# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

**2010: No. 65**

**BETWEEN:**

**EDWARD BENEVIDES**

**GAIL BENEVIDES**

**Plaintiffs**

**-v-**

**ELSWORTH WALKER**

**Defendant**

Date of Judgment: 4th October 2013

P. Harshaw of Canterbury Law Limited for the Plaintiffs;

E. Bailey of Edward P. Bailey & Associates for the Defendant

## JUDGMENT

1. This matter concerns the construction by the Defendant of a swimming pool, pool house and hot tub on the Plaintiffs' property situate in the parish of St. Georges. By a Generally Endorsed Writ of Summons dated the 23rd February 2010, the Plaintiff claims the sum of $110,587.12 in damages for defective workmanship in the construction of said pool, hot tub and pool deck. In the Statement of Claim however the Plaintiff claims $100,484.62 comprising $90,350.00 for rectifying defective work,

and $10,134.62 as the Defendant has signed a debt note for various other costs. Said debt note is a matter of contention between the parties.

**Background**

2. The Plaintiff (hereinafter referring to the first named Plaintiff) obtained the services of an architectural firm which produced plans which ultimately were approved by the relevant government authority for the project. The project was put out to tender by the Plaintiff. The Defendant desirous of performing the construction of the project obtained a copy of the plans from the Plaintiff and submitted a written quote for the project.

3. The quote was presented in written form on paper bearing the Defendant's letter head dated June 4th 2003. It specified in line form various parts of the project with the attendant cost thereof, including labour and material for the pool; labour and material for hot tub and labour and material for the construction of the pool house. It included the cost of sub trades such as a plumber, an electrician and a tiler. The total cost for the project was stated as $118,330.00.

4. Some considerable disparity between the parties' pleadings, witness statements and evidence arises over whether the Defendant's quote amounted to an offer to carry out the construction project or amounted to no more than an estimate. As events turned out, the Plaintiffs engaged the Defendant in the construction project for the price quoted. There is a disparity between the parties as to when the Defendant actually started the work on the site, the Plaintiff's witness statement suggesting 2003 and the Defendant's 2004. Nothing of any significance turns on this, as it is clear from all of the evidence that the construction work was carried out over an extended period of time.

5. In furtherance of the project, prior to the Defendant commencing the job it became clear to the Plaintiff that the excavator (retained solely by the Plaintiff) had incorrectly excavated the site. Some disparity arises over whether the Defendant brought the faulty excavation to the Plaintiff's attention or whether the Plaintiff drew it to the Defendant's attention. It is common ground that the site was over excavated width wise on one end, too deep in another area, and that footings had not been excavated at all.

6. Discussions took place between the Plaintiff and the Defendant as to what was to be done in the circumstances. They eventually agreed a means of remediation of the incorrect excavation. The upshot of this was that the pool width would be decreased by 2 feet to accommodate the narrowest end of the excavation, the wider end of the excavation would be back filled and the corners of the pool would be squared.

7. The overall effect would be that the pool, pool house and spa would be built as indicated by the plan but the pool width would be reduced by 2 feet. It was also agreed that the Defendant would carry out the additional work required for the

remediation and the Plaintiff would pay the Defendant as invoiced as that work fell outside of the works under quote.

8. The excavation company that had wrongly excavated the site had refused to return to the site to correct their errors. They were subsequently successfully sued in the Magistrates' Court by the Plaintiff who recovered a sum that appears in part to be based on the cost incurred on the basis of what the Defendant charged him for remedial excavation work to the site.

**The Defendant's Health**

9. Having extended beyond the time fixed for completion of this trial, the court adjourned the matter on the 20th May 2011 for a date to be fixed for the continuation. The Defendant was still under cross-examination by Mr Harshaw. A date was fixed for the continuation of the trial on the 17th October 2011. Unfortunately prior to that date Mr Bailey filed an affidavit exhibiting a medical report indicating that Mr Walker had suffered from an acute illness and would not be fit to attend court on the date fixed for the continuation.

10. Several medical reports were subsequently filed and the last report dated 16th March 2012 was filed under cover of letter dated the 20th June 2012. The matter came back before the court on 27th June when Mr Harshaw asked for the matter to continue notwithstanding Mr Walker's inability to continue with his evidence. It was clear by then from the medical evidence that the Defendant would not be fit to continue his evidence. Mr Bailey indicated that he wished to call one more witness after which he would close the defence. The court directed in the circumstances that the trial would follow that course.

