages in the amount \$389,047 with interest against the Defendants for breach of a building contract in that the works carried out under the contract were defective and in that the Defendants abandoned the works before completion.
6. This matter raises a number of issues, the principal ones being;
 - (i) *Did the parties enter into a contract or was the estimate provided by Mr. Bean a non-binding estimate subject to change?*
 - (ii) *If there was a contract with which of the Defendants did Mrs. Steede enter into the contract?*
 - (iii) *What was the legal relationship between the Defendants? Was it that of partners, employer/employee or contractor/sub-contractor? Was Mr. Bean an independent contractor?*
 - (iv) *Did the Defendants leave the site prior to completion or did Mrs. Steede order the Defendants off the site prior to completion?*
 - (v) *Was it the Plaintiff or the Defendants who breached the agreement?*
 - (vi) *If the Defendants breached the contract what are the Plaintiff's loss and damages?*

History

7. Mrs. Steede wished to build a two-storey addition to her property and renovate her existing home at 21 Cataract Hill, Paget. She decided to make the two-storey addition into two apartment units – one on the upper floor and one on the lower floor. She submitted the architectural plan to the Department of Planning and received Planning approval in May 2006.
8. The Plaintiff got in touch with Mr. Bean whom she was told was well placed to carry out the building works.
9. In about September 2006 a ‘Proposal’ document (dated 12 September 2006) together with an ‘Estimate’ and a ‘Payment Schedule’, was put before Mrs. Steede by Mr. Bean.
10. Mrs. Steede was to pay Mr. Bean the total sum of \$675,800 in respect of the works. In respect of renovation works to the property the sum of \$150,000 was allocated and for works of addition the sum of \$525,000 was allocated. The latter involved the building of the two storey addition. The contract price was inclusive of all materials the same to be mid-range in price and quality.
11. Mrs. Steede claims that in consequence of the Defendants’ defaults (the Defendants abandoning of the works before completion and the works carried out being defective in part) she had incurred substantial additional costs to have the works completed, including remedial work relating to the Defendants’ defective work.
12. The Schedule of Payment dates specified the stage which the works must have reached and the work which must have been completed before any installment was paid. The Plaintiff claims that a fixed price agreement for the works had been concluded at \$675,800 that in consequence she, Bean and Vickers all signed the Proposal on 12 September 2006; and that though promised a copy she never received one.
13. In late November 2006 the First Defendant, Mr. Bean, and his work crew commenced work at the site. They laid the concrete foundations for the two storey addition.
14. In November 2006, Mrs. Steede formally applied to the Department of Planning for a 5ft addition to the eastern side of the two-storey addition. She made Mr. Bean aware of the application and she provided him and Mr. Vickers with the necessary plans. The revision was approved by the Department of Planning on 6th January 2007. Mr. Bean requested \$10,000.00 (which was paid by cheque dated 5th April 2007) for these changes plus moving the laundry room to a new location. Mrs. Steede said this change order also included reference to digging

and rouging in the bathroom in the existing home but this was wrongly included in this order and properly formed part of the \$28,000 she paid to Splash Services for their work.

15. Mrs. Steede did not meet Mr. Vickers until December 2006, after work had begun. She assumed that Mr. Bean and Mr. Vickers were equal partners from their conduct; and that the third Defendant, Splash Services Ltd, was their joint business. Mr. Vickers would address any concerns she had; he was not just acting as a plumber. It was only after litigation started that she came to know Splash was a company and Mr. Vickers its main shareholder.
16. In November 2006 Mrs. Steede gave Mr. Bean a copy of the plans forming part of her planning application for the two storey addition. Prior to Christmas 2006 Mr. Vickers asked Mrs. Steede for some money for his men over Christmas. She gave it to him but all other payments were made to Mr. Bean.

On Site Problems

17. The works continued until April 2007 when Mr. Bean and Mr. Vickers became absentee bosses and very little progress was made.
18. Mrs. Steede said that she was informed in a conversation with Mr. Vickers that Mr. Bean had underbid the project. She became concerned that they would not complete the work; this was highlighted when during April 2007 Mr. Bean threatened to walk off the site on repeated occasions on the basis that he was being asked to carry out works that was not approved by the Department of Planning. She listened on each occasion but did not enter into a dialogue as the plans had clearly been approved and she already had paid a substantial amount of money. The Defendants walked off the property on August 6, 2007 leaving the works unfinished in breach of contract. She accepted the repudiation of the contract.
19. As I understand the matter, Mrs. Steede is here alleging a breach of contract by the Defendants by failing to complete the works, and that the work which was carried out was defective, and that the Defendants left the site with the work unfinished in breach of the contract. She seeks damages in the sum of \$380,000.

