Judgment 5/2010 **Ferbrache v C & R Homes (Guernsey) Limited – Royal Court (Civil action File 1142) – 27 January 2010**

Contract – Plaintiff alleged breach of contract by developer of apartments – transmission of noise from flat above – Jurats held that there was a breach of contract in that the ceiling of the Plaintiff's apartment was not built in the manner required by the contract – held that both as a matter of law and as a question of fact there was no basis for implying into the contract any term relating to (1) transmission of noise between the apartments or (2) construction in such a manner as to permit full enjoyment by the Plaintiff of his dwelling – held that the noise problem was caused not by the breach of contract but by the reconfiguration of the upper apartment after it had been sold by the Defendant – no basis for compensatory damages – Jurats awarded damages to the Plaintiff in the nominal sum of £100

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1142

The 27th day of January 2010, before Richard John Collas Esquire, Deputy Bailiff, and Jurats Susan Mowbray, Michael John Tanguy and Terry George Snell

ANDRE JOHN FERBRACHE

Plaintiff

V

C & R HOMES (GUERNSEY) LIMITED

Defendant

Whereas in the action of the Plaintiff against the Defendant, in the terms attached hereto, the Court having on the 14th, 15th, 16th & 17th December 2009 tried this action, Advocates J T Le Tissier and M G A Dunster appearing for the Plaintiff and Defendant respectively and whereas on 22nd December the Court awarded by a majority decision, unspecified, nominal damages to the Plaintiff, the Court this day handed down written judgment in the terms attached hereto and awarded the Plaintiff damages in the sum of £100.00.

S M D ROSS
H M Deputy Greffier

OZANNES
(PTRF)
12.10.07

IN THE ROYAL COURT OF GUERNSEY
ROLE DES CAUSE A PLAIDER

ANDRE FERBRACHE, of 'Apartment 8', Symphony Court, Hacse Lane in the parish of the Vale and whose address for service is 1 Le Marchant Street in the Parish of Saint Peter Port ('the Plaintiff').

ACTION

C&R HOMES (GUERNSEY) LIMITED whose address for service is 7 New Street in the parish of Saint Peter Port ('the Defendant') to see the Court make the orders requested herein, the whole in the following circumstances:

1. The Plaintiff is the owner of premises known as Apartment 8 forming part of a development known as 'Symphony Park', situate at Hacse Lane in the Parish of the Vale ('the dwelling') which the Plaintiff purchased whilst in the course of construction, from the Defendant by conveyance registered on 20 September 2001.

2. The Plaintiff also on 20 September 2001 entered into a building contract with Defendant.

3. At the trial hereof both the said conveyance and the building contract will be referred to in full insofar as the same is necessary for the proper pursuance of this claim.

4. The dwelling forms part of a development which was developed by the Defendant and which had formerly been an hotel.

5. In the building contract the Defendant is described as 'the Contractor' and the Plaintiff as 'the Employer'.

6. The building contract contained the following provisions:

(1) (Clause 1) "*That .... The Contractor will complete the construction of the dwelling and install the services to supply the same in a sound and workmanlike manner with good quality materials in accordance with:*

(i) *the said approved detailed drawings;*

(ii) *the requirement of the relevant States Authorities;*

(iii) *the specification contained in the First Schedule hereto; and*

(iv) *recognised prudent practices of the local building industry and in compliance with all local laws, ordinances and regulations for the time being in force or applied*"; and

(2) (Clause 8) "*That that Contractor hereby covenants with the Employer:*

(i) *that the said partly constructed dwelling has at the date of the signing hereof been constructed in accordance with the said approved drawings and with the said specification and with good quality materials, in a sound and workmanlike manner and in accordance with the recognised prudent practices of the building trade and in compliance with all local laws, ordinances and regulations for the time being in force*".

7. Reference will also be particularly made to the First Schedule headed 'Specification' and Third Schedule to the building contract.

8. Further it was a term of the contract or alternatively the same is to be implied that the dwelling on completion would be fit for its purpose namely the enjoyment by the Plaintiff as his residence free from any unreasonable noise and that the remainder of the development carried out by the Defendant would be carried out in such a manner to enable the Plaintiff to fully enjoy the dwelling.

9. Almost since taking up occupation of the dwelling the Plaintiff has experienced problems with excessive noise to such an extent that his reasonable enjoyment thereof has been unreasonably impaired.

10. Further the dwelling suffers from other defects listed in the reports of Robert W Le Page, Chartered Surveyor, dated August 2004 and Robert S Waite, Chartered Quantity Surveyor, dated 10 August 2006 ('the said reports').

11. The said reports will be referred to in fully at the Trial hereof.

12. The said reports detail the breach of the building contract of and the other terms particularised in paragraphs 6 and 8 hereof.

13. At page 21 of his report Mr Waite concludes:

"*In my opinion the Builder/Developer C&R Homes (Guernsey) Ltd has not provided Apartment No. 8 as a dwelling 'fit for use' …….*"

He also in the report costs out as at May 2006 the cost of remedial work as £34,381 but say this only relates to bringing the dwelling to an acceptable standard of sound installation/resistance to the transmission of airborne impact sound as at 2001/2002 standards, (Pages 19 and 21).