**Findings**

**When did the Defendant become aware of the defective excavation?**

11. In paragraph 7 of his defence the Defendant claims that he brought the excavation errors to the Plaintiff's attention. However in paragraph 4 of his witness statement the Defendant states that before starting the construction the Plaintiff brought the errors in excavation to his attention. These assertions are clearly in conflict; one would have expected Mr Bailey, counsel for the Defendant, to have noticed this and advise his client of the conflict.

12. It would seem to me that if the Plaintiff brought the problems with the excavation to the Defendant's attention prior to the Defendant submitting his bid, then his quote conceivably would have contained a phrase such as 'subject to alterations to the excavation', or would have indicated that the quote did not cover remedial work for the excavation. This was not the case.

13. Instead, the Plaintiff has exhibited to his witness statement 2 invoices from the Defendant headed 'extra work on pool'. The May 7th 2004 invoice describes excavating and digging foundations for $3,012.50 and the December 22nd 2004 invoice refers to cutting out steps and digging foundation for $1,500.

14. The Defendant has exhibited only the invoice of the 7th May 2004 and states in his witness statement that, that is the only extra that he charged for the pool. In his evidence in court however he admitted that he had the steps to the pool realigned and cut for which he received extra payment.

15. I am inclined to conclude on the balance of probabilities that the evidence shows that the Defendant discovered the problems with the excavation after he had submitted his quote dated June 4th 2003. At the very least I prefer the Plaintiff's position especially in light of the prevarication of the Defendant on the point.

16. There remains however a greater issue to be resolved; whether the quote of the 4th June 2003 amounted to an offer, and whether the Plaintiff accepted that offer, and a binding contract for a fixed price ensued.

**Was there a binding contract?**

17. Mr Harshaw referred the court to Chitty on Contracts, 29th Edition Volume II for its statement on the general principles on the formation of a contract. The authority is clear that there must be an offer, an acceptance, consideration and an intention to create legal relations. Chitty on Contracts speaks to essential terms of a contract and provides that it is for the parties to decide what is important or essential to their reaching agreement.

18. Hudson's Building and Engineering Contracts, 11th Edition Volume 1 paragraph 1-018 speaks to what constitutes an offer. It provides that:

> "An offer must be something which invites, and is intended by the offeror to invite, acceptance, and must be sufficiently definite to be capable of resulting in a contract if accepted. There is, however, no requirement that the word "offer" must be used, and an offer is no less an offer because some word such as"estimate"or "quotation" or even "order" is used."

19. As stated above The Plaintiff's evidence is that the Defendant submitted a quote in writing dated June 4th 2003 based on the supplied drawings. The Plaintiff states that he accepted the Defendant's offer to construct the works for the sum of $118,330.00 inclusive of labour and materials.

20. The Defendant's case, Mr Bailey submits, is that there was never a formal acceptance of the Defendant's quote to carry out the work as stipulated. Instead, the Defendant's case is that he proceeded by way of oral agreement to carry out the said works. The Defendant under cross-examination denied that his quote was ever an offer. In point of fact he disputed the use of the word offer in paragraph 3 of his defence.

21. Further the Defendant's evidence given in the trial is that after discussions on the erroneous excavation he requested that the Plaintiff have the plan redrawn by the architect and resubmitted to the planning department. The Defendant's evidence is that since the cut to the land differed from that on the plan and the dimensions on the pool would be altered, it would be illegal to proceed without going back to the planning department.

22. The Defendant's evidence is that he was not willing to carry out the work without a revised plan approved by the Planning Department. He said that the Plaintiff did not want to incur additional costs to have the plans redrawn, therefore the Plaintiff instructed him to proceed as discussed and without the use of the plans. In the pleadings counsel for the Defendant referred to this as the Plaintiff having suspended the drawings.

23. The Defendant's evidence is that having taken measurements from the plans for the purposes of the quote, he thereafter started the work using those measurements, but never brought the plans back onto the job site. He also said that he feared reprisal from the Planning Department on future jobs if he had on site a plan that was at variance with the actual work found on the site.

24. The Plaintiff's evidence is that he did not think that the plans had to be redrawn as all that was required was a simple adjustment amounting to reducing the width by two feet and squaring the corners of the rectangular pool. His evidence is that he not only paid the Defendant 100% of the quoted amount for the construction of the pool, he in fact over paid him.

25. The Plaintiff's evidence is that he paid the Defendant $142,000 which was the agreed construction price, plus $17,660 for extra work and about $6,000 in over payment. Over payment later resulted in the Defendant signing a debt note for $10,134.62 for work and materials not completed and the cost of correcting the steps and for coping. Repayment of the excess has not been made.