The defence of the First Defendant Mr. Bean

20. The following summarises Mr. Bean the First Defendant's case as it is pleaded in his Amended Defence.

“(i) *that he was merely a foreman, working for Mr. Vickers and Splash Services Ltd, procuring workmen for the latter; and was not a party to the contract*

- (ii) *that Mr. Vickers is the beneficial owner of Splash*
- (iii) *that Splash was the contracting party with the Plaintiff*
- (iv) *that Mr. Vickers & Splash used his stationery to prepare the contract price and payment; that he was allowed to use Splashes' facilities to secure benefits for his own business*
- (v) *that in breach of contract, the Plaintiff ordered workmen off the site and brought her own workmen; and that is why there was non-completion*
- (vi) *that Mr. Vickers was aware of all payments [bar one] since he received them all*
- (vii) *that he never removed any workers from the site*
- (viii) *that it was the Plaintiff who told Splash (Vickers) to remove his men and tools from the job*
- (vii) *that it was Mr. Vickers who over saw the leaving of the workmen on the Plaintiff's instructions*
- (x) *that he did not remove any of the supplies purchased by the Plaintiff*
- (xi) *that the Plaintiff had ordered him to alter the approved building plans and do the work in accordance with those altered plans*
- (xii) *that there was no exchange between himself and SKB Coatings as the Plaintiff alleges*
- (xiii) *that the Plaintiff having ordered Splash to leave the site, that he, having being ordered by Vickers to leave the site had no alternative but to do so."*

Vickers/Splash Claim

21. The following summarises the Amended Defence and Cross Claim of the Second and Third Defendants.

- (i) *that he never represented to the Plaintiff that he was in partnership with Mr. Bean*
- (ii) *that he never represented to the Plaintiff that Mr. Bean was an employee of Splash*
- (iii) *that the work done for the Plaintiff was a joint venture*

between Mr. Bean and Splash, Mr. Bean doing the construction work and Splash doing the plumbing

- (iv) that Mr. Bean and/or the Plaintiff made the contracted arrangements*
- (v) that Mr. Bean approached Splash for assistance in preparing the Proposal and Bean determined the amount charged for the works*
- (vi) that Splash never kept any funds received respecting the works, save for the plumbing work done by Splash*
- (vii) that the remainder of the funds were transferred by Splash to Mr. Bean, albeit the Plaintiff had issued cheques to Splash*
- (viii) that in due course Mr. Bean was made a signatory to Splash's bank account for that purpose*
- (ix) Splash concedes that it was the general contractor for the works; that it had permitted its stationery to be used for the quotation*
- (x) that Splash sub-contracted all the work, save plumbing work, to Mr. Bean*
- (xi) that, for the duration of the contract only, and as part of the sub-contract Splash agreed to add Mr. Bean and his employees to its health plan and to make social insurance contributions on their behalf*
- (xii) that he never entered into any agreement with Mr. Bean or the Plaintiff in his personal capacity*
- (xiii) that Splash's plumbing work was performed to a workmanlike standard*
- (xiv) that the Proposal was just that – a Proposal – and there was no fixed price agreement; that it was but an estimate and subject to change.*
- (xv) that it was a term of the Plaintiff's contract with Splash that any changes to the works would result in an increase in costs and in the time for completion, and that the Plaintiff ordered many changes and revisions to the works*

- (xvi) *that when the Proposal was done the Plaintiff had provided no specifications for finishes*
- (xvii) *that Splash was never in breach of contract and had been ordered off site by the Plaintiff*
- (xviii) *that Splash had no knowledge of Mr. Eddy's report*
- (xix) *that the Plaintiff's sons never completed the excavation works they had undertaken to do*

Cross-Claim

22. The Second and Third Defendants Cross Claim against the First Defendant and seek damages for breach of contract and alleged that, if any of Mr. Vickers/Splash are found liable to the Plaintiffs' each and either of them is entitled to an indemnity and damages for breach of contract from Mr. Bean. They deny that the Plaintiff has any claim against either one of them and requested that the action be dismissed against each.

Plaintiffs Reply

23. The Plaintiff in her reply to the Amended Defence of Dennis Vickers and Splash Service Limited joins issue with the Defendants and denied the allegations made against her in the Defence and Counterclaim.

First Defendants Reply

24. The First Defendant Patrick Bean in his reply joins issue with the Amended Defence and Counter-claim of Dennis Vickers and Splash Service Ltd; and denies the allegation made against him in the amended Defence and Counterclaim.
25. It is not necessary to rehearse at length all the evidence with respect to the detailed history of this matter but I have considered all the evidence and will refer to the relevant evidence as I deal with the issues.

