



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 152

BETWEEN:

BS&R GROUP LIMITED

Plaintiff/Defendant by Counterclaim

-and-

WESTPORT ARCHITECTURE

First Defendant/First Plaintiff by Counterclaim

- and -

C.W. CONSTRUCTION AND LANDSCAPING LIMITED

Second Defendant/Second Plaintiff by Counterclaim

JUDGMENT

Trial on construction subcontracts for carpentry services, determination of the proper defendant and counterclaimant, contractual agreement in respect of building “extras”, repudiation of contract, counterclaim for remedial costs, consequential loss, pure economic loss, reasonable contemplation of remoteness

Date of Hearing: 25 & 26 January, 20, 21 & 22 April, 4 October 2021

Date of Ruling: 22 December 2021

Appearances: **Allan Doughty, MJM Limited, for the Plaintiff**
Frederick Stephen West and Arthur “Tripp” West, Litigants in Person,
for Westport Architecture and C.W. Construction and Landscaping
Limited

JUDGMENT of Mussenden J

Introduction

1. The Plaintiff BS&R Group Limited (“**BS&R**”) is a body corporate which provides carpentry services and is duly incorporated pursuant to the laws of Bermuda. Mr. Anthony Madeiros (“**Mr. Madeiros**”) was the General Manager at all material times. His father Mr. “Tony” Madeiros is also employed at BS&R.
2. At the start of this litigation, it appeared that Frederick Stephen West (“**Mr. West**”) was a sole proprietor trading as Westport Architecture (“**WA**”) offering architectural services. Mid-trial, the position of Westport Architecture changed from sole proprietor to a partnership firm of two people, Mr. West and his son Arthur “Tripp” West (“**Tripp West**”), as set out below.
3. By a Specially Indorsed Writ of Summons (“**SIW**”) issued on 20 April 2015, BS&R commenced the present action for damages for breach of contract against WA. The central allegation was that Mr. West was a sole proprietor architect trading as WA who had contracted with BS&R to provide carpentry services to him on three construction projects and had failed to pay BS&R in full for their services for each project.
4. On 25 June 2015 a Defence and Counterclaim was filed by First Defendant Mr. West who asserted that his construction company C.W. Construction and Landscaping Limited (“**CWC**”) contracted with the Plaintiff rather than WA. Therefore, he countered that CWC

was the proper defendant, and thus added CWC as the Second Defendant¹. In the same pleading, CWC set out that it was the “counterclaimant” and made a counterclaim against BS&R although it also set out that if WA was found by the Court to be the proper defendant then WA would be the counterclaimant.

5. Therefore, from the start of the matter, an issue to be resolved by the Court after trial was the question of who or what was the actual defendant to BS&R’s claim – in other words was it WA the architectural firm, or was it CWC the construction company.
6. The litigation continued over time and on 21 January 2019 leave was granted to amend the Writ to an Amended Specially Indorsed Writ (“**ASIW**”).
7. The trial commenced on 25 January 2021 with evidence given by witnesses for the Plaintiff. On the 26 January 2021 the trial continued when Mr. West was giving evidence in chief and on 27 January 2021 when he was being cross-examined. During that evidence Mr. West made some statements to the effect that WA was actually a ‘partnership’ between him and his son Tripp West. Those statements caused Mr. Doughty for BS&R to request an adjournment of the verbal evidence to allow an application for leave to re-amend the ASIW.
8. On 12 March 2021 after a hearing on the application to amend, I granted leave for BS&R to re-amend the ASIW (“**RASIW**”) which in effect, was to replace “Frederick Stephen West trading as Westport Architecture” with “Westport Architecture, a firm”, that is, a partnership of Mr. West and Tripp West. It still remained an issue for the Court to determine who was the proper Defendant, that is, either WA the firm/partnership or CWC the construction company.
9. For ease of reference, in setting out the pleadings and various issues, generally: (a) I will use the term “WA” for Westport Architect as BS&R was pleading against the sole proprietorship although now it is amended to a partnership; and (b) where the Defendants

¹ BS&R have not conceded that CWC is the proper and/or only defendant.

have pleaded matters in their Defence I will use the term “Defendants” although the Court has determined in this judgment that WA was the actual defendant. However, in my analysis and findings, I will be specific about the party to whom I am referring.

The Pleadings – Statement of Claim, Defence, Reply

10. BS&R’s claim is damages for breach of contract for three different construction projects in Bermuda, at the job sites known as “**Braemore**”, “**Trevena**” and “**Vista Verde**” (the “**Three Jobs**”) as set out below. There was an agreement between the parties in respect of each the Three Jobs (the “**Agreements**”). In total, BS&R seeks from WA \$87,760.28 in damages for breach of contract and as debt for the Three Agreements, being the total unpaid balance on the outstanding invoices that had been issued by BS&R to WA.
11. The Defendants filed a Defence and Counterclaim dated 25 June 2015. The Defence stated that the proper defendant to the claim was the Second Defendant CWC. It stated that to the extent that WA engaged in any negotiations or other interactions with BS&R, WA was acting on behalf of CWC as directors of CWC. Further, the Defendants denied the entirety of the Statement of Claim save where it was expressly admitted or not admitted.
12. BS&R filed a reply to the Defence and Counterclaim dated 13 October 2015. BS&R replied that at all material times, Mr. West and Tripp West held out to BS&R that they acted on behalf of WA and BS&R was never provided with any documentation to suggest that CWC was a party to the agreements. Also, Mr. West made online payments to BS&R from his personal bank account and BS&R never received a payment identified as being made by CWC.

The “Braemore Job”

13. BS&R pleaded that on or about 20 May 2014 WA retained BS&R to provide carpentry services at the job site Braemore. WA had been retained by the owner of the site to provide architectural services for the building site. WA in turn subcontracted with BS&R to provide carpentry services for the specific purpose of building a wooden deck to be attached to the

house on that site (the “**Braemore Agreement**”). Other than which entity was the actual defendant, the Defendants admitted this part of the claim.

14. The agreement between BS&R and WA was reached through verbal representations, architectural plans exchanged between the parties, a written quotation and subsequent directions that extra work² (the “**Braemore Extras**”) be performed by BS&R per the directions of WA. It was agreed that the Plaintiff would bill WA directly for services rendered per the quoted price of \$38,475.00 as well as charge for the Braemore Extras to be billed on a “costs and charge” basis meaning BS&R would charge WA at \$65 per man per hour plus materials for work performed outside the quotation. It was also agreed that after the initial deposit of 50% of the quoted price was paid, that the balance of the quoted price as well as charges for the Braemore Extras would be payable upon completion of the Braemore Job. BS&R proceeded to provide the carpentry services as requested and invoices were issued to WA for payment. Other than which entity was the actual defendant, the Defendants admitted this part of the claim.
15. The particulars of the claim for the Braemore Job are that BS&R invoiced WA a total of \$47,140.75 and WA paid a total of \$44,723.25 leaving a balance of \$2,417.50. BS&R claims that in breach of the terms of the agreement between the parties for the Braemore job, WA has still not paid the outstanding balance of \$2,417.50 and therefore claims the amount pursuant to the breach of WA’s contractual obligations and as debt.
16. The Defendants denied that they owed \$2,417.50 stating that Mr. Madeiros agreed that a payment of \$6,118.25 for the Braemore Extras made on 8 December 2014 was made in full and final settlement of the Braemore job.
17. BS&R in reply denied that it had ever agreed a settlement of \$6,118.25 for the Braemore Extras but that had offered to reduce the bill by up to \$800 which was not accepted by Tripp West.

² In the judgment I will refer generally to “extra work” as “**extras**”.

The “Trevena Job”

18. On or about 12 August 2014 BS&R claimed that WA retained it to provide carpentry services at the job site Trevena. WA had been retained by the owner of the site to provide architectural services in relation to the building site. WA in turn subcontracted with BS&R to provide carpentry services to deal with a punch list of deficiencies (the “**Trevena Punch List**”) that had been presented to the Defendant by the owner of the Trevena site (the “**Trevena Agreement**”). Other than which entity was the actual defendant, the Defendants admitted this part of the claim.

19. The agreement between BS&R and WA was reached through verbal representations and instructions along with guidance provided by the Trevena Punch List. It was agreed that BS&R would bill WA at a rate of \$65 per man hours plus materials. It was also agreed that regular invoices would be issued by BS&R to the WA and that WA would pay those invoices within 30 days of receipt. BS&R proceeded to provide the carpentry services as requested and invoices were issued to WA for payment. Other than which entity was the actual defendant, the Defendants admitted this part of the claim.

20. The particulars of the claim for Trevena is that BS&R invoiced WA a total of \$35,302.78 and WA paid a total of \$3,500.00 leaving a balance of \$31,802.78. BS&R claims that in breach of the terms of the agreement between the parties for the Trevena Job, WA has still not paid the outstanding balance and therefore claims the amount pursuant to the breach of WA’s contractual obligations and as debt.

21. The Defendants admitted that they owed payment to BS&R but that its records indicate that the total cost for the job was \$31,399.43 for which they paid \$3,500 on 24 November 2014 leaving an outstanding balance of \$27,899.43 rather than the sum claimed by BS&R.

22. BS&R replied that the \$3,500 was accounted for and the amount outstanding was \$31,802.78.

The “Vista Verde Job”

23. On or about 8 September 2014 BS&R claimed that WA retained it to provide carpentry services at the job site Vista Verde. WA had been retained by the owner of the site to provide architectural services in relation to that building site. WA in turn subcontracted with BS&R to provide carpentry services on that site, to build wooden cabinets for the kitchen (the “**Kitchen Cabinets**”) and the living room (the “**Living Room Cabinets**”) and to build a kitchen island (the “**Kitchen Island**”) (together the “**Vista Verde Agreement**”).
24. According to BS&R, the agreement between BS&R and WA was reached through verbal representations, plans provided by WA to BS&R (the “**Vista Verde Plans**”) and written quotations. Although a final quotation price was not agreed between the parties, at the time that WA commenced work on the Vista Verde Job, it was agreed that WA would commence work on an understanding that the ultimate charge for manufacturing the cabinets would be \$80,000³. A major part of the dispute is whether it was agreed that the installation of the cabinets would amount to extra work, which would fall outside of the quotation price, and which would be billed on a “cost and charge” basis, meaning that BS&R would bill WA at a rate of \$65 per man hour plus materials (“**Vista Verde Extras**”). It was also agreed that 50% of the quotation price would be paid as a deposit before work was commenced with the balance of the quotation price as well as charges for extra work becoming due upon completion of the project.
25. BS&R then proceeded to provide carpentry services and part of the installation services as requested and directed by WA at the Vista Verde Job and invoices were accordingly issued to WA for payment. BS&R maintain that the fabrication of the cabinets was completed on 14 January 2015 and consequently BS&R invoiced WA on 16 January 2015 for \$48,656.25 for the fabrication of the cabinets.

³ Notice of Admission dated 18 December 2018 confirmed the contract price as \$80,000.

26. The particulars of the claim for Vista Verde are that BS&R invoiced WA a total of \$98,540.00⁴. Once BS&R confirmed that the contractual price for fabricating the cabinets was \$80,000, the 'corrected' invoice total was \$93,540⁵. WA paid a total of \$40,000.00 as a deposit, leaving a balance of \$53,540.00⁶. BS&R claims that in breach of the terms of the agreement between the parties for the Vista Verde job, WA has still not paid the outstanding balance of \$53,540.00 and therefore claims the amount pursuant to the breach of WA's contractual obligations and as debt.
27. In respect of the Vista Verde job, the Defence was originally that there was no agreed final quotation price, although as stated above, \$80,000 was confirmed to be the contract price. Also, there was no agreement that the installation of the cabinets would be extra work on the cost and charge basis plus materials.
28. The Defendants stated that BS&R breached the terms of the Vista Verde Agreement by:
- (a) negligently fabricating the Kitchen Cabinets which were not (i) to the specifications provided; and/or (ii) to a fit and proper standard and by failing to fully remedy those errors;
 - (b) failed completely to fabricate or install the Living Room Cabinets;
 - (c) failed to complete the fabrication of all cabinetry by the agreed deadline of early November;
 - (d) failed to complete the Vista Verde job in its entirety by the agreed deadline of early December 2014; and
 - (e) left the Vista Verde job when it was less than half completed in repudiation of the Vista Verde Agreement.
29. The Defendants further stated that the Vista Verde Agreement did not authorize BS&R to charge additional fees for installation beyond the agreed fixed fee of \$80,000 and further or alternatively, the installation fee quoted by BS&R was excessive, was not agreed, and was not a true reflection of the work completed or the number of man-hours required for the work alleged.

⁴ Comprising: (a) Cabinet fabrication costs of \$85,000 plus upper Kitchen Cabinet refabrication costs of \$3,656.25 for a total fabrication costs of \$88,656.25; and (b) installation costs and Extras of \$9,883.75 for a total of \$98,540.

⁵ Comprising: (a) Cabinet fabrication costs of \$80,000 plus upper Kitchen Cabinet refabrication costs of \$3,656.25 for a total fabrication costs of \$83,656.25; and (b) installation costs and Extras of \$9,883.75 for a total of \$93,540.

⁶ WA was later given a credit of \$1,500.00 per Notice of Admission dated 18 December 2018 which confirmed a set-off of \$1,500.00 for a removed appliance.

30. Consequently, the Defendants denied that they owed the outstanding balance of \$53,540.00 and that they were in breach of a contractual obligation to BS&R under the Vista Verde Agreement. They maintained that BS&R breached its obligations under the Vista Verde Agreement and left the Vista Verde job when it was less than half complete with the result that the completion required the engagement of other sub-contractors and was significantly delayed beyond the early December completion deadline. Therefore, there was no balance owed to BS&R by the Defendants.

31. BS&R replied that:

- a. It was not negligent in the provision of services and that the cabinetry was constructed according to the Vista Verde Plans and drawings provided by Tripp West which specified the dimensions to which all Kitchen Cabinetry were to be built. BS&R state that after the cabinetry was built, errors by Tripp West were identified who requested BS&R to alter the dimensions which BS&R then billed as extras.
- b. The landfall of Hurricane Fay and Hurricane Gonzalo in October 2014 caused a loss of electricity which affected production of the cabinetry;
- c. The deadline dates lacked specificity and were extended by Tripp West due to the hurricanes and the errors in dimensions;
- d. It had not failed to completely fabricate the Living Room Cabinets and denied that it was required to install it as part of the contract price. Also, once Tripp West made it clear that the invoices for the Vista Verde job were not going to be paid, that BS&R withheld the completed Living Room Cabinets from the Defendants, the same being stored in BS&R's premises.
- e. It denied that it had left the site when the Vista Verde job was less than half completed. It averred that the contract was repudiated when it became clear that WA had breached the Vista Verde Agreement, at which point BS&R only had to deliver the Living Room Cabinets per the contract price which would be installed and charged as extras.
- f. It denied that the price of \$80,000 included installation which was to be extra work charged at 'cost and charge'. It also denied that the extras charges were excessive

or went beyond what would be charged by a reasonable carpenter on a 'cost and charge' basis at fair market value.

32. The Defendants maintained that BS&R's negligence caused remedial costs to be incurred by the Defendants to remedy such negligence and such remedial costs should be offset against any sums found to be due to BS&R. The other sub-contractors were engaged to do various tasks as following: (a) remedy BS&R's negligently fabricated Kitchen Cabinets; (b) fabricate the Living Room Cabinets that BS&R failed to fabricate; and (c) finish the installation at the Vista Verde Job. The particulars of the remedial costs incurred for a total of \$26,316.56 were as follows:

- a. Maurice Shaiffer (Carpenter) – provided works to rectify the installation of the BS&R Kitchen Cabinets - \$2,017.20;
- b. Bermuda Build (Carpenter) provided fabrication of two bookcases for the living room - \$18,750.00;
- c. Carvalho Construction (Carpenter) provided fabrication and finishing of trim its to frame appliances and to rectify installation of the Kitchen Cabinets - \$4,483.00; and
- d. Custom Painting to match existing cabinets - \$1,066.36.