26. There was much ado made by Mr Bailey that in both the Defendant's pleaded Defence and in his evidence there was never any formal acceptance by the Plaintiff of the Defendant's quote. I think by that he meant that a contract did not exist in the usual contractor's standard form document which includes conditions, penalties and time lines and other detailed matters.

27. However Mr Bailey elicited from the Defendant himself during the Defendant's examination-in-chief that the Plaintiff found no fault with Mr Walker's quote, but rather telephoned him and told him that he accepted the quote. Indeed Mr Walker eventually said in evidence "I never said that it was not formally accepted. It had to be accepted for me to, ah, do the work."

28. The Court was faced with a Defendant who admitted in his evidence and demonstrated that he had difficulty reading some words and understanding some

written words. I find it extremely difficult to believe that Mr Bailey had not known of his client's limitation in that regard. Indeed I find it extremely disconcerting. Mr Bailey ought in my estimation to have realised his client's limitation. It was very apparent and became a mounting concern to Mr Harshaw who found it necessary to probe the matter. No doubt Mr Walker was embarrassed for the matter to have come out as it did.

29. Had Mr Bailey been forthcoming about the matter he could have and indeed would have been required to qualify Mr Walker's signature on his statement and affidavit by including a caption that the contents were read over to Mr Walker etc. This was not done and the trial in this matter became bogged down unnecessarily. The Plaintiff's attorney and the court were left with the evidence of the Defendant who had signed documents containing inconsistent statements and who gave inconsistent evidence on important points in the trial. The Defendant's evidence in the circumstances is very unreliable.

30. It is clear to me from the evidence of the Defendant, and I find as fact, that he carried out the construction of the pool works with the benefit of measurements that he took off the plans. He was under no obligation to commence the work once he learned of the over cutting of the site however he assisted Mr Benevides independently of the work he quoted on in sorting out the overcut for which he received separate payment. The original sum quoted for the construction works remained unaltered. The Defendant for his own purposes chose, erroneously in my view, to commence the work without the plans on site.

31. I find on the evidence that a contract for the construction of the pool at a fixed price of $118,330 did exist between the Plaintiff and the Defendant. The contract was a simple one made partly in writing and partly orally. It was partly in writing, that is, the quote was an offer made in writing by the Defendant. The contract was partly oral, that is the offer was accepted by the Plaintiff. Further the evidence indicates that there was no reference made to separate labour and or materials charges. The parties determined in their own way the time line for completion of the construction.

32. The consideration portion of the contract is evidenced by the payments made by the Plaintiff to the Defendant. The extra work is not in contention and both parties agree that the Defendant separately invoiced for that work and was paid by the Plaintiff accordingly. While no terms were fixed for the completion of the project I find that the Defendant commenced working in 2003 and completed the project in 2005.

**The Debt Note**

33. An inordinate amount of time was spent during the trial on the issue of the debt note dated the 1st August 2006. When Mr Bailey attempted to cross-examine the Plaintiff on the debt note, Mr Harshaw became justifiably concerned in my view that Mr

Bailey appeared to be straying from the Defendant's pleaded case into the unchartered territory of new evidence.

34. It became clear that paragraph 17 of the Defendant's defence stood in conflict with paragraph 6 of the Defendant's witness statement. The Defendant denied signing a debt note in his Defence, whereas in his witness statement he stated that he took issue with the debt note as he does not take ownership of any such debt. Mr Harshaw had served a Notice pursuant to Order 27, rule 2 on Mr Bailey requiring the Defendant to admit that his signature was on the Debt Note and that the Defendant had signed it. Again the Defendant's inability to read at a sufficient level became clear from his evidence.

35. Much time was spent and confusion ensued because it appeared that Mr Bailey had not appreciated at the time of drafting the Defence what the debt note concerned. Mr Bailey should have pursued all avenues open to him under the Rules to ensure that he could inspect the note. He purported to write a letter requesting sight of the original note. As events turned out Mr Bailey did not pursue the issue by attempting to schedule a time and place for the inspection.

36. On the third day of the trial the Defendant acknowledged that the signature on the debt note was actually his. In the circumstances Mr Bailey sought leave to amend in order to admit the defendant's signature on the debt note. I allowed the amendment on the basis that the Defendant would be liable in costs. On that basis, as a result, the Defendant's previous incongruous witness statement that he does not take ownership of the debt, morphed into a denial of liability for the document under the doctrine of *non est factum*.