Contract Issues

26. Dealing with the first two issues for determination which involves two (2) questions:-
- (i) *Did Mrs. Steede enter into a contract with the Defendants or was it merely a non-binding estimate subject to change?*

(ii) *If a contract, with which of the Defendant's did Ms. Steede enter into a contract?*

27. In my view the answer to this issue depends on two documents – The Proposal presented on “Splash Services” letter head and the Summary Cost Budget – and the evidence of the surrounding circumstances at the time the documents were prepared and presented to Mrs. Steede, as well as the subsequent conduct of the parties after these documents were given to Mrs. Steede.
28. The question is whether the document headed “Proposal” plus the annexed schedule of fees was an offer to do the work at the price mentioned. Based on the evidence I am satisfied that the parties intended this proposal and the annexed schedule to be an offer to do the works for a fixed price. Once the Plaintiff accepted this offer it constituted a complete contract. The language used in the Proposal and Mrs. Steede’s conduct is instructive.
29. It is undisputed that Mr. Bean took possession of the site and started the works before he received any funds. Thereafter the parties acted on the terms of the proposal until some seven months later there was discussion to revise its terms to one of cost and charge.
30. On the evidence before me I find that Mr. Bean and Splash Services agreed to carry out and complete Mrs. Steede’s building works for the consideration of \$675,000 apportioned as to \$525,000 for a new two-storey addition and \$150,000 for renovation to the existing house (“The Contract Works”). It was only after it became apparent that there was some difficulty in completing on time and within budget that discussion started regarding whether the terms of the agreement could be revised to one of cost and charge.
31. In my judgment the Proposal dated 12th September 2006 and the annexed Summary Cost Budget was an offer by Mr. Bean and Splash Services to Mrs. Steede which she accepted and acted upon. This formed a legally binding contract.

If a contract, with which of the Defendants did Mrs. Steede enter into a contract?

32. The evidence shows that Mrs. Steede met and dealt with Mr. Bean only in all discussions prior to the presentation of the written proposal on Splash Services letter head. She met Mr. Vickers for the first time in December 2006 a few months after the initial discussion and presentation of the proposal by Mr. Bean and after the building works commenced. Mrs. Steede testified that after the work commenced both Messers Bean and Vickers were on site regularly. The first payment of \$1,000 for the contract works was handed to Mr. Vickers. Thereafter all other payments totaling \$570,000 were handed to Mr. Bean. On

site she spoke to Mr. Vickers on a less regular basis than to Mr. Bean but Mr. Vickers did assist her with some concerns.

33. In paragraph 5 of its Amended Defence and Counterclaim Splash Services accepted and conceded that in permitting the proposal to be submitted on its stationary and in permitting its account to be used as a conduit for payment to Mr. Bean, that it was the general contractor for the contract works and that the entire project except for the plumbing which was subcontracted to Mr. Bean.
34. In my judgment the contract was entered into by Splash Services ("The Company") and Mr. Bean. Mr. Vickers, met the Plaintiff for the very first time after the contract was concluded and the work commenced. Mr. Vickers should not have been made a party to these proceedings and he will be dismissed as a party to this action.

What was the legal relationship between the Defendants: that of partners employer/employee or contractor/sub-contractor? Was Mr. Bean an independent contractor?

35. The pre and post contractual conduct of the parties on this issue may be taken into account for determining the relationship. I am satisfied and find as a fact that Mr. Bean was an independent contractor. Mr. Bean testified that he was the foreman employed at the site and was paid at the rate of \$45.00 per hour for a 40 hour week or \$7,200 monthly as an employee. The financial document produced by the Second and Third Defendants shows very clearly that Mr. Bean received a total income of \$175,300 from the funds paid by Mrs. Steede which amounts to an average income of \$22,000 per month. Initially he would have the court believe that the amount of \$175,300 was to purchase and pay cash for supplies so that he could receive the benefit of discount of the wholesalers. Later he accepted in cross-examination that these sums were received personally by him for his own account. He controlled and paid his own staff. I have no doubt that he was an independent contractor.

Did the Defendants leave the site prior to completion or did Mrs. Steede order the Defendants off the site prior to completion?

36. Mrs. Steede testified that on August 6 2007 at about 10:15am she had a discussion with Mr. Bean and Mr. Vickers regarding "the low quality Baptiste Builders French doors" that had been installed. She told them that Baptiste had agreed the doors could be returned and upgraded. She told them not to install any more of their French doors but remove those installed and return them to Baptiste Builders, whereupon Mr. Vickers walked away and said words to the effect, "No one is going to intimidate me". Thereafter the men began to gather their tools and

to move off site. Her notation in her note book shows that this happened about 10:15 am. At about 10:45 am Mr. Morton of the Department of Planning, arrived while Mr. Bean and Mr. Vickers were still “milling about” outside of the property, and met with them all. A representative from SKB Coating attended at the property about the same time. She said despite Mr. Morton’s assurance to Mr. Bean and Mr. Vickers that the plans were approved they walked off the site.