Mr Waite also makes it clear (Page 19) that even when the remedial works are carried out matters may not be satisfactorily resolved. He also states (Page 20) that the works would take 5 weeks.

14. The Plaintiff also may claim further and/or reserves any claim should on further inspection further works be required.

15. The Plaintiff therefore claims:

(1) £34,381 being the remedial costs as at May 2006 but intends to amend those costs in the light of current building costs;

(2) £3,310 relocation costs whilst the works are carried out; being:

(a) £640 to take up store and refit carpets and resew thresholds;
(b) £1,200 being rent of 1 bedroom furnished apartment for 5 weeks at £240 per week;
(c) £180 – payable to Cable and Wireless;
(d) £1,290 – removal and storage fees.

(a) to (d) are subject to revision as these were the costs as at August 2006.

(3) Surveyors fees paid to RS Waite and Robert W Le Page £6,693.36.

(4) General damages for inconvenience and lack of reasonable enjoyment £5,000.

And the Plaintiff claims interest and costs.

By Act of the Royal Court dated 15 June 2007 the Defendant gave as its address for service 7 New Street in the parish of Saint Peter Port, Guernsey, and the action was placed Inscrite.

P T R FERBRACHE
ADVOCATE

Approved Text
27 January 2010

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between

ANDRE JOHN FERBRACHE

Plaintiff

and

C & R HOMES (GUERNSEY) LIMITED

Defendant

Date of hearing: 14th, 15th, 16th & 17th December 2009
Judgment handed down: 27th January 2010

Before: Richard John COLLAS Esq., Deputy-Bailiff and
Jurats: E I J S M Mowbray, M J Tanguy & T G Snell

Advocate for Plaintiff: **J T Le Tissier**
Advocate for Defendant: **M G A Dunster**

Cases, texts, legislation and other material referred to:

1) The Guernsey Building Regulations 1992
2) Chitty on Contract, 30th Edition, Volume 1 & Volume 2
3) *Investors Compensation Scheme Ltd v West Bromwich Building Society*
4) *The Moorcock* (1889) 14 P.D.64
5) *Lawrence v Cassel*[1930] 2 KB 83
6) *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113
7) *Jennings v Tavener* [1955] 1 WLR 932
8) *Lynch v Thorne* [1956] 1 WLR 303
9) *Hancock v B W Brazier (Anerley) Ltd* [1966] 1 WLR 1317 at page 1332F
10) McGregor on Damages, 17th edition
11) *Hugo v Skillett* 13. GLJ. 12 (Royal Court) and 1 August 1994 (Guernsey Court of Appeal)

Introduction

1. Symphony Court is an apartment block forming part of a development known as Symphony Park in Hacsé Lane in the Vale. Formerly a hotel, it was acquired by the Defendant and converted into apartments. The conversion work involved the demolition of a substantial part of the hotel building, retaining little more than the original Victorian facade.

2. The Plaintiff owns one of the first floor apartments, number 8, where he lives with his partner. He complains about an excessive amount of noise from the flat above, number 12. The master bedroom in apartment 8 is directly underneath the kitchen in apartment 12 and the complaint

concerns the transmission of noise from the kitchen, especially the granite work surfaces, to the bedroom.

3. The Plaintiff holds the Defendant responsible for the noise problem, alleging that the Defendant failed to construct his apartment in accordance with the terms of the building contract entered into between the parties when the Plaintiff purchased his apartment. The building contract (to which we refer as the 'Contract') is at Tab 9, page 78 of the Plaintiff's bundle.

4. The Contract is dated the 20th September 2001, the day on which the Plaintiff acquired ownership of apartment 8 by conveyance from the Defendant. Symphony Court was then in the course of construction and the Defendant agreed to complete the construction of the Plaintiff's apartment on the terms specified in the Contract.

5. The issues for the Court are to establish what the parties agreed as to the method of construction of the ceiling and floor separating the Plaintiff's apartment from the apartment above, involving consideration of the express terms of the Contract and any implied terms. Has there been a breach of contract? If so, was such breach the cause of any noise problems from which the Plaintiff suffered? If so, what remedy was the Plaintiff entitled to receive? If damages, what is the quantum of the loss?

General Directions to the Jurats

6. The Deputy Bailiff reminded the Jurats of their respective roles. The Deputy Bailiff is the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats must accept his directions on the law and follow them. He directed the Jurats to have regard to the whole of the evidence presented to the Court, and to form their own judgment about the witnesses, which evidence is reliable, and which is not. The Deputy-Bailiff directed that the facts of the case are the Jurats' responsibility. They may take account of the arguments in the speeches they heard, but are not bound to accept them. Equally, if at any time the Deputy-Bailiff appeared to express any views concerning the facts, or emphasise a particular aspect of the evidence, the Jurats were not to adopt those views unless they agreed with them. When it comes to the facts of this case, it is the Jurats' judgment alone that counts.