37. The Plaintiff's evidence is that once he determined that he had over paid the Defendant he had various discussions with the Defendant about the overpayment. The Plaintiff invited the Defendant to sign the debt note acknowledging that he had been paid for materials and work that had not been completed. Mr Benevides also attested to including in the note costs associated with correcting the east side of the pool, for coping and for the pool steps. The Plaintiff's evidence is that he explained the document to the Defendant before he signed it. The Defendant's signature was witnessed by a Mr Faria.

The following was included in the debt note:

> "I accept all charges include legal, bank and collection charges that may be incurred as a result of this debt. The discharge of this debt will be provided either directly by my assets or by my estate in the event of my death prior to the payment of the debt."

38. In essence the Defendant's evidence on the debt note is that he did not read the document when it was proffered by the Plaintiff in his office, he just signed it. The Defendant's evidence is that he was not feeling well on that day, had earlier had a

spell of shortness of breath, and was heading a short time thereafter to hospital abroad for heart surgery.

39. Mr Bailey argues that this is a case of *non est factum*, alternatively fraud or mistake of fact. For this he relies on Saunders (Executrix of the estate of Rose Maud Gallie (deceased)) v Anglia Building Society (formerly Northampton Town and County Building Society) and the case of Foster v Mackinnon L.R. 1869 p 704**.**

40. These authorities do not seem to support the Defendant's case in the way that Mr Bailey has argued it or on the facts. The first mentioned case make clear that a plea of *non est factum* can only rarely be established by a person of full capacity. The case shows that it is unlikely to avail a person who signs the document without taking reasonable care to inform himself of its meaning. This principle applies to a person who although not illiterate, has a challenge reading. The second case shows that a fraudulent mis-statement is required to be proved.

41. I find that this is clearly not a case of *non est factum*, nor does it amount to fraud or mistake of fact on the evidence as I find it to be. There is absolutely nothing in the Defendant's defence indicating that he has pleaded that a fraud had been committed by Mr Benevides. There has been no evidence in the case at all that is capable of sustaining such an allegation.

42. Mr Benevides' evidence was that he explained the debt note to Mr Walker over the telephone and that Mr Walker had a clear understanding of what it was. The Plaintiff's evidence was that he had earlier spoken to the Defendant about the debt note and explained that he needed him to sign it. The evidence is that the Defendant had objected once it was explained and wanted something changed which was done and in those circumstances the Defendant came in and signed the note.

43. I am drawn inescapably to find on the evidence that the Defendant is the author of his own demise for not independently acquainting himself with the contents of the debt note before signing it. He is not contending that something different was explained to him other than what is contained in the note. His evidence is that he trusted Mr Benevides and believed that he and Mr Benevides were friends. It was in those circumstances that he said that he signed the debt note.

44. It would appear to me from the evidence and in particular the selected wording above from the debt note that if the Defendant's trust was not misplaced, the friendship may have been unrequited. Mr Benevides stated in evidence that he wanted to get the note signed because he knew the Defendant was weak and was an elderly man in ill health. He seemed in the circumstances to be more concerned with securing money than with Mr Walker's health.

45. Be that as it may, I accept the Plaintiff's evidence that he discussed the contents of the note with the Defendant in circumstances that leave no doubt that the Defendant understood. The Defendant asked for a change to be made; he could have refused to

sign the note. In the circumstances I find that the Defendant knew what he was signing and signed the note. The Defendant is fixed in the circumstances with what he signed.

**The Quality of the Construction**

46. The Plaintiff's case is that the Defendant failed to use reasonable skill and care in the construction of the pool, pool deck and hot tub. That the finished works are not fit for their intended purpose, are not aesthetically pleasing and fail to conform to the drawings supplied for construction of the works.

*The Pool*

47. In particular the Plaintiff complains that the deck surrounding the pool pitches in different directions resulting in water settling on the deck and not draining. His case is that the coping around the edge of the pool is unsightly and in several places is out of line with the edge of the pool. His position is that the finished inside surfaces of the pool are rough as they were not rendered according to the manufacturer's directions which had it been followed would have rendered the surfaces smooth. As a result the bottom and sides of the pool are not smooth.

48. He complains that the water level shows that one end of the pool is higher than the other; the pool deck is up to four inches out of level with the existing deck and the skimmers are misaligned so that one is completely out of water and the other is so placed that the water level is not at an optimum height therefor they are inadequate for filtration purposes.