37. On the other hand at paragraph 37 of his Witness Statement Mr. Vickers gave evidence that Mr. Bean told him that Mrs. Steede no longer wanted him on the job. He was not involved in any discussions with Mrs. Steede. In this regard he is unable to say what took place between them. Mr. Bean at paragraph 7 of his Witness Statement dated 25th January 2010 said that he was inside the upstairs section of the building when Mr. Vickers ordered all of them off the job immediately, following Ms. Steede’s instructions given to him directly.
38. Mr. Bean in cross-examination said that he was right in the doorway when Mrs. Steede told Mr. Vickers to get off the job and Mr. Vickers said “come, come she said she was going to call the police and he Mr. Bean retorted “let’s get the hell out of here.” On the other hand Mr. Vickers evidence in cross-examination was that “Mrs. Steede did not tell me to get off the site.”
39. Messers Mapp and Tankard were called as witnesses on behalf of Mr. Bean and Mr. Vickers respectively. These men were on that site at the time but they were unable to assist. Mr. Mapp said that he was in the vicinity of the mixer and he could not hear Mrs. Steede say anything. He saw them talking and he assumed from Mr. Vickers saying, “down tools” that Mrs. Steede had told him to do so.
40. Mr. Tankard recalls that Mr. Bean and Mr. Vickers were in the house having a discussion with Mrs. Steede. He could not hear what was being discussed. Mr. Tankard recalls that when the discussion ended Mr. Bean told all his workmen to take everything off the property. Mrs. Steede was frenetic after they left. Among her efforts to have them resume work she called the police as well as the Department of Consumer Affairs to see if they would assist her. Also, she immediately wrote a letter dated August 6, 2007 to the Defendants in which she expressed her disappointment in them taking their equipment and a quantity of material off site. She sought an explanation. Mrs. Steede did not receive a reply to this letter nor to further letters she sent on November 7, 2007 suggesting a meeting. She wrote inter alia: “Mr. Bean and Mr. Vickers, this is an unacceptable situation with legal consequences. I ask that you give this matter urgent consideration and contact me in writing at my above address so we can set up an appointment to meet and to amicably resolve the matter of you receiving funds for work that you never completed.”
41. Counsel for Mrs. Steede submits that her reaction to the Defendants leaving the site is entirely consistent with the fact that it was the Defendants that walked off the job site. I agree. Neither of the Defendants’ responded with a complaint or a claim of their own after being allegedly ordered off the site.

42. In this regard I accept Mrs. Steede's version of events and I find that the Defendants abandoned the site prior to completion. Mrs. Steede was partly responsible for that because of the many change orders that she introduced and the confusion caused by the changes she made to the plans without removing the name of Context. There was also her refusal to pay for additional works.

Was it the Plaintiff or the Defendants who breached the Agreement?

43. I am satisfied and find as a fact that Mrs. Steede was changing the plans as the building works progressed. I reject Mrs. Steede's evidence that she explained to Mr. Bean that she made revision to the plan and presented it to the Department of Planning and it was approved and Mr. Bean accepted it.
44. Her admission for the very first time in cross-examination that she personally made certain revisions to the 2006 plans herself, since the Department of Planning only required that she show the changes, is very important. After Mrs. Steede made the revisions she did not remove the name Context a firm of professional Architects. This left a clear impression that the drawings were prepared by Context. The expert Mr. Perinchief testified that this is something she ought to have done and which would have been done by an architect.
45. Mr. Bean said Mrs. Steede made a number of modifications to the building works. I am satisfied that she did make a number of modifications as the work progressed. The Court finds that there is support for Mr. Bean's allegation that Mrs. Steede did not communicate the changes she had made to the plans to Mr. Bean. Mr. Morton confirmed that to be the position when he visited the site of 6th August 2007. Mr. Morton wrote:-

"...The Contractor complained to me that the owner/applicant was trying to get him to undertake "Unauthorized Work". However, as a result of this site inspection/meeting with all parties involved, I have determined that at this stage of the project there appears to be a lack of communication between the Contractor and owner. The owner has received approval for changes from planning but has not communicated them to the contractor who still insists on working by the original plans that he has submitted his original quotation by..."

46. Further Mr. Taylor submitted that:-

"...it must have been an implied term of the contract that works requested and completed outside the original scope would be paid for at a reasonable price by the Plaintiff. The evidence surrounding the change order in the amount of \$10,000 suggests very strongly that the Plaintiff requested changes and then refused to pay for them.

