In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011: No 426

BETWEEN:-

DENNIS ARTHUR SOARES FIGUREIDO

Plaintiff

-and-

CINDY LAWS

Defendant

JUDGMENT

(In Court)

Date of hearing: 13th – 15th October 2014; 21st and 24th – 25th November 2014; 16th January 2015

Date of judgment: 16th March 2015

Ms Lovette Tannock, Christopher E Swan & Co, for the Plaintiff
The Defendant in person

Introduction

1. The Plaintiff is a self-employed builder. On or about 29th June 2009 the Defendant hired him to carry out building works on her property at 1 Tree Lane Drive, Paget ("the Property"). I shall refer to this job as "the Project". The Plaintiff carried out certain building and plumbing works at the Property. He employed his son to work on site with him. He charged for their work at an agreed rate of $45.00 per hour.

2. The Plaintiff did not hire anyone else. All the other workers on the site were hired by the Defendant, or by workers whom she had hired. Although the Plaintiff describes himself as a "*contractor*", the word is apt to mislead. Apart from his son, the other workers on the site were not sub-contracted to work for him or subject to his supervision. There was one partial exception, but I shall deal with that later in this judgment.

3. On 5th October 2009 the Department of Planning ("The Department") issued a stop work notice ("the first SWN"). The Plaintiff gave evidence, which the Defendant disputed, that he submitted a report from a structural engineer named CHB Crisson to address the Department's concerns, following which he understood that the first SWN had been lifted. However it was not in fact lifted at this time.

4. On 30th October 2009 the Defendant suspended work on the site. The Plaintiff did not carry out any further work for her. So far as he was concerned, the Defendant had terminated his engagement. In due course the building work resumed under another builder.

5. On or about 12th December 2009 the Plaintiff submitted a bill for labour and materials. The Defendant had been chasing him for one for several months. The bill came to $57,520.62. $41,075.00 was attributable to labour (masonry and plumbing labour $29,970.00; electrical labour $11,105.00) and $16,445.62 was attributable to materials (masonry materials $6,232.66; plumbing materials $2,813.73; and electrical materials $7,399.23). The masonry and plumbing work was carried out by the Plaintiff and his son: the

electrical work was carried out by an electrician hired by the Defendant whose bills the Plaintiff had paid while the Defendant was off island.

6. On 10th March 2010 the first SWN was finally lifted. This was following the submission by the Defendant of report from Jamie Pehkonen of Brunel Engineering Consultants ("Brunel").

7. A further SWN was issued on 12th April 2010 ("the second SWN"), in part because work subsequent to the first SWN had allegedly been carried out before that SWN was lifted. This included substantial excavation which had taken place mainly underneath the existing building. In fact the excavation work had been carried out before the first SWN was issued, but had apparently not been noticed by the inspector.

8. On 14th April 2010, at the Defendant's request, Gordon Ness, who was the Building Control Officer for the Department, met her on site. Upon arrival, Mr Ness was concerned that the ceilings above the excavation work had not been underpinned, with the result that the building above the excavation was in danger of collapse. He varied the second SWN to allow for temporary supports to be put in place.

9. On 15th September 2010 the Defendant emailed the Plaintiff to say:

> "*I will make a monthly commitment of $1,000 per month starting toward materials until such time as I can do better and until all other matters are concluded.*"

10. On 25th November 2011, in response to a letter before action from the Plaintiff's attorneys, the Defendant wrote back:

> "*When I made a payment to Mr Figureido, he seemed unappreciative of what I was able to afford at the time. During the course of his tenure, I kept asking him for a bill and he never gave me one until months after he had left the site. When I finally received it I had run out of money so I am doing the best I can.*
>
> *I will resume payments to Mr Figureido to the best of my ability. I have enclosed a copy of my most recent cheque [for $500] sent to him by mail for your information."*

11. On 19th January 2012 the Plaintiff issued a specially endorsed writ of summons. This alleged that the Defendant agreed to and did hire the Plaintiff to act as the contractor to provide supplies and perform works at the property; that it was inter alia an implied term of the contract that the Defendant pay the Plaintiff for goods supplied and services rendered by the Plaintiff to the Defendant; and that in breach of contract the Defendant has failed to pay monies due and owing to the Plaintiff. The Plaintiff (or his lawyer) had recalculated the amounts previously billed, and the principal sum claimed in the writ was only $55,041.01. It is common ground that the Defendant has already paid the Plaintiff $1,500.00.

12. With the leave of the Court, at trial the Plaintiff amended his claim for electrical labour and materials to include an alternative claim in restitution as the claim concerned monies paid to a third party by the Plaintiff on the Defendant's behalf. The claim could also be formulated as arising under a collateral contract.

13. The Defendant filed a defence dated 18th May 2012 which was followed on or about 27th July 2012 by a counterclaim. The precise amount claimed grew as the trial unfolded. Her final position was that she admitted that the Plaintiff was entitled to $26,232.96, of which $10,690.00 was attributable to labour and $15,542.96 to materials. However she claimed a set-off in the sum of $44,104.73. The set-off formed part of a counterclaim for $380,892.15 as the cost of curing the Plaintiff's allegedly defective work and for consequential loss of income, and $1,095,807.00 for what she described as "*investment losses*". The net result was that on the Defendant's case she did not owe the Plaintiff money: rather, he owed money to her.

14. The Plaintiff filed a defence to counterclaim dated 5th September 2012 in which he denied any liability to the Defendant.

Case management

15. During the course of the trial I became concerned that the costs of the litigation were at risk of becoming disproportionate to the amount that either party was likely to recover. There were various reasons which made the length of the trial, which lasted seven days, unavoidable: the detailed factual inquiry to which the competing claim and counterclaim gave rise; the number of witnesses called; and the fact that the Defendant was unrepresented. Although the thrust of her questions when cross-examining witnesses was always relevant and focused, she took rather longer to ask each question than an attorney would have done.

16. When the Court adjourned part heard on 25th November 2014, the Plaintiff's counsel was in the course of cross-examining the Defendant. The Defendant was the final witness. I indicated, pursuant to the Court's duty to manage cases under Order 1A/4 of the Rules of the Supreme Court 1985, that I would expect the hearing to be concluded on the next occasion. To this end, I set a timetable whereby the morning would be taken up with the conclusion of the cross examination of the Defendant and any re-examination; and the afternoon by closing submissions, for which each party was allocated equal time.

17. That timetable was duly implemented. After the final day of the hearing on 16th January 2015, the Defendant filed written submissions with the Court in which she expressed concern that she had not the opportunity to make all the points which she had wanted to make in her closing submissions. She stated that she wished through her written submissions to remedy that. The Defendant included a small bundle of material with her submissions, most of which had previously been submitted in evidence but some of which had not.

18. I invited the Plaintiff, whom the Defendant had supplied with copies of her written submissions and material, to make any representations that he

wished regarding that material and whether the Court should have regard to it. However the Plaintiff did not avail himself of this opportunity.

19. In the circumstances, I have taken into account (i) the Defendant's written submissions, which I have found of assistance; (ii) her revised figures in the Scott Schedule which the parties prepared, although I have declined to admit any new heads of claim; and (iii) material from the records kept by the Department, as these help to put the parties' respective cases into context. I have not taken any other fresh material into account. I am satisfied that in so doing neither party has been prejudiced or given an unfair advantage.

20. I am further satisfied that both parties have had ample opportunity to make their respective cases and to put all the evidence upon which they wished to rely before the court in a timely manner.

The law

21. This case turns largely on its facts, so I need spend little time on the law. The Plaintiff's claim and the Defendant's counterclaim are both principally for breach of contract. The Plaintiff contracted to undertake certain building works for the Defendant at an agreed price on a "cost and charge' basis. The Defendant is liable to pay the Plaintiff for those works provided that they were carried out in accordance with the contract. The Plaintiff claims that in breach of contract the Defendant has failed to pay him for his work. The Defendant counterclaims for losses which she has allegedly sustained as a result of breaches of contract by the Plaintiff.

22. As the Plaintiff contracted to provide building services for the Defendant, the contract between them was governed by The Supply of Services (Implied Terms) Act 2003 ("the 2003 Act"). This means that, irrespective of the position at common law, certain terms were implied into the contract by statute.

23. Under section 3 of the 2003 Act, there was an implied term that, as the supplier of a service, the Plaintiff would carry out that service, ie the building works, with reasonable care and skill and under section 4 there was an implied term that he would do so within a reasonable time. To take a hypothetical example, if a reasonably skilful builder could plaster a wall in eight hours, a builder would not be permitted to charge for 16 hours' labour even if the task had in fact taken him that long.