49. Mr Harshaw submits that one of the terms implied in law into construction contracts is a term that the contractor will use all proper skill and care. The standard required in the particular case is to be gathered from all the circumstances of the contract. He relies on Chitty on Contracts (Vol. II) at 37-071 for that principle of law. He argues that these principles of law arise even to the extent that the Defendant is saying that he did not use the Context plans supplied by the Plaintiff for the construction of the pool.

50. Paragraph 37-074 of Chitty on Contracts speaks to principles of law concerning implied terms in construction contracts as to the fitness of the work. It provides that there can be implied into a construction contract a warranty that the work carried out by the contractor will on completion be reasonably fit for its particular purpose. This implied warranty applies when the following conditions are met:

> "(1) the employer makes known to the contractor the particular purpose for which the building is required;
>
> (ii) the work is of a kind which the contractor holds himself out as performing; and
>
> (iii) the employer relies on the contractor's skill and judgment."

51. However the authority provides that where the contractor is required to carry out the work according to detailed plans provided by a third party then there is little room for implying the warranty. Mr Harshaw submits that to the extent that the Defendant in his evidence denies using the context plans then the Defendant should argue that the implied warranty does not apply.

52. Mr Bailey for the Defendant does not make that argument. He argues that any fault in the construction or completion of the project lies with the Plaintiff because of the original excavator's error in wrongly cutting the site. Additionally Mr Bailey argues that the Plaintiff is to blame for any defect because he did not comply with a legal obligation to obtain a revised drawing.

53. By his reasoning the Plaintiff impliedly provided a disclaimer to the Defendant for defects in the works for breaching his statutory duty under the Residential Building Code 1998. It is the Defendant's evidence and his case throughout his pleadings that the plans or drawings, as they are variously referred to, were suspended or disregarded and he constructed the works without the benefit of the plans.

54. When cross-examined on the issue of the plans the Defendant said "When I gave Mr Benevides the quote, I had all the measurements home. And the measurements, it would come off the swimming pool. That's how come I could do that without a plan."

55. When asked where he got the measurements from Mr Walker replied "From a plan that Mr Benevides gave me." The Defendant was then shown the Context drawings and identified them as a copy or a similar copy to the drawing he had referred to. He went on to say that he had to have the plan in order to make the quote. This evidence stands in direct conflict with the content of the Defendant's list of documents and with replies made by Mr Bailey on the Defendant's behalf to requests by Mr Harshaw for the Plaintiff for further and better particulars.

56. This evidence confirms my earlier finding above that the quote was submitted before the discovery that the excavation was incorrect. This evidence of using the plans to make the quote becomes relevant to certain other principles of law that are relied on by counsel for the Plaintiff.

57. In so far as the Context plans are concerned Mr Harshaw argues that principles of law pertaining to the duty of an architect or engineer (herein after A/E) are to be distinguished from the duty of the contractor. For this he relies on Hudson's Building and Engineering Contracts (hereinafter Hudson's) which provides as follows: At paragraph 1.293:

> "Since the earliest emergence of priced construction contracts for work to be designed or supervised by or on behalf the owner, contractors have sought to escape from their obligations… [W]hen faced with claims for defective work, [contractors] have sought to avoid liability, on grounds variously of causation or estoppel, by blaming the owner's supervisor for failing to detect or correct their work, or to take

> charge of or over the temporary works should unexpected physical difficulties arise during construction. In these attempts they have, in the absence of express provisions, been substantially unsuccessful in the past in all Commonwealth jurisdictions."

Hudson's provides at paragraph 1.295:

> " the A/E's principal area of expertise lies in giving effect to his client's amenity requirements by producing the most suitable permanent work in place to meet those requirements within the limitations of the available site. The contractor's area of expertise, on the other hand lies in the "how" or method, as opposed to the "what" or final result, of construction… it is by the contractor's superior expertise in the "buildability" that he can expect and should be encouraged to succeed in the pricing competition with his tendering rivals.
>
> Thus it is an absolute fundamental of a priced contract for a project designed on behalf of the owner that, in the absence of provisions to the contrary, the owner does not warranty the practicability or buildability of his advisor's design, and on the contrary a contractor, by pricing for that design, does warrant his ability to carry it out and complete it."

58. When asked by counsel for the Plaintiff if he was expected to exercise reasonable skill and care of a competent contractor in constructing the works, the Defendant agreed, stating that he did that without approved plans.