Both Mr. Eddy and Mr. Perinchief [the Plaintiffs and the Second and Third Defendants experts respectively] agreed that, setting aside any evidence from the parties as to what the Change Order was supposed to deal with in terms of revisions, that \$10,000 was nowhere near the cost to carry out all the changes suggested by the Plaintiff. Mr. Eddy has valued the changes at \$70,000. Mr. Perinchief gave evidence that \$10,000 “was not even in the ballpark. This Change Order shows an extension of the manhole to tank and front porch, move laundry to new location, dig out and rough in bathroom on ground floor of existing home.” Mrs. Steede insisted that the Change Order includes adding the five foot extension and all of the consequent extensions of the walls.”

47. In my judgment the circumstances did not warrant the Defendants completely abandoning the works; they could have worked things out or at least tried to do so. If Mr. Bean was of the opinion that any alterations or additions would cause additional expense he should have informed Mrs. Steede that any such verbal request be put in writing. If Mrs. Steede refused to put her request in writing he should have confirmed Mrs. Steede’s request in writing so the instructions were clear and that he could be paid for any extra work involved. Except for one (1) invoice no extra or variation orders were properly given in respect of a significant number of changes that Mrs. Steede requested.
48. Mr. Bean must accept and share the blame. As an experienced building contractor Mr. Bean ought to have been more thorough when he was preparing the proposal. For example the drawings were incomplete; there were no adequate details for plumbing and electrical works and the cesspit was not even on the plan. A contractor ought to know some things are indispensably necessary to complete the entire works. One cannot have a building without some of these things.
49. All inconsistencies should have been brought to the Plaintiffs attention and should have been resolved before Mr. Bean entered into the contract. At the very least a method for resolving any subsequent difficulties should have been agreed and inserted into the contract given these factors Mr. Bean should have made every effort to resolve this matter.

Conclusion

50. I have carefully considered all of the evidence presented. I find that Mrs. Steede’s acts did not constitute a fundamental breach justifying Mr. Bean and Splash Services treating the contract as at an end and stopping work. Mr. Bean and Splash Services had contracted to build a two storey addition to the Mrs. Steede’s property and renovate her existing home. I am satisfied that they did not complete the works. As they had not completed the works they are liable in damages.

If the Defendants breached the contract what are the Plaintiffs damages?

51. Before giving my assessment of the competing claims it is appropriate to summarise a few of my findings:

The failures of the Defendants to complete the works on time cannot be attributed entirely to the fault of the Defendants as various factors led to this delay.

The Plaintiff must take the blame for some of the problems. Mr. Bean did not know that the drawings were not professionally prepared. It was only during cross-examination that the Plaintiff admitted that she drafted the revisions to the 1996 plans. In so doing she did not remove the name Context - a firm of architects – giving the clear impression that the plans as well as the revisions, were professionally prepared by the architects. Consequently there were discrepancies between the elevations, the upper floor plans and the lower floor plans (documents bundle pages 4-6) making them difficult to read and to understand.

I am satisfied, on the evidence, that the Plaintiff made a significant number of changes to the works as the project progressed. The Plaintiff failed to communicate that she had Planning approval for all the changes that she had made to the plans to Mr. Bean who not surprisingly insisted on working by the original plans that he submitted his quotation on.

Certainly, it was the Plaintiff's obligation to communicate the changes to Mr. Bean. Also, unless otherwise agreed which was not the case, the Plaintiff should have paid a reasonable amount for the changes she requested.

On the other hand there was the problem whereby the Defendants' did not provide an accurate list of each change as it arose and present it to the Plaintiff with the cost to undertake that extra work.

The consequence of the Plaintiff's failure to pay for the extra works was to precipitate Mr. Bean's conduct, at least in part, in walking off the job. Of course as I have already indicated that did not justify his abandonment of the works.

Damages

52. The Plaintiff is entitled to her reasonable costs for completing the incomplete works caused by the abandonment of the contract and repairing any defective works.
53. Mr. Russell Eddy was called as a witness to provide evidence in order to assist Mrs. Steede in presenting her case on damages. He prepared reports dated 13th February 2008, 13th April 2008 and 2nd December 2009.