24. A term that a builder will use all proper skill and care, which means the same thing as reasonable care and skill, is also implied at common law. See Young & Marten Ltd v McManus Childs Ltd [1969] 1 AC 454, HL, *per* Lord Reid at 465 C – D; and Benevides v Walker [2013] Bda LR 73, SC, *per* Simmons J at para 49, referring to Chitty on Contracts (Vol. II)[1] at 37-071, and para 62. I take this common law term to include the requirement that the builder completes the work within a reasonable time.

25. Where the builder is responsible for the selection of the materials, then a building contract will also contain, unless excluded by the terms of the contract, an implied warranty that the materials used are of good quality. See Young & Marten Ltd v McManus Childs Ltd *per* Lord Reid at 466 B – D.

26. A building contract may further contain an implied warranty that what is built will be fit for purpose. Such a duty is likely to be implied where the builder relies on plans provided by the employer: by agreeing to build the design the builder is warranting his ability to do just that. See Chitty on Contracts (Vol. II) at 31-074 and Hudson's Building and Engineering Contracts[2] at 1.295, cited with approval in Benevides v Walker at paras 50 and 57.

[1] The edition is not given in the judgment. The paragraph can be found in the twenty-ninth edition, but I do not know whether it occurs in subsequent editions.

[2] The edition is not given in the judgment.

27. I have considered whether the Plaintiff might owe the Defendant a concurrent duty of care in negligence, although in this case it would make little practical difference if he does given his contractual duty to act with proper care and skill. I am mindful that Lord Scarman, giving the judgment of the Board in Tai Hing Cotton Mill Ltd v Liu Ching Hong Kong Bank Limited [1986] AC 80, PC, at 107 B, stated that:

"*Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship.*"

28. In that case, the Privy Council held that a claim against a banker for failing to exercise due care and skill in the performance of his duties to his customer lies solely in contract. In White v Conyers, Dill and Pearman [1994] Bda LR 9 at 6 the Court of Appeal ruled that the same applied to a claim against an attorney by his client. Bankers and attorneys are professionals. Without the benefit of argument on the point, I am not prepared to extend the principle, at least not in absolute terms, to other types of contract such as a contract for building services provided by a skilled manual labourer like the Plaintiff. Particularly as there is authority to the contrary.

29. The leading case is Robinson v PE Jones (Contractors) Ltd [2012] QB 44, EWCA. The facts concerned the duties owed by a building company to the purchasers of a building which it had constructed. By parity of reasoning, the principles stated by the Court would apply equally to building work carried out, as in the present case, to an existing building.

30. Jackson LJ, with whom the other members of the Court agreed, stated at para 68:

"*Absent any assumption of responsibility, there do not spring up between the parties duties of care co-extensive with their contractual obligations. The law of tort imposes a different and more limited duty upon the manufacturer or builder. That more limited duty is to take reasonable care to protect the client against suffering personal injury or damage to other property. The law of tort imposes this duty, not only towards the first*

person to acquire the chattel or the building, but also towards others who foreseeably own or use it."

31. Thus, as stated by Stanley Burnton J at para 92:

"*... the builder/vendor of a building does not by reason of his contract to construct or to complete the building assume any liability in the tort of negligence in relation to defects in the building giving rise to purely economic loss. The same applies to a builder who is not the vendor...*"

32. As to what is meant by "*assumption of responsibility*", Jackson LJ drew a distinction at para 83 between a normal building contract where the builder simply undertakes the building work which he has agreed to do (no assumption of responsibility) and a professional relationship where, eg, the plaintiff was paying the defendant to give advice or to prepare reports or plans upon which the plaintiff would act (responsibility assumed).

33. In the present case, the Defendant asserts that the Plaintiff assumed responsibility for supervising an electrician who was working on site, and that she suffered loss because the Plaintiff negligently failed to supervise him adequately. I shall consider the merits of this assertion, which is relied upon both to provide a defence to part of the Plaintiff's claim and to establish a counterclaim against him, later in this judgment. I am satisfied that this is the only respect in which the issue of assumption of responsibility arises in this case.

34. As to the terms to be implied under any collateral contract, the question is whether the term is to be implied from the contract when construed as a whole against the relevant background. See AG of Belize v Belize Telecom Ltd [2009] 1 WLR 1988, PC, *per* Lord Hoffmann at para 21.

35. Damages for breach of contract must be for losses which, at the time when the contract was made, were either foreseen by the parties or were reasonably foreseeable. That was the test laid down by Alderson B, giving the judgment of the Court of Exchequer, in Hadley v Baxendale (1854) 9 Exch 341 at 354:

"*Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.*"

36. As mentioned recently in Curtis-Thomas v Bermuda Hospitals Board [2014] SC (Bda) 68 Civ at para 138, Alderson B's judgment has been explained in, eg, Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528, CA; Koufos v C Czarnikow Ltd [1969] 1 AC 350, HL; and Jackson v Royal Bank of Scotland plc [2005] 1 WLR 377, HL. It remains authoritative.

37. Reasonable foreseeability is also the test for liability for damage in negligence. As Viscount Simonds stated in The Wagon Mound No 1 [1961] AC 388, PC, at 426: "*the essential factor for determining liability is whether the damage is of such a kind as the reasonable man should have foreseen*".

38. As to the Plaintiff's claim in restitution, the applicable principle was stated by Parke B, giving the judgment of the court, in Simpson v Eggington (1885) 10 Exch 845 at 847:

"*The general rule as to payment or satisfaction by a third person, not himself liable as a co-contractor or otherwise , has been fully considered in the cases of Jones v Broadhurst (9 CB 193) , Belshaw v Bush (11 CB 191) , and James v Isaacs (22 LJCP 73) ; and the result appears to be, that it is not sufficient to discharge a debtor unless it is made by the third person, as agent, for and on account of the debtor and with his prior authority or subsequent ratification.*"

39. Simpson v Eggington was recently cited with apparent approval, although it was distinguished on the facts, in Ibrahim v Barclays Bank plc [2013] Ch 400, EWCA. See the judgment of the Court, given by Lewison LJ, at paras 36 – 37.

40. However a claim in restitution will not generally arise where it would be inconsistent with the contractual arrangements between the parties. See

MacDonald Dickens & Macklin (a firm) v Costello [2012] QB 244, EWCA, *per* Etherton LJ, giving the judgment of the Court, at para 23, which was followed in SJ Construction Ltd v Simons [2015] SC (Bda) 7 Civ (15th January 2015).

The Plaintiff's claim

41. The Plaintiff gave evidence that he had more than 40 years' experience working as a building contractor and his son gave evidence that he had more than 20 years' such experience. The Plaintiff also adduced evidence from three former clients who expressed their high opinion of him and his work. All three clients gave oral evidence and I found them to be credible witnesses.

42. The Plaintiff explained that his son and he each kept a contemporaneous record of the time which they spent on the Project in a time-book, and that his son went through their time books at the end of the Project to prepare the bill. That is how the Plaintiff arrived at the hours claimed. The Plaintiff said that the time books were destroyed at the end of the Project.

43. However I was referred to two computer spreadsheets which were apparently prepared on behalf of the Plaintiff at a later date. I say "apparently", because although they were included in the trial bundle their provenance was not explained. They showed hours worked during June through October 2009.

44. One time sheet showed a total of 484 hours, which at $45.00 per hour came to $21,780.00. The Plaintiff said that without his time-book he couldn't say whether these were the hours that he had worked.

45. The other time sheet showed two totals: 94 hours and 121 hours – at $45.00 per hour, 121 hours came to $5,445.00. The time sheet showed how the 94 hours but not the additional 27 hours (ie the difference between 94 hours and

121 hours) was made up. The Plaintiff's son gave evidence that the second time sheet showed the hours that he had worked.

46. Taken at their highest, however, the time sheets show a total of 605 hours, which at $45.00 per hour would come to $27,225.00. This is slightly less than the $29,970.00 claimed in the Plaintiff's bill.

47. At my request, the parties prepared a Scott Schedule in which the Plaintiff broke down his claim into the specific pieces of work which he had done, together with the time taken and the amount claimed. The Defendant commented on each item. I am grateful for the work which both parties have put into this document. However during the Plaintiff's evidence it became clear that he had little recollection of the specific items of work which he had undertaken and was unable to verify the accuracy of the Schedule. It was based on a document dated 20th April 2012 which was prepared for the Defendant by the Plaintiff's attorneys – although it is unclear whether it was ever sent to her – which broke down the Plaintiff's work into specific items but did not attribute a time or cost to them. In the Scott Schedule the Plaintiff claimed $27,340.00 for masonry labour and $3,960.00 for plumbing labour, for a total of $38,405.00.