59. The Defendant denied noticing any problems with the pool at any time during the construction or at the time that the pool was being filled with water. This evidence is contradicted by Mrs Benevides who said in the trial that Mr Walker was present when the pool was being filled and the water truck driver said to her in the Defendant's hearing that the pool was not level and the contractor should be sued. Mrs Benevides said that she was embarrassed by the statement and when she looked at Mr Walker he hung his head. Mrs Benevides also testified to the fact that she told the Defendant on two occasions that the steps were crooked.

60. Mr Walker agreed that he had on an occasion subsequent to the completion of the works met with Mr Benevides when Mr Benevides made complaint about the pool and hot tub. His evidence was that prior to that Mr Benevides had not complained about the work once completed. The Defendant stated that while he was prepared to return to the site to address the complaints, the Plaintiff did not want anyone else who had worked on the project returning to the job site, and did not want him returning there. This struck me as odd as the Defendant remained or returned on site to do other work for the Plaintiff not related to the contract.

61. On the facts, I find that the Defendant has prevaricated between using the plans to formulate his quote for the job, and not using the plans for construction of the works; while at the same time using the measurements taken off the plans for the construction.

62. I find that it is clear from the principles of law referred to above, that the Defendant was subject to a duty to exercise reasonable skill and care to the extent that he relied on the plans, because the choices that he made in constructing the works were his own choices and he cannot complain about the fact that the measurement taken off one dimension of the plan had to be adjusted to suit the site as he found it or as it was modified by him.

63. Mr Bailey's argument that Mr Benevides or the architect who drew the Context plan ought to have assisted the Defendant with a new drawing is without merit according to the cited legal principles. Mr Walker had priced his quote with the benefit of the plan and the plan was not found to be faulty. The problem encountered on the site had to do with the excavation, and the Plaintiff paid the Defendant independently of the contract sum to make adjustments to the excavation and the pool at the Defendant's suggestion.

64. The Defendant was also subject to the duty to use reasonable skill and care to the extent that he admits that he disregarded the plan because according to the above principles he built the works according to his own design and not that of another person.

**Visit to the Location of the Pool**

65. The Plaintiff submitted photographs of the pool and surround with his witness statement. These photographs were used for illustration purposes during the trial to facilitate the parties' evidence. At the agreed invitation of Counsel I visited the Plaintiff's property after the conclusion of the hearing. Upon entering the area of the patio looking on to the pool and surrounds all seemed quite attractive, indeed inviting. However as I advanced toward the pool I observed the lack of level between the original patio and the pool deck. The connection between the two is an ungainly downward slope consistent with the Plaintiff's estimate of approximately four inches difference. Mr Walker admitted in evidence that the surface of the pool deck was not level.

66. On a closer view of the pool I could plainly see that the coping was poorly installed and was flush with some edges of the pool yet overhanging other edges. The number of tiles laid vertically up the pool walls was consistent, yet the position of the water line on the steps and on opposing tiled walls was not consistent. I take judicial notice of the fact that water seeks its own level. I could only conclude therefore that this showed that the pool was not level. The pool was full of water. The water surface came up to one of the skimmers on the south west of the pool. The other skimmer was clearly completely out of the water. Overall the appearance of the pool was consistent with the complaints that the Plaintiff has made of it.

67. It is in these circumstances that I find it difficult to believe that the Defendant could say in his evidence that he did not see the difference in the height of the skimmers.

The Defendant told us that his son did the tiling and coping. Again his evidence was that he did not notice the misaligned coping or the difference in the height of the two long sides of the pool.

*The Hot Tub*

68. There was much evidence given on the construction and plumbing of the hot tub. Mr Walker testified that once the hot tub had been constructed Mr Benevides decided to have the tub demolished. The plumber Mr Simmons testified that one day the hot tub was completed and the next day that he returned it had been demolished. His evidence is that another hot tub was built in its place. The Plaintiff denies that the tub was demolished but admits that a portion was taken down for plumbing purposes.

69. Mr Simmons' evidence is that when Mr Benevides told him how he wanted the hot tub reconstructed he told the Plaintiff that he would carry out his instructions but that he would not be responsible for the result.

70. What became clear from the Plaintiff's evidence from a frank admission by him is that the plumbing of the hot tub was not included in the Defendant's quote. The Plaintiff stated that the plumbing around the hot tub that connected with the jets was not part of the quote. Indeed Mr Benevides's evidence was that he paid the plumber separately not just for plumbing the hot tub but also the cost of supplying the plumbing supplies such as the jets and pumps and filters for the hot tub. Mr Simmons confirmed that he had been paid for the plumbing work.