54. Mr. Eddy's witness statement stated that in 2007 Mrs. Steed requested him to visit the property as she needed advice on what it would cost to complete the construction as the contractors had abandoned the site. His first site inspection was on 15th August 2007. He studied the drawings, from Context architects, which Mrs. Steede gave him. He had the impression the contractors completed two thirds of the contract. He revisited the site on 13th November 2007 and made regular visits between January 2008 until the presentation of his report in 2008. His estimate of \$523,093 to complete the residence was in his report dated 13th February 2008. The Plaintiff claimed \$523,093. That sum was later reduced to \$389,047.80. It was reduced because the Plaintiff, wrongly had included various sums in respect of modification after the Defendants abandoned the site.
55. Mr. Taylor submits that it is conventional for the expert witness to be qualified as an expert at the trial and Mr. Eddy was not so qualified. Therefore, whenever a difference of opinion exists between Mr. Eddy's opinion and that of Mr. Perinchief, Mr. Vickers and Splash's expert, the Court should accept Mr. Perinchief's opinion as he was duly qualified by the Court as an expert. I agree. Mr. Perinchief *curriculum vitae* provides his educational achievements, his affiliations, previous experience including a list of projects in which he has been involved some dealing with issues similar to the case at bar.
56. The Court was satisfied that he had the relevant skill and experience which qualified him as an expert in construction project management and construction project costing.
57. The Court has no information regarding Mr. Eddy's education, training and experience. Also, it is worthy of note that when Mr. Eddy prepared his reports dated 13th February 2008 and 13th April 2008 he did so in order to estimate the cost of completion for submission to the Plaintiff's bank. In preparing his report Mr. Eddy had no regard for the duty of an expert in providing a report to the court, which overrides any obligation to the person from whom the expert receives instructions or by whom the expert is paid. I am not persuaded that Mr. Eddy has the experience and training to give opinion evidence in this case therefore, wherever there is a difference of opinion between Mr. Eddy and Mr. Perinchief, the Court prefers and accepts Mr. Perinchief's opinion.
58. Mr. Perinchief stated that he did not have the opportunity to review the building permit filed at the Department of Planning which would have typically contained the most crucial evidence related to the construction. He was advised that the file has been missing since the last time it was signed out in 2007.
59. The Plaintiff made extensive changes to the works after the Defendants left the site. Mr. Perinchief states that five (5) revisions are noted on the building inspection history. Four (4) were approved subsequent to the date of the Defendant's quotation on 12th September 2006, and three (3) were approved subsequent to the contractor's departure from the site (6th August 2007). The revision which was approved during the contract period is dated 26th January 2007, and encompasses the building extension, together with the porch additions.

He said he carried out a comparative examination of the “red-lined” as built drawings produced and the original contract drawings, together with site photographs, which illustrates the numerous changes (65 in total) that were undertaken after the project commenced.

60. Mr. Perinchief provided an analysis of the cost of the works required to complete the project after Splash and Mr. Bean left the site. This analysis of specific damages is listed at items A to S at pages 7 to 11 of the Scott Schedule which was presented to the Court. The term variation or extra work as used in this contract means alteration or modification of the design, quality or quantity of the work as shown on the contract drawings expressly or impliedly included in the work for which the lump sum was payable.
61. In Mr. Perinchief’s opinion only one of the initial approved building permit revisions issued 19th May 2006 was encompassed within the Splash Services scope of work. He found that all the works not illustrated within the drawing set are in his opinion, beyond the scope of works.
62. Mr. Perinchief carried out an extensive review and analysis of Mr. Eddy’s estimate, which is considered to be the owner’s estimate of the cost of the works required to complete the project after Splash and Mr. Bean left the site. The detailed analysis is present in Paragraphs A-S in the Scott Schedule which I have adopted fully and which is annexed as Appendix one (1).
63. I have noted at paragraph 59 that Mr. Perinchief concluded that there are a total of 65 revisions and or changes, which were not reflected in the originally approved drawings and are outside the scope of the works.
64. He stated *inter alia* the Building Control Department provided final approval of the overall additions on 29th September 2008 which is in excess of one (1) year beyond the time frame during which the original contractor finished on site.
65. Having regard to those factors Mr. Perinchief is of the opinion that the damages implications are as follows:-

<i>“...Original contract sum</i>	<i>=</i>	<i>\$675,800.00</i>
<i>Change order #1</i>	<i>=</i>	<i>\$ 10,000.00</i>
<i>Less payments by Plaintiff</i>	<i>-</i>	<i>(\$571,000.00)</i>
<i>Plaintiff credit (cost analysis)</i>	<i>-</i>	<i>(\$234,041.63)</i>
<i>Contractor compensation (add. works)</i>	<i>+</i>	<i><u>\$ 45,630.00</u></i>
		<i>\$ 73,611.63</i>

Given the negative balance, I am of the opinion that the extent of damages, if a any, amounts to BD\$73,611.63.”

66. The Plaintiff claims damages in the amount of \$389,047.80. I find that the Plaintiff is entitled to the sum of \$73, 611.63 by way of damages for remedial works from the First and Third Defendants.