33. The Defendants maintained that to the extent that BS&R proves that it is entitled to any sums under the Vista Verde Agreement, BS&R is only entitled to a claim for loss of profit. This is on the basis that had BS&R honoured the Vista Verde Agreement, BS&R would not have derived a profit of \$40,000 from the balance of the contract works.

34. BS&R replied that:

- a. Any need to hire other subcontractors or remedial costs were entirely WA's fault for breach of contract and negligence in mistakes made in the Visa Verde Plans provided by Tripp West;
- b. All Kitchen Cabinets were installed pursuant to specifications provided by Tripp West and remedial work required for trim kits and frame appliances was a result of Tripp West's negligence;

- c. The Living Room Cabinets would have been delivered had WA not breached the terms of the Vista Verde Agreement; and
- d. As it is claiming in Contract and in Debt, it is accordingly entitled to claim the entire amount of the outstanding invoices claimed on the Vista Verde job.

The Pleadings – The Counterclaim and Defence to the Counterclaim

35. The Defendants filed a Defence and Counterclaim dated 25 June 2015.

36. CWC, as counterclaimant, claimed that BS&R was negligent and/or in breach of the Vista Verde Agreement and consequently suffered loss and damage. Also, if the Court determined WA to be the proper party to the Vista Verde Agreement, then WA has suffered loss and damage as a result of BS&R's breaches and counterclaims against BS&R for the same. For ease of reference in setting out the counterclaim at this stage of the Judgment, I shall use the term "Counterclaimant", meaning either WA or CWC.

37. The Counterclaimant pleaded that as a result of such negligence and breach including the delay to the completion of the Vista Verde job, it was compelled to: (a) hire a Project Manager to oversee the remedial work set out above at the Vista Verde job; and (b) reduce its charges to the client by reason of the same. The Counterclaimant counterclaims for that loss and damage as follows:

- a. The sum paid by the Counterclaimant to hire a Project Manager, Ms. Martha Gould ("**Ms. Gould**") during the period January 2015 to May 2015 to coordinate the remedial works at the Vista Verde job for the sum of \$10,000; and
- b. The sums deducted by the client at the Vista Verde job, being (i) a reduction of \$10,000 by reasons of the negligence and/or breach of contract by BS&R; and (ii) the sum of \$1,500 deducted by the client for an appliance that BS&R removed from the site prior to the renovation works at the Vista Verde job.

38. BS&R filed a Defence to the Counterclaim dated 13 October 2015. It stated that:

- a. BS&R denied it breached the Vista Verde Agreement and any damage suffered by the Counterclaimant was as a result of its breach of contract and/or its own negligence;
- b. BS&R denied that CWC suffered any loss or damage as BS&R never had any contractual relationship with the CWC;
- c. The Counterclaimant cannot claim against BS&R simultaneously for breach of contract and in tort. Further, at no material time did BS&R owe CWC a duty of care as BSR was unaware that CWC claimed to be the primary contractor in charge of the Vista Verde job; and
- d. BS&R denied that it was in any way liable to the Counterclaimant.

39. By an Order dated 4 July 2019 and 11 March 2020 the Counterclaimants were granted leave to file Particulars of the Counterclaim in the form of a letter which was filed and dated 10 February 2020 claiming \$297,314.50 as set out below. BS&R filed a Defence to the Particulars of the Counterclaim denying the entirety of the Counterclaim except where admitted.

- a. \$12,800 for four days in Court in February 2020 for Mr. West and Tripp West. BS&R denied this claim on the basis that they were costs as opposed to damages;
- b. \$180,000 for contractor fees for a construction job not awarded by their client in 2018/2019 (the “**Vista Verde Potential Renovation Job**”) due to the deficiencies and delays caused by BS&R on the Vista Verde job which resulted in considerable losses for WA. The Vista Verde Potential Renovation Job for the same Vista Verde client was a full home renovation project with architectural fees of \$65,000 and construction costs estimated to be \$1,020,000 with overheads and profits of \$180,000. BS&R denied this claim for the following reasons:
 - i. If the claim is alleged breach of contract, BSR never had a contractual relationship with CWC;
 - ii. If the claim is alleged breach of contract, it was never in the contemplation of BS&R at the time the Vista Verde Agreement was formed that CWC

- would lose further work, that is the Vista Verde Potential Renovation Job, if that contract was breached;
- iii. If the claim is alleged breach of contract and alleged negligence, the damage claimed was too remote given the passage of time between the alleged breaches and the alleged loss;
 - iv. If the claim is alleged negligence, BS&R did not owe CWC a duty of care as BS&R was unaware that CWC was involved in the Vista Verde job; and
 - v. If the claim is alleged negligence, any negligence was due to the contributory negligence of Tripp West in respect of failing to adequately manage the project, creating problems with tiling schedules, ordering the incorrect refrigerator, dealing with BS&R in bad faith and breaching the terms of the contract in failing to pay the Travena invoice until BS&R agreed to: deliver the already finished cabinetry for the Vista Verde job, write off the remaining \$2,417.50 from the Braemore job, give a \$5,257.78⁷ discount on the Travena job, and give a \$23,215.28⁸ discount on the Vista Verde job. BS&R maintained that the bad faith is what led to the breakdown in the working relationship between BS&R and the Counterclaimants.
- c. \$65,000 for architectural fees for the Vista Verde Potential Renovation Job not being awarded by their client in 2018/2019; BS&R denied this claim for the following reasons:
- i. If the claim is alleged breach of contract, it was never in the contemplation of BS&R at the time the Vista Verde Agreement was formed that WA would lose further work if that contract was breached;
 - ii. If the claim is alleged breach of contract and negligence, the damage claimed was too remote given the passage of time between the alleged breaches and the alleged loss; and
 - iii. If the claim is alleged negligence, any substantive delay that occurred on the Vista Verde job arose from the contributory negligence of the Counterclaimants in that the plans drawn did not reflect the dimensions

⁷ Later corrected to \$4,802.78

⁸ Later corrected to \$17,760.28

required by the client and the Counterclaimants failed to adequately review those plans and discover any errors.

- d. \$2,750 for mediation fees in June 2019. BS&R denied this claim as it did not arise from a cause of action known to law;
- e. \$26,764.50 for legal fees in 2017/2018. BS&R denied this as it was a claim for cost as opposed to damages; and
- f. \$10,000 as set out in the original counterclaim. BS&R denied this claim.

The Evidence – The Plaintiff’s Case

- 40. The Plaintiff called three witnesses – Donnie Matthews (“**Mr. Matthews**”) who worked for BS&R, Mr. Madeiros and construction and quantity surveyor expert witness Timothy Berry (“**Mr. Berry**”).

Plaintiff’s Case – Donnie Matthews – Evidence-in-Chief

- 41. Mr. Matthews made a witness statement dated 18 July 2018 which stood as his evidence in chief. In summary, he stated that he was employed as carpenter at BS&R since August 2013. He recalled that he was told by Mr. Madeiros that BS&R would be building cabinets for WA for the Vista Verde job. He recalled that in October 2014 Hurricane Faye and Hurricane Gonzalo caused BS&R’s carpentry workshop to be out of power for two weeks. When that power was restored he began working on cutting the wood for the Vista Verde cabinets. Thereafter, he focused on fabricating the Kitchen Cabinets which were delivered in mid-December. He recalled refabricating some of the upper Kitchen Cabinets as the original set were too small for the client’s plates.

- 42. Mr. Matthews stated that after refabricating the upper Kitchen Cabinets he then started working on the Living Room Cabinets which parts had already been cut out. According to his timesheets, he began work on the Living Room Cabinets on 17 December 2014 and completed them on 19 December 2014 when he prepared them for transport to Vista Verde. He exhibited a photograph of the Living Room Cabinets which he stated he took and he

exhibited the photograph details which showed that it was taken at 11:53am on 20 January 2015 at Upland Street, Bermuda⁹. He stated that by that day, the Living Room Cabinets had been sprayed, fitted, put together and were sitting in the carpentry shop ready to go. He recalled attending Vista Verde for the installation of the Kitchen Cabinets.

Plaintiff's Case – Donnie Matthews – Cross-Examination

43. Mr. Matthews was cross-examined. He stated that he works with Mr. Madeiros, they have lots of communication and he worked from the Visa Verde Plans which were supplied to him. He said that he recalled a time when Mr. Madeiros left the business because of a dispute with his father Tony Madeiros but that he continued to work in order to get paid, noting that when Mr. Madeiros and Tony Madeiros did have disputes the business continued operating. He said that he knew they had to be completed for Christmas and everything went smoothly with the Kitchen Cabinet installation except for the upper Kitchen Cabinets in respect of the depth issue. He stated that the standard depth for upper kitchen cabinets is 12” but they had to change them to 14” or 16”. He stated that in respect of the lower Kitchen Cabinets, it was no big deal to provide the filler pieces to make up for the differences with appliances and the wall – it was a minor issue that happens when the appliances are not on site or on island. He did not recall if he had the appliance specifications.

44. Mr. Matthews stated that after installation of the Kitchen Cabinets he worked on the Living Room cabinets but he did not come to the site to confirm the measurements as they were given to him and it was straightforward. He said that he built the Living Room Cabinets and once they were sprayed they were packed in a container in order to keep the carpentry shop clear.

⁹ I note that BS&R is located near the junction of Middle Road and Upland Street, Devonshire Bermuda.

Plaintiff's Case – Anthony Madeiros – Evidence-in-Chief

45. Mr. Madeiros made a witness statement dated 20 September 2016 which stood as his evidence in chief. He gave further evidence in chief during the trial. He exhibited various items including: (a) correspondence between the parties; (b) a roll of design plans provided by WA for the Braemore Job and the Vista Verde Plans which included clean copies and markups; (c) photographs for the Braemore and the Vista Verde jobs (the “**Photos**”); and (d) other documents including BS&R invoices and worksheets. He described the pictures pointing out various details. He described each page of the Vista Verde Plans pointing out various details noting the original drawings, then markings made in handwriting, which generally were changes to the Vista Verde Plans made as a result of discussions with Tripp West.

46. In his statement Mr. Madeiros stated that he was the General Manager of BS&R, a carpentry business that amongst other things build decks and manufactures and installs cabinetry. He stated that he knew Mr. West professionally as an architect and the head of Westport Architecture. Through the litigation he learned that Westport Architecture was not a company. In his role at BS&R and personally, he had never heard of CWC.

Braemore Job

47. Mr. Madeiros explained the background of working with WA. Around March 2014 he had discussion with Tripp West who he knew to be the son of Mr. West and who worked for his father. They had some discussion about WA retaining BS&R to build a wooden deck on the Braemore job. The email correspondence to Tripp West used the email address tripp@westportarchitecture.bm and there was no mention anywhere in the documentation about CWC. They had email and verbal discussions settling the terms of the Braemore job and it appeared that Tripp West was managing the project on behalf of WA. There were agreements on various matters including the quoted price of \$38,475, initial deposit of 50% which was paid out of Mr. West’s personal bank account, rates for Braemore Extras such extras to be paid at job completion with the balance, use of “ipe” woods for some aspects and “accoya” wood for other aspects. There was nothing in the quotation that factored in the labour and materials for oiling the wood.

48. Mr. Madeiros stated that on or about 4 July BS&R commenced the work and Tripp West agreed to several change orders resulting in Braemore Extras' costs: (a) Oiling the wood with Braemore Extras' costs of \$3,770; (b) changing the deck layout from a "V" shaped pattern to a herringbone pattern with Braemore Extras' costs of \$1,560; (c) changing the railing design with Braemore Extras' costs of \$1,657.50; (d) building the shower screen with Braemore Extras' costs of \$1,820; and some other extras of small amounts.
49. Mr. Madeiros stated that WA made payments of the deposit of \$19,237.50, the balance of the quoted price of \$19,237.50 and \$6,118.25 leaving a balance of \$2,417.50. He denied that he agreed to write the bill down to \$6,118.25 or provide any discount and that BS&R's work was billed in an excessive or unreasonable manner.

Travena Job

50. Mr. Madeiros stated that while working on the Braemore job Tripp West asked him to assist with the Trevena job by working on the Trevena Punch List. He referred to email correspondence and that at no time ever was there a mention of CWC. They agreed a rate of \$65 per man per hour and a total of \$35,757.78 was billed to WA for work between August and November 2014 of which \$3,500 was paid to BS&R from Mr. West's personal bank account. He clarified a few issues with the invoices noting that the actual amount claimed at the time of the trial was \$29,142.78.
51. Mr. Madeiros stated that in November 2014 he saw a truck bearing the name of "C.W. Construction Limited" being driven by Mr. West onto the Trevena job. On one occasion when helping Mr. West fix a loose muffler on the truck he asked him what did "C.W." mean to which Mr. West replied "Don't worry about it. It's an old company".

Vista Verde

52. Mr. Madeiros stated that in or around August or September 2014 while the Trevena job was ongoing, Tripp West asked him if BS&R could assist WA in providing Kitchen Cabinets, a Kitchen Island and Living Room Cabinets at Vista Verde. Initially Tripp West met with him and his father Tony Madeiros at the BS&R shop to review the Vista Verde

“Floor Plans”¹⁰. A quote of \$102,000 was prepared for the construction of all of the Kitchen Cabinets, the Kitchen Island and the Living Room Cabinets. He referred to exhibited correspondence pointing out that nothing in the quotation states that BS&R would install the any of the cabinets of the kitchen island. He pointed out that there was a Westport logo on Floor Plans and a notice (the “**WA Notice**”) which said “*All drawings and specifications as instruments of service are the exclusive property of the agent F. Stephen West. Any reproduction in whole or in part is prohibited without the prior written consent of the agent. ©*”. As a result of the logo, the WA Notice and the email addresses he believed he was dealing with WA when he drafted the quotation.

53. Mr. Madeiros stated that around 8 September 2014, as a result of Tripp West informing him that the quote of \$102,000 was too high, Tripp West met with him and his father again to see if the costs could be reduced, marking up the Floor Plans during the discussions. Thereafter, a revised plan was drawn by WA¹¹ and BS&R provided its ultimate quotation and operated from the revised plans. Mr. Madeiros stated that some significant details were as follows:

- a. The upper part of the Kitchen Cabinets showed a depth of 12”. Mr. Madeiros sates that he queried this dimension as the standard for upper cabinets is 12½” but that Tripp West confirmed the 12” depth to be correct calling it a “Westport Cabinet’.
- b. The quote of \$85,000 caused Tripp West to indicate that it was still too high, with Mr. Madeiros replying that the bill would be between \$80,000 to \$85,000;
- c. At no time was there a discussion of installation charges; and
- d. On 18 September 2014 Mr. West paid the deposit of \$40,000 to BS&R from his personal bank account.