71. The Plaintiff bears the burden of proving his claim against the Defendant for damages resulting from faulty installation of the plumbing in the hot tub. In my judgment the Plaintiff has not proved his case in this regard. The Defendant is responsible under the contract for construction of the cement block or concrete construction of the hot tub. Mr Benevides does not complain of that construction, either before or after demolition took place.

72. To the extent that the Plaintiff's case is that he did not know if the leaks were from the plumbing or the concrete structure, he has not proved that the structure built under the contract is leaking. Further he has not proved that any lines laid under the deck concrete pad are faulty. Just anticipating that they may be is insufficient to amount to a cause of action. Further speculating that the piping to the jets may have come out of plumb or line when the concrete was poured in the block walls is insufficient to found liability on the part of Mr Walker.

73. The contract as agreed by the Plaintiff and the Defendant covered plumbing lines from the pool house to the pool and to the hot tub. In the circumstances of this case I find that the plumbing of the actual hot tub and the installation of the hot tub heater did not form part of the contract and therefore is not covered by the contract. Nor did it form an additional part of the contract by any implication. Discussions with Mr

Simmons about redoing plumbing clearly do not amount to a variation of the original contract.

74. I find that all of the plumbing carried out by Mr Simmons but for that specifically provided for in the contract was done on a priced basis or cost and charge basis between Mr Benevides and Mr Simmons. This is confirmed by the fact that all discussions about the actual plumbing of the hot tub took place between the Plaintiff and the plumber Mr Simmons. Mr Walker was not addressed about it and in my view justifiably did not take part in the discussions.

75. It is clear on the face of the offer document, the so-called quote, that Mr Walker did not include any of the plumbing system in the contract. I also find from the evidence that when a point of contention arose between the parties over the provision of the more specific plumbing services, Mr Benevides conceded that they fell outside of the contract.

76. Mr Walker did select Mr Simmons to carry out the plumbing on the works covered by the contract. However in my judgment it would be wrong in principle for the Court to imply the provision of a warranty by the Defendant in the circumstances as to the quality of Mr Simmons work on the plumbing of the hot tub. The Plaintiff's recourse in that regard, would have to be an action against Mr Simmons.

77. In any event I find that Mr Simmons himself expressly disclaimed any warranty on his work on the hot tub when he told the Plaintiff that he would not be responsible for any problems because the original hot tub had been knocked down. Mr Benevides did not deny that statement. In all the circumstances I accept Mr. Simmons evidence on the demolition of the hot tub and the circumstances of its construction. Accordingly that part of the Plaintiff's claim based on defects with the plumbing of the hot tub fails.

**Limitation Point**

78. Mr Bailey for the Defendant argues that the Plaintiff's case is statute barred. He argues that the accrual date for damages in simple contract as in tort is governed by Section 7 of the Limitation Act 1984 and is 6 years. He argues that in a claim based on simple contract time runs from when the breach occurs, the accrual date, and not on the date when damage has resulted from the breach, as it does in tort.

79. The writ in this action was filed on 25th of February 2010. The finish date of the contract works is therefore pertinent. Neither party gave evidence of that precise date. One of the invoices tendered to the Plaintiff for payment by the Defendant for cutting the steps to the pool and digging the foundation is dated December 2004. It is the Plaintiff's case that time runs from when the completed work is handed over to the owner. Mr Harshaw argues therefore that taking December 2004 as the latest date of the construction then the limitation point is moot because December 2004 to February 2010 is well within the 6 year limitation period.

80. There is a planning inspection history for the project that Mr Bailey drew to the attention of Mr Benevides at one point in cross-examination during the trial. The inspection history indicates that inspections for various aspects of the pool construction which form part of the contract took place in early 2005. The statement of claim asserts that the construction works were completed in 2005. This was not traversed in the defence, or indeed disputed by the Defendant's evidence at all.

81. I find that the correct statement of the law in Bermuda in regards to a simple contract as in this case is that damage from lack of skill and care lies solely in contract, there being no concurrent liability in tort, and is actionable once the damage occurs (see White v Conyers Dill and Pearman [1994] Bda LR 9). Before the contract works had been completed the Defendant had an opportunity throughout to rectify any defect in the works.

82. I accept the Plaintiff's evidence that nearing the end of the pool work he noticed the problems with the pool and drew those complaints to the Defendant's attention. I accept Mrs Benevides's evidence that she drew a problem with the step to his attention. However, I find that the Defendant did not address them.

83. I have already indicated a rejection of the Defendant's evidence that he saw no problems. I also reject his evidence that once he had a conversation with Mr Benevides in his office that Mr Benevides told him he did not want him to come back and address the problems. I address my overall view of the Defendant's evidence below.