67. The claim against the First Defendants Mr. Bean succeeds in part. As the independent contractor he is liable in damages in the amount \$62,411.63.
68. The claim against the Second Defendant is dismissed as he never entered into any contractual relations with Mrs. Steede.
69. The claim against the Third Defendant succeeds in part. Mr. Perinchief found that the plumbing works was 60% complete. The actual cost to complete was assessed at \$11,200 or 15.215 % of the overall total cost of the remedial works – see page 25 of the Appendices. Splash Services Ltd is liable to pay the sum \$11,200 or 15.215% of the damages. There was no evidence of any defective work done by Splash Services Ltd.
70. The Second and Third Defendants made a cross-claim against the First Defendant and seek damages and a full indemnity from Mr. Bean if they are found liable to the Plaintiff. In the Courts judgment Splash is liable for the failure to complete the plumbing works which was its sole responsibility. Splash is entitled to be indemnified by Mr. Bean from all other liability to the Plaintiff. Mr. Bean was an independent contractor and all other aspects of the project were his sole responsibility. Splash is not entitled to an indemnity from the First Defendant in respect of the plumbing works which was the sole responsibility of Splash to carry out.

Costs

71. I award the Plaintiff 80% of her costs to be paid by Mr. Bean to be taxed if not agreed.
72. The First Defendant failed to make out his defence I order that he pays the Plaintiff 80% of her costs to be taxed if not agreed.
73. All claims against the Second Defendant have failed and are dismissed. The Plaintiff must pay the Second Defendants cost to be taxed if not agreed.
74. Doing the best I can on the evidence that I have heard and based on my findings I award the Plaintiff 80% of costs against Mr. Bean to be taxed if not agreed. The Plaintiffs claim against Splash fails in part.
75. The Plaintiff claim that Splash failed to complete the plumbing works has been made out I award her the sum of \$11,200 which represents the actual cost of completing the works based on Mr. Perinchief's assessment of the damages – see item Q at page 25 of the Appendices. I award the Plaintiff 10% of her costs against Splash.
76. The Cross-Claim of the Second and Third Defendants are each dismissed. I make no order as to cost on each of the Cross-Claim.

77. I award interest at the statutory rate from 28th October 2008 until the date of Judgment.

Dated the 21st day of March 2011

WADE-MILLER J

APPENDIX 1

The Scott Schedule – Items A-F, Pages 1-12

A	Covered Porches	<p>The only change was an arched edge rather than a straight edge on the balconies.</p> <p>RE: Covered porches were shown on original bid drawings. Estimate did not include the arches so no reduction necessary.</p>		<p>BP: These elements form part of the building permit revision that was approved on 26 January 2007. Hence, they are beyond the original scope of works.</p>	<p>P: \$37,840</p> <p>D: \$0.00</p>
B	Entrances	<p>The only new additions were the side light to the front door and the extended masonry walling.</p> <p>RE: No extra cost to estimate.</p>		<p>BP: These items are covered under the revisions that were approved on 26 January and 26 October 2007. Hence, they are beyond the original scope of works</p>	<p>P: \$14,418</p> <p>D:\$0.00</p>
C	Utility Area	<p>This relates to the pump room which was simply relocated from its original location. The cost would</p>		<p>BP: This is believed to be referring to the exterior structure adjoining the east</p>	<p>P:\$3737</p> <p>D:\$0.00</p>

		<p>have been the same to build.</p> <p>RE: No extra.</p>		<p>wall of the lower kitchen. It does not appear on the original drawings and is deemed to be beyond the original scope of works.</p>	
D	Roofing & Lining	<p>RE: I re-measure 1769.00 square feet (37'3"x 38'2" eave to eave on flat and then factor in slope) 151'0" eaves lining</p>		<p>BP: I calculated a roof plan area of 1123.50 square feet, and a length of 114.5 feet for the leaves. The same unit costs of materials and labour were utilized</p>	<p>P:\$16,293</p> <p>D:\$8,837.75</p>
E	Exterior Doors & Windows	<p>The upstairs doors were not in and the downstairs doors were left unfinished. A total of 5 french doors and 1 single door had to be returned and replaced after the Defendants left the site.</p>		<p>BP: Mr. Vickers stated that the lower level was completed, and the frames were already installed at the upper floor. The upper floor of the original scope</p>	<p>P:\$28,466</p> <p>D:\$6,240.00</p>

				consists of 3 finished doors, and 8 windows. I have allowed for 2 pairs of French door, 1 single French door with 1 sidelight (\$1,500.00 allowance). And the caulking of the 8 windows	
F	Completion of Tank	An overflow also had to be constructed after the Defendants left the site.		BP: The tank was constructed a number of years prior to the commencement of the contract. Hence, clean-out would be the responsibility of the owner	P:\$2807 D:\$60.00
G	Ceilings & Walls	Tray ceilings were necessary as the walls of the upstairs apartment were too high. The stud wall was inserted at Mr. Bean's own suggestion with no mention of additional cost.		BP: I have altered the last 2 elements under this line item, i.e. tray ceiling and stud wall. I noticed 3 tray ceilings on the drawings and calculated a plan area of 555sq.ft. Further, the	P:\$18,593 D:\$9,670.75