7. Evidence was given by the Plaintiff and by two experts called by him, Mr Brian Scrivener and Mr Robert Waite. On behalf of the Defendant, evidence was given by Mr Roger Martel, Mr Peter Falla and Mr Steven Gosling. Evidence was also contained within the documents, plans and drawings in the Trial Bundles and in the reports of the respective experts who gave evidence.

8. The Deputy Bailiff directed the Jurats that the burden of proof is on the Plaintiff throughout. The standard of proof is the civil standard of the balance of probabilities; to establish something on the balance of probabilities means to prove that something is more likely so than not so.

9. The Jurats were directed to decide the case on the evidence which was placed before them. They are entitled to draw inferences, that is, to come to common sense conclusions based on the evidence which they accept, but not to speculate about what evidence there might have been or to allow themselves to be drawn into speculation. The Jurats were unanimous in their findings except where we say otherwise in this judgment.

10. On behalf of the Defendant, Advocate Dunster submitted it was surprising that the Plaintiff had chosen to sue the Defendant when he could have commenced an action either in nuisance, or for breach of the covenants in the schedule that governs the rights and obligations of the apartment owners towards each other, or both in nuisance and for breach of covenant. He said such an action could be pursued against the owner of apartment 12 or against the management

company that owns the structure of the building which company could, in turn, sue the owner of apartment 12.

11. The Deputy-Bailiff directed the Jurats that they are to disregard the fact that the Plaintiff may have one or more other causes of action available to him. If he has an action against the Defendant, he is entitled to pursue it, regardless of whatever causes of action may also be available to him.

The Noise Complaint

12. The Deputy-Bailiff reminded the Jurats that the Plaintiff's evidence of the level of noise transferred from apartment 12 to apartment 8 was given by the Plaintiff and by his expert, Mr Scrivener.

13. Mr Ferbrache said that he moved into his apartment in May or June 2002. Problems started in early 2003 when two young teachers moved in as tenants of the apartment above him, apartment 12. He was frequently woken at 2.00 or 3.00 a.m. on Saturdays and Sundays by noise from the tenants when they had been out on the Friday or Saturday night and returned late to their apartment, often accompanied by friends. The disturbance was loudest in the main bedroom of his apartment. There was noise of banging and clattering, consistent with activity in the kitchen above.

14. Initially he was unaware that the kitchen was directly above his bedroom. It was only after the problems arose that he saw the plans and realised there had been a change in the configuration of the second floor of the building. He instructed Robert Le Page to investigate the matter on his behalf and with the agreement of Mr Read of the Defendant, a noise test was arranged in about May 2003. However, it did not take place because Mr Martel telephoned the night before to say it had been cancelled. Mr Martel said in his evidence that was because it was inconvenient to arrange for the tenants of apartment 12 to give access to their apartment.

15. The noise problems continued. The tenants of the apartment changed on an annual basis. Some of them were quiet and approachable. Others, the Plaintiff said, were party animals and inconsiderate. Even quiet tenants caused noise but they were less of a problem because they would tend to go to bed earlier. The main problems were caused by tenants who went out for the evening and came back late, often accompanied by friends.

16. The Plaintiff said he hears impact noises from the kitchen work surfaces. When a ceramic cup has been placed on the granite work-surface and stirred with a spoon, he has been able to hear how many times it was stirred. He has also heard the sound produced by the fan in the oven and the noise of the washing machine although tenants have agreed not to use the washing machine after 10.00 pm.

17. He can avoid the noise by sleeping in his other bedroom but that is not convenient because the room is much smaller. In the summer, he and his partner often sleep on his boat in the marina at the weekends in order to avoid the nuisance.

18. The Plaintiff's acoustic expert, Mr Brian Scrivener, described how he carried out a noise test, accompanied by Mr R S Waite. The standard tests measure the noise attenuation characteristics of the structures separating dwellings within the block of apartments. They test the transmission of airborne sound and the transmission of impact sound from one apartment to another through the walls and ceilings of the building.

19. His tests established that the apartments met the standard specified in the UK Building Regulations of 1991 and even the more stringent Regulations of 2000. They would also have met the requirements for enhanced sound transfer if they had been applicable. The Defendant's acoustic expert, Mr Gosling, reached the same conclusion.

20. However, the tests did not explain the Plaintiff's complaint. After discussion with Mr Waite, Mr Scrivener was persuaded to devise a test to replicate the complaint. He was reluctant to do so because there was no established procedure. He was sceptical as to whether a satisfactory scientific test could be devised but despite his reluctance, he and Mr Waite created a novel 'spoon test'. He believes that the methodology they adopted allowed the test to be reproduced and replicated.

21. They took three spoons from the cutlery drawer of apartment 12 which Mr Waite dropped together from a height of 100mm on to the granite work surface. Mr Scivener measured the sound 500 mm from the point of impact. Then he measured the sound level in the lower apartment, leaving Mr Waite in apartment 12 dropping the spoons. The test and the results are explained in Mr Scrivener's Report at page 153, Tab 11 of the Plaintiff's Trial Bundle.