54. Mr. Madeiros set out the chronology of events which included:

- a. On 6 October 2014 Nathalie Dyrli (“**Ms. Dyrli**”) of WA sent a Schedule of Work (the “**Schedule**”) indicating: (i) Demolition beginning on 5 November 2014; (ii) electrical rough in taking place on 10 November 2014; (iii) tiling taking place on

¹⁰ Pages 4 and 5 of the exhibited Roll of Plans

¹¹ The Revised Plans included a “clean copy” and a “working mark-up” as exhibited

13 November 2014; and (iv) Kitchen Cabinets to be installed on 19 November 2014 although BS&R had never agreed to installation;

- b. On 9 October 2014 he purchased plywood for the cabinets;
- c. On 12 October 2014 Hurricane Faye made landfall knocking out power at BS&R for 4 ½ days and being restored on 16 October 2014;
- d. On 15 and 16 October 2014, in preparation for the imminent arrive of Hurricane Gonzalo, he and two other BS&R carpenters assisted Mr. West in boarding up his residence at no charge with the result that no work was performed on the cabinets on 16 October 2014;
- e. On 17 October 2014 Hurricane Gonzalo made landfall knocking out power at BS&R until it was restored on 23 October 2014;
- f. On 23 and 24 October 2014 he and Tony Madeiros attended Vista Verde to take and confirm gross measurements to ensure the Kitchen Cabinets would fit within the walls of the kitchen;
- g. Shortly afterwards, there was a meeting at Vista Verde attended by Tripp West and all the sub-contractors. At that meeting he asked and Tripp West confirmed that BS&R were to do the installation although he did not understand the installation cost to be part of the agreed quotation. He did not provide a quotation for installation at that time as it was impossible to accurately determine the hours required to do the installation;
- h. BS&R began measuring the plywood on 24 October 2014 and cutting it on 27 October 2014 returning to Vista Verde site for further measurements on 2 November 2014;
- i. On 6 November 2014 Ms. Dyrli from WA emailed saying the tiling date had to be pushed back as the tile had not arrived in Bermuda and demolition date had to be pushed back to 17 November 2014, 12 days on from the original demolition date;
- j. Also on 6 November 2014 Mr. Madeiros emailed Tripp West asking for payment for invoices for the Braemore and Trevena jobs that were past due noting that he hoped they would be paid before delivery of the cabinets to Vista Verde;
- k. Tripp West emailed to say he wanted the tiling to commence on 21 November 2014;

- l. On 14 November 2014 Tripp West emailed a request for a subcontractors meeting at Vista Verde on 17 November 2014 whilst stating that demolition work would begin on 19 November 2014 and that the kitchen had to be ready by 24 December 2014;
 - m. In late November he met with Tripp West to design the Kitchen Island which design could not be fully fabricated as the Building Code required there be at least 36 inches from countertop of the Kitchen Island to the nearest fixed structure. So it was only after all cabinets were installed could the Kitchen Island be built to code; and
 - n. On 27 November 2014 there was some correspondence about the cutout for the trash cans which had yet to be provided.
55. Mr. Madeiros stated that the Kitchen Cabinets were ready to be installed by 5 December 2014 and BS&R started delivering the Kitchen Cabinets to the Vista Verde job but they could not be installed on that date as the tiling had not been completed. The Kitchen Island was delivered to the Vista Verde Job on 18 December 2014.
56. Mr. Madeiros stated that on 8 December 2014 the tiling was finished but the electrical works were not completed as the Vista Verde Kitchen Plans did not show where the electrical receptacles were going to be. At the request of Mrs. Thorson-Gould, the Project Manager he helped to mark out where the electrical line channels were going to be cut. On 9 December 2014 he began the installation of the lower Kitchen Cabinets and the lower appliances were put in place for marking purposes.
57. Mr. Madeiros stated that on 10 December 2014 Tripp West called him to complain that BS&R had built the Kitchen Cabinets to the wrong dimension as the client had tried to fit his plates into the cabinets but that the cabinets were too small. Heated discussion followed thereafter. Further discussions and review of the Vista Verde Kitchen Plans showing no change to a 12" depth took place with Mr. Madeiros insisting that refabrication would have to be an extra cost to WA and WA insisting the cost should be borne by BS&R. In any event, the upper Kitchen Cabinets were refabricated during the period 13 – 16 December 2014 using five BS&R carpenters for a total of 40.75 man hours with the cabinets delivered

to Vista Verde on 17 December 2014. However, this caused delays with completing the Kitchen Island and the Living Room Cabinets.

58. Thereafter, further problems with the Kitchen Cabinets, the refrigerator, installation, dimensions, other works were highlighted by Tripp West as the Christmas Eve deadline quickly approached. At one point on 20 December 2014 Mr. Madeiros and Mr. Alexander DeCouto, who was then a subcontractor of BS&R, used a jackhammer to cut required channels for the hood exhaust resulting in further Vista Verde Extras. It was at that time that the relationship between Mr. Madeiros and Tripp West deteriorated significantly.
59. Mr. Madeiros stated that by 23 and 24 December he had attended Vista Verde to do minor touchups on the Kitchen Cabinets and then took a break for Christmas. In January 2015 work resumed with WA sending a Vista Verde Punch List to all subcontractors with some tasks for BS&R to complete. The Living Room Cabinets were completely finished by 14 January 2015.

Payment issues with all the jobs – Braemore, Trevena and Vista Verda

60. Mr. Madeiros stated that concurrent to the Kitchen Cabinet installation issues in December, other issues developed in respect of the payment by WA for all three jobs. In essence he was trying to ensure that BS&R was being paid by WA for the past due invoices for the Trevena Job and the Braemore Job. He became concerned that Tripp West was holding back payment for the Trevena Job and the Braemore Job until the Vista Verde cabinets were fully delivered and installed. He told Tripp West that the Living Room Cabinets could not be completed as his carpenters were working on the Kitchen Cabinets installation and could not be delivered in any event as the living room was full of kitchen items and tools.
61. Mr. Madeiros stated that on 8 December 2014 he declined other work from Tripp West as BS&R was busy and they could revisit further work once WA was current on payments with Tripp West replying that he needed all the Vista Verde Kitchen Cabinets, Kitchen Island and Living Room Cabinets in place by the following week to process payment and he would settle Travena and the Vista Verde jobs. Mr. Madeiros stated that he continued to ask for payment for the various jobs:

- a. On 11 December 2014 he asked Tripp West about the overdue invoices for the Travena Job and the payment timeline;
- b. On 16 December 2014 he again asked Tripp West about payment for the Trevena Job reminding him about receiving payment shortly after work was performed;
- c. On 8 January 2015 he was asking for payment for the fabrication and installation of the Kitchen Cabinets and prior to delivery of the Living Room Cabinets;
- d. On 16 January 2015 he sent the final invoices for the Vista Verde job which included:
 - i. Invoice # 20964 dated 29 December 2014 of \$9,883.75 for the installation (which included install of \$8,433.75, labourer of \$1,100 and materials of \$350);
 - ii. Invoice # 20980 dated 16 January 2015 of \$48,656.25 for the kitchen renovation which included (cabinet fabrication of \$85,000 plus change order of \$3,656.25) less the \$40,000 deposit. Once the Notice of Admission was filed admitting the \$80,000 fabrication price, then the real value of this invoice was \$43,656.25; and
 - iii. A statement that he would be happy to do the Vista Verde Punch List tasks when he delivered the Living Room Cabinets;
- e. Shortly thereafter, he received a call from Mr. West who asked him to deliver the Living Room Cabinets without payments which he refused to do with Mr. West asking him to accept a smaller payment than what was invoiced. On 22 January 2015 he wrote to Mr. West and Tripp West setting out some terms for delivery of the Living Room Cabinets on the basis of a schedule of payments for the Three Jobs;
- f. On 29 January 2015 Tripp West told him that he was only prepared to pay for the Travena Job to get the Living Room Cabinets released, he would not pay anything for the installation of the Kitchen Cabinets or the Living Room Cabinets and blamed BS&R for deficiencies at Vista Verde which he refused to accept. He was of the view that Tripp West was trying to get him to agree a significant write down of invoices and to intimidate him. He replied that he would not be bullied to provide

work without payment and that once WA paid the overdue invoices he would release the Living Room Cabinets;

- g. On 11 February 2015 there were further exchanges when Tripp West tried to rebid the Vista Verde Job, complained of poor workmanship and deficiencies and claimed there was no breakdown of the charges offering to pay in full for the Trevena Job, \$30,000 for the Vista Verde cabinets and \$3,500 for the installation, noting that if the terms were not agreed then WA no longer wanted the Living Room Cabinets, instead getting them from another source; and
- h. On 14 February 2015 Mr. Madeiros replied to Trip West denying the allegations, accepting the full payment for the Trevena Job provided it was not contingent on writing off or down any other invoice due and providing a breakdown of charges.

Plaintiff's Case – Anthony Madeiros – Cross-Examination

62. Mr. Madeiros was extensively cross-examined by Tripp West.

Braemore Job

63. Mr. Madeiros stated that they had numerous meetings and discussions about the Braemore Job before work commenced. Once the work commenced Mr. West and other WA staff members came on site with Tripp West visiting a few times. He agreed the herringbone change and railings change were significant but had enhanced the Braemore Job. He stated that he was not required to produce formal written change orders.

64. Mr. Madeiros stated that for the Braemore Job there was good collaboration and communication between BS&R and WA.

Trevena Job

65. Mr. Madeiros stated that he met with Mr. West and Ms. Gould of WA about the long Trevena Punch List. He stated that he did not think he was hired at the Trevena Job because of his success at the Braemore Job, rather because Tripp West thought he was young and

dumb. In any event, he had many conversations and emails showing that the work was being done on a cost and charge basis.

66. Mr. Madeiros stated that for the Trevena Job there was also good collaboration and communication between BS&R and WA along with some vague sketches from Mr. West but not specifics.

Vista Verde job

67. Mr. Madeiros stated that Tripp West was looking to source local fabricated cabinets as there were delays in getting custom cabinets delivered on island within his time frame. He based his quotations on labour and materials. He recalled that they were able to reduce the original quotation by eliminating the 'bells and whistles' getting to a lower price. He recalled that there were no timelines at that point.

68. He recalled the subcontractor meeting around the time of the demolition to ensure everyone knew who was doing what and when a vague timeline was developed, vague because some things such as receptacles were not on the drawings and WA figured things out as they went along. BS&R experienced delays as the result of the hurricanes and losing power. He stated that he had financial stresses as a result of running a business but that did not cause deficiencies in what was an efficiently run business. He denied having personal stresses with his father noting that they butt heads but resolve issues for the benefit of the clients and the business. He maintained that when he left the business for 4 days during the period 2 – 7 October 2014 it did not affect the Vista Verde Job.

69. Mr. Madeiros maintained that his team at BS&R built the Living Room Cabinets which were straightforward at the same time as building the Kitchen Cabinets.

70. Mr. Madeiros stated that there were no deficiencies in BS&R's work in the lower Kitchen Cabinets or the upper Kitchen Cabinets as he had built the cabinets according to the Vista Verde Plans. The depth of the upper Kitchen Cabinets was resolved once it was identified. He did not make 'filler panels' ahead of time as there was a lack of specifications and filler

panels were a minor issue. He stated that WA sent appliance specifications but he was not sure that the specifications were for the appliances that were eventually installed.

71. Mr. Madeiros stated that the breakdown in the relationship was a result of WA's lack of payment for the Braemore Job and the Trevena Job. He maintained that the communication broke down with Tripp West although they continued with emails and phone calls with Mr. West and Martha, but the quality of the product did not decrease. Also, he continued to work on Vista Verde whilst chasing their money for the Braemore Job and the Trevena Job because he knew the client wanted to have the kitchen for Christmas. Further Tripp West became unavailable and despite the chaser emails for payments, BS&R continued working without payment. This lack of payment for all Three Jobs caused him stress, but his youth did not cause him stress. He stated that when he saw there was no chance of getting paid for the Three Jobs, he insisted on getting his money and decided he had to hold onto the Living Room Cabinets as he had to play hardball to get his money. Mr. Madeiros stated that although it was not his job to help outside his scope of work, he did so helping others like the electrician and jack hammering holes for the hood.

72. Mr. Madeiros stated that he visited the Vista Verde site to get measurements as he could not get sketches and drawings from Tripp West despite asking for them. This affected the timeline but not the quality of work. Due to a lack of sketches, they could not fabricate the Kitchen Island which Mr. Madeiros himself had to sketch and to which Tripp West agreed.

73. Mr. Madeiros maintained that although pleasant communication broke down with Tripp West, he continued communicating, chasing BS&R's money whilst Tripp West was not prepared to pay them thus holding them over a barrel but he stood his ground. He stated that BS&R completed the jobs and wanted to be paid for them.

Plaintiff's Case – Expert Mr. Timothy Berry – Evidence-in-Chief

74. Mr. Berry made a witness statement dated 22 September 2017 and a supplementary witness statement dated 14 January 2019 which stood as his evidence in chief. He is a certified quantity surveyor and project manager. He had worked in the construction industry for

more than 38 years, 9 which were in England and 29 in Bermuda. He qualified as an Associate of the Royal Institute of Chartered Surveyors in 1986 and in 1993 he was elected a Fellow of the Royal Institute of Chartered Surveyors.

75. In Bermuda Mr. Berry has prepared estimates for projects for developers and other clients. He has offered project management services for owners so that they can get an opinion on costs. He has provided expert evidence in statements but the parties have settled before he gave evidence in Court.

76. WA did not object to Mr. Berry being tendered as an expert. The Court accepted Mr. Berry as an expert in construction matters.

Braemore job

77. In respect of the Braemore Job, Mr. Berry commented on the value of the Braemore Extras noting the complaint was that they were excessive. His opinion was as follows:

- a. The cost of \$3,770 for sanding and oiling the deck was reasonable;
- b. The cost of \$1,560 for changing the 'V' pattern to herringbone pattern slightly exceeded the reasonable cost of approximately \$1,300;
- c. The cost of \$1,657.50 for the railing change was reasonable;
- d. The cost of \$1,820 of building the shower screens was reasonable; and
- e. He was unable to comment on the \$195 cost for the dock and the \$130 cost for the chair.

Vista Verde job

78. In respect of the Vista Verde Job, Mr. Berry commented on the value of the Kitchen Cabinet installation costs and the Vista Verde Extras noting the complaint was that they were excessive. His opinion was as follows:

- a. He had not viewed any of the installed Kitchen Cabinets;
- b. He viewed the Living Room Cabinets and commented that they had been manufactured to a high standard;

- c. If the contract did not state the installation of the cabinets was included in the contract price then they should be charged at an agreed lump sum or on a reasonable costs and charge basis;
- d. The costs of \$10,457.50 charged for installation of the Kitchen Cabinets were excessive having exceeded the reasonable cost of \$6,543.50. In his Supplementary Witness Statement Mr. Berry explained that BS&R had priced a schedule of extra work¹² that fell outside of the installation of the Kitchen Cabinets for a cost of \$3,315. He agreed that the items fell outside of installation work for a reasonable cost of \$2,925 which when added to the reasonable cost of the installation of \$6543.50 gave a total of \$9,468.50.
- e. The costs of \$2,648.75 later clarified to be \$3,656.25 to refabricate the upper Kitchen Cabinets was reasonable.

79. In respect of the Counterclaim, Mr. Berry commented as follows:

- a. The Defendant assessed a cost of \$10,000 to engage a project manager to oversee the remedial work required to complete the kitchen. Most project managers charge by the hour for such work with rates between \$100 per hour to \$150 per hour. Therefore, it seemed that the claim was for a range of 67 – 100 hours but with no way of knowing how many hours the project manager spent on the job, he could only comment anecdotally that this was a lot of time to manage a kitchen installation.

Plaintiff's Case – Expert Mr. Timothy Berry – Cross-Examination

80. WA did not dispute anything in Mr. Berry's report and did not cross-examine him.

The Defence Case

81. The defendant called two witnesses, Mr. West and Tripp West.

¹² Based on BS&R invoice 20964

Defendant's Case – Stephen West – Evidence-in-chief

82. Mr. West made a witness statement dated 21 July 2016 which stood as his evidence in chief. Mr. West stated that he had been practicing architecture for 61 years and owned his own firm for 57 years with significant experience in high end homes in Bermuda. He stated that WA offers architectural services for plans, drawings and specifications depending on the size of the job.