				stud wall is believed to be adjacent to the additional cabinet at the upper floor living/dining area, and is not considered to be within the original scope of works	
H	Painting to walls and Ceilings	The exterior was only painted on the west (road) and north side. The east side was left unpainted. The lower level was only primed but not finished.		BP: Mr. Vickers advised that the building exterior was already completed and I removed the exterior wall painting element. Further, he noted that the lower level interior was finished, and only the upper floor interior remained. Hence I halved the 'interior walls' total and added the resulting sum to the ceilings	P:\$21,441 D:\$5,844.80

				amount	
I	Bathroom Ceiling	RE: Agree that this refers to new bathroom.		BP: I believe that this relates to the new bathroom adjacent to the laundry at the lower level. It is outside of the original scope of works and subsequent change order	P: \$0.00 D: \$0.00
J	Chimney Complete	<p>The chimney is on the plans and part of the contract.</p> <p>RE: There is no way a 2 storey chimney can be constructed for \$8,900. That would not even cover a single story chimney.</p>		<p>BP: Due to the nature of the drawings it is unclear to me whether a chimney is actually a part of the project. Also, there are no unit rates applied to the chimney line item in the estimate. Further, the finishes are certainly beyond any anticipated scope. Having recent experience building 3 chimneys, I used a conservative</p>	<p>P:\$21,000</p> <p>D:\$8,900.00</p>

				allowance of 10 working days, 1 mason (\$45/hr), and 1 labourer (\$35/hr), plus a \$2,500.00 material allowance	
K	Tile to Bathroom	RE: Agree that this refers to new bathroom.		BP: Appears to refer to the additional bathroom, which is not a part of the original scope of works	P: \$0.00 D:\$0.00
L	Kitchen Cabinets	It is accepted that some of the cabinetry is an extra in the upper kitchen.		BP: Adjusted due to the increased sizes on both levels. The original layout of the cabinets had a total cumulative length of 33.5 feet, whilst the 'as-built' totals 56.5 feet (as measured on the red-lined as-built drawings). This represents	P: \$42,000 D:\$37,402.53

				an increase of over 65%. Hence, a reduction of approximately 40% was applied to the estimate	
M	Interior Doors			BP: I completed a summation of the materials and labour costs shown on the estimate, and arrived at the figure provided	P: \$9581 D:\$8,960.00
N	Site-works	Boundary walls and a car park did form part of the original contractual plans.		BP: The drawings provided do not provide any details related to this line item. The upper and lower floor plans do not indicate a new pit, boundary walls, or Bermuda stone. Further, the elevations' drawing contradicts	P: \$28,672 D:\$0.00

				the plans. For example, a vague section through a swimming pool is shown on drawing number 6, whilst it does not appear on the upper and lower floor plans. I am of the opinion that this item is not within the original scope of works.	
O	Utility/Storage Room			BP: A summation of the materials and labour gives the total shown	P:\$3606 D:\$3,011.00
P	Existing Building	Agreed.		BP: As per estimate	P:\$115,040 D:\$115,040
Q	Plumbing	The actual plumbing cost to complete was \$48,741.40.		BP: The contract sum is believed to be \$28,000.00. Mr. Vickers advised that the plumbing works were 60% complete.	P:\$16,337 (but see actual cost to complete) D: \$11,200
R	Electrical	The actual electrical cost		BP: The estimate	P:\$27,000 (but see

		to complete was \$56,733.39.		does not provide any rates. Hence, an average of \$12.00 psf for a gross floor area of 2,247 sq.ft. was used. Further, from the building history, the 'rough-in' was completed on both floors. Hence, the electrical was deemed to be at least 30% completed	actual cost to complete) D:\$18,874
S	Contractors Requirements & Profit	RE: Works done piece-meal traditionally cost more and require higher overheads and profit.		BP: From my review of the witness statements, it appears to me that the project was completed by various family members, and small sub-contractors (electrical, plumbing). This confirms the absence of a replacement general contractor. Further, the scope of works	P:\$90,785 D:\$0.00

				<p>shown on the originally approved drawings was substantially complete.</p> <p>Hence, I am of the opinion that the 'contractor requirements' was negated, and that the profit margin did not apply.</p> <p>Typically, whilst a project is underway, a schedule of unit rates is applied to any changes in the scope, and the rates account for the profit margin</p>	
	Total				P:\$497,616 D:\$234,041