48. The Plaintiff adduced a number of invoices to support his claim for materials. Although he did not attribute particular materials to particular items of work, the Defendant did so in her response in the Scott Schedule. Subject to set-offs, she allowed $5,330.00 for masonry materials and $2,813.73 for plumbing materials, for a total of $8,143.73. The Plaintiff did not dispute how the Defendant allocated materials to particular items of work, so I shall proceed on the basis that, subject to set-offs, this allocation is agreed. I shall disallow the Plaintiff's claim for any surplus materials as these have not been accounted for.

49. The Plaintiff, with the aid of his lawyer, had evidently attempted to reconstruct the information in the document dated 12th April 2012 and the Scott Schedule from memory without the aid of contemporaneous records.

He submitted that he should not be penalised if his memory of the information which he had attempted to reconstruct was poor. Subject to some minor concessions made in cross-examination, he stood by the overall time for which he had charged, which was based on the contemporaneous records which he and his son had kept in their time books.

50. The Plaintiff gave evidence that although he saw several sets of plans for the property he was never given an approved set of plans to keep. He stated that he got most of his instructions from the Defendant, whom he said was on-site nearly every day, or from one of her two adult sons. He complained that the Defendant would have him start a job one day and then have him start another job the next before he had completed the first job. He said this happened throughout his time on the Project. In his words, the Defendant had him and his son "*working like chickens, scratching here, scratching there, and with nothing completed*".

51. The Plaintiff accepted that the Defendant personally had not asked him to do any plumbing work. But he said that it was necessary to do some of the plumbing work before doing some of the work which he was contracted to do, such as levelling floors. Moreover, the Plaintiff said that he discussed some of the plumbing work with the architect whom the Plaintiff had hired for the Project, and that the architect had told him to complete the work which they had discussed.

52. The Plaintiff submitted that all the work carried out by him and his son was nonetheless executed with reasonable care and skill and was fit for purpose and compliant with the Building Code. He relied on the fact that in correspondence the Defendant agreed to pay his bill, and that she did not challenge it until he commenced these proceedings. He invited me to conclude that the Defence and Counterclaim had been brought in bad faith and that the Defendant was just someone who didn't want to pay her bill.

53. The Defendant resisted the Plaintiff's claim on the grounds that he had overcharged, having claimed for work which he had either not done at all or

had done in less time than that for which he had claimed. She further alleged that much of his work was shoddy and incompetent, and that she had had to hire other tradesmen to put right what he had done wrong. The cost of rectifying his allegedly inadequate work was in some instances greater than the amount billed by the Plaintiff for doing the work in the first place. The Defendant objected to paying for materials used in work which had to be undone. She objected to paying anything at all for the plumbing work as she alleged that it was not fit for purpose and that it was done contrary to her express instructions.

54. The Defendant explained that she had not raised these points earlier as she had had more pressing matters to deal with. Moreover, she said that the true picture had only come to light gradually, in part as a result of her preparation for these proceedings.

55. The Defendant called several tradesmen who worked on the property after the Plaintiff had left. They gave evidence of the condition in which they found it and the work which they undertook, which in some cases involved undoing or remedying work which the Plaintiff had done. I also heard evidence about the Plaintiff's work from the Defendant's two adult sons, who had worked on the property while the Plaintiff was there.

56. In my judgment, the contemporaneous records maintained by the Plaintiff and his son in their time-books, as recorded in the bill which was issued to the Defendant and subject to the downward revisions contained in the Scott Schedule, give the best indication available as to the time which the Plaintiff actually spent working on the Project. There were no other contemporaneous records, and the Defendant's time estimates have been prepared long after the event. There is force in the Plaintiff's submission that now, several years later, he cannot reasonably be expected to provide an itemised break-down of the time which he spent on the Project with any degree of accuracy.

57. On the other hand, I agree with the Defendant that it is reasonable to require the Plaintiff to indicate the work for which he charged. Otherwise it would not be possible to assess whether the time charged was reasonable.

58. I shall therefore proceed on the basis that the time claimed with respect to any particular item is reasonable unless there is a good reason why I should not do so. In adopting this approach, and having had the benefit of hearing both the Plaintiff and the Defendant give oral evidence, I accept the Plaintiff's evidence that the Defendant would frequently ask him to move from job to job without completing the one before moving on to the next. I make allowance for the fact that as a result the jobs may have taken longer than would have been the case had the Plaintiff been allowed to work uninterrupted.

59. I turn now to the specific items for which the Plaintiff has claimed. I shall address them in the order in which they were set out in the Scott Schedule.

Masonry

(1) <u>Construction of new 6x14x8 cesspit</u>. Mr Crisson certified that the work on the concrete block sides and slab roof of the cesspit was entirely satisfactory. Mr Pehkonen certified that the slab roof was structurally sound for its intended purpose. The Plaintiff claims $3,500.00 for 78 hours' or two weeks' labour and $1,700.00 in materials: the Defendant asserts that a maximum of one week would have been reasonable. In view of the engineers' reports, I shall allow the Plaintiff's claim for this item in full and award a total of **$5,200.00**.

(2) <u>Remove existing wood roof framing and masonry walls extension</u>. The Plaintiff claims $800.00 for 18 hours' or two and a half days' labour. He said in evidence that he believed that he did that work, which related to a roof over the garage, but was not sure. The Defendant claims that this work was not carried out by the Plaintiff but by Stephen H Smith, a builder whom she employed subsequently. She has

adduced a breakdown of work billed by Mr Smith which includes the following narrative for 17th February 2010: "*put up staging and removed roof above garage door*". I accept that the work was carried out by Mr Smith or those working under him and shall **disallow** the Plaintiff's claim for this item.

Existing lower apartment #2

(3) Floor in living/dining/kitchen area. The Plaintiff claims $3,420.00 for 76 hours' or two weeks' labour and $1,500.00 for materials. When pressed under cross-examination, he said that he didn't know how long the work took. In response to a suggestion of three days, he said "*Whatever you say*". However it appeared to me that he said this because he was fed up with being questioned rather than because he really agreed with the suggestion. I shall compromise and allow five days' labour or 38 hours, amounting to $1,710.00. I shall also allow the sum claimed for materials. This gives a total for this item of **$3,210.00**.

(4) Remove small kitchen window & frame/block up opening with masonry. The Plaintiff claims ten hours' labour and $30.00 materials. The Defendant initially submitted that it should only have taken four hours' labour but later proposed that eight hours would be reasonable. I shall allow the Plaintiff's claim for this item in full and award a total of **$480.00**.

(5) Plaster existing kitchen walls. The Plaintiff initially claimed $3,000.00 for 67 hours' labour plus $30.00 for materials. However he accepted when cross-examined that he and his son had jointly plastered two walls, and that to do that they had each worked two eight hour days, for a total of 32 hours or $1,440.00. The Defendant claimed that they had only plastered one wall and that the remaining walls had been plastered by Mr Smith. The breakdown of work supplied by Mr Smith does

suggest that he plastered two or three walls. However, having heard the Plaintiff on this point, I accept his evidence. I shall therefore allow $1,440.00 plus the sum claimed for materials, for a total for this item of **$1,470.00**.

(6) Build masonry walls/plaster both sides. The Plaintiff claimed $1,500.00 for 34 hours' or one week's labour and $380.00 for materials, although when cross-examined he had little recollection of the work. The Defendant initially proposed to allow $720.00 for 16 hours' work but later said that she would allow another day. I shall allow the Plaintiff's claim for this item in full and award a total of **$1,880.00**.

(7) Demolish existing masonry wall. The Plaintiff claims $500.00 for roughly eleven hours' labour. The Defendant initially submitted that this work was done by her sons, but subsequently, and on the face of it inconsistently, submitted that it was done by Mr Smith. She produced a narrative of the work which he carried out on 23rd February 2010 which included "*Removed existing wall in East apt. bedroom*". But as the Defendant accepted, the Existing Apartment #2 was the West apartment. I am not satisfied from the narrative produced by Mr Smith that the wall to which he refers was the same as the wall which the Plaintiff claims to have demolished. I shall therefore allow the Plaintiff's claim for this item and award **$500.00**.