83. Mr. West stated that as time went on clients asked if WA could do the construction work. Therefore, he bought a construction company in the 1980s which WA uses for their own projects. His son Tripp West was a partner in the construction company. They have done several design and builds. In respect of the Three Jobs in this matter he said they were a combination of using WA and CWC. WA would be engaged first as the client would be focused on the design and when that was accepted then CWC would give a price to build. WA would seek comparative quotes for the client. If the client chose CWC to build, then WA would be on hand for design and supervision of CWC work using subcontractors. Mr. West stated that he did not know why BS&R chose to sue him in his personal capacity as he had been clear about WA and CWC.

Trevena Job

84. In respect of the Trevena Job, Mr. West said that he worked very well with Mr. Madeiros who was a lot younger with different techniques and approach. BS&R did an excellent job on the Trevena Punch List to completion.

Vista Verde Job

85. In respect of the Vista Verde Job he explained that WA was hired to design the new kitchen and CWC hired the contractors to do the renovation works. Mr. West said he attended the site almost daily working with the subcontractors in a small space. They all worked together and he answered any questions or got the answer. He stated that initially Mr. Madeiros worked well but then complained about things such as the electrician being in his way. Difficulties arose when the appliances were not fitting although BS&R had the

appliance specifications for the cutouts. He noted that filler strips were used to make up the space between appliances and cabinetry.

86. Mr. West stated that Mr. Madeiros left the job at some point and was difficult for WA people to reach for a period of time, longer than 4 days. This caused the project significant delay and difficulty amongst the subcontractors. Eventually he returned to the job but by that time it was full of tension. In any event, they got the job finished on Christmas Eve and the client was able to use the kitchen which was in a presentable state.

87. Mr. West stated that once the relationship with BS&R deteriorated, then they incurred out of pocket expenses to cover hiring other subcontractors to correct mistakes and deficiencies in the kitchen and they had to hire another carpenter to build the Living Room Cabinets.

Counterclaim

88. In respect of the Counterclaim for not being awarded the contract for the Vista Verde Potential Renovation Job, Mr. West stated that it was intended to be a build and design using WA and CWC. It would involve many meetings with the client about their needs, then sketches would be made and reviewed, followed by design work, approval in principle by the Department of Planning and then working drawings are completed and submitted for approval. As architects, WA would be onsite, would work with the contractor and oversee excavation, demolition and build. He stated that the design work would take place over 18 months and the build would take about one and half years.

Defendant's Case – Stephen West – Cross-examination

89. Mr. West was cross-examined extensively on a number of areas. He stated that WA was a partnership with Tripp West although he had not described Tripp West as a partner. He was taken to various pleadings which he had approved which referred to WA as a sole proprietorship and he claimed that he was never intentionally misleading the Court, the Plaintiff or anyone in respect of the partnership. He denied that he did not say it was a partnership in order to protect Tripp West from personal liability. Mr. West's evidence about WA being a partnership caused an adjournment which resulted in leave to amend the

Defendant to be a partnership as set out above. It also led to a lengthy adjournment on the evidence.

90. The trial resumed on 20 April 2021 with further cross-examination of Mr. West. He stated that Mr. Madeiros was absent from the Vista Verde Job for 10 – 14 day noting that although he thought it was important he did not mention it in his witness statement.
91. Mr. West maintained that there were issues with the refrigerator sticking out beyond the cabinet but agreed that was not listed on the Vista Verde Punch List suggesting but not speculating that there might be other punch lists other than what was in evidence. He maintained there were other deficiencies about the refrigerator and the need for filler strips.
92. Mr. West maintained that there was no written contract for the Vista Verde job so WA did not have to sign off on anything noting that sometimes WA would sign off on CWC work but not in this case. At the time of the Vista Verde Job, CWC had some employees, masons and labourers but at the time of the trial it no longer did. He said that he used WA letterhead and emails reflecting WA. He could not recall if there was any documentation in the hearing bundle that showed CWC letterhead but he was sure that CWC had a plain letterhead. He agreed that payments to BS&R came from his personal bank account and correspondence, invoices and quotations from BS&R were all addressed to WA. He stated that Mr. Madeiros had said that he always wanted to work with WA and CWC but admitted that he did not put that in his statement as he did not think it was important.
93. Mr. West stated that he had a good relationship with Mr. Madeiros who boarded up his house ahead of Hurricane Gonzalo but he did not pay him as Mr. Madeiros did not send him a bill. He did not recall Mr. Madeiros helping him with his truck muffler or saying that CWC was an old company. He stated that he and Tripp West used WA email addresses and he was not sure if he had a CWC email address.
94. In respect of the Vista Verde Job, Mr. West agreed that a Ms. Dyrli was employed by WA and she gave instructions by email to Mr. Madeiros copied to him, for extra work, including shopping for a trash can to which Mr. Madeiros replied that installation was not included

in the Vista Verde Job contract and that installation charges including shopping for trash cans would cost \$65 per man hour. During these exchanges no-one told Mr. Madeiros that he was working for CWC.

95. Mr. West was cross-examined about the plans and details about the depth of the upper Kitchen Cabinets for the plates. He did not recall much detail of discussion about the cabinet depth. When he was asked if the 12” depth on the plans was a mistake he replied “Yes”. It was at this point that Tripp West, who was not giving evidence, said “No”¹³. When cautioned by the Court about interfering in the evidence of Mr. West, Tripp West explained that he had intended to say “No” under his breath. Upon clarification of whether it was a mistake, Mr. West stated that one part of the Vista Verde Plans showed the depth of the upper Kitchen Cabinets at 12”. In his closing submissions, Mr. Doughty submitted that this behaviour by Tripp West was worthy of moral condemnation and struck at the heart of how the defence to BS&R’s claim was being run. Mr. West further stated his draftsman’s errors fell on him but that the issue of who would bear the cost for refabricating the upper Kitchen Cabinets was under discussion and he did not recall Mr. Madeiros telling him he would do it for \$65 per man hour.

96. In respect of Vista Verde Extras, Mr. West admitted that various requested tasks, for example dealing with electrical receptacles and boring holes in masonry in the Vista Verde kitchen were legitimate extras and he was non-committal on others.

97. In respect of the payment dispute, Mr. West acknowledged to some degree that WA was having cash problems which affected payments to BS&R but that another reason for non-payment was because the Living Room Cabinets were not yet ready.

Defendant’s Case – Tripp West – Evidence-in-chief

98. Tripp West made witness statements dated 21 July 2016 and 10 January 2018 which stood as his evidence in chief.

¹³ The Court listened to the Courtsmart record for this part of the evidence.

99. The thrust of his evidence was that he and his father Mr. West were directors of CWC, which had been around for years and which provided building and construction services but that they were partners in WA which provided architectural and design services. He stated that for the Three Jobs, WA did the design work and CWC did the construction work with the majority of the interaction between CWC and BS&R being between Mr. Madeiros and himself. On that basis, he could not understand why BS&R were not aware of CWC. He confirmed that "C.W. Construction" was written on both sides of their truck.
100. Tripp West described the background of the Three Jobs noting that he was aware that BS&R had a reputation to be on the more expensive side of local subcontractors.
101. In respect of the Braemore Job, he stated that after an initial quote was deemed to be too high, an agreement was reached for \$38,475 along with extras on a cost and charge basis of \$65 per hour which itself was not particularly excessive. He was eventually billed for Braemore Extras \$9,335.75 which at \$65 per hour which meant an additional 131 hours were spent at the Braemore Job. After some aggressive emails with Mr. Madeiros about the Braemore Extras, he claimed that he agreed to settle them with Mr. Madeiros for \$6,118.25 although he felt even that was too high as he suspected they was inflated by BS&R.
102. In respect of the Travena Job, Tripp West stated that CWC used BS&R to work on the Trevena Punch List on a cost and charge basis at \$65 per hour. As a result of the dispute in the Vista Verde Job, he was reluctant to pay for the Travena Job but keen to reach a settlement of all the issues for the Three Jobs. He stated the amount due for the Travena Job was \$31,882.78 less an undisputed payment of \$3,500 for a balance of \$28,382.78.
103. In respect of the Vista Verde Job, Tripp West stated there was no written contract. He stated that CWC engaged BS&R to fabricate and install the Kitchen Cabinets, the Kitchen Island and the Living Room Cabinets for \$80,000 with an installation cost of \$6,500 and there was to be no extras on a costs and charge basis. He maintained that the Vista Verde Extras for installation claimed by BS&R were excessive and if they had installed the Living Room Cabinets those extra charges would be even greater, perhaps

more than double. Tripp West stated that BS&R were given strict deadlines to have the cabinets fabricated by early November and installed by early December in order to have the Vista Verde Job finished for Christmas.

104. Tripp West stated that he provided BS&R with the Vista Verde Plans and sat with Mr. Madeiros and his father Mr. Tony Madeiros and went over the plans in complete detail. Tripp West stated that BS&R commenced with the Kitchen Cabinets, he visited BS&R's shop to go over details many times and soon realized they were falling behind schedule.

105. Tripp West called a meeting of all sub-contractors on 17 November 2014 and even allowed BS&R a small grace period as the tiling had been delayed. He was concerned that BS&R had only fabricated the Kitchen Cabinets but not the Kitchen Island and Living Room Cabinets. Once the tiling was finished around middle November 2014, he had difficulty getting BS&R to deliver the cabinets to Vista Verde. At one point Mr. Madeiros disappeared from BS&R causing further delays. By the time the Kitchen Cabinets arrived, there was a problem with the upper Kitchen Cabinets which were too small for the client's plates. He said Mr. Madeiros blamed the Vista Verde Plans but eventually fixed the upper Kitchen Cabinets. The next problem was that there were issues fitting the appliances into the cabinets. He said that Mr. Madeiros again blamed the Vista Verde Plans although, he Tripp West, had provided BS&R with the appliance specifications. Once the Kitchen Cabinets were modified and installed then there was a delay with the Kitchen Island and the Living Room Cabinets had still not been fabricated noting he never had what would have been usual meetings about the Living Room Cabinets as they were being made.

106. In any event, by 22 December the Kitchen Cabinets and the Kitchen Island were installed and the Vista Verde kitchen ready for use by the client for Christmas. However, they had deficiencies which had to be remedied by other contractors at cost.

107. Thereafter, Mr. Madeiros sent various invoices claiming full payment for the \$80,000 plus \$9,883.75 for installation before delivery of the Living Room Cabinets. However WA was not prepared to do that. As time went on there were further correspondence and disagreements about payment for all Three Jobs and discussions to

resolve the matters to no avail. Tripp West states that eventually they had to get other contractors plus a Project Manager to remedy deficiencies and fabricate and install the Living Room Cabinets for \$16,290 which was the basis for the Counterclaim.

108. Tripp West stated that based on his own experience, there was no way that Mr. Matthews could have built the Living Room Cabinets in three days, that they were not fabricated in December 2014 when he visited the BS&R shop, that the pictures of them are not the finished product capable of being installed and the December dates that Donnie Matthews speaks of about fabrication are convenient in respect of the December deadline.

Defendant's Case – Tripp West – Cross-examination

109. Tripp West was cross-examined extensively. In respect of CWC being the contractor at the Three Jobs, Tripp West insisted that CWC hired masons and labourers. When challenged that there was nothing in the hearing bundle to indicate that CWC hired masons and labourers, Tripp West replied that he did not know that to be the case and that he did not remember. He stood by his witness statement that CWC hired subcontractors for the Three Jobs and he agreed to various circumstances of WA involvement including email addresses, correspondence, quotations and invoices addressed and sent to WA, and the use of Mr. West's bank accounts to make payments to BS&R. He stuck by his claim that he could not understand how Mr. Madeiros was not aware that he was dealing with CWC although accepting that Mr. Madeiros had referred to WA without correction from him.

110. In respect of the Braemore Job, Tripp West agreed that the Braemore Extras included requested work of sanding and oiling the wooden deck and changing the wood pattern from a "V" shape to herringbone. He agreed that the Braemore Job was paid for out of Mr. West's bank account. He agreed with Mr. Berry's report on reasonable charges for the Braemore Job although he maintained that the Braemore Extras were disproportionate to the value of work performed. He stated that if the Braemore client was not prepared to pay for the Extras then WA was not obliged to pay for them.

111. In respect of the deficiencies at the Vista Verde Job, Tripp West:
- a. Maintained that there was always an agreed installation price of \$6,500 and could not recall if Mr. Madeiros was advised of that budget;
 - b. Maintained there were multiple issues with the base cabinets including the dishwasher but did not recall what the other issues were and he thought that there was evidence of BS&R's fault of this in the hearing bundle;
 - c. Maintained his claim that the installation charges were excessive which was part of a BS&R pattern although later saying he would not dispute the charges;
 - d. Maintained that he did not order a different refrigerator than what was specified and conceded that filler pieces were used to easily address the gap between the cabinets and the appliance;
 - e. Stated that BSR were asked to "collaborate" when challenged if BS&R were asked to trouble-shoot issues;
 - f. Denied that he had received the kitchen that he had ordered, although he did not cross-examine Mr. Madeiros on this point as he did not know that he had to; and
 - g. Agreed he did not take measurements of deficiencies such as with the dishwasher sticking out beyond the cabinets.
112. In respect of Mr. Madeiros' email dated 29 January 2015 about payments to BS&R, Tripp West stated that BS&R required their invoices be paid upon completion, WA was delinquent in paying several outstanding invoices, he was withholding payment on the Trevena Job for the purpose of having the Vista Verde Job completed and the Three Jobs were mixing although they should have remained separate.
113. In respect of Mr. Madeiros' email dated 11 January 2025 Tripp West stated that the commercial relationship between WA and BS&R was dead by that point, that he was proposing to pay only \$30,000 once the Living Room Cabinets were delivered and \$3,500 for work done on the Vista Verde Job, that other subcontractors had to be brought in to rectify deficiencies.

114. In respect of the Vista Verde Punch List in evidence, Tripp West stated that there were multiple Vista Verde punch lists, gave various answers about items on the Vista Verde Punch List and agreed that there was not very much left for BS&R to do in the Vista Verde Kitchen.
115. In respect of the Counterclaim for the cost of building the Replacement Living Room Cabinets which were ultimately installed, Mr. Tripp West stated that they were delivered in late April or Early May 2015 and that perhaps the Vista Verde client would have received the Living Room Cabinets earlier if he had reached an agreement with BS&R in early January 2015.
116. In respect of the Counterclaim generally, Tripp West maintained that CWC had paid the expenses appearing in the Counterclaim, that he did not know from which accounts the expenses were paid, did not know if Project Manager Ms. Gould was paid by CWC, upon seeing a banking screenshot agreed that he and Mr. West had made the payments.
117. In respect of the Particulars of Counterclaim letter, Tripp West stated that some items were a claim for costs, one was legal fees paid to a law firm, claimed \$180,000 in projected contractor fees and \$60,000 in architectural fees which is a service that CWC did not offer, it was a muck-up from the beginning of what WA and CWC were claiming, insisted his claims for profits was 17.5% of the estimated construction costs of \$1,020,000, agreed he not filed any documentary evidence to justify his assessment of the total construction costs but instead relied on the homeowner of Vista Verde, and answered “*Why would I say that?*” when asked if he told Mr. Madeiros, when first asked to build cabinets for the Vista Verde Job, that WA was hoping to obtain further work from the homeowner of the Visa Verde site.

The Plaintiff’s Submissions in General

118. BS&R’s submissions were based on four parts:
- a. First, who were the parties to the respective agreements;

- b. Second, do the respective agreements permit BS&R to invoice the Defendant for extras;
- c. Third, is there any reason in law that excuses the Defendant from paying for the extras that was invoiced by the Plaintiff; and
- d. The Counterclaim – which gave rise to four sub-issues:
 - i. Whether BS&R’s alleged breach of contract caused CWC to experience a consequential loss of \$180,000;
 - ii. Whether BS&R’s alleged negligence caused CWC to experience a pure economic loss of \$180,000;
 - iii. Whether BS&R’s alleged breach of contract caused WA to experience a consequential loss of \$65,000; and
 - iv. Whether BS&R’s alleged negligence caused WA to experience a pure economic loss of \$65,000;

The Defendants’ Submissions in General

119. The Defendant’s maintained that CWC was the party that contracted with BS&R and that BS&R charged excessive extras generally, delivered and installed Kitchen Cabinets that had deficiencies, charged on a cost and charge basis, never fabricated the Living Room Cabinets by December 2014, then never delivered them and then caused CWC to have to bring in other subcontractors to finish off various aspects of the Visa Verde Job.