22. The sound he heard and the results of the test established that the level of noise in the Plaintiff's bedroom was far worse than he was expecting and told him that something was wrong. Analysis of the results showed that high frequency sound was transmitting through the structure at a significant level, especially at frequencies of 3.15 kHz and above. Such frequencies are outside the range tested in the standard tests carried out. The table in paragraph 5.1 of Mr Scrivener's Report shows that the sound level in the Plaintiff's bedroom was up to 19dB above the background level at a frequency of about 4.0 kHz. He described a 19dB increase as significant.

23. For the Defendant, Mr Gosling was highly critical of the 'spoon test' saying he would not have carried out the same. It is not a standard test, it involves too many variables and it is not capable of being repeated or reproduced. Furthermore, the measurement error is unknown.

24. The conclusions of the Jurats in respect of the transfer of noise between the apartments is that they accept the evidence of the Plaintiff that he can hear noises from the kitchen above his bedroom, particularly the noise of impact on the granite work-surfaces. The level of noise has, on occasions, amounted to an unacceptable disturbance to him especially at night-time, when he has been woken up and has been unable to go back to sleep by reason of the noises from the apartment above.

25. The Jurats note that the acoustic experts agree that the apartments comply with the requirements of the Building Regulations concerning sound transfer. In their view, it is not contradictory to say both that the apartments comply with the Regulations and that there is a nuisance. The two statements can be reconciled because the tests carried out for the purpose of the Building Regulations do not measure the sound levels across the entire spectrum of audible sound.

26. The Jurats accept the criticisms of the 'spoon test' and might not have attached any weight to the results if they had not been supported by the Plaintiff's own evidence of what he has heard and, to a lesser extent, by Mr Scrivener's evidence of what he heard.

Cause of the Noise Problems

27. The acoustic experts disagreed as to the method of sound transmission between the apartments.

28. They agreed that in the absence of any sound insulation between the kitchen units and the walls of apartment 12, impact noise from the granite worktops is transferred via the wall. The vertical wall is a continuous construction, without any horizontal division or insulation between the two floors. Noise energy travels down the wall and into the Plaintiff's apartment via the wall that radiates sound energy into his bedroom.

29. The experts disagreed as to how the sound energy travels into the bedroom. Mr Scrivener believed that the energy enters the cavity in the ceiling of the Plaintiff's bedroom, in between the beams and blocks supporting the floor of apartment12 and the plasterboard of the ceiling of

apartment 8. There is no absorbent material so the sound amplifies itself by bouncing around within the cavity. A characteristic of sound waves is that within a sealed area, at certain frequencies, a standing wave can become established, the noise energy does not dissipate and the sound is amplified.

30. When Mr Scrivener listened to the noise, he thought it was coming from the ceiling void and this was his explanation as to why that is happening. If insulating material had been provided within the ceiling cavity, as detailed on the approved plans, the sound energy would be absorbed and the noise would be dissipated.

31. Mr Gosling disagreed. He believed that the whole of the wall surface acts as a radiator, radiating sound energy into the Plaintiff's apartment. Only a small proportion of the surface of the wall is contiguous to the ceiling cavity and hence the amount of energy radiating into that space is an insignificant proportion of the total amount of the sound coming down the wall. He believed the sound that the Plaintiff hears is coming from the exposed surface of the wall in his bedroom. He had not heard the noise but he did not believe that should hamper his view, Mr Scrivener may have been misled as it can be difficult to hear where noise is coming from.

32. The Jurats considered carefully the opinions of the two experts and concluded that Mr Gosling was the more plausible witness. They therefore concluded that the absence of any sound insulation in the ceiling cavity is of no consequence to the transmission of sound from the kitchen work surfaces and is not a cause of the problems experienced by the Plaintiff.

Breach of Contract

33. The ceiling of apartment 8 and the floor of apartment 12 have not been constructed in the manner originally envisaged in the approved plans. The essential difference is that the drawings showed that the sound insulation was to be in the ceiling (a type 1 design) but instead it has been incorporated in the floor (a type 2 design). The difference between the two designs is explained graphically on page 119 of the Plaintiff's Trial Bundle.

34. Mr Falla said that he prepared the plans showing a type 1 floor which is designed to be heavy enough to resist the passage of sound and to comply with the Regulations. Mr Martel said that he and Mr Read of the Defendant, changed the design to type 2, with the insulation in the floor. That is said to be an improved design because the sound insulation is incorporated in the floor and hence is closer to the source of the sound. Mr Martel said that similar floors had been built in two other apartment developments where he had worked for the Defendant and they had proved to be satisfactory. In his view, they provided better sound insulation than the type 1 design prepared by Mr Falla. The Building Inspectors were consulted and they approved the change of design. The alteration in design was agreed before the apartments were sold and, he said, were described in the Specification forming part of the Contract. He understood that the purpose of the Specification was to identify any alterations to the approved plans.

35. The Court has to consider whether the actual construction is a breach of contract. In this judgment, we consider first the express terms of the Contract before asking whether any additional terms are to be implied in relation to preventing the transfer of sound between apartments.