Existing lower apartment #3

(8) Masonry walls in new bathroom constructed. The Plaintiff claims $750.00 for 17 hours' or two days' labour. But when cross-examined he said that he could not remember whether he did the work. The Defendant gave evidence that the bathroom walls already existed and that a subsequent builder, Barry De Couto Jr, closed an opening in the walls. She therefore disputes that the Plaintiff should be paid anything

for this claim. Mr DeCouto gave evidence as to the work that he did, but it was insufficiently precise for me to link it to this particular item. Nonetheless, I accept the Defendant's evidence on this point and shall **disallow** the claim for this item.

(9) Trenching to carry plumbing pipes from bathroom and kitchen area to outside of existing building. The Plaintiff claims $1,000.00 for around 22 hours' or three days' labour. The Defendant contends that the Plaintiff had no permission to do plumbing work and gave evidence that in any case this work was not done by the Plaintiff but by an excavator. I regard this work as digging rather than plumbing. When cross-examined, the Plaintiff stated that he had to dig a lot of trenching, some of which had to be done by hand. When asked whether he had permission to do the digging, he replied that the Defendant saw him doing the work and that it needed to be done. Why, he asked rhetorically, didn't the Defendant stop him? I accept the Plaintiff's evidence on this point and allow his claim for this item of **$1,000.00** in full.

(10) Existing door and frame between garage and lower entrance foyer removed; and

(11) Gap blocked by masonry/plastered.

(a) I shall consider items (10) and (11) together. The Plaintiff initially claimed $250.00 for five and a half hours' labour for item (10) and $360.00 for eight hours' labour plus $40.00 in materials for item (11). The two items are related in that item (10) involved removing a door and frame and item (11) involved blocking up the doorway.

(b) When cross-examined, the Plaintiff initially stated that it took a little more than one day to complete item (11), but then, when the Defendant suggested that $360.00 would be a reasonable overall payment for both items, said, "*Whatever you say*". I am

satisfied that the Plaintiff made this concession because he was getting fed up with being questioned rather than because he agreed with the Defendant's suggestion.

(c) The Defendant later alleged that the work in item (10) had in fact been done by Mr Smith, and produced a narrative of the work which he had carried out on 11th February 2010 which included, "*Cut door opening into bedroom of East apt.*". The narrative does not appear to me to relate to item (10).

(d) I shall allow the Plaintiff's claim for items (10) and (11) in full, and award a total of **$650.00**.

(12) Patching up electrical channels and masonry and existing building. The Plaintiff claims $1,500.00 for 33 hours' or one weeks' labour. He gave evidence that he did a lot of work and "slugged up" four panels. The Defendant claimed that he had done no more than two hours' work, and that the rest was done by Mr Smith and a self-employed mason, Patrick Hall. She referred to the narrative provided by Mr Smith for work done on various dates in February and March 2010. Mr Smith and Mr Hall both gave evidence confirming that they had done some "slugging up". I do not find that there is any inconsistency in the evidence of the Plaintiff on the one part, and Mr Smith and Mr Hall on the other, and award the Plaintiff **$1,500.00** for this item.

(13) Pulled up old well pump. The Plaintiff claims $300.00 for seven hours' or one days' labour for this task. The Defendant claimed that $90.00 for two hours' work was sufficient, although when cross-examining the Plaintiff she appeared to accept that $300.00 was reasonable. I shall allow the Plaintiff's claim for this item, and award **$300.00**.

(14) Construct new exterior reinforced concrete stairs between existing swimming pool and exterior existing kitchen porch.

(a) Much evidence was devoted to these stairs. The Plaintiff claims $5,400.00 for 120 hours' or 3 weeks' labour and $1,200.00 for materials. He stated in his witness statement:

> "*My son and I began building the steps and after concreting them, the Defendant came over and asked us to move them. The steps in question initially came straight down to the ground level and then she changed them to come down to the level of the pool room door and then down to the ground. The Defendant then asked for the basement to be renovated and the steps were in the way. The steps had to be rerouted all over again.*"

(b) The Plaintiff's son corroborated the Plaintiff's evidence about the stairs.

(c) The Defendant alleged that the Plaintiff had built the wrong stairs using the wrong plan, and that consequently they had to be demolished and rebuilt. Her witnesses Mr De Couto Jr and Mr Hall gave evidence that their demolition was necessary as they did not run parallel with the existing building; were too steep; and the treads were too shallow such that the stairs did not meet the existing porch deck out of the kitchen. In the circumstances, the Defendant does not accept that the plaintiff should be paid anything for his work on the stairs.

(d) Mr Crisson stated that the construction of the steps was more than adequate and Mr Pehkonen stated that their foundation was structurally sound. Mr Ness observed on his site visit that the concrete used to build the stairs was not properly compacted and showed signs of "honeycombing", and criticised the quality of workmanship, but he did not suggest that they were not fit for purpose.

(e) I accept that any functional deficiency in the stairs was largely due to the Defendant repeatedly chopping and changing her instructions. I shall therefore allow the Plaintiff's claim for

labour, but subject to a ten per cent deduction to reflect the poor quality of workmanship identified by Mr Ness. The claim for materials is allowed. I shall therefore award a total of **$6,060.00** for this item.

(15) Construct temporary wood guard rail on new exterior reinforced concrete stairs. The Plaintiff's claim for $250.00 for five and a half hours' labour plus $100.00 for materials was not disputed. I shall therefore award a total of **$350.00** for this item.

(16) Construct new reinforced concrete slab and tank access on south partition of existing kitchen porch. The Plaintiff claims $360.00 for eight hours' or one days' labour plus $350.00 for materials. The Defendant claims that the slab, which was suspended, was not adequately supported and had to be demolished. Mr Hall, who undertook the demolition, gave evidence that the slab, which rested on plastic and wire mesh, was not adequately supported and was dangerous. Mr Ness, who was shown photographs of the plastic and wire mesh support, stated that if this was a suspended slab the mesh was not adequate reinforcement. In the circumstances, I shall **disallow** the claim for this item.

Plumbing

(17) Remove and install new plumbing lines; and

(18) Install exterior supply, drain and soil lines from upper level revised bathroom area and to be connected to plumbing lines on lower level; and

(19) Install supply drain lines from kitchen in apt#2 to be connected to lines in apt#3; and

(20) Install drain and soil lines from kitchen and bathroom to new cesspit.

(a) I shall deal with these items together. The Plaintiff claims a total of $3,960.00 for 88 hours' labour and $2,813.73 for materials. The work was carried out by him and his son. He stated that there were no plans for the plumbing, which was something which he had to "*play by ear*". However he said that the work in the bathroom area was passed by an inspector from the Health Department, although I have seen no documentary evidence of this. I also heard from his son, who described some of the plumbing work that he did.

(b) The Defendant denies that the Plaintiff is entitled to anything for the plumbing work. First, she states that she told the Plaintiff not to do any plumbing work, and that a plumber was on stand-by to do this once the Department approved the plans for the Project. She gave evidence that much of the plumbing work was done during two weeks in October when she was not present at the property.

(c) The Plaintiff's response was that he thought that he had the Defendant's implied authority to undertake plumbing work as the work was necessary and as when the Defendant hired him he had held himself out as able to do it. As to item (19), the Plaintiff gave evidence that he had acted on the express authority of the architect hired by the Defendant. However when the Defendant asked him directly in cross-examination how he could justify doing plumbing work when she had never asked him to do it, the Plaintiff replied, "*I can't answer that*".

(d) Vincent Joaquin, the plumber hired by the Defendant after the Plaintiff left the Project, gave evidence of a number of defects which he had found in the Plaintiff's work:

"*The first problem we found was in the area under the south upper bedroom. There was a sewage line in the ceiling that disconnected and dropped off as soon as we touched it. If the owners would have activated*

a toilet connected to this pipe in the upper bathroom en suite to that south bedroom, it would have filled up in the wall creating tremendous problems for them.

We also eventually found the other end of this sewage line about twenty feet away buried and open-ended in a block wall going nowhere in the west apartment's east bathroom wall.

The west apartment's existing plumbing had been cut off from a separate pit that it had been connected to on the west side of the property. This was a newer area of the house that had been built more recent and had been set up with all of its own plumbing, tank and pit. New floors had been poured very recently in this apartment so I suspect that the sewage plumbing had run across these floors to the pit and grease trap that had been on that side. Neither the bathroom or kitchen sewage or drainage could be located so all new sewage plumbing had to be installed and run a different route on the unconstructed east side to the new pit from this apartment.