120. CWC also maintain that if the Court finds that WA was the contracting party and the proper defendant, then WA would be the Counterclaimant.

Issue 1 - Who were the parties to the respective agreements?

Plaintiff’s Submissions

121. BS&R submitted that the evidence shows that for each of the Three Jobs, it had contracted only with WA and on the contrary there is no documentary evidence whatsoever to support WA's claim that BS&R had contracted with CWC.

122. In support of the BS&R's contention it relied on the following evidence:

- a. Mr. West and Tripp West were in a partnership of WA and operated under the name of WA;
- b. All of the quotes prepared by BS&R were addressed and directed to "Westport Architecture" without objection from WA or CWC;
- c. All email correspondence on behalf of WA by Mr. West, Tripp West and other WA staff was conducted through WA email accounts;
- d. All of BS&R's invoices for services were issued to WA, without objection from WA or CWC;
- e. All payments made to BS&R in relation to the Three Jobs came from Mr. West's personal bank account; and
- f. When Mr. Madeiros asked Mr. West about the name "C.W. Construction", which was on the side of a truck he was driving, Mr. West replied "*Don't worry about it. It's an old company.*" Otherwise, he had never heard of CWC.

123. BS&R submitted that there is no evidence which suggests that CWC was ever a party to the Agreements or alternatively, that BS&R could have reasonably concluded that CWC was a party to the Three Agreements. Mr. Doughty pointed to the cross-examination of Mr. West which indicated that no documents, payments, quotations, emails addresses or correspondence disclosed that CWC was involved in the Vista Verde Job. He submitted that when Mr. West agreed that a statement that he attributed to Mr. Madeiros, namely that he (Mr. Madeiros) wanted to work with CWC, was not in his written statement because he did not think it was important, that Mr. West was not being honest and was being self-serving.

124. Mr. Doughty submitted that in respect of Tripp West's evidence:

- a. That Tripp West's claims that CWC employed tradesmen were undermined by his inability as to when and whether those tradesmen were hired for the Three Jobs. Furthermore, it was submitted that Tripp West was being evasive about whether the Vista Verde contract was with CWC rather than with WA;
- b. That Trip West effectively admitted that there was nothing in the documentary evidence that would have given BS&R any indication that it was dealing with any entity other than BS&R and by not correcting Mr. Madeiros about a reference to WA, therefore he cannot be taken seriously on that issue;

125. BS&R submitted that the Court should reject the Defendants' argument that the construction work was done by CWC and the clients of CWC were invoiced by and made payments to CWC. BS&R submitted that it was not a party to the contracts between CWC and its clients.

126. For the reasons set out above, BS&R submit that the facts establish, inter alia, that both BS&R and WA intended to form a contract between them. Mr. Doughty relied on the case of *Storer v Manchester City Council*¹⁴ where Lord Denning M.R. stated "*In contracts you do not look into the actual intent in a man's mind. You look at what he did and said. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: 'I did not intend to contract' if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract, that is enough.*" Further, BS&R argue that the fact that the exchange of consideration under the Agreements occurred solely between BSR and WA further evidences that they are the only parties to the Agreements.

127. Mr. Doughty submitted that should the Court agree that WA was the proper defendant, then this begs the question as what standing CWC has to bring a counterclaim against BS&R. For that reason, then the Counterclaim of CWC must fail per the doctrine of privity of contract as CWC was never a party to any of the Agreements. He relied on the case of *Tweddle v Atkinson*¹⁵ where the Court reinforced that the doctrine of privity meant

¹⁴ [1974] 1 WLR 1403 at page 1408

¹⁵ (1861) 1 B & S 393 at page 764, (1861) 121 ER 762 at para 398

that only those who are party to an agreement may sue or be sued on it and stated “*The modern cases have, in effect, overruled the old decisions; they shew that the consideration must be moved from the party entitle to sue upon the contract.*”

Defendants’ Submissions

128. The Defendants submitted that a lot of time was taken to determine which entity did what. They submitted that WA was the architectural firm and that CWC was the construction firm. The Defendants relied on their evidence at trial on this issue.

129. Further, the Defendants submitted that either WA or CWC were prepared to stand behind any judgment of the Court if found against them.

Analysis

130. In my view, I am satisfied on the balance of probabilities that BS&R had contracted with WA for all Three Jobs or Agreements for several reasons based on what the parties said and did as set out in *Storer v Manchester City Council*. First, I accept that there is considerable evidence to support that BS&R was at all material times in discussions and negotiations with WA only. The evidence of Mr. Madeiros, Mr. West and Tripp West includes: (a) the BS&R quotes were prepared, addressed and directed to WA without objection; (b) the correspondence was to and from the Defendant was conducted through WA email accounts; (c) BS&R’s invoices were issued to WA without objection; and (d) all payments to BS&R came from Mr. West’s personal bank account.

131. Second, I accept the evidence of Mr. Madeiros about the conversation he said he had with Mr. West about the truck he saw him driving that had “C.W. Construction” on it. I found Mr. Madeiros to be a reliable witness on this point as it accords with the fact of a description of a truck driven by Mr. West. Mr. West admits that he had such a truck although he does not recall the conversation about it. In accepting Mr. Madeiros’ evidence of what was said, I can infer that at the time of that verbal exchange, Mr. West was not taking the opportunity to clarify to Mr. Madeiros what CWC was and further that it was a

party to the Agreements, if in fact it was. Thus, there was no statement or clarification to Mr. Madeiros that BS&R was not contracting with WA but with CWC.

132. Third, in my view there is a lack of evidence in any form that CWC was a Party to the Agreements. As set out above, the contemporaneous documentary evidence supports WA as being a party to the Agreements. In my view, I am not satisfied of the contentions in the witness statements of Mr. West and Tripp West or their evidence at trial that CWC was a party to the Agreements. In my view, they made bare assertions that lacked any documentary or other contemporaneous evidential support about CWC being a party to the Agreements.

133. Fourth, I have considered that the Vista Verde Plans had the WA logo and the WA Notice on them. Initially, this evidence is not determinative that WA was the contracting party as either WA or CWC could have had the possession of the Vista Verde Plans as they sought as either architect or contractor to negotiate with and contract with a subcontractor carpenter. However, the evidence shows that there were numerous meetings where the Plans were discussed, decisions were made based on value engineering to reduce the Vista Verde original quotation price and decisions were made to change the Vista Verde Plans. There is no evidence that Mr. West or Tripp West ever said or indicated that they, as CWC, had to go back to WA to get the Vista Verde Plans amended. It appears to me that at all times they were discussing the Vista Verde Plans in the capacity of WA with authority to amend the Vista Verde Plans as they saw fit. Thus, this would have led BS&R to believe that that the Agreements were with WA.

134. Fifth, Mr. Doughty submitted that Mr. West's evidence about whether WA was a trading name or a partnership was "misleading, worthy of moral condemnation and highly unreasonable" and should bear on the Court's assessment of the credibility of Mr. West's testimony. He relied on the case of *Aeroflot v Berezovsky et al*¹⁶ where the Court dealt with the circumstances of how a litigant raised and pursued certain allegations and the manner in which he pursued his case and allegations. In light of the abundance of evidence that

¹⁶ [2018] EWHC 1735 (Ch) at para 60

supports the finding that WA was the actual Defendant in this case, in my view Mr. West's credibility is questionable when a significant plank of the defence was to shift any liability for whatever reason from WA to CWC.

Issue 2 - Did the respective Agreements permit BS&R to invoice WA for Extras?

Issue 3 - Is there any reason in law that excuses the Defendant from paying for the Extras that was invoiced by the Plaintiff?

Expert Report and Evidence of Mr. Timothy Berry

135. Mr. Tripp West acknowledged that WA had been working with Mr. Berry on previous jobs and found him to be credible in his work. He accepted that what Mr. Berry said was correct in this case. However, he submitted that Mr. Berry was not aware of the unique circumstances of the jobs, that is, the type of work, the quality of a premium product and the deficiencies of the work, whether charging for the remedy of a deficiency was fair, the verbal agreements or the final result. He submitted that Mr. Doughty's questions to Mr. Berry were hypothetical questions that he answered on a hypothetical basis but which he himself could not contradict. He submitted that he had no opportunity to ask Mr. Berry questions about various issues including deficiencies and the cost to repair them. He did not specify which job in particular this complaint applied but I note that Mr. Berry only provided expert evidence in respect of the Braemore and Vista Verde Jobs.

136. In my view, in respect of the expert Mr. Berry, I find his evidence to be extremely helpful in this case. First, I accepted Mr. Berry as an expert in construction matters based on his qualifications, practical experience and knowledge in construction and quantity surveying, particularly in Bermuda. Further, I found that his evidence was impartial and objective.

137. Second, Mr. West was allowed to cross-examine Mr. Berry but chose not to do so. He had full opportunity to cross-examine Mr. Berry on any issues that he wanted to in respect of his evidence and reports. Therefore, I am obliged to dismiss his complaint that the opportunity did not arise to cross-examine Mr. Berry on various points.

Braemore

Plaintiff's Submissions

138. Mr. Doughty submitted that the evidence showed that the Braemore Job encompassed both a fixed quote price, and an agreement that any Extras performed over and above the work set up in the quotation, would be billed at a rate of \$65 per man hour. He stated that Tripp West accepted this fact but claimed that the Braemore Extras of \$9,335.75 was excessive and further that Mr. Madeiros agreed to settle them in full and final payment of \$6,118.25. As Mr. Madeiros denied any such settlement the outstanding amount of \$2,417.50 was still owing.
139. Mr. Doughty submitted that the expert report of Mr. Berry showed that the Braemore Extras were all reasonable except for the cost of \$1,560 for changing the 'V' pattern to herringbone pattern which slightly exceeded the reasonable cost of approximately \$1,300 by \$260. However, Mr. Doughty submits that as this is a claim for breach of contract with fixed pricing terms, the Court need not consider the fair market value of the work under the principle of *quantum meruit*. He relied on the case of *Way v Latilla*¹⁷ where Lord Atkin made that point and stated that the Court could take into account the bargaining between the parties as evidence of the value which each of them puts upon the services.
140. Mr. Doughty submitted that as the claim is for breach of contract, the issue is whether the work was done per the direction of WA. If the Court is satisfied that the work was in fact performed for the hours billed, it follows that the Defendant is liable to pay the outstanding amount. Further, that when Tripp West admitted that when he told Mr. Madeiros that if the Braemore client would not pay him, then WA was not obliged to pay BS&R, this demonstrated the bad faith exhibited by WA towards BS&R throughout the entire duration of their commercial relationship.

¹⁷ [1937] 3 All ER 759 at page 764

141. In respect of whether there was any lawful reason to excuse WA's payment of the Braemore Extras, Mr. Doughty submitted that there was sufficient evidence to show that BS&R did the work at the direction of WA. He submitted that the Court should reject WAs contention that its client had not agreed to pay that amount on the basis that WA had contracted with BS&R. He relied on the case of *Scobie & McIntosh Ltd. v Clayton Bowmore Ltd.*¹⁸, where Davies J stated "*In this case, the employer terminated the main contract and the contractor terminated the sub-contract when half the sub-contract work had been done, but none had been certified and paid for. ... The effect of [the sub-contractor] Scobie's acceptance of [the contractor] Clayton's repudiation was to put an end to all unperformed obligations under it and to substitute by implication of law for the primary obligations of the party in default which remained unperformed, the secondary obligation to compensate Scobie for the loss sustained in consequence of the non-performance of those obligations.*"

Defendants' Submissions

142. WA admitted in their Defence that Braemore Agreement allowed for extras at the rate of \$65 per man hour. However, they complain that the amount of Braemore Extras was excessive although Tripp West agreed in his witness statement and therefore in his evidence-in-chief that the rate of \$65 was not excessive. Therefore, the complaint was in the number of hours leading to the Braemore Extras which Tripp West said amounted to an extra 131 hours or 16 days of extras.

143. WA submitted that BS&R took advantage of the opportunity to charge for time and materials on the Braemore Job. They submit that the \$9,000 for the Braemore Extras were inflated and that quotes and estimates presented by BS&R at the start of the jobs were inflated and that BS&R would try to make up the differences with extras. On that basis WA never accepted the \$9,000 in Braemore Extras. Further, WA accepted that extra work was requested but that the invoiced amounts far exceeded the original quotation that was rejected initially.

¹⁸ (1990) 49 BLR 119, 23 ConLR 78 at pages 129-130

144. However, WA accepted the expert report of Mr. Berry which found all the Braemore Extras were reasonable except for the cost of \$1,560 for changing the 'V' pattern to herringbone pattern which slightly exceeded the reasonable cost of approximately \$1,300 by \$260. In any event, Tripp West relied on email correspondence with Mr. Madeiros where he says Mr. Madeiros agreed to settle the Braemore Extras for \$6,118.25. Tripp West complained that he did not have the opportunity to ask Mr. Berry questions about deficiencies and the cost to repair them. He did not specify which job in particular this complaint applied.

Analysis

145. First, in my view, BS&R were allowed to invoice for Braemore Extras as that was agreed between the parties.

146. Second, in respect of the claim by WA that the Braemore Extras were excessive or inflated, in my view I am not satisfied that they were. WA admitted that they requested changes which were made. In doing so, they should have known that those changes were going to be charged as extras at the agreed rate. Based on the expert report of Mr. Berry, I am satisfied that the Braemore Extras were regarded as reasonable for all the items except one which only exceeded Mr. Berry's reasonable cost estimate by \$260. However, I do not find that the \$260 was excessive in all the circumstances.

147. Third, in respect of the claim by WA that Mr. Madeiros had agreed to settle the Braemore Extras of \$9,335.75 for \$6,118.25, I am satisfied that Mr. Madeiros did not agree to such a settlement. I found him to be a reliable witness on this point. The emails of the 5 December 2014 show that Tripp West claims there was a settlement but that is immediately rejected by Mr. Madeiros in two emails within two hours of Tripp West's email about the final payment he had made. Further, although Mr. Madeiros suggested he could take \$800 off the oiling bill, there is no evidence that this offer was accepted by Tripp West. Therefore, I find that the documentary evidence of the emails is a strong inference that Mr. Madeiros did not settle the Braemore Extras as asserted by WA.

148. Fourth, in applying the principle set out in *Scobie & McIntosh Ltd. v Clayton Bowmore Ltd.* I reject any contention that WA's client had not agreed to pay an amount to WA as a reason for WA to not pay certain amounts to BS&R pursuant to their agreement. In light of the above reasons, I find that there was no reason in law for WA to be excused from paying BS&R's invoices, namely there was a contract between BS&R and WA and there was an agreement to pay the invoices for the Braemore Extras.

149. In light of the above reasons, in my judgment on the balance of probabilities I find that WA were in breach of contract by failing to pay the Braemore Extras. Therefore, I find in favour of BS&R in respect of the claim of \$2,417.50 for the Braemore Extras.

Trevena

Plaintiff's Submissions

150. Mr. Doughty submitted that BS&R had performed the required work at Trevena and invoiced WA for a total of \$35,302.78, based on eight exhibited invoices¹⁹ in paragraph 10 of the RASIW, and WA paid a total of \$3,500.00 leaving a balance of \$31,802.78. He submitted that the failure to pay the invoices was a breach of contract. Further, he submitted that the refusal to pay for the Trevena Job as a means to pressure BS&R to settle the claim for the Vista Verde Job at a vastly reduced rate also amounted to a breach of contract as the Trevena Job and the Vista Verde Job were separate and distinct from each other.