Express terms of the Contract

36. Clause 1 of the Contract is relevant. The parties agreed that:

> *"1. THAT for the prices set out in the Second Schedule hereto (subject to variation as hereinafter provided) the Contractor will complete the construction of the dwelling and install the services to supply the same in a sound and workmanlike manner with good quality materials in accordance with:*

(i) the said approved detailed drawings;

(ii) the requirement of the relevant States authorities;

(iii) the specification contained in the First Schedule hereto; and

(iv) recognised prudent practices of the local building industry and in compliance with all local laws, ordinances and regulations for the time being in force or applied."

37. Clause 5 is material:

> *"5. THAT in the event of any duplication giving rise to a difference between the detail given in the specifications contained in the First Schedule hereto and the detail shown on the said drawings, the detail shown in the said specifications shall form the basis of this contract."*

38. In the Cause, the Plaintiff also pleaded reliance upon clause 8 which contained a covenant by the Defendant as to the quality of the construction works carried out prior to signing the Contract. The evidence in Court suggested that the works that are the subject of complaint were completed after signing the Contract. If so, clause 8 is not relevant and does not need to be considered. Even if the relevant works were completed prior to the Contract, the Court's conclusions would be the same because the effect of clause 8 would be to make the Defendant liable to the same extent as if the works were completed at a later date when they would have been in breach of clause 1.

39. The First Schedule to the Contract entitled 'Specification' is material to the Court's deliberations. The first three paragraphs are in general terms:

> *"THE WORKS*
>
> *The works comprise the construction of Apartment No 8 at Symphony Park, Hacse Lane, Vale including services, ancillary works and external works all as described herein.*
>
> *The Contract Drawings*
>
> *The Contract Drawings are those as approved by the Island Development Committee in a form satisfactory to the Employer as identified for the avoidance of doubt by their reference numbers in the Third Schedule hereto.*
>
> *General*
>
> *The Contractor shall execute the whole of the work as described herein generally conforming to the Contract Drawings and to the reasonable satisfaction of the Employer and the requirements of the States of Guernsey Building Inspectors."*

40. Those three paragraphs are followed by six specific paragraphs, the last of which is also relevant:

> *"Ceilings*
>
> *Beam and blocked ceilings counterbattened, plasterboarded and drylined to smooth finish. Lounge and hallways with egg and dart cornice and centre roses, all other ceilings with standard 5" covings. All ceilings and coving painted with 2 coats white emulsion."*

41. The Guernsey Building Regulations 1992 required that the floor separating one apartment form another *"shall resist the transmission of airborne sound"* and *"shall resist the transmission of impact sound"* (Regulations E2 and E3 quoted in the letter from Mr Waite to Advocate P T R Ferbrache at page 199 of the Trial Bundle).

42. The original type 1 design is shown in plan number 4540/B/7C (one of the Contract Drawings as defined and listed in the third schedule to the Contract at page 89). The description is: *"First and second floor to comprise of 50mm sand/cement screed on 100mm Ronez solid concrete block on 225mm Anandale precast beams with Rockwool Rw6 sound insulation between, with 2 layers of 50x25mm battens and 13mm fireline board with plasterboard and skim finish"*. That description is at page 117 and is shown diagrammatically in the drawing at page 118.

43. The document entitled 'Specification' in the first schedule to the Contract specifies that the ceiling was to be *"beam and blocked ceilings counterbattened, plaster boarded and drylined to smooth finish"*. In the same document there is a specification of the first floor which Mr Falla said was also to be read as the specification for the second floor: *"Beam and block construction with polythene slip sheet and 30 mm rock floor with 18 mm moisture resistant chipboard decking"*.

44. The Plaintiff argued that the only duplication between the plan and the Specification was that the Specification required the ceiling to be dry-lined whereas the plan required it to be skim finished. There was no duplication as to the requirements for sound insulation and so in that regard, the Specification did not take priority over the plan. The Contract therefore required the sound insulation to be in the ceiling (a type 1 design).

45. Mr Waite pointed out that the Specification was in very general terms, containing far less detail than would normally be found in a building contract specification. Most of the detail is in the drawings.

46. Mr Martel said he drafted the Specification with the late Richard Reed of the Defendant in order to 'mop up' any changes that had been made from the drawings. He believes that the Specification adequately reflects the change from a type 1 to a type 2 design. He confirmed that what has been constructed is in accordance with the Specification.

47. In deciding what the Contract records as to the agreement between the parties regarding the floor and ceiling, the Jurats were directed to have regard to clause 5 of the Contract (quoted above).