84. I find on the facts that the earliest that the pool itself could have been completed was December 2004 but, considered as a whole, the pool work included the pool and the pool deck. This action was filed within 6 years of the completion of the work carried out on the pool, taking December 2004 as the completion date. Therefore this action is not statute barred.

**The Defendant's Incomplete Case**

85. As indicated in the non-contentious background facts above, the Defendant fell ill during the trial and was unable to attend court to continue with his evidence under cross-examination. However he did give evidence on the construction project generally, his method of working and the quality of the workmanship that went into the pool.

86. He stated that he did not see the problems that the Plaintiff pointed out in his evidence and now complains about. His evidence on many points seemed to be confusing as he often contradicted himself. The Defendant's testimony did not correspond with the case that Mr Bailey drafted for him in the pleadings and in other documents relied on in the case. I also observed that the Defendant had memory lapses and often referred to the passage of time since the works had been carried out as a reason for lapses in memory.

87. I am drawn inescapably to doubt that had the Defendant been available to complete cross-examination and re-examination he would have been in a position to alter the course that his evidence had taken. He simply was not a reliable witness on many matters that he spoke on. I make no judgement of his character; I am merely assessing him as a witness in this matter. Mr Walker seemed genial and earnest; however he was genuinely confused on important issues. It is for this reason that I have preferred the Plaintiff's evidence where I have so indicated.

**Quantum**

88. In the particulars of claim the Plaintiff claims a lump sum of $90,350.00 to correct the works undertaken by the Defendant (not including the sum in the debt note). The Plaintiff has not proved his case regarding the hot tub. The Plaintiff has not provided a basis for calculating the cost of the remediation to the hot tub. Had the plaintiff supplied details of the works to be done, that cost could readily have been deducted from the sum he has claimed. The R.E.L. estimate is mentioned in the Plaintiffs list of documents however the Plaintiff provided no further proof of it in trial. If the document listed has a breakdown of works to be rectified then the math could readily be done by the parties.

89. In the circumstances where there is no break down then I am left to do the best that I can do in estimating the costs that should be deducted in the absence of a specified amount. What I can rely on is that in his evidence Mr Benevides indicated that he paid Mr Simmons approximately $4,500 to $5,000 for the plumbing of the hot tub, a drain and the kitchen sink. In my view the hot tub plumbing would clearly have cost the majority of that sum. Further I can take notice from the manner in which the Plaintiff's case has been run that great stock has been placed on recovering plumbing costs associated with the hot tub yet the Plaintiff was unable to pin down the exact cost that he paid; a burden that is his to satisfy.

90. It is to be noted that the cost of remediation does not include any portion of the construction of the pool house at $35,200; the pit at $4,300 and the windows and associated fittings for the pool house at $7,500, as no complaint has been made of those at all. Leaving aside the debt note for the moment, in the circumstances it is clear that the cost of remediation is calculated at a far greater rate than that of the original cost of construction.

91. In the circumstances, doing the best that can be done to make a reasonable assessment I think it fair in the absence of a detailed breakdown in the R.E.L. estimate, that the sum of $90,350 should be reduced by 10% which amounts to $9,035 to reflect the plumbing costs associated with the hot tub.

**Conclusion**

92. The Plaintiff's claim for damages succeeds in part, but fails in respect to the claim associated with the hot tub. The quantum of damages is subject to the following. As to

the sum of the debt note claimed as outstanding at $10,134.62, the court finds the debt note proved. I should point out that there should be no double accounting where amounts claimed in the debt note have been calculated in the remediation sum claimed.

93. Having heard the parties on the issue of quantum, the court is satisfied that the Defendant failed to traverse the sum claimed for repairs to the pool set out in the statement of claim as required by Order 18 rule 31 (3). Further the Defendant failed to address the issue by way of further or better particulars, at the time the issue was raised in the Plaintiff's opening address or at trial. Subject to paragraph 91 above, the court therefore finds the estimated amount for repairs proved.

94. The Plaintiff shall have judgment in the sum of $81,315 in respect to repairs to the pool and the sum of $10,134.62 in respect to the debt note. The Plaintiff shall have cost in respect to the debt note on an indemnity basis. All other cost to the Plaintiff on a standard party and party basis.

95. The plaintiff shall have interest from the date of the writ at half the statutory rate, that being 3 ½ %, and interest from the date of judgment at the statutory rate of 7%.

Dated this day of 2013

_____

Charles-Etta Simmons
Puisne Judge