[Mr Joaquin expanded on this point when giving oral evidence. He said that the sewage pipe from the west apartment to the existing cesspit some 15 feet away had been severed. The pipe had gone under the living room floor, which had just been re-concreted. It was therefore not possible to reconnect the apartment to that cesspit without digging up the new living room floor. Consequently, he had to connect the apartment to the new cesspit built by the Plaintiff, which was 40 to 50 feet away. The Defendant's case was that the Plaintiff had severed the existing sewage pipe when he re-concreted the living room floor.]

"*Another thing we found strange was the setup of the North Apt bathroom. There were plumbing pipes installed that were running to the pit that were covered with screenings that made no sense at all. We couldn't make heads or tails out of what was supposed to be the tub, the toilet or the basin. The pipes appeared to be high in the ground both inside the house and outside going to the pit.*

After completing our investigations of the current situation we began by snaking all the pipes including all those going to the pit that we were told [the Plaintiff] had installed to see what they were and where they went. The snakes would not go through any of the pipes. All the pipes were

buried and covered. Next we decided to open up pipes w[h]ere snakes stopped to investigate and found all the joints were stuffed with either sponge or cement bags.

Because of all these problems we had no trust in the work done by [the Plaintiff] and dismantled all the plumbing done by him and discarded it."

(e) The Plaintiff was able to explain the set-up of the pipes in the north apartment bathroom. However he did not explain the situation in the west apartment. As to the outside pipes running from the apartments to the new cesspit, his son said in evidence that he had tested them all before he left the property and that they were all clean and empty and running properly. He stated that when his father and he left, the pipes were "*screened in*" with only the tops showing so that they wouldn't move or get jostled about. The son referred to a photograph of the pipes which the Defendant had put in evidence and pointed out that one had a "*clean out knot*" only twelve inches away from the join where the materials blocking the pipe had been found. However he agreed that there was no visible clean out knot in the photographs of the several other blocked pipes.

(f) The Plaintiff did not accept the Defendant's suggestion that the plumbing work was shoddy. He stated that it was "*adequate and above*".

(g) I am not satisfied that the Plaintiff had authority to undertake any plumbing work for the Defendant. I am, however, satisfied that the plumbing work carried out by the Plaintiff and his son was not done with reasonable skill and care or fit for purpose. It is difficult to account for the blockage of the outside pipes, but I am satisfied that the blockage was more likely to have occurred before the pipes were screened in than afterwards.

(h) I shall therefore **disallow** the Plaintiff's claim for plumbing work in its entirety.

Electrical work

(21) Electrical work and materials

(a) The Plaintiff claims $11,090.00 for labour and $6,686.38 for materials. The labour was carried out by an electrician named Cedric Nash and his assistant. Mr Nash was hired by the Defendant and was initially paid by her directly. But when the Defendant left Bermuda for a time in August 2009 the Plaintiff offered to pay Mr Nash in her absence so that work on the Project could continue. The Plaintiff gave evidence that he took it upon himself to pay them. The Defendant gave evidence that he had approached her and that a brief conversation took place. She said that he had asked her, "*Would you like me to take over the payments?*", and that she had replied, "*If you want to*".

(b) The Plaintiff paid three invoices for work carried out in September 2009. They were for: (i) $5,115.00 (93 hours x $55.00; (ii) $2,790.00 (93 hours x $30.00); and (iii) $3,185.00 (41 hours x $55.00 and 31 hours x $30.00).

(c) By way of comparison, I was referred to four subsequent invoices for work carried out in September and October 2009. They were for: (i) $3,300.00 (60 hours x $55.00); (ii) $1,800.00 (60 hours x $30.00); (iii) $3,932.50 (71.5 hours x $55.00) and (iv) $2,145.00 (71.5 hours x $30.00). On 3rd October 2009 the Defendant paid $3,080.00 on invoice (i) and $1,680.00 on invoice (ii).

(d) The Defendant claims that the Plaintiff, in assuming the responsibility to pay Mr Nash, impliedly also assumed a supervisory responsibility over him, and/or a responsibility to ascertain that the expenses invoiced by Mr Nash had been properly and reasonably incurred. She submits that they were not, and that Mr Nash overcharged her for both labour and materials. Moreover, she submits that his work was not carried out with reasonable care and skill and was unfit for purpose.

(e) The Plaintiff, she submits, should have been aware of this and have refused to pay the invoices, or at the very least have passed them to her for approval. Had he done so, she would not have authorised payment.

(f) Indeed, she submits that the considerable cost of rectifying Mr Nash's poor work means that not only should those invoices never have been paid, but that Mr Nash – like the Plaintiff – has ended up owing her money. She therefore objects to reimbursing the Plaintiff for any part of the payments which he made to Mr Nash.

(g) The Plaintiff accepts that he did not show Mr Nash's bills to the Defendant promptly upon her return, although the Defendant gave evidence that she had asked for them straightaway. He said that he had felt intimidated by Mr Nash into paying them, but that he would have paid them anyway: Mr Nash was an electrical engineer and the Plaintiff felt that it was not for him to question Mr Nash.

(h) As to the materials, during the Defendant's absence Mr Nash told the Plaintiff what materials he required and the Plaintiff went out and bought them. The Plaintiff gave evidence that he had questioned Mr Nash about one of the items, electrical wire, because he did not agree with the size of the wire that Mr Nash

wanted. The Plaintiff had deferred to Mr Nash's expertise. The Defendant accepted that prior to her trip the Plaintiff had bought materials for Mr Nash, and that she was present and knew about it.

(i) The Plaintiff said that at one point he had told the Defendant, that he thought that Mr Nash was using too much material. The Defendant recalled him mentioning this to her after she came back, and maybe before she left. During her absence, the Plaintiff raised his concerns with Mr Nash, who replied, "*I'm the engineer and this is what I need.*" So the Plaintiff bought the requested materials. He stated that if Mr Nash did not need all the materials then he could have returned them and obtained a refund for the unused amount.

(j) I am satisfied that in the circumstances there was a collateral contract whereby the parties agreed that if the Plaintiff paid Mr Nash's labour and materials then the Defendant would reimburse him. I am satisfied that the term as to reimbursement is to be implied from the contract when construed as a whole against the relevant background.

(k) I am satisfied from the Defendant's evidence that when the Plaintiff paid Mr Nash's invoices and purchased materials for him during the Defendant's absence he was acting with her express authorisation. I am therefore satisfied that these payments discharged any liability that the Defendant may have had towards Mr Nash to pay those expenses. Consequently, if I am wrong in holding that there was a collateral contract, the Plaintiff is in principle entitled to recover those payments from the Defendant in restitution.

(l) As a restitutionary claim would only arise in the alternative that the payments to Mr Nash were made pursuant to a non-

contractual arrangement between the Plaintiff and the Defendant that was collateral to the contract between them, it would not be barred by the principle in MacDonald Dickens & Macklin (a firm) v Costello.

(m) I accept that the Plaintiff's authorisation did not extend to payment of and for invoices and materials which were to his knowledge or on the face of it false or excessive. But I am satisfied that none of the payments which he made can fairly be impugned in this way. He was entitled to proceed on the basis that Mr Nash was acting in good faith and defer to his expertise. The Defendant's submissions to the contrary notwithstanding, the Plaintiff did not impliedly undertake to supervise Mr Nash or investigate his invoices. Indeed he was not asked to do so.

(n) I am not in a position to judge the adequacy of Mr Nash's work or whether the expenditure on materials bought at his request was excessive. Any remedy that the Defendant may have in respect of these matters lies not against the Plaintiff but against Mr Nash. (As Mr Nash is no longer in the jurisdiction I appreciate that this remedy is likely to prove hollow.)

(o) I shall therefore allow the Plaintiff's claim for electrical work in full, and award a total of **$17,776.38**.

Summary

60. In summary, I award the Plaintiff:

(1) Masonry (labour and materials): $22,600.00

(2) Plumbing (labour and materials): $0.00

(3) Electrical work (labour and materials): $17,776.38

Total: **$40,376.38**.

61. The Plaintiff must give credit for the $1,500.00 which the Defendant has already paid, which leaves a balance of **$38,876.38**.

<u>The Defendant's counterclaim</u>

62. The Plaintiff did not challenge how the figures claimed by the Defendant were calculated but rather disputed in its entirety the Defendant's entitlement to each head of loss that she claimed. I can therefore address the counterclaim in quite general terms.