48. The Deputy-Bailiff also directed the Jurats that, as a matter of law, when interpreting the terms of a contract, the starting point was to give the words used their ordinary and natural meaning, in the sense explained by Lord Hofmann in the passages quoted in *Chitty on Contract, 30th Edition, Volume 1*, at paragraph 12-050:

> *"12-050* ***Meaning of words.*** *Judges differ widely in their belief in the reliability of language and in the inherent meaning of words. In 1997 in Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd Lord Hoffmann said:*
>
> *"It is of course true that the law is not concerned with the speaker's subjective intentions. But the notion that the law's concern is therefore with the 'meaning of his words' conceals an important ambiguity. The ambiguity lies in a failure to distinguish between the meanings of words and the question of what would be understood as the meaning of a person who uses words. The meaning of words, as they would appear in a dictionary, and the effect of their syntactical arrangement, as it would appear in a grammar, is part of the material which we use to understand a speaker's utterance. But it is only a part; another part is our knowledge of the background against which the utterance was made. It is that background which enables us, not only to choose the intended meaning when a*

> *word has more than one dictionary meaning but also … to understand a speaker's meaning, often without ambiguity, when he has used the wrong words."*

Again in 1998, in Investors Compensation Scheme Ltd v West Bromwich Building Society, he said:

> *"The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean."*

"12-051 ***Adoption of the ordinary meaning of words.*** *The starting point in constructing a contract is that words are to be given their ordinary and natural meaning. This is not necessarily the dictionary meaning of the word, but that in which it is generally understood. The courts assume that the parties have used language in the way that reasonable persons ordinarily do. So terms are:*

> *"….to be understood in their plain, ordinary, and popular sense, unless they have generally in respect to the subject-matter, as by the known usage of trade, or the like, acquired a peculiar sense distinct from the popular sense of the same words; or unless the context evidently points out that they must in the particular instance, and in order to effectuate the immediate intention of the parties to that contract, be understood in some other special and peculiar sense."*

49. In deciding what the parties had expressly agreed, the Court considered carefully the details of the plans, the Specification and the actual construction. A majority of the Jurats agreed with the Plaintiff's submissions. They were satisfied that the change to a type 2 design (in agreement with Building Control) was a deliberate variation and could not be described as a duplication between the plans and the Specification. The Defendant was at fault in not advising the Plaintiff in writing of the proposed variation as required by clause 2 of the Contract. Hence the majority found that the Contract required the Defendant to build a type 1 design with the sound proofing in the ceiling.

50. The third Jurat, Jurat Tanguy, considered that the Contract should be read as a whole. He took account of the requirement that the apartment be constructed in accordance with the requirements of Building Control and the Building Regulations. Reading that provision in conjunction with the plans and the Specification he was satisfied that the manner of construction of the ceiling is consistent with the terms of the Contract.

51. The consequence of those findings is that the Court, by a majority, concludes that there was a breach of contract in that the ceiling of apartment 8 and the floor of apartment 12 were not built in the manner required under the terms of the Contract.

Implied Terms of the Contract

52. Is there to be any implied term in relation to sound insulation or sound transfer? The Plaintiff pleaded a number of implied terms, including that *"the dwelling on completion would be fit for its purpose namely the enjoyment by the Plaintiff as his residence free from any unreasonable noise"*.

53. The parties made legal submissions as to the principles governing implied contractual terms.

54. Advocate Le Tissier, on behalf of the Plaintiff, relied upon the well-known decision in *The Moorcock (1889) 14 P.D.64* where Bowen LJ said:

> *"The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side".*

55. He also relied upon two later cases, *Lawrence v Cassel[1930] 2 KB 83* and *Miller v Cannon Hill Estates Ltd [1931] 2 KB 113*, as authority for the proposition that in agreements for the construction of a property terms will be implied to ensure that the property is fit for purpose, that is to say fit for human habitation, that it will be completed in an efficient and workmanlike manner, and that proper materials should be used.

56. In the present case, there is no need to imply a term that that the dwelling will be completed in an efficient and workmanlike manner with proper materials because there is an express term in the Contract of similar effect.

57. Advocate Le Tissier cited *Jennings v Tavener [1955] 1 WLR 932* where, in a contract from a builder for the sale of a bungalow in the course of construction, a warranty was implied that it should be fit for habitation and be completed in a workmanlike manner. Advocate Le Tissier said the case also demonstrates that the builder will be responsible for problems that arise as a result of decisions made during the course of construction that have a bearing on the fitness for purpose of the building when complete.

58. The view of the Deputy-Bailiff is that the cases relied upon by the Plaintiff are authority for the proposition that, in the absence of any express terms to similar effect, in a contract for the purchase from a builder or developer of a dwelling that is under construction, English law will imply a term that the completed dwelling will be fit for purpose that is to say fit for human habitation. The cases are highly persuasive, but not strictly binding in this jurisdiction. However, the Deputy-Bailiff directed that the principles established thereby could be taken as representing the law of Guernsey.

59. In the present case, it is arguable as to whether there is any need to imply such a term. The express terms of the Contract, including that it be built in accordance with the approved detailed drawings and in accordance with the requirements of the Building Regulations and Building Inspectors, are sufficient without requiring anything more. However, that is not the issue because the Defendant accepts that there is to be an implied term in the Contract that the dwelling would be fit for purpose when constructed.

60. Advocate Le Tissier submitted that the term implied by law that the dwelling shall be fit for purpose extends to the transmission of noise between dwellings. Advocate Dunster argued that it does not.