151. In respect of whether there was any lawful reason to excuse WA's payment of the Trevena Job invoices, Mr. Doughty submitted that there was sufficient evidence to show that BS&R did the work at the direction of WA. He submitted that it was not a defence for WA to withhold payment for the Trevena Job in order to secure concessions in relation to the Vista Verde Job, an action which effectively destroyed the commercial relationship between the parties.

¹⁹ Invoice 20804 for \$3,983.25, invoice 20830 for \$1,882.50, invoice 20831 for \$624.13, invoice 20832 for \$3,558.75, invoice 20882 for \$7,598.58, invoice 20883 for \$14,655.97, invoice 20941 for \$424.60 and invoice 20947 for \$2,575.00

Defendant's Submissions

152. WA admitted that they owed payment to BS&R but that its records indicate that the total cost for the job was \$31,399.43 for which they paid \$3,500 on 24 November 2014 leaving an outstanding balance of \$27,899.43 rather than the sum claimed by BS&R. BS&R replied that the \$3,500 was accounted for and the amount outstanding was \$31,802.78.
153. Tripp West repeated his claims that BS&R invoiced at an inflated rate and would try to make up the job by charging extras.

Analysis

154. First, WA admitted that they owe payment to BS&R for the Trevena Job but they dispute whether it is \$27,899.43 or \$31,802.78.
155. Second, I am satisfied on the balance of probabilities that the invoices presented by BS&R to WA were valid invoices for the work performed by BS&R at Trevena. In my view, there was no credible evidence to be considered to undermine the value of the invoices. Further, I have found no credible evidence to show that the invoices were inflated or excessive. There is no invoice-by-invoice critique or complaint of the work performed and the amounts charged. Therefore, I am not satisfied by the bare denials about the invoice amounts.
156. Third, I have reviewed the eight invoices listed and I am satisfied that the total amount of those invoices amounts to \$35,302.78. On that basis, I reject WA's contention that the invoice total was \$31,399.43. By my calculation, \$35,302.78 less a \$3,500 payment by WA leaves a balance of \$31,802.78.
157. Fourth, I am satisfied that Tripp West was using the circumstances of the Vista Verde Job to pressure BS&R about that job by withholding payment from BS&R for the Trevena Job. The first Trevena Job invoice was dated 3 September 2014 and the last Trevena Job invoice was dated 9 December 2014. There was ample time for WA to pay

the invoices as they were presented but they chose not to do so. By December 2014, the relationship between the parties in respect of the Vista Verde Job had deteriorated significantly such that the Trevena Job payment had become a tool to get BS&R to deliver on the Vista Verde Job. In my view, the issues on the Vista Verde job did not provide a lawful reason to excuse payment for the Trevena Job. I am inclined to take a dim view of the credibility of Tripp West in his conduct of withholding payment from one job to effect a result in another job.

158. In light of the above reasons, in my judgment I find on the balance of probabilities that WA were in breach of contract by failing to pay the Trevena invoices. Therefore, I find in favour of BS&R in respect of the claim of \$31,802.78 for the Trevena Job.

Vista Verde

Plaintiff's Submissions

159. Mr. Doughty submitted that Mr. Madeiros' evidence showed that the fabrication of the cabinetry for the Vista Verde Job was a fixed fee quote of \$80,000 whereas installation and all other Vista Verde Extras would be billed at an hourly rate. BS&R denied that there was an agreement of a fee of \$6,500 for the installation of the cabinetry. In respect of the installation and Vista Verde Extras, he relied on email correspondence where Mr. Madeiros stated that such work was being billed on a 'cost and charge' basis.

160. Mr. Doughty submitted that the evidence of Mr. Madeiros showed that the Vista Verde Extras were requested by WA and included shopping for trashcans, collection of range hood, installation of the range hood including boring holes through masonry, layout of under cabinet lighting wiring, meeting with Bermuda Gas to determine the location of the temporary hookup of gas shutoff and its installation, fabrication of a door to house the shutoff valve, installation of appliances into the cabinetry, installation of wiring into the kitchen island, installation of baseboard into the laundry room, installation of a double door frame into the laundry room, fitting of the laundry room door with hardware and fitting of cabinetry with surface hardware.

161. Mr. Doughty submitted that given that the Vista Verde Extras were not included in the initial agreement nor within BS&R's overall obligation to complete, and in the absence of an express agreement on rates or prices, BS&R is entitled to a reasonable sum on the basis of an implied term as to payment. He relied on the case of *A Vigers Sons and Co Ltd v Swindell*²⁰ where Asquith J stated "*So long, therefore, as nothing has happened to modify the scheme embodied in the building contract, neither the architect nor anybody else is intended to have any authority to pledge the credit of the building owner with the nominated subcontractor.*" Also, Mr. Doughty relied on the case of *Costain Civil Engineering Limited and Another v Zanen Dredging and Contracting Co Ltd*.²¹ where Judge Wilcox stated "... *a fair commercial rate would include allowance for reasonable profit. Each party would be able to assess and evaluate his commercial strengths and weaknesses. It would be unreal to ignore them where the basis of assessment is not that of implied contract.*" Mr. Doughty also relied on the Supply of Services (Implied Terms) Act 2003 at Section 5 where it is stated:

Implied term about consideration

5 (1) Where, under a contract for the supply of a service, the consideration for the service is not —

(a) determined by the contract;

(b) left to be determined in a manner agreed by the contract; or

(c) determined by the course of dealing between the parties;

there is an implied term that the party contracting with the supplier will pay a reasonable charge.

(2) What is a reasonable charge is a question of fact.

162. Mr. Doughty submitted that the expert report of Mr. Berry concluded that the installation charges of \$6,543.50 for the installation of the cabinetry only would have been reasonable based on the square footage of the cabinetry in question. Mr. Berry also

²⁰ [1939] 3 All ER 590 at page 594

²¹ (1996) 85 BLR 77 at page 94

submitted in his supplemental report that a reasonable price for the Vista Verde Extras in the circumstances was \$2,925 in comparison to the \$3,315 charged.

163. In respect of the 17 – 19 December 2014 dates of the fabrication of the Living Room Cabinets, Mr. Doughty submitted that as the evidence of Mr. Matthews was unchallenged by the Defendants on cross-examination, the Court was bound to accept that evidence. He relied on the extract from *Phipson on Evidence*²² where it set out that in general a party is required to challenge in cross-examination the evidence of any witness of the opposing party if he wishes to submit to the court that the evidence should not be accepted on that point and if a party has chosen not to cross-examine on a particular important point, he will be in difficulty in submitting that the evidence should be rejected.

164. Mr. Doughty made the same submission in respect of parts of the first and second witness statements of Mr. Madeiros which stood as his evidence-in-chief which went unchallenged including his evidence on the following:

- a. There was nothing in the Vista Verde original quote that priced installation of the cabinets and once the quote of \$80,000 was agreed, there was never a quotation, estimate or agreement for installation;
- b. During a meeting in August 2014 between Tripp West, Mr. Madeiros and Tony Madeiros, the depth of the upper Kitchen Cabinets were conformed to be 12 inches;
- c. A schedule received on 6 October 2014 which stated for the first time that BS&R were tasked with installing the cabinets and at a discussion on or about 24 October 2014 about the installation, there was no mention of a fixed price for the installation;
- d. That on 6 November 2014 Ms. Dyrli had informed the subcontractors that the due date for the demolition was extended to 17 November 2014 and the tiling delayed to 21 November 2014; and on 14 November 2014 Trip West emailed all the subcontractors that that demolition was pushed back to 19 November 2014 with the only deadline given was that the kitchen was to be ready before 24 December 2014;

²² (17th Edition) paragraph 12-12

- e. That on 27 November 2014 Mr. Madeiros had informed Tripp West that all installation charges were being billed at \$65 per hour in addition to the quoted price of fabrication.
- f. That on 8 December it was not possible to deliver the Living Room Cabinets until after Christmas as there was no room for them at Vista Verde due to the renovation work. Mr. Doughty submits that WA is estopped from claiming breach of contract over the later completion of the Living Room Cabinets;
- g. That on 10 December 2014 Mr. Madeiros emailed Tripp West to tell him that the refabrication of the upper Kitchen Cabinets would be at extra cost – an email which went unanswered. That refabrication took 40.74 hours and further delayed the fabrication of the Living Room Cabinets;
- h. That on 11 or 12 December 2014 Mr. West discussed the issue of the upper Kitchen Cabinets with Mr. Madeiros and accepted that his draftsman made an error and that Tripp West had approved the dimensions at a cost-cutting meeting. At that meeting, Mr. West asked to be billed at the same rate for the original manufacturing and Mr. Madeiros replied that the refabricating would be at a rate of \$65 per hour. Mr. Doughty submitted that given there was no reply to the 10 December 2021 email and Mr. West asked for the original rate, then WA by its acquiescence, silence, words and actions agreed to be billed for the remedial work at the \$65 rate.
- i. The Kitchen Cabinets, the refabricated upper Kitchen Cabinets, the Kitchen Island and the remaining hardware were installed between 17 – 19 December 2014, thereby satisfying BS&R’s revised contractual obligation in relation to the completion and installation of the kitchen.
- j. The 7 January 2015 Vista Verde Punch List had seven minor tasks for BS&R to complete. Mr. Doughty submits that Mr. Madeiros was never cross-examined on this point which concedes the issue about what was on the list and which also strikes at the heart of Counterclaim of numerous deficiencies as the Vista Verde Punch List had only a few small tasks to be completed. Thus, WA should be estopped from claiming there were numerous deficiencies in BS&R’s work.
- k. On 8 January 2015 Mr. Madeiros replied to a WA query about delivery of the Living Room Cabinets stating that he had to be paid for the fabrication and

installation of the Kitchen Cabinets before the Living Room Cabinets would be delivered, a response which was repeated on 13 January 2015. The Living Room Cabinets were finished and ready for installation by 14 January 2021. Mr. Doughty submits that as WA filed witness statements on this issue but did not call them or submit them to cross-examination was astonishing given that this concedes that the Living Room Cabinets were in fact ready for delivery by mid-January 2105.

- l. After Tripp West tried to negotiate a settlement in respect of the Three Jobs, Mr. Madeiros replied that 129 $\frac{3}{4}$ hours were spent on extra work that BS&R performed on the Vista Verde Job. Mr. Doughty submitted that it was scandalous that Mr. Madeiros was never cross-examined about the amount of work that he had done and billed for, as Tripp West's allegations of BS&R padding bills was a fundamental issue in the case. He submitted that that WA had ceded its entire case on account of failure to challenge the evidence concerning the extra work in any meaningful way and as a result, its entire "*house of cards*" has collapsed.
 - m. Mr. Doughty submitted that as Mr. Madeiros was never cross-examined on the substance of BS&R's claim, that failure effectively conceded BS&R's claim and took the conduct of the defence out of the norms of how a civil action is conducted. By not challenging Mr. Madeiros about his honesty about the invoices amounted to an abandonment of their defence without explanation.
165. Mr. Doughty submitted that a failure to cross-examine Mr. Berry without explanation was also unreasonable conduct that amounted to an abandonment of WA's defence of fraud which was a serious matter that required time and resources to address. He stated this also struck at the heart of how the entire defence was conducted.
166. Mr. Doughty submitted that in respect of Mr. West's evidence:
- a. That when Tripp West interrupted the cross-examination of Mr. West's evidence by saying "No" aloud, that Mr. West was evasive and that his credibility as an honest witness was questionable; and

- b. That the credibility of Mr. West was in serious question throughout as his evidence showed that WA was trading whilst insolvent, that he could not recall specific exchanges, that he attempted to explain away the issues of the depth of the cabinet as being '*the one dimension that was not discussed*' at a meeting between Tripp West and Mr. Madeiros even though he was not at that meeting and that he never denied that he had agreed the rate of \$65 for the refabrication of the upper Kitchen Cabinets.

167. Mr. Doughty submitted that the Court should take a dim view of Tripp West's evidence in relation to the work and fees of the Third Party Contractors as upon a review of such evidence, there were no particulars provided of what the Third Party Subcontractors actually did to justify the fees that have been claimed and WA or CWC called no third party witnesses to support the thin evidence that was filed before the Court.

168. In respect of whether there was any lawful reason to excuse WA's payment of the Vista Verde Job invoices, Mr. Doughty submitted that the fabrication of the Kitchen Cabinets and Living Room Cabinets was completed on 14 January 2015. However, WA was insisting on a 21.4% discount off the fabrication price so as to accept delivery and conclude the contract which amounted to a breach of contract. Also, although WA would argue that time was of the essence, it was impossible for BS&R to complete the contract by the original vague deadline of "early November 2014" on account of the extensive power outages caused by Hurricane Faye and Hurricane Gonzalo. Further, WA acquiesced to the postponement of the deadline on account of the failure of other subcontractors to have the site ready in time to accept the delivery of the cabinets and WA's failure to draw the cabinets to the specification required by the client, all of which led to further delay for which BS&R was not at fault.

Defendant's Submissions

169. Tripp West submitted that BS&R had agreed on the cost of a premium product but when it failed to deliver them, it still wanted to be paid. He repeated his submissions about the expert report and about how BS&R tended to submit inflated invoices for Vista Verde

Extras. Further, Tripp West submitted that when he would not accept the quality of work or sign off as complete, BS&R would reluctantly revise the product and then submit a bill for addressing the deficiencies.

170. Tripp West submitted that once Anthony Madeiros walked off the job it had almost entirely destroyed with the potential of leaving the kitchen demolished and considerable cost to find new vendors. One Anthony Madeiros returned, then there were deficiencies in the works as his personal issues were affecting his work performance.

171. Tripp West submitted that Mr. Doughty's cross-examination of him was an attempt to fault WA with issues such as the refrigerator and the shut off valve but these things were the result of mistakes by BS&R. Further, BS&R were trying to assert that hand produced plans were inferior to plans produced by AutoCad but BS&R failed to accept that many significant historic buildings around the world were created without AutoCad.

172. Tripp West submitted that kitchens are usually the most difficult part of a residential project and it takes a unified team to execute it successfully. In respect of the Vista Verde Job both parties had made mistakes but they accept that it was the job of the parties to rectify them without impacting the project or client.

Analysis

173. In considering the claims in respect of the Vista Verde Job, I will first deal with the issue of whether installation costs and extras were allowed and at what rate, then the Kitchen Cabinets issues, the Living Room Cabinets issues, the issues of the consequential and pure economic losses and then the claims for set-off for remedial work.

Whether Installation Costs and Extras were allowed

174. In my view the fabrication cost of the Kitchen Cabinet, the Kitchen Island and the Living Room Cabinets were for the fixed fee quote of \$80,000 and the installation costs and all other Vista Verde Extras were to be billed at the rate of \$65 per man hour and not at a fixed rate of \$6,500 for several reasons.