Plumbing

63. The Defendant counterclaims $20,330.98 for plumbing work. This comprised: (i) the cost of digging up and removing the plumbing work carried out by the Plaintiff, which the Defendant estimated as the aggregate of $7,600.00 (96 hours x $80.00) and $1,600.00 (40 hours x $40.00); and (ii) the cost of rerouting plumbing from the west apartment to the new cesspit because the Plaintiff severed the original plumbing lines. The Defendant was able to identify specific items on an electronic summary of work carried out by Gavin Virgil Plumbing, for whom Mr Joaquin worked, to support her claim for the cost of rerouting.

64. Mr Joaquin gave evidence that dismantling the Plaintiff's work took around two weeks' labour for work outside the building and another two days' labour for the work inside the building. His evidence was therefore broadly consistent with the Defendant's unchallenged calculations.

65. I accept that this work was necessary. I shall therefore allow the Defendant's counterclaim for plumbing work in full and award a total of **$20,338.98**.

Underpinning

66. The Defendant counterclaims $34,674.92 for the cost of underpinning some excavation work which was carried out at the property. She has provided a detailed and appropriately documented breakdown of how this figure was calculated. I accept that her calculation is accurate. The excavation work was carried out by a company called Bell's Skyline Ltd ("BSL"). The Defendant claimed that the Plaintiff hired BSL as a sub-contractor, but that is not quite accurate. I am satisfied that the correct position was set out in a letter dated 2nd March 2010, addressed "*to whom it may concern*", which the Plaintiff wrote on behalf of BSL. The letter, upon which the Defendant relied, stated:

> "*This letter is to certify that I, Mr Dennis Figureido ... was authorised by Ms. Cindy Laws to hire Bell's Skyline Ltd. for the excavation and trucking services to be carried out at Tree Lane, Paget – building permit #BO446/09.*
>
> *It was agreed that Ms. Laws would be responsible for payment of all charges related to work carried out by Bell's Skyline Ltd. under my supervision. Excavation services commenced on the 28th of July and were completed on the 21st of September. During this time, I monitored the project and was pleased with the service that they provided for us.*"

67. Thus when the Plaintiff hired and supervised BSL he was acting as an agent of the Defendant: BSL had a contract not with him but with her. I am satisfied that in the circumstances she knew in advance of the excavation work that BSL was hired to carry out. However the Plaintiff owed the Defendant a contractual duty to exercise reasonable care and skill in his supervision of BSL. This is the partial exception that I mentioned at the start of this judgment.

68. The excavation work was carried out underneath the existing building. As noted above, when Mr Ness inspected the site on 14th April 2010 he was concerned that the ceilings above the excavation work had not been underpinned, with the result that the building above the excavation was in danger of collapse. He observed that the contractor had left stone columns

in place – not constructed, but excavated around – but said in evidence that they were inadequate to support the roof.

69. Mr Ness gave evidence that the normal practice would be to erect a temporary horizontal support structure of wood or steel, supported by jacks, but that this was not present. He added that he would expect to see temporary underpinning that was adequate to support the existing structure while excavations took place. He said that it was not the excavation that posed the problem but the lack of support. He varied the stop work notice with immediate effect so that one could be put in place pending the construction of some supporting walls from concrete blocks.

70. The Plaintiff gave evidence that he didn't think that the excavation work needed underpinning, but that he would have underpinned it if it had done. His counsel noted that evidently Mr Smith did not think that underpinning was necessary either; otherwise he would have caused it to be done when he started work on the site.

71. The Plaintiff stated that he had instructed the Defendant's sons, who were helping him from time to time, to make three inch cuts into the walls of the excavated area about three inches from the ground so that when the floor was poured it could be "*tied in*" to the walls in order to strengthen them. The Defendant alleged that the Plaintiff had made cuts, or caused cuts to be made, in the supporting pillars as well.

72. Mr Ness gave evidence that, at any rate until the floor was poured, the cuts weakened the walls. He mentioned that he had seen cuts in the walls but did not mention cuts on the pillars. The Defendant gave evidence that as pipes and/or electrical cables would have had to be laid, there would have been a delay between the conclusion of the excavation and the pouring of the floor. She suggested that if the walls and/or pillars were to be cut – and Mr Ness stated that as this was a ground floor, cuts were unnecessary – they should not have been cut until shortly before the floor was to be poured.

73. Mr Ness stated that it appeared to him that the excavation had only been done in the last few weeks, ie in February or March 2010. However I am satisfied from the evidence of both the Plaintiff and the Defendant that the excavation was carried out by BSL – indeed that was the main task for which BSL was hired – and that, as stated in the above letter, it took place over the period July to September 2009. The Defendant stated that some smoothing of walls had been done in the excavated area in the few weeks prior to Mr Nash's visit. It may be that that is when the Defendant's sons made the cuts in the walls. If so, that would help explain why Mr Nash thought the excavation work looked fresh.

74. I am satisfied from Mr Nash's evidence that the excavation work required underpinning, but also that it would have required underpinning in any event. There is no evidence from which I can properly conclude that the cuts in the walls and/or pillars made any difference to the degree of underpinning required. Neither can I properly conclude from the evidence that if the excavation had been carried out differently – eg, as the Defendant suggested, that the stone pillars had been left thicker at the base – the underpinning required would have been any different. It is therefore a cost that the Defendant would have had to bear in any event.

75. I shall therefore **disallow** the Defendant's counterclaim for underpinning.

Electrical main feed

76. The Defendant claims $1,000.00 as the cost of replacing an electrical main feed which she states was installed by the Plaintiff. By this, she means a pipe through which the electrical wiring was to be fed. The main feed laid by the Plaintiff ran through the new front apartment.

77. I accept that the Plaintiff did this work. Although he did not claim for it, he did not dispute it either. The reason he did not claim for it may well be because, which was not in dispute, the Defendant did not ask him to do it.

78. The Defendant claims that the installation was too shallow, and that as a result it was severed during subsequent excavation work. Moreover, she claims that the pipe took the wrong route as it went through the bathroom, which she asserts was dangerous because it gave rise to a risk that water would enter the pipe and come into contact with the electrical wiring.

79. The Defendant's evidence was supported by her son, Markez Laws, who stated that the Plaintiff laid the feed less than one foot below ground level, whereas Mr Nash, whose work he was completing, had laid it two feet below ground level.

80. The Plaintiff, through his counsel, suggested that the work was not wrong: just differently to the way in which Mr Nash would have done it.

81. I do not have the benefit of evidence from an electrician commenting on the competence of the Plaintiff's work. But I do not need it. The Defendant had instructed Mr Nash, an electrician, to install the main feed. The Plaintiff took it upon himself to complete the job without her instructions, contrary to her wishes, and in a way that she did not want. This had unfortunate consequences, with the result that the work had to be redone. The Defendant is entitled to the cost of getting it redone in the way that she wanted. The amount claimed has not been challenged as unreasonable.

82. I shall therefore allow the counterclaim for the electrical main feed and award the Defendant **$1,000.00**.

Overpayment of electrical work

83. The Defendant wishes to counterclaim $7,207.50 for monies which she claims as the cost of correcting his allegedly faulty work. She contends that the Plaintiff is liable for this sum as he impliedly accepted responsibility for supervising Mr Nash when he assumed responsibility for paying for him. This counterclaim was raised for the first time in the documents which the Defendant submitted after the hearing had concluded. Moreover, earlier in

this judgment I have rejected the argument on which the counterclaim is based. I shall therefore **disallow** the Defendant's counterclaim for overpayment of electrical work.

Stairs

84. The Defendant counterclaims $720.00 for the cost of dismantling the external stairs built by the Plaintiff and $275 for the cost of removing the rubble. As I have allowed the Plaintiff's claim to build these stairs it follows that I shall **disallow** the counterclaim for the cost of their removal.

Stop work notices

85. The Defendant counterclaims that the Plaintiff is liable for the costs which she has incurred in getting the stop work notices of 9th October 2009 and 12th April 2010 removed.

86. It will be helpful to place this counterclaim in the context of the various types of approval that may be required from the Department in the course of building work. Mr Ness gave evidence explaining that an applicant, normally the home owner, is required to obtain planning permission before undertaking building work. Once this has been obtained, the applicant is required to apply for a building permit. The Department will inspect the plans submitted by the applicant to ensure that they comply with the Bermuda Residential Building Code 1998 ("the Code"). If they do, they will be stamped as approved. That approval is the trigger to commence building works.