61. The Court noted that in *Lawrence v Cassel* the property in question was not watertight. In *Miller v Cannon Hill Estates Ltd* the property was so damp that the plaintiff had to move out and the local sanitary inspector served on the plaintiff a notice to abate the nuisance caused by damp. The property defects in *Jennings v Tavener* concerned the cracks in the structure caused by the withdrawal of moisture from the subsoil by the roots of poplar trees growing near the bungalow. In *Lynch v Thorne*, the nine-inch brick walls were not adequate to keep out driving rain. The Court therefore noted that in each of those cases, the defects were so serious that no one could live in the dwelling.

62. The defects in the present case are not so serious. Consequently, the Jurats are satisfied that the Plaintiff's apartment does satisfy the basic requirements as to fitness for human habitation. The fact that the Plaintiff has lived there for the past seven years or so is evidence that it is habitable.

63. The second term the Plaintiff sought to imply was a term that he would be able to enjoy the dwelling free from any unreasonable noise. The Jurats were directed to consider whether a term is to be implied, by applying well accepted principles

64. The Deputy-Bailiff had regard to the basic principles governing the implication of terms into a contract, as summarised in *Chitty on Contracts, 30th Edition, Volume 2* at paragraph 37-072, 37-073 and 37-080:

> *"37-072* ***General principles.*** *Where problems or conflicts occur which are not clearly addressed by the express terms of the construction contract, then parties will frequently seek to imply a term into their contract which will enable them to achieve their objective such as, for example, access to the site or to particular working areas of the site, or timely provision of drawings and information. The general rules governing the implication of terms by the courts apply to construction contracts in the same way as to contracts generally, and they are considered in detail elsewhere. The basic principles are that:*
>
> *(i) the term must be reasonable and equitable;*
>
> *(ii) the term must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;*
>
> *(iii) the term must be so obvious that "it goes without saying";*
>
> *(iv) the term must be capable of clear expression;*
>
> *(v) the term must not contradict any express term of the contract.*
>
> *"37-073* ***Necessary terms.*** *The courts will imply terms into a construction contract where necessary to achieve the intentions of both of the parties to a contract, and where necessary to make the contract work as a matter of business efficacy. It follows from the requirement of necessity that the courts will not imply terms which, in effect, improve the contract made by the parties, or which is but one of many routes by which a problem may be addressed. A term will be implied only where there is an obvious gap in the contract which requires filling.*
>
> *"37-080* ***Construction and sale of a dwelling.*** *When a purchaser buys a house from a builder who contracts to build it, there will be implied warranties: (i) that the builder will do the work in a good and workmanlike manner; (ii) supplying good and proper materials for the work; and (iii) that the house will be reasonably fit for human habitation. However, the "threefold implication" will not arise if the contractor simply sells a house which he has previously constructed."*

65. An example of a situation where the standard implied terms may be excluded by the express terms of the contract is given in <u>*Hancock v B W Brazier (Anerley) Ltd [1966] 1 WLR 1317 at page 1332F*</u>:

> *"It is quite clear from <u>Lawrence v Cassel</u> and <u>Miller v Cannon Hill Estates Ltd</u> that when a purchaser buys a house from a builder who contracts to build it, there is a threefold implication: that the builder will do his work in a good and workmanlike manner; that he will supply good and proper materials; and that it will be reasonably fit for human habitation. Sometimes this implication, or some part of it, may be excluded by an express provision, as for instance in <u>Lynch v Thorne</u>. The specification there expressly provided that the walls were to be nine-inch brick walls. The work was done with good materials and workmanship and exactly in accordance with the specification. But the walls did not keep out the driving rain. The builder was held not liable."*

66. The Deputy-Bailiff concluded, as a matter of law, that having regard to the express terms there was no basis for implying a term into the Contract that on completion the dwelling could be enjoyed by the Plaintiff free from any unreasonable noise or for implying any other term in respect of the transmission of noise between apartments.

67. He directed the Jurats to consider, as a question of fact, whether there was any basis for doing so. The Jurats agreed that there was no need to imply any such term in order to give business efficacy to the Contract nor was such a term so obvious that it would go without saying and that there was no other basis for doing so.

68. Thirdly, the Plaintiff sought to imply a term that the remainder of the dwelling would be carried out by the Defendant in such a manner as to enable the Plaintiff to fully enjoy the dwelling. The Deputy-Bailiff was satisfied that no such term is to be implied as a matter of law and the Jurats concluded that as a matter of fact, there is no basis for doing so.

69. The reason for seeking to imply such a term is that the configuration of apartment 12 was altered from the detail shown in the approved drawings in such a way that the kitchen area was built above the main bedroom in the Plaintiff's apartment whereas the original plans showed it to be above the bathroom. Had it been installed as originally drawn, there would still have been a problem with the transfer of sound but the noise would have been heard principally in the bathroom of apartment 8 and hence would not have caused a nuisance to the Plaintiff.

70. Mr Martel said that he was an owner and director of Irri Ltd, the company that until recently owned apartment 12. Irri Ltd had bought the apartment from the Defendant when it was still a shell. It decided to alter the apartment. The alterations included changes to the external glazing that required planning consent. Mr Falla's firm prepared the revised plans and made the planning application. Consent was granted and the changes were made. However, all of that was done by Irri Ltd and was not the responsibility of the Defendant.