175. First, I am bound to accept the unchallenged evidence of Mr. Madeiros that the Vista Verde Job original quote was for the fabrication of the cabinets and that it was only in the schedule received by BS&R from WA on 6 October 2014 that BS&R were tasked with the installation of the cabinets.
176. Second, I am I am also bound to accept the unchallenged evidence of Mr. Madeiros that on 27 November 2014 he had informed Tripp West that all installation charges were being billed at \$65 per hour in addition to the quoted fabrication price. Therefore, in applying the principle of the case of *Costain Civil Engineering Limited and Another v Zanen Dredging and Contracting Co Ltd.* and the Supply of Services (Implied Terms) Act 2003 which states that what is a reasonable charge is a question of fact, I am satisfied that a reasonable rate for the installation charges and the Vista Verde Extras was \$65 per hour per man.
177. Third, I am also bound to accept the unchallenged evidence of Mr. Madeiros that he informed Tripp West by email on 10 December 2014 that the refabrication of the upper Kitchen Cabinets would be at extra cost and that there was no reply to that email.
178. Fourth, Tripp West accepted that the installation cost was separate from the fabrication cost although his evidence was that it was for an agreed price of \$6,500. However, I am not satisfied by Tripp West West's evidence that there was an agreed price of \$6,500 as I have seen no documentary evidence to support this contention.
179. Fifth, I have assessed Tripp West's conduct throughout the Three Jobs and during the trial and I do not find him to be a credible witness generally based on his refusal to pay the Trevena Job when it was due, based on interfering in Mr. West's evidence, on his own demeanor and in some cases his evasiveness and on some of his bare assertions of matters in the absence of any supporting documentation.

Installation Costs of the Kitchen Cabinets

180. I am satisfied by the evidence of Mr. Berry that the installation charge of \$6,543.50 for the Kitchen Cabinets was reasonable. Mr. Berry was not cross-examined and Tripp West in his evidence accepted the evidence of Mr. Berry. As stated earlier, I reject Tripp

West's later complaint that he was not able to cross-examine Mr. Berry because he had the opportunity to cross him.

181. In respect of the alleged deficiencies in the Kitchen Cabinets, I reject that claim by WA as I agree that the Vista Verde Punch List showed a small list of tasks that had to be performed by BS&R. I am not satisfied by the evidence of Mr. West that there were other punch lists that may have showed other deficiencies. In my mind, Mr. West was clutching at straws to suggest that there were other punch lists as none had been referred to previously and there was no evidence in the documents of any other such punch list.

182. In respect of the deadlines that WA say were a part of the Vista Verde Agreement. I accept that there were stated deadlines of having the cabinets fabricated by early November and the installation completed by early December. However, I also accept that there were delays as a result of a number of reasons as follows: a) There was a loss of power to the BS&R carpentry shop caused by Hurricane Faye and Gonzalo hitting directly on Bermuda. In my view, this was an acceptable reason for delay as BS&R could not fabricate the cabinets without power; and (b) I accept the evidence that WA contributed to the delay because their other subcontractors were behind in demolition and electrical work and the tiling caused further delays because tile had not arrived in Bermuda. I have considered the evidence about Mr. Madeiros leaving the job. In my view, the evidence demonstrates that Mr. Madeiros left the job for a period of 3 – 5 days but Mr. Matthews stated that the fabrication work still went on. In my view, I am not persuaded by the evidence of Mr. West or Tripp West that Mr. Madeiros left the Vista Verde Job for a period as long as 10 – 14 days and that this caused delays in the Vista Verde Job. Such a period seemed to be an exaggeration and an inconsistency between Mr. West and Tripp West themselves. In light of the above reasons, I am not satisfied that BS&R breached the terms of the terms of the Vista Verde Agreement to have the Kitchen Cabinets installed by early December. On the contrary, I am satisfied that BS&R complied with the terms of the Vista Verde Agreement to have the Kitchen Cabinets installed by Christmas or in particular by 24 December 2014.

183. In light of these reasons, I find in favour of BS&R in respect of the installation cost of the Kitchen Cabinets in the sum of \$6,543.50.

Visa Verde Extras

184. First, I am satisfied that there were a list of tasks that were requested by WA to be performed by BS&R. Some of those tasks were carpentry related but others were not such as helping with electrical issues as well as boring a hole through masonry for the kitchen hood. In my view, I recognize that a kitchen renovation is a challenge as according to Tripp West, all the subcontractors are required to do work in a kitchen. I also find that such a renovation requires cooperation and coordination to keep it on track. I further accept that, when there is a deadline, especially when the deadline is Christmas the homeowner will demand that his or her kitchen is in total working order, especially having undertaken a costly renovation.

185. Second, in my view, as the deadline tightened, Mr. Madeiros was performing his obligation to install the Kitchen Cabinets. There was much ado about the Kitchen Cabinets being deficient including spaces between appliances and cabinets and the microwave but I accept the evidence that there are commonplace issues in fitting kitchen cabinets that are addressed by using filler pieces as well as other techniques used to install cabinets to perfection. In my view, these circumstances did not amount to deficiencies undermining the cost and quality of the installation.

186. Third, during the tight timeline to install the Kitchen Cabinets, Mr. Madeiros was requested to do other tasks which amounted to the Vista Verde Extras. At the same time, Mr. Madeiros was trying to get paid for Braemore and Trevena to no avail. In my view, Mr. Madeiros pressed on also to do the other tasks so that the homeowner could have a working kitchen for Christmas. In my view this goes to his credit especially as he was working on non-carpentry items such as drilling boreholes in masonry and shopping for trashcans as well as earlier helping Mr. West to fix the muffler on his van as well as helping him, with payment, to board up his house before the hurricanes struck Bermuda. On the contrary, in my view, Tripp West was withholding the payment for the completed work at

the Braemore Job. I also find that Tripp West was withholding the significant payment that was outstanding for the Trevena Job in order to get the Vista Verde cabinets delivered and installed. I further accept BS&R's evidence and submission that WA sought to strike a compromise deal for all Three Jobs and Mr. West was discussing partial payments as WA was not able to pay the full amounts. In my mind, I am inclined to take a very dim view of this conduct of Mr. West and Tripp West.

187. In any event, I am satisfied by the supplemental evidence of Mr. Berry that a reasonable price for the Vista Verde Extras was \$2,925 rather than the \$3,315 that was charged. As stated above, WA did not challenge the evidence of Mr. Berry, rather it accepted that such evidence was accepted. In light of these reasons, I am satisfied on the balance of probabilities that BS&R are entitled to the Vista Verde Extras on the basis of Mr. Berry's reasonable costs of \$2,925.

188. In light of these reasons, I find in favour of BS&R in respect of the Vista Verde Extras in the sum of \$2,925.

Refabrication Costs of the Upper Kitchen Cabinets

189. In respect of the refabrication of the upper Kitchen Cabinets, in my view WA set out on the Vista Verde Plans that the depth of the upper Kitchen Cabinets was to be 12". I accept the evidence of Mr. Matthews that the standard depth for upper kitchen cabinets is 12" which is what was on the Vista Verde Plans. I am satisfied that the evidence shows that this was an error on the part of the WA draftsmen, that the Vista Verde Plans were approved by Tripp West and that Mr. West upon the mistake being addressed, had discussions with Mr. Madeiros who had made it clear in his emails that the cost of the refabrication was to be charged at the rate of \$65 per man hour. In any event, as the mistake was on the part of WA and its Plans, I find no reason whatsoever that BS&R were obligated to incur the cost of the refabrication.

190. In light of these reasons, I find in favour of BS&R in respect of the costs of refabricating the upper Kitchen Cabinets in the sum of \$3,656.25.

The Living Room Cabinets

191. In my view, Mr. Matthews was a straightforward witness who gave credible evidence which was not undermined by WA. Mr. Matthews had left BS&R by the time of the trial and there was no reason shown why his evidence should be discredited. I am satisfied by the evidence of Mr. Matthews that he fabricated the kitchens during the period 17 – 19 December 2014 as supported by his work time sheets. On the contrary, I am not persuaded by the evidence of Mr. West and Tripp West that the Living Room Cabinets were not fabricated at that point. I also accept Mr. Matthews' evidence that the Living Room Cabinets were completed and ready for installation in January 2015 as supported by the photos and the photo data. I also accept Mr. Madeiros' evidence that as a result of various delays in the Vista Verde kitchen, Tripp West had informed him in December 2014 to focus on the installation of the Kitchen Cabinets and the Kitchen Island to meet the Christmas deadline. Further, I accept the evidence of Mr. Madeiros that there was no room in the Vista Verde living room to store the Living Room Cabinets as it was full of all the kitchen items – therefore they could not be delivered to Vista Verde. Therefore, I find that there was no breach by BS&R in not installing the Living Room Cabinets in December 2014.

192. The evidence shows that BS&R never delivered the Living Room Cabinets to Vista Verde and that WA had another contractor fabricate and install the Replacement Living Room Cabinets. Two issues arise: (a) whether BS&R or WA were in breach of the Vista Verde Agreement in respect of the Living Room Cabinets in January 2015 and (b) whether WA has a proper counterclaim against BS&R for getting the other contractor to fabricate and install the Living Room Cabinets.

193. In respect of the claim by BS&R for the costs of the fabrication of the Living Room Cabinets, in my view BS&R have a successful claim for several reasons.

- a. First, as already stated, I find that the Living Room Cabinets were completed by 14 January 2015 and ready for installation. I accept the evidence of Mr. Matthews who stated that he took a picture of the Living Room Cabinets on 20 January which showed them put together and sitting in the carpentry shop ready to go.

- b. Second, Mr. Madeiros had sent the invoice for the completed Living Room Cabinets on 16 January 2015 when they had been completed. In my view, WA were obligated to pay for the Living Room Cabinets when presented with that invoice at that time. However, the evidence shows that Tripp West was holding out payment for the Living Room Cabinets as he attempted to secure a total settlement on the various issues still existing between the parties at that stage, namely the invoices for the Braemore Job, for the Trevena Job, for the installation costs of the Kitchen Cabinets and the Vista Verde Extras.
 - c. Third, in my view, the Braemore Job and the Trevena Job were separate and distinct jobs from each other and from Vista Verde. As such, there was no proper reason for WA to use the issues of those other jobs to withhold payment to BS&R for the Living Room Cabinets for the Vista Verde Job.
 - d. Fourth, the invoices for the installation of the Kitchen Cabinets and the Vista Verde Extras had been issued to WA. In my view, there was no proper reason for WA to withhold the payment for the completed Living Room Cabinets because of any issues they had in respect of the installation costs for the Kitchen Cabinets and the Vista Verde Extras.
 - e. Fifth, as a result of the above findings, in my view, WA were in breach of contract for not making payment to BS&R for the fabrication of the Living Room Cabinets and consequently repudiated the Vista Verde Agreement.
 - f. Sixth, I reject WA's contention that BS&R are only entitled to a loss of profit. BS&R had incurred the costs of fabricating the Living Room Cabinets and therefore it should be allowed its costs of fabrication and the profit.
194. In light of the above stated reasons, I find that BS&R are entitled on their claim in breach of contract for the cost of \$40,000 for the fabrication of the Living Room Cabinets.
195. In respect of the counterclaim by WA for the Replacement Living Room Cabinets, in my view, the counterclaim fails for the reasons as set out above where I granted judgment to BS&R for the breach of contract by WA to pay BS&R for the fabrication of the Living Room Cabinets. Further, had WA paid BS&R for the Living Room Cabinets then there

would have been no need for WA to engage other carpenters to fabricate the Replacement Living Room Cabinets.

The Counterclaims

Counterclaimant's Submissions on consequential and pure economic loss

196. I had earlier found in this Judgment that WA was the proper Defendant to BS&R's claim. CWC had submitted that if I had made such a finding, that WA would be the Counterclaimant. Therefore, I shall proceed to assess the counterclaim on the basis that WA is the Counterclaimant although some aspects of the claim are specific to WA and some are specific to CWC which I will address as necessary.

197. Tripp West submits that WA and/or CWC were able to get the Vista Verde kitchen substantially completed by Christmas 2014. However, the Living Room Cabinets were never delivered or installed and they had to get another carpenter to finish the job for the client. The Vista Verde client was satisfied enough to sign off on the job however WA and CWC were not invited back to be a part of a million dollar plus refurbishment, that is the Vista Verde Potential Renovation Job. They submit that this was connected to the deficiencies and stress of the kitchen project which BS&R contributed to significantly. Tripp West submits that as a result of working with BS&R, it has cost WA and CWC considerable sums in losses from actual projects where BS&R was engaged and from missed revenue opportunities due to BS&R's conduct and lack of professionalism on the Vista Verde Job. Further, WA has paid out considerably to rectify the Vista Verde Job as set out in the counterclaim as well as suffered considerable loss.

BS&R's Submissions Generally on consequential and pure economic loss

198. Mr. Doughty submitted that one of Tripp West's answers was fundamental to BS&R's defence to the Counterclaim. This was where Tripp West on cross-examination was asked if he had ever told Mr. Madeiros that WA was hoping to obtain further work from the homeowner of Vista Verde at the time when BS&R was first asked to do the Vista Verde Job. Tripp West replied "*Why would I ever say that?*". Mr. Doughty submits that the

claims for loss of profit or pure economic loss requires proof that the defendant knew that the breach of contract would result in economic loss to the Plaintiff.

Whether BS&R's alleged breach of contract caused CWC to experience a consequential loss of \$180,000

Submissions of BS&R (as Defendant to the Counterclaim)

199. Mr. Doughty submitted that there was no documentary evidence which suggests that CWC was actually a party to the contract with BS&R and alternatively, that BS&R knew that CWC was the other contracting party. He submits that if CWC is unable to prove either of these points then the claim in respect of the Vista Verde Potential Renovation Job, fails on the basis of privity of contract. Further, if the Court found in favour of CWC on these points then its claim for consequential loss of profit fails on the following bases:

- a. There is no evidence before the Court which shows that the potential loss of CWC's future profit was in the reasonable contemplation of BS&R at the time that it agreed to the terms of the Vista Verde Job. He relied on the extract from *Chitty on Contracts*²³ where it commented on the combined effect of the case of *Hadley v Baxendale* and other cases that "A type or kind of loss is not too remote a consequence of a breach of a contract if, at the time of contracting (and on the assumption that the parties actually foresaw the breach in question), it was within their reasonable contemplation as a not unlikely result of that breach." He also relied on the case of *Hadley v Baxendale*²⁴ where it was stated "It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, not were the

²³ (Thirty Third Edition), Volume 1, at para 26-121 at pp. 1875- 1876

²⁴ [1843-60] All ER Rep 461 (Exchq) at page 466

special circumstances which, perhaps, would have made it a reasonable or nature consequence of such a breach of contract communicated or known to the defendants. The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. ...”

- b. There is no evidence before the Court that BS&R had any notice there being a special circumstance that would result in a loss of profits for CWC in relation to further work that may have been ordered by the homeowner. He relied on the extract from *Chitty on Contracts*²⁵ which cited cases where a contemplated loss may operate as a cap on recovery. He again relied on the case of *Hadley v Baxendale*.
- c. There is no evidence before the Court which shows that BS&R agreed to assume responsibility for the loss of CWC’s future profits at the time that it agreed to the terms of the Vista Verde Job. He relied on the extract from *Chitty on Contracts*²⁶ on the assumption of responsibility and *Transfield Shipping Inc. v Mercator Shipping Inc. (“The Achilles”)* where it stated “... it now seems that a claimant will not recover, even for losses that were not unlikely to occur in the usual course of things, if the defendant cannot reasonably be regarded as having assumed responsibility for losses of the particular kind suffered.”

Analysis

200. As already found in this Judgment, WA was the party which had contracted with BS&R. On that basis, my finding is that CWC, the construction company, was not a party to the contract with BS&R. In applying the principles of privity of contract, in my view, CWC has failed to establish privity of contract with BS&R in respect of the Vista Verde Job. I have also found that BS&R were not in breach of the Vista Verde Agreement. Therefore, I am not satisfied on the balance of probabilities that BS&R caused CWC to experience a consequential loss of \$180,000.

²⁵ (Thirty Third Edition), Volume 1, at para 26-127 at p 1879

²⁶ (Thirty Third Edition), Volume 1, at para 26-136 at pp. 1884- 1886 and paras 26-137 at page 1866 to 26-145 at page 1891

201. In considering whether WA, as a party to the contract, could establish that it had a proper claim to a loss of \$180,000 as a result of losing the opportunity to secure the potential construction contract at Vista Verde, in my view this claim also fails as WA was the architectural entity which did not offer construction services. Both Mr. West and Tripp West went to great length in their evidence to set out that CWC was the construction arm of their businesses. As BS&R was not in breach of the contract with WA, therefore WA is not entitled to claim for a loss of the profit from the Vista Verde Potential Renovation Job in respect of the construction services offered by CWC.