87. However there is a fast track procedure whereby the Department will issue deemed planning permission ("PDP") for small-scale building work. This involves the issue of a building permit without the grant of planning permission. Sometimes the applicant will obtain a PDP to get the Project

started pending the grant of planning permission. That is what happened in the present case.

88. Section 2.7.1 of the Code provides:

> "*The permit holder shall, at least one working day before proceeding with or concealing work which requires inspections, notify the Building Official [at the Department] that such inspection is needed. These works shall not commence until the inspection has been carried out and approved.*"

89. The section goes on to provide that work which requires inspection includes: excavations and foundation reinforcing prior to pouring footing concrete; structural reinforcing in all structural concrete and reinforced masonry prior to pouring concrete; and all electrical work prior to concealing. It identifies other work which requires inspection, but this does not concern us.

90. Leroy Rodgers, who worked under Mr Ness at the Department as a Senior Building Control Inspector, gave evidence that in his experience it was the duty of the contractor to arrange inspections to ensure Code compliance. I take this to mean that, notwithstanding that the permit holder is typically the home owner, it is custom and practice that responsibility for arranging such inspections is the contractual responsibility of the contractor. I am therefore satisfied that in the present case, although the permit holder was the Defendant, it was the contractual duty of the Plaintiff to obtain the approval of the Department that his work was Code compliant.

91. Mr Rodgers explained that inspectors, besides carrying out inspections at the request of the contractor, would also carry out inspections unannounced. If an inspector found something in need of correction, he would issue a field correction notice ("FCN") setting out what needed to be done and normally when it needed to be done by. If the FCN was not complied with, the inspector could issue a SWN. This was similar to a FCN, save that it required all work on site, or on part of the site, to be stopped until its requirements had been complied with.

92. On 4th September 2009 the Department issued a FCN which read as follows:

"*The following orders are hereby issued for their correction:*

As you have poured the pit top without inspection you are required to have a locally registered engineer submit a report to planning accepting substantial structural liability for the works done.

You are required to have approved plans on site showing structural details for footings to steps and if any changes you must submit application for approval before any sign offs can be given.

PLEASE CALL FOR REINSPECTION WHEN CORRECTIONS HAVE BEEN COMPLETED, ACCEPTANCE AND APPROVAL BY AN INSPECTOR OF THIS DEPARTMENT IS REQUIRED. ALL CORRECTIONS MUST BE MADE ON OR BEFORE Any work is signed off".

93. As mentioned above, on 5th October 2009 the Department issued the first SWN. This was accompanied by an explanatory letter which red as follows:

"*This stop work notice has been issued for the following reasons.*

On Sept, 04, 2009 a field correction notice was issued for concealment w/out inspection for the pit top. Since then the footings for the steps and the ground floor slabs have been poured w/out compulsory inspection request being made, also of note the electrical was not inspected.

Please be advised that the above is a violation of section 2.7.1 of the Bermuda Residential Building Code. As such, all site works must stop immediately.

To resolve the aforementioned, exposing some of the reinforcing at points we will determine will be acceptable. Alternatively you can employ a structural engineer to certify structural integrity. A report will then be sent to our department for approval.

Failure to respond to this directive within 5 working days may result in further action being taken."

94. There are several things about the first SWN which merit comment.

(1) Although the SWN mentions that it is "*also of note*" that the electrical work was not inspected, its inspection does not appear to be necessary to have the SWN removed. Thus the electrical work is not addressed in the steps given as necessary to resolve the situation.

(2) The SWN mentions building work which has taken place since the FCN was issued, namely that the footings for the steps and the ground floor slabs have been poured.

(3) Inspection by the Department or a report by a structural engineer are given as alternative ways to get the SWN lifted: it is not necessary to have both.

95. As mentioned earlier, the Defendant commissioned a report by Mr Crisson, a structural engineer ("the Crisson letter"). This was dated 7th October 2009 and read as follows:

> "*I have been provided with your Field Correction Notice dated Sept. 4/09, a copy of the Approved Plans and a number of photographs.*
>
> *I have visited the site with the contractor, Mr Dennis Figuredo (sic). I have also taken photographs which indicate the very hard rock on the site. One of Mr Figureido's photographs shows the rebars provided for the cess pits top slabs and the concrete block sides. I find that this work is entirely satisfactory although it was in place before either you or I were able to inspect it before the pour.*
>
> *Your second item referred to having approved plans on site. Mr Figureido carries them in his truck for security reasons. The footings to steps and the steps for the most part bear on the very hard native rock or compacted fill. The photographs show the excessive amount of reinforcing in the stairs and the adjacent landings. I submit that this construction is more than adequate.*
>
> *I trust that you will find this is all acceptable and that you will permit the work to proceed.*"

96. The Crisson letter addresses the FCN not the first SWN. It addresses the cesspit and the footings to the steps which are raised in the SWN. However it is not clear from the face of these documents whether the "*adjacent landings*" mentioned in the letter are the same as the "*ground floor slabs*" mentioned in the SWN.

97. The Plaintiff gave evidence that he submitted the Crisson letter to the Department. He stated that he had not stopped working even though he had never heard back from the Department about the letter. He said that as it was a letter from an engineer it was not necessary to wait for confirmation from the Department that it was acceptable.

98. The copy of the letter which was put in evidence was endorsed in manuscript "*approved Oct 9.09*" and initialled. Mr Ness said in evidence that he recognised the handwriting and initials as belonging to Mr Rodgers. He explained that if a structural engineer certified the work as being of adequate quality that was good enough for the Department. An inspector would normally just sign the letter and place it on the file for the Project. However he was also required to record this action in the inspection history which the Department maintained for the property.

99. Mr Ness agreed to a suggestion from the Defendant's counsel that Mr Crisson's letter was sufficient to lift the first SWN. He stated that, provided that the engineer certified that the work was adequate and thereby assumed responsibility for its adequacy, the Department would in all cases accept such a letter.

100. Mr Rodgers accepted in evidence that the manuscript endorsement to the letter bore his signature. Although he had stated in his witness statement that the Crisson letter was not sufficient, he was unable to explain why the Department had not rescinded the first SWN when it had approved the work which the letter addressed.

101. There is no record of the letter on the inspection history kept by the Department for the Property. The Defendant gave evidence that she had

inspected the Department's file on a number of occasions subsequent to 9th October 2009 but had not seen Mr Crisson's letter there until after the action had commenced. She invited me to conclude that the endorsement was a forgery and the letter quite possibly a recent fabrication which the Plaintiff had placed on the file himself.

102. I reject that very serious allegation. I am satisfied that Mr Rodgers did endorse the letter on 9th October 2009 and that by doing so he intended to indicate that he was content that the issues raised in the letter had been addressed to his satisfaction. The failure to record the approval in the inspection history was most probably due to administrative error.

103. Sometime in February 2010 the Defendant learned that the first SWN had not been lifted. She stated in evidence that this news came as an unwelcome surprise, as the Plaintiff had told her that he had taken care of everything. As mentioned earlier, the Defendant, who was unaware of the Crisson letter, instructed Brunel to prepare a report on the work identified in the SWN.

104. By a report dated 4th March 2010 ("the Brunel letter"), Mr Pehkonen, a structural engineer, confirmed that Brunel had inspected the exposed reinforcing steel in the cess pit top slab; the exterior stair foundation; and the kitchen/living room slab "*on grade*". He stated that Brunel understood that the Department had requested that these structural elements be inspected by a registered structural engineer as they were poured without compulsory inspections. He concluded, based upon his inspection of them, that these structural elements should be structurally sound for their intended purpose. Mr Rodgers confirmed that, based upon this report, the first SWN was lifted on 10th March 2010.

105. Mr Pehkonen clearly understood the "*ground floor slabs*" mentioned in the first SWN to be the "*kitchen/living room slab*". On the face of it, "*kitchen/living room slab*" is not a synonym for the "*adjacent landings*". I therefore conclude that the "*ground floor slabs*" mentioned in the first SWN

and the "*adjacent landings*" mentioned in the Crisson letter were most probably different.

106. As noted above, on 12th April 2010 the Department issued a further SWN. This was accompanied by a letter which read as follows:

"***UNAUTHORIZED DEVELOPMENT***

Proposed RETROACTIVE APPLICATION for Partial Basement Application and Additions and Renovations to Incorporate Enclosure and Extension of Existing Verandah, New Garage, Pool House, New Bay Window and Internal Conversion to incorporate Two (2) New Dwelling Units, 1 Tree Lane, Paget

Good Day Ms. Laws

It has been brought to the Department's attention that work has preceded (sic) at the above captioned locality. On 19th March, 2010 the Department of Planning received a Retroactive Application for the above but as of today 12th April, 2010 this application has not been assigned to a Planner nor has your application been approved. This being the case, you must also be aware that you ***do not*** *have a Building Permit for this site.*

On 5th October, 2009, a Stop Work Notice letter was sent to you regarding the concealment without inspection for the pit top, footing for the step and ground floor slabs were poured without compulsory inspection, as well as no inspection for the electrical works had been made. You were advised that you were in violation of Section 2.7.1 of the Bermuda Residential Building Code 1998 and you were advised to **Stop Work** *immediately. As of 7th April, 2010, pictures received show that works are still ongoing.*

Please refer to Sections 5 & 6 of the Building Act 1988.

There seems to be a clear pattern of Non-Compliance and therefore if building operations continue, enforcement action will be taken."

107. There were two matters raised in the letter. First, the Defendant had sought but not yet obtained retroactive planning permission for work carried out by the Plaintiff. Thus the work was not covered by a building permit. In accordance with the procedure explained by Mr Ness, obtaining planning permission was the Defendant's responsibility. It was no concern of the Plaintiff's.

108. The Defendant gave evidence that on most days she discussed with the Plaintiff the building work to be done – although she would not have done so while she was away in August 2009. I have found earlier that she knew of the basement excavation in advance. I am therefore satisfied that the work for which planning permission was required was carried out by the Plaintiff with the Defendant's knowledge and consent. Although her consent to any work carried out after the first SWN was issued was impliedly dependent upon the Plaintiff getting that SWN removed, her consent was not dependent upon the grant of planning permission.

109. Planning permission and a building permit for the work mentioned in the second SWN were granted by letter dated 9th August 2011. The letter stated that $1,113.00 was required for outstanding fees. Those fees were not the Plaintiff's responsibility. I shall therefore **disallow** the Defendant's claim for this amount.

110. Secondly, getting the first SWN lifted was the Plaintiff's contractual responsibility. In my judgment he discharged that responsibility with respect to the cess pit and the stairs by obtaining the Crisson letter and sending it to the Department. The fact that the Department appears to have misplaced it once they approved it was no fault of his.

111. However the Crisson letter was written in response to the 4th September 2009 FCN and not the first SWN. As a result it did not address the ground floor slabs. Thus, even if the Department had not misplaced the FCN, a further report from a structural engineer would have been necessary to remedy this omission. The Defendant counterclaims $750.00 for the cost of obtaining that report and $600.00 in related retroactive fees levied by the Department. I shall allow these counterclaims, which total **$1,350.00**.

112. The Defendant further counterclaims $1,250.00 for the cost of engaging Brunel in what she describes as "*proactive project management an attempt to resolve all other issues caused by Figureido such as excavating needing underpinning and structure support*." I am not persuaded of the need to

instruct Brunel for this purpose, particularly as I have found that the cost of underpinning would have been incurred in any event. I shall therefore **disallow** the counterclaim for this amount.

Consequential loss

113. The Defendant counterclaims for various items of consequential loss which allegedly resulted from the cost and delay caused by putting right the work which the Plaintiff and Mr Nash were alleged to have done wrong, and the hiatus in work caused by the SWN/s. I remind myself that in order to be recoverable, consequential loss must be reasonably foreseeable.

Loss of rental income

114. First, the Defendant counterclaims for loss of rental income for delays due to work stoppages that were allegedly caused by the Plaintiff. She claims 20 months' rent at a rate of $2,400.00 per month for both apartments, ie $48,000.00 for each apartment, for a total claim of $96,000.00. The 20 months runs from 9th October 2009, when the first SWN was issued, until 9th August 2011, when planning permission and a building permit for the additional works carried out by the Plaintiff were granted.

115. The Plaintiff accepted in evidence that he knew that the apartments were for rental purposes. I therefore accept that loss of rental income was a reasonably foreseeable consequence of any delay in building works caused by the Plaintiff. However I do not accept that the Plaintiff caused a delay of 20 months.

116. The Defendant suspended work on site from 30th October 2009 until February 2010. That was not due to the first SWN as it was not until February 2010 that the Defendant learned that it had not been lifted.

117. The narrative of work supplied by Mr Smith shows a break of ten days from 5th to 14th March 2010 inclusive, of which three days fell on a weekend. It is clear from that narrative that Mr Smith and his men did not work every day of every week, so I shall assume a six day week with a break on Sunday. That would mean a loss of nine days' work.

118. I am not satisfied that any further delay can properly be attributed to the Plaintiff. There is no evidence from which I can properly conclude that the underpinning would have been completed more quickly if it had been carried out while the excavation was in progress rather than afterwards. Neither can I properly conclude from the evidence that the time taken to undo the plumbing or the electrical main feed laid by the Plaintiff added materially to the time taken to complete the Project, as there is no evidence that all other work on the Project stopped or slowed while these tasks were being completed.

119. Insofar as there was further delay in the completion of the Project, over and above the time that it would have taken to complete if everything had run smoothly, on the evidence before me this was largely attributable to:

(1) The need for the Defendant to obtain planning permission and a building permit for the additional works carried out by the Plaintiff. As already stated, obtaining them was not the Plaintiff's responsibility.

(2) The need to redo the electrical work undertaken by Mr Nash. I note from the inspection history kept by the Department that on 12th March 2010 an inspector failed the electrical rough-in and noted that' "*this place needs a total rewire*". Ensuring the quality of Mr Nash's work was not the Plaintiff's responsibility.

(3) The fact that, as the Defendant admitted in evidence, she ran out of money several times during the Project. In my judgment that is the most plausible explanation for the delay between the end of October 2009 and February 2010. Lack of funds was also evidenced by non-

payment of the Plaintiff's bill: see, eg, the Defendant's email of 15th September 2010.

120. The Defendant adduced in evidence rental agreements for both apartments. They commenced on 12th August 2012 and 1st November 2012 respectively. I am not satisfied that but for the short delay caused by the Defendant getting the first SWN lifted either apartment would have been rented any earlier.

121. I shall therefore **disallow** the claim for loss of rental income.

Cost of obtaining additional funding for the Project

122. The Defendant obtained a bank loan of $378,487.38 to fund the Project. She counterclaims for the cost of obtaining additional funding. Specifically, she sold land and incurred transaction fees in doing so, but the sale was at a loss (amount claimed: $123,886.00); took out a further bank loan, and thereby incurred the cost of interest payments (amount claimed: $32,644.52); and borrowed money from her company – which required the company to cash various certificates of deposit and thereby lose the benefit of interest payments on them – and thereby incurred transfer fees (amount claimed: $26,041.31).

123. The Defendant also counterclaimed as "*investment losses*" the amount for which she sold the land ($628,807.00) and the amount of the loans from her company ($467,000.00). She makes the point that the company loans have deprived her company of investment capital.

124. These losses were not reasonably foreseeable. Neither has the Defendant proved that they were caused by the Plaintiff. The "*investment losses*" were not actually losses. I shall therefore **disallow** these counterclaims.

125. In summary, I award the Defendant:

(1) Plumbing: $20,338.98

(2) Underpinning: $0.00

(3) Electrical main feed: $1,000

(4) Overpayment of electrical work: $0.00

(5) Stairs: $0.00

(6) Cost of lifting first SWN: $1,350.00

(7) Costs related to second SWN: $0.00

(8) Consequential loss $0.00

Total: $22,688.98.

<u>Summary</u>

126. I shall allow $40,376.38 with respect to the Plaintiff's claim. He must give credit for the $1,500.00 which the Defendant has already paid, leaving a balance of **$38,876.38**.

127. I shall allow **$22,688.98** with respect to the Defendant's counterclaim.

128. The net result is that the Defendant must pay the Plaintiff **$16,187.40** (ie $38,876.38 minus $22,688.98).

129. Pursuant to sections 4 and 10 of the Interest and Credit Charges (Regulation) Act 1975 ("the 1975 Act"), interest on this sum will run from the expiration of six months from the time of the first rendering of the Plaintiff's account, ie from 12th June 2010, until the date of this judgment.

130. Thereafter, pursuant to section 9 of the 1975 Act, interest at the statutory rate shall accrue on the money (principal and interest) payable under this judgment until the judgment is satisfied.

131. I shall hear the parties as to costs.

DATED this 16th day of March, 2015

____

Hellman J