71. The Jurats accepted Mr Martel's evidence as to the alterations to the configuration of apartment 12 and therefore concluded they were not the responsibility of the Defendant.

72. However, the Court considers it to be regrettable that Mr Martel failed to take steps to investigate the Plaintiff's complaint at the earliest opportunity. Mr Martel was involved as a director of the company that carried out the building works and as a director of the company that owned apartment 12. He had altered the configuration of that apartment. If he had properly investigated the complaint, the evidence suggests that he could have remedied the problem by removing the kitchen worktops in apartment 12 and installing an appropriate rubber seal as a barrier between them and the wall in order to absorb the sound at source and to prevent the transmission of sound energy through the wall. As a builder it would no doubt have been cheaper and easier for him to do that, than for the Defendant to have defended these proceedings.

Causation Loss and Damages

73. The legal consequence of the Court's findings is that the noise problems suffered by the Plaintiff are not attributable to any breach of contract on the part of the Defendant. Therefore, there is no basis for awarding compensatory damages to the Plaintiff in respect of any remedial work to be carried out.

74. There remains the question of whether the court should award nominal damages for the breach of contract.

75. The principle of awarding nominal damages for breach of contract is considered in *Chitty on Contract 30th Edition, Volume 1*, paragraph 26-008:

> *"Wherever the defendant is liable for a breach of contract, the claimant is in general entitled to nominal damages although no actual damage is proved… Normally, this situation arises when the defendant's breach of contract has in fact caused no loss to the claimant, but it may also arise when the claimant, although he has suffered loss, fails to prove any loss flowing from the breach of contract…"*

76. Similarly, *McGregor on Damages, 17th edition* at paragraph 10-002:

> *"The best statement as to the meaning and incidence of nominal damages is given by Lord Halsbury L.C. in* The Mediana, [1900] A.C.113 at 116 *where he said:*
>
> > *"'Nominal damages' is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed."*
>
> *Thus nominal damages may be awarded in all cases of breach of contract and in torts actionable per se."*

77. As to the quantum of nominal damages, *McGregor* says at paragraph 10-006:

> *""Nominal damages" said Maude J. in* Beaumont v Greathead (1846) 2 C.B. 494 at 499, *"means a sum of money that may be spoken of, but that has no existence in point of quantity"…. Today £5 has become common if not the norm.."*

78. The Deputy-Bailiff is unaware of any local decisions as to the figure that in Guernsey is considered to represent "nominal damages" other than the case of *Hugo v Skillett*. It was not an action for breach of contract, but an action in trespass. The case started in the Petty Debts Court which, at that time had a limit to the amount of damages it could award of £1,000. The Magistrate's Court dismissed the plaintiff's claim for trespass. On appeal to the Royal Court, the plaintiff conceded there had in fact been a trespass, the Court allowed the appeal and awarded damages in the sum of £10. A summary of the Royal Court decision is reported at 13. GLJ. 12. It would appear from that summary and from the later decision of the Court of Appeal mentioned below that £10 was intended by the Royal Court to represent "nominal damages".

79. The Royal Court's award of damages was appealed and the appeal was allowed. Delivering the decision of the Court of Appeal on 1st August 1994, Calcutt J A said:

> *"Our duty is simply to consider an appeal against quantum of damages, but it does give rise to the nature of the appropriate damages. Should it simply be nominal damages, or should it be ordinary damages for actual damage which has been sustained, or should it be exemplary damages."*

80. After listing the damage to the plaintiff's land that had been sustained, he said:

> *"It is the Plaintiff's land and there has been in my view a trespass to it. Actual damage has been sustained and mere nominal damages could not be appropriate."*

81. Later he said it was not necessary to consider the issue of exemplary damages. The Court of Appeal set aside the sum of £10 and awarded damages of £1,000 being the maximum that could be awarded in the Magistrate's Court.

82. The Deputy-Bailiff's analysis of the decision is that the Court of Appeal was not deciding what should be the quantum of "nominal damages". It was substituting an award of actual damages for the Royal Court's award of "nominal damages" in the sum of £10.

83. £10 is greater than the amount awarded in the English courts but the decisions of those courts are in no way binding in this jurisdiction. £10 is a nominal sum. It satisfies Maude J.'s description of *"a sum of money that may be spoken of, but that has no existence in point of quantity"*.

84. In the present case, the Jurats have decided to award £100.00.

Conclusion

85. In conclusion, the Plaintiff suffers an unacceptable level of noise from the second floor apartment number 12 which he hears most loudly in his main bedroom and is caused principally by impacts on the granite kitchen work surfaces. By a majority, the Court decided that the ceiling of the Plaintiff's apartment and the floor of the apartment above were not constructed in accordance with the express terms of the Contract between the Defendant and the Plaintiff. However, such breach of contract is not the cause of the noise problems experienced by the Plaintiff. The Plaintiff has therefore failed to prove his claim for substantial damages to carry out remedial works. In such circumstances, the Court awards "nominal damages" in the sum of £100.00.

86. The Court will hear any applications arising from this judgment including as to costs.