202. If I were wrong that WA was the contracting party and it turned out that CWC was the contracting party then in my view, CWC's claim for loss of the profit from the construction services for the Vista Verde Potential Renovation Job also fails for several reasons. First, there is no evidence to support the contention that BS&R were aware of the Vista Verde Potential Renovation Job at the time when they entered the Vista Verde Agreement. Second, I rely on the emphatic statement of Tripp West as to why would he ever inform BS&R about the Vista Verde Potential Renovation Job.

203. In light of the above reasons, CWC and WA have failed to satisfy me that BS&R are in breach of contract and have caused them to experience a consequential loss of \$180,000.

Whether BS&R's alleged negligence caused CWC to experience a pure economic loss of \$180,000;

Submissions of BS&R (as Defendant to the Counterclaim)

204. Mr. Doughty submitted that if CWC were to argue its claim against BS&R in negligence, then CWC had to prove to a balance of probabilities, that it was owed a duty of care. If the Court found that BS&R was unaware of CWC's existence then a serious issue arose as to whether a duty of care existed per the "Who is my neighbor?" principle arising in *Donoghue v Stephenson*²⁷ where Lord Atkin stated "*The rule that you are to love your neighbor becomes in law, you must not injure your neighbor; and the lawyer's*

²⁷ [1932] 1 AC 562 (HL) at 580

question, Who is my neighbor? [sic] receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor. Who, then, in law is my neighbor? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.” Therefore, if CWC was not in the reasonable contemplation of BS&R throughout its involvement in the Vista Verde Job, it follows that BS&R cannot be said to have owed CWC a duty of care.

205. Mr. Doughty submitted that in cases of concurrent liability, the applicable test is not that of “reasonable foreseeability” but the contractual standard of whether it was in the contemplation of the promising party that it “was not unlikely” that the aggrieved party would suffer pure economic loss in the event of there being a breach of contract. The “not unlikely” standard is a higher standard than that of “reasonable foreseeability”. In any event, given the clear lack of evidence on whether BS&R knew that or ought to have known of CWC’s potential loss of profit, the “not unlikely” threshold had not been reached by CWC in its counterclaim in negligence.

206. Mr. Doughty submitted that as five years had passed from the alleged breach of duty and the damage complained of it raised a serious issue as to remoteness of damage.

Analysis

207. In my view, I am not satisfied to a balance of probabilities that BS&R owed a duty of care to CWC and thus any negligence on the part of BS&R was not a cause of pure economic loss of \$180,000 by CWC. As stated above, there is no evidence that BS&R was ever aware of the existence of CWC in respect of the Three Jobs and Vista Verde in particular. Further, in my view, CWC was never in the reasonable contemplation of BS&R and thus could not be said to owe CWC a duty of care. It follows that on the evidence, in respect of the question as posed in *Donoghue v Stephenson* of “Who is my neighbor?”, it is extremely unlikely that BS&R would have answered the question indicating CWC.

208. Further, I agree with Mr. Doughty that due to the lack of evidence as to whether BS&R knew or ought to have known of CWC's potential loss of profit, the "not unlikely" threshold had not been reached by CWC in its counterclaim in negligence.

209. In light of the above reasons, I am not satisfied on the balance of probabilities that BS&R's alleged negligence caused CWC to experience a pure economic loss of \$180,000.

Whether BS&R's alleged breach of contract caused WA to experience a consequential loss of \$65,000

Plaintiff's Submissions

210. Mr. Doughty submits that as WA's defence is that CWC was the contracting party with BS&R, it is now contradictory that WA now claim damages for consequential losses arising from breach of contract, despite the doctrine of privity of contract. He submits that at all material times BS&R met the terms of the Agreements with WA. Alternatively, any due dates which had been previously agreed by the parties had been extended by WA which estops WA from claiming breach of contract arising from the timing of the manufacture and/or delivery of the various cabinets BS&R built pursuant to the Vista Verde Job.

211. Mr. Doughty further submits that the evidence shows that the contract for the Vista Verde Job was actually breached by WA, therefore any damage which WA sustained was on account of its own actions.

212. Mr. Doughty submits that if the Court were to find BS&R breached the contract with WA, then it is asserted that WA's claim for consequential loss of profits fails on the basis that such damages were not, nor should have been, reasonably contemplated by BS&R, at the time it entered into the contract, as the probable result of a breach of the contract. He relied on the extract from *Chitty on Contracts*²⁸ and *Hadley and Baxendale*.

²⁸ (Thirty Third Edition), Volume 1

213. Mr. Doughty submitted that WA's consequential claim for loss fails in that:
- a. There is no evidence before the Court which shows that the potential loss of WA's future profits was in the reasonable contemplation of BS&R at the time that it agreed to the terms of the Vista Verde Job; He relied on the extract from *Chitty on Contracts*²⁹ and *Hadley and Baxendale*.
 - b. There is no evidence before the Court that BS&R had any notice there being a special circumstance that would result in a loss of profit of WA in relation to further work that may have been ordered by the client. He relied on the extract from *Chitty on Contracts*³⁰ and *Hadley and Baxendale*.
 - c. There is no evidence before the Court which shows that BS&R agreed to assume the responsibility for the loss of WA's future profit at the time that it agreed to the terms of the Vista Verde Job. He relied on the extract from *Chitty on Contracts*³¹ on the assumption of responsibility and *Transfield Shipping Inc. v Mercator Shipping Inc. ("The Achilles")* where it stated "... it now seems that a claimant will not recover, even for losses that were not unlikely to occur in the usual course of things, if the defendant cannot reasonably be regarded as having assumed responsibility for losses of the particular kind suffered."

Analysis

214. First, for the reasons stated, I have not found that BS&R breached the terms of the Vista Verde Agreement in contract. I have found to the contrary that WA breached the terms of the Vista Verde Agreement. I have also found that BS&R did not breach the term of the Agreement by not supplying the Living Room Cabinets in December 2014 as WA had agreed to the extension of time for completion of the fabrication of the Living Room Cabinets to January 2015.

215. Second, I am not satisfied on the balance of probabilities that WA's claim for \$65,000 for consequential loss of profit succeeds as in my view such damages were not

²⁹ (Thirty Third Edition), Volume 1, at para 26-121 at pp. 1875- 1876

³⁰ (Thirty Third Edition), Volume 1, at para 26-127 at p 1879

³¹ (Thirty Third Edition), Volume 1, at para 26-136 at pp. 1884- 1886 and paras 26-137 at page 1866 to 26-145 at page 1891

reasonably contemplated by BS&R at the time it entered the contract with WA. I agree with Mr. Doughty's submissions about the lack of evidence of any notice of special circumstances or that BS&R agreed to assume the responsibility for the loss of WA's future profit in relation to the Vista Verde Potential Renovation Job.

216. In light of the above reasons, I am not satisfied on the balance of probabilities that BS&R's alleged breach of contract caused WA to experience a consequential loss of \$65,000.

Whether BS&R's alleged negligence caused WA to experience a pure economic loss of \$65,000;

Plaintiff's Submissions

217. Mr. Doughty submits that BS&R concedes that it owed WA a duty of care for the purpose of analyzing WA's allegation that BS&R was negligent and thereby caused it damage. However, BS&R maintains that it met the standard of care expected of it at all material times in relation to WA.

218. Mr. Doughty submitted that in cases of concurrent liability, the applicable test is not that of "reasonable foreseeability" but the contractual standard of whether it was in the contemplation of the promising party that it "was not unlikely" that the aggrieved party would suffer pure economic loss in the event of there being a breach of contract. The "not unlikely" standard is a higher standard than that of "reasonable foreseeability". In any event, given the clear lack of evidence on whether BS&R knew that or ought to have known of WA's potential loss of profit, the "not unlikely" threshold had not been reached by WA in its counterclaim in negligence.

219. Mr. Doughty submitted that as five years had passed from the alleged breach of duty and the damage complained of it raised a serious issue as to remoteness of damage.

Analysis

220. First, in my view, as conceded by BS&R, I accept that WA had a duty of care to WA. However, as stated above, I have not found that BS&R ever had knowledge about the

Vista Verde Potential Renovation Job. In my view, it follows that BS&R never contemplated that WA could suffer damages as a result of any alleged breach of duty of care in respect of the Vista Verde Agreement.

221. Second, in my view, BS&R had met the standard of care expected of it at all material times in relation to WA, relying generally on the witnesses for BS&R. I rely on the evidence of Mr. Madeiros that he relied on his discussions and meetings with Tripp West as well as the Vista Verde Plans that were provided to him for details and measurements. Additionally, the time lines were delayed by WA due to issues with demolition, electrical and tiling works. I also rely on the evidence of Mr. Matthews that he fabricated the cabinets according to the Vista Verde Plans and standard measurements and the completion timelines of December for the Kitchen Cabinets and of January for the Living Room Cabinets. Further, I rely on the evidence of expert Mr. Berry who stated that the Living Room Cabinets were fabricated to a high standard. Finally, I rely on the evidence of Mr. Madeiros and Mr. Matthews in respect of the installation of the Kitchen Cabinets in that it was a usual occurrence to use filler pieces to finish off the fitting of appliances.

222. Further, I agree with Mr. Doughty that due to the lack of evidence as to whether BS&R knew or ought to have known of WA's potential loss of profit, the "not unlikely" threshold had not been reached by CWC in its counterclaim in negligence.

223. In light of these reasons, I am not satisfied that BS&R were negligent in any way in its duty of care to WA.

224. In light of the above reasons, I am not satisfied on the balance of probabilities that BS&R's alleged negligence caused WA to experience a pure economic loss of \$65,000.

Set-off for Remedial Costs and other Costs

Submissions

225. The Counterclaimants set out Remedial Costs of \$26,316.56 in their Defence and Counterclaim and they claim that if any amounts are due to BS&R then the Remedial Costs

should be set-off against such sums on the basis that further work was required to be performed in order to complete the installation of the Kitchen Cabinets. I have given consideration to these set-off claims as follows:

- a. In respect of the cost of \$18,750 for Bermuda Build (carpenter) to fabricate the Replacement Living Room Cabinets, I dismiss this claim as I have already found that BS&R had completed the fabrication of the Living Room Cabinets but that WA had breached the terms of the agreement by refusing to pay for such fabrication. It follows that if WA had paid BS&R for the fabrication of the Living Room Cabinets then WA would need to have anyone else build them. On that basis, I am not satisfied that this claim amounts to a set-off in favour of WA.
 - b. In respect of additional carpentry work, in my view, based on the evidence of Mr. Matthews and Mr. Madeiros, I find that BS&R built the cabinets to specification as set out in the Vista Verde Plans and by way of the meetings and discussions Mr. Madeiros had with Tripp West. As a result, I am not satisfied that BS&R is responsible for any work done by Maurice Shaiffer (Carpenter) for \$2,017.20 and Carvalho Construction (Carpenter) for \$4,483.00. Therefore, I dismiss these amounts as a set-off amount.
 - c. In respect of the custom painting of \$1,066.36 to match existing cabinets, I dismiss these costs as in my view, they do not originate from any fault of BS&R, which as I stated above, had fabricated the Kitchen Cabinets to specification. However, I do note that the Vista Verde Punch List dated 7 January 2015 set out a need for ‘touch up’ paint on a Kitchen Cabinet and for a scuff mark on the Kitchen Island. However, the evidence of Tripp West does not set out any detail on how much time and expense was required for the two small ‘touch up’ paint tasks. I am satisfied that WA should be given the benefit of a set-off for paint touch ups to a nominal value of one hour at \$65 an hour, which was BS&R’s rate for extras.
226. In respect of hiring a Project Manager for \$10,000 to oversee the remedial works for the installation of the Kitchen Cabinets, I dismiss the costs on the basis that BS&R had built the Kitchen Cabinets to specification. In my view, any deficiencies were the result of

the Vista Verde Plans drawn by WA. Further, I rely on the evidence of expert Mr. Berry who stated that he could only comment anecdotally that 67 – 100 hours was a lot of time to manage a kitchen installation. Additionally, Tripp West stated in his witness statement that the Project Manager was engaged “during the period January 2015 to May 2015 to coordinate the remedial works at the Vista Verde Job”. In my view and in any event, it appears that the Project Manager was working on other tasks at Vista Verde other than the installation of the Kitchen Cabinets.

227. In respect of CWC and/or WA reducing its charges to its Vista Verde client by \$10,000 for the length of time taken to complete the Vista Verde Job, I dismiss this claim as in my view, BS&R was not responsible for any delay in the completion of the Vista Verde Job. As stated earlier, BS&R was not responsible for the delays in installing the Kitchen Cabinets from early December to when they were installed just before Christmas. Further, I have already found that BS&R had completed the Living Room Cabinets in January 2015. In my view, the evidence highlights that had WA paid BS&R for the Living Room Cabinets in January 2015 then it is most likely that they would have been installed soon thereafter. Therefore, I dismiss this amount as a set-off.

228. In respect of the set-off amount of \$1,500 for the removal of an appliance by BS&R, I allow this amount as a set-off as BS&R admitted to such set-off.

Particulars of Claim as set out in the Counterclaim Letter

Submissions

229. The Counterclaimant set out further claims in the Particulars of Claim letter dated 10 February 2020 as set out in the Pleadings section above. BS&R set out its Defence to the Counterclaim denying the entirety of the Counterclaim except where it was admitted. I have considered these claims as follows:

- a. A claim for \$12,800 for four days in Court in February 2020 for Mr. West and Tripp West. This claim is dismissed as this is a claim for costs rather than damages;

- b. A claim for \$2,750 for mediation fees in June 2019. This claim is dismissed as I am not satisfied that this is a cause of action and damages; and
- c. A claim for \$26,764.50 for legal fees. This claim is dismissed as this is a claim for costs rather than damages;

Conclusion

230. I have found that WA is the proper defendant for all Three Jobs in this matter.

231. In respect of the claims by BS&R for the Braemore Extras, I have found in favour of BSR against WA for \$2,417.50 in damages and debt.

232. In respect of the claims by BS&R for the Trevena Job, I have found in favour of BSR against WA for \$31,802.78 in damages and debt.

233. In respect of the Vista Verde Job, I have found the following:

a. In favour of BSR against WA as follows:

- i. Kitchen Cabinets installation costs of \$6,543.50 (Invoice # 20964);
- ii. Vista Verde Extras costs of \$2,925.00 (Invoice # 20964);
- iii. Vista Verde upper Kitchen Cabinets refabrication costs of \$3,656.25 (Invoice # 20980);
- iv. Vista Verde fabrication costs of the Living Room Cabinets of \$40,000 (Invoice # 20980);

For a gross total for Vista Verde of \$53,124.75;

b. I dismiss WA's set-off claim for its Remedial Costs, except for:

- i. The admitted set-off amount of \$1,500 for an appliance removed from Vista Verde.
- ii. Costs of the Vista Verde painting 'touch up' tasks of \$65.

For a net total of \$51,559.75 after set-off.

- c. In respect of the Particulars of Claim as set out in the letter dated 10 February 2020, I dismiss the counterclaim by WA in its entirety. For avoidance of doubt, I dismiss any counterclaim by CWC also.
234. The total of the judgment for the Three Jobs in favour of BS&R is \$85,780.03.
235. In respect of the disposition of the Living Room Cabinets, I will hear submissions if necessary from the parties if such disposition cannot be agreed.
236. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of BS&R on a standard basis, to be taxed by the Registrar if not agreed.

Dated 22 December 2021

